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In this Issue

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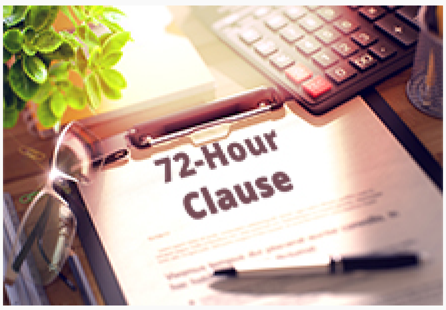
You Signed a Property Sale Agreement, Can You Still Accept a Better Offer?



You put your property on the market and an acceptable but not-perfect offer comes in. On the "a bird in the hand is worth two in the bush" principle you want to accept the offer even though it's not ideal.

Perhaps it's not perfect because it's subject to a suspensive condition - common ones give the buyer time to sell his/her current house or to obtain a bond. In both scenarios your sale will fall through if the buyer is unsuccessful within the stated time, and if that happens you are back to square one after a long and fruitless delay. Bear in mind that that delay could be a protracted one depending on what your sale agreement actually provides – normally no less than 30 days to get a bond, sometimes several months to sell an existing house. That's a lot of very valuable marketing time lost – and you'll never know for sure whether you just missed out on that "perfect offer".

The "72-hour clause" and what it does

This is where the "72-hour", "continued marketing" or "escape" clause comes in handy.

In a nutshell, it allows you to continue marketing your property until suspensive conditions are met. If your marketing pays off and an unconditional offer does come in, you can give your existing buyer 72 hours' notice to match it. So the buyer would have an opportunity to make the sale unconditional - either by waiving (abandoning) the condition or by fulfilling it.

If the buyer fails to do whatever the clause requires within the 72 hours, you are clear to accept the new offer. If on the other hand the buyer does perform in time, the existing sale immediately becomes fully binding and the transfer process can get underway.

A note for buyers

The clause is usually there for the seller's benefit so perhaps avoid it when you can. But if it's a choice between your offer being accepted or not, bear in mind that having a signed sale agreement at least gives you a solid base for a full bond application and/or a concerted effort to finalise your own house sale.

Just be ready to react quickly if the seller does indeed give you the 72 hour notice – you don't want to be rushing around in a last-minute panic.

Buyers and sellers - check the wording!

Although 72-hour clauses are common in standard sale agreements, the exact wording can vary substantially, and may need tailoring to meet your specific needs. You might for example want to be given proof of availability of funds together with a bond clause waiver, or proof that the sale of the buyer's house is a viable one – every situation will be different.

Apart from everything else, make sure that -

- The 72 hour period specifically excludes Saturdays, Sundays and Public Holidays (religious holidays too if important to you),
- You can extend the 72 hours by mutual agreement if you want to,
- There are clear requirements for the method and timing of giving notice and of waiving conditions, and
- You aren't binding yourself to anything else that could turn around and bite you down the line.

Delete the clause if it doesn't apply.

As always, have your lawyer check it all for you before you sign anything!

Directors at War and the Liquidation Option – A Tale of Sibling Rivalry

"Family quarrels are bitter things. They don't go according to any rules" (F. Scott Fitzgerald)

A company's directors have both the power and the duty to manage the company's affairs for its benefit.

When two or more directors are in place, it's perhaps natural for the occasional disagreement to arise between them. Indeed, regular expression of a variety of different viewpoints and ideas can make for a strong, dynamic board and business. Provided, that is, that the directors are in the end result still able to agree on the decisions vital to their company's continued operations.

What happens though when disagreements and disputes escalate and make it impossible to continue running the business? Typically, communications break down to the extent that decision-making is paralysed. First prize will of course always be an amicable settlement – through formal mediation perhaps, or negotiation to buy out a dissenting director's shareholding. But if these attempts fail, the company is in big trouble.

Fortunately our law offers you an effective remedy in the form of the "just and equitable" liquidation. It comes with its own risks and can be costly, so it's often regarded as a last-resort option (ask your lawyer for advice on the various other remedies that may be available to you), but it works. A recent High Court decision illustrates…

Sister v brothers in a deadlocked development company

- A sister and her two brothers owned, through their trusts, equal shares in a farm (partially inherited from their father and partially purchased from their uncle's deceased estate).

- They were also the three directors (and, again through trusts, the equal shareholders) of a company formed to subdivide, develop and sell residential plots on parts of the farm.

- The company operated successfully and profitably for many years, paying substantial dividends to the shareholders, and has always been and remains solvent.

- Trouble began brewing it seems several years ago, primarily between the sister and the brother in charge of the day-to-day running of the company's business. Serious disagreements arose around an unhappy saga of sibling fallout – including the disputed existence of a partnership, alleged fraudulent stripping of over R6m by the brothers, and a litany of purported personal and familial abuse.

- All these allegations were hotly denied, although an undertaking by the brothers to not "emotionally abuse" their sister in a settlement agreement at one point clearly indicated to the Court that the relationship breakdown was not confined to the siblings' professional affairs. The relationship between the directors and shareholders was, said the Court, "that of partners in a family context".

- The sister applied for the liquidation of the company on the grounds that it was "just and equitable". This is a procedure provided in the Companies Act for a court to have the discretion – even though a company is solvent – to liquidate it in order that an independent liquidator can take over.

- The brothers opposed the application, claiming that there was no deadlock in the functioning of the company or between the directors and shareholders, but the Court disagreed. Its order liquidating the company, and its reasons for doing so, provide a useful summary of how this particular law works in practice…

3 grounds on which to wind up a solvent company

The Companies Act allows a court to liquidate a solvent company on application by director/s or shareholder/s on any of three grounds -

1. "The directors are deadlocked in the management of the company, and the shareholders are unable to break the deadlock, and

    - Irreparable injury to the company is resulting, or may result, from the deadlock; or

    - The company's business cannot be conducted to the advantage of shareholders generally, as a result of the deadlock;

2. The shareholders are deadlocked in voting power, and have failed for a period that includes at least two consecutive annual general meeting dates, to elect successors to directors whose terms have expired; or

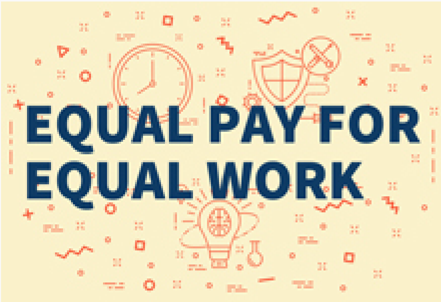
3. It is otherwise just and equitable for the company to be wound up."

That last "just and equitable" ground gives courts a wide discretion to reach a decision based on all the facts of each particular case. The Court in this matter found that the involvement of all the directors in the business had effectively come to a standstill and took into account the facts that there had not been a directors' meeting since 2014 plus the sister had refused to sign the latest financial statements.

It concluded that "the directors do not communicate and there is clearly immense personal animosity between them, and a lack of trust and confidence", making it difficult to see how the company could continue its business. The lack of substantiation provided by the sister to back up some of her disputed allegations did not, said the Court, detract "from the fact of the breakdown in their relationship, and the lack of trust and confidence".

It was therefore just and equitable that the company be wound up.

Equal Pay for Equal Work – Can You Differentiate Without Unfairly Discriminating?



> ***"Prohibition of unfair discrimination: No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth or on any other arbitrary ground" (from the Employment Equity Act)***

Our employment laws and labour courts come down heavily on any unfair discrimination in the workplace, but it's not always easy to decide whether "differentiation" between employees is or is not "unfair discrimination".

Take for instance a recent Labour Court case where a black female employee complained to the CCMA (Commission for Conciliation, Mediation and Arbitration) about the higher salary paid to her white male colleague.

They were both employed as "surveillance auditors" in a casino with the same job descriptions, doing the same work on a daily basis, graded at the same level, and reporting to the same surveillance shift manager. Nevertheless her remuneration package was nearly half of her colleague's – unfair discrimination, she said, on the grounds of race and gender.

The CCMA agreed with her and ordered her employer to (1) place her in the same salary bracket as her colleague and (2) pay her a once-off amount of the annual difference in their packages.

Requirements and defences

The Labour Court however set aside the CCMA's award and ordered a re-hearing before a different commissioner. Its decision, although based on "reviewable irregularities" in the CCMA (in itself a topic of interest to labour lawyers more than to their clients) neatly summarises the legal principles as they applied in this case. Principles important to both employers and employees –

1. Where unfair discrimination is alleged, the onus is on the employer to prove that the discrimination did not take place or that any discrimination that did take place was rational and not unfair, or is otherwise justifiable.

2. There is a general requirement on employers to "ensure that employees are not paid different remuneration for work of equal value based on race, gender or disability".

   "Work of equal value" means work that –

   a. Is the same as the work of another employee of the same employer, if their work is identical or interchangeable;

   b. Is substantially the same as the work of another employee employed by that employer, if the work performed by the employees is sufficiently similar that they can reasonably be considered to be performing the same job, even if their work is not identical or interchangeable;

   c. Is of the same value as the work of another employee of the same employer in a different job, if their respective occupations are accorded the same value ...".

   (In this case of course there was no dispute that the first category – same work - applied, so the other categories were not analysed by the Court, but in many workplaces they will be highly relevant.)

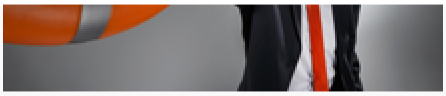
3. Where there is differentiation, an employer can raise various defences to justify it - seniority, length of service, qualifications and the like. In this case the employer relied on the male employee's superior (30 years' worth) relevant experience in security, much better qualifications and "market forces" which it said forced it to match his existing package in order to recruit him.

   The commissioner's failure to adequately address these defences was central to the Court's decision here, but the practical issue is that as an employer, whatever defence/s you raise, you will have to prove "rationality, fairness or other justifiability".

As always, our labour laws being as complex as they are (the above is of necessity just a brief summary of a particular case), and the penalties for getting them wrong potentially so costly, **take specific legal advice in any doubt!**

Business Rescue: Are Your Suretyships Enforceable? A R5.5m Lesson for Directors and Creditors

"Some people use one-half their ingenuity to get into debt, and the other half to avoid paying it" (George Prentice, newspaper editor and author)



You are owed a lot of money by a company that goes into business rescue. The business rescue plan provides for creditors like you to accept a dividend of only a few cents in the Rand in settlement of your debt. You stand to lose heavily.

But perhaps there's hope yet - a director with assets has signed personal suretyship. Can the director now say "sorry, you adopted the business rescue plan so your claim no longer exists", and refuse to pay you?

The directors' defence

- A creditor was owed R6.5m for the lease of mining equipment to a company which was placed under business rescue. In terms of a business rescue plan approved by the creditor it was paid only a portion of its claim, losing its right to claim anything further from the debtor company.

- The two directors of the debtor had signed a deed of suretyship in terms of which they stood as co-sureties and co-principal debtors with their company for all amounts owing.

- The creditor duly sued the directors for its shortfall of some R5.5m The directors' defence was that they were not liable because –

    - The suretyship entitled the creditor to go after them only for "any sum which after the receipt of such dividend/s or payment/s may remain <u>owing by the Debtor</u>." (Own underlining).

    - Nothing remained owing by the debtor which had been released from its debt by the business rescue plan.

  In other words, argued the directors, nothing was owed by the debtor company, so they were liable for nothing.

- Not so, said the Court. That "would render the terms of the deed of suretyship nonsensical and militates against the very reason for a creditor obtaining security against the indebtedness of a debtor i.e. to mitigate the risk of the debtor being unable to fulfil its obligations due to inter alia business rescue." The business rescue plan made no provision for the position of sureties and therefore "the liability of the sureties is in my view preserved. And while the debt may not be enforceable against [the company], it does not detract from the obligation of the sureties to pay in the circumstances of this case." In other words, a surety's liability is unaffected by the business rescue unless the plan itself makes specific provision for the situation of sureties.

- Bottom line - the directors must personally cough up the R5.5m (plus interest and costs).

Lessons for directors and creditors

The outcome here could have been very different had the wording of either this particular suretyship or the business rescue plan supported the directors' defence.

Creditors - when securing your claim with a director's suretyship check that you are fully covered in any form of business failure situation. And ensure that a business rescue plan specifically provides that its adoption does not release sureties.

Directors – when you sign personal surety understand exactly what you are letting yourself in for. And if you are unlucky enough to find yourself in the middle of a business rescue, actively manage your personal liability danger - particularly when it comes to the wording of the rescue plan.

Tax Freedom Day 2019 Has Arrived!

"Untold Wealth: That which does not appear on income tax returns" (Anonymous)

"Tax Freedom Day" is the first day of the year that we South Africans (as a whole) have earned enough to pay off the Tax Man and to finally start working for ourselves.

It arrived this year on 18 May. That's five days later than in 2018, and a whole 37 days later than in 1994 when we first started measuring this – not a happy trend, nor unfortunately one likely to be reversed in future.

But it could be worse. Taxpayers in a lot of other countries are still working for government - Norwegians for example only celebrate on 29 July!

Your Website of the Month: Coming Soon - More Courts Offering Mediation Options

"Agree, for the law is costly" (wise old proverb)

The cost, delay and risk of contested litigation sometimes makes it sensible to rather try to resolve a dispute with mediation. Ask your lawyer for advice on whether your dispute is a suitable one, and if so be aware that in addition to the option of existing "private" mediation, you can refer a dispute to "court-annexed" mediation at selected magistrate's courts around the country, either before or during a trial.

The list of courts offering mediation options expands greatly on 1 July 2019 – see the full list **here**.