Riaan Bosch Attorneys

Met Komplimente

Suite 5, Monpark Building
76 Skilpad Avenue
Monument Park
PRETORIA
0040

Tel: 012 346 2325
Fax: 086 600 7592
e-mail : riaan@riaanbosch.co.za
Web site : www.riaanbosch.co.za

Forward email

Online Printable Version

KEEPING YOU IN TOUCH

LawDotNews

In this Issue

November 2016

Bad Tenants: Can You Lock Them Out?

"I'll answer him by law" (Shakespeare)

It's very tempting, when you have a bad tenant who doesn't pay his/her rentals or otherwise remains consistently and unapologetically in breach of the lease, to slap the biggest and strongest padlock you can find onto the front door/driveway gate.

Don't do it! By taking the law into your own hands you immediately put yourself in the wrong and can land yourself in all sorts of trouble with unnecessary delays, extra legal costs, perhaps even a damages claim.

A recent High Court case illustrates.

The landlord who locked the gate and paid the price

- The tenant of four sets of commercial premises allegedly –
    - Failed to honour an acknowledgment of debt (presumably for rental arrears), and
    - Sub-let a portion to some 150 people as accommodation without the landlord's permission
- The landlord put a lock on the entrance gate to deny access to the tenant and his sub-tenants

- The tenant immediately approached the Court for relief. To understand the outcome (a decisive victory for the tenant) we need to understand how our law views the whole question of “self-help law”.

Taking the law into your own hands

It has long been a fundamental principle of our law that “no man is allowed to take the law into his own hands; no one is permitted to dispossess another forcibly or wrongfully and against his consent of the possession of property, whether movable or immovable. If he does so, the Court will summarily restore the *status quo ante*, and will do that as a preliminary to any inquiry or investigation into the merits of the dispute.”

In other words, no matter how strong your case against your tenant may be, a court will without further ado order you (in the form of a “spoliation order”) to allow the tenant back in. It won’t enquire into whether the tenant’s occupation is wrongful or illegal, nor will it enquire into your respective legal rights. Those enquiries only come later, when you comply with the law by bringing a proper eviction application before the court.

To succeed in obtaining a spoliation order, your tenant needs to prove only two things –

1. That he/she was “in peaceful and undisturbed possession of the disputed premises” and

2. That he/she was “deprived of that possession without consent or recourse to law”.

Tenant 1, Landlord 0

After finding on the facts that the tenant and his sub-tenants had been in physical possession of the premises prior to being locked out, the Court ordered the landlord to immediately restore access and possession to them. The landlord must also pay the tenants’ legal costs, so it’s back to square one, and with somewhat lighter pockets.

Lessons for landlords

Prevention being, as ever, much better than cure, make sure up front that your tenant is good, trustworthy and creditworthy. Check with your lawyer that your lease is water-tight. Take sureties if you can. Insist on holding a reasonable deposit. Treat good tenants like gold, even if it means giving them a bit of rent relief.

Most importantly, if and when your tenant falls into arrears or otherwise seriously breaches the lease, **seek legal assistance without delay!**

Are You David Trying to Sue Goliath? Consider Litigation Funding

Justice should be accessible to us all, but regrettably litigation, particularly in the higher courts, can be an expensive process and thus out of reach unless you have both deep pockets and nerves of steel.

To the rescue comes a concept which, although relatively new in South Africa, has been successfully implemented overseas – litigation funding. The “Please Call Me” case is a recent high-profile example of how the practice is starting to gain traction locally. Note that whilst some funders concentrate on commercial litigation, others have a much wider mandate.

How it works

In essence, a litigation funder steps in and takes responsibility for all legal costs associated with launching and running a legal claim. In return, the funder gets a fair share in the final award, usually between 40 – 55%. If that sounds like a lot to give away, remember the wise old proverb “Half a loaf is better than nothing” – it’s either the deep pockets and nerves of steel we mentioned above, or be very happy with your share of the prize.

If the claim fails, the funder gets paid nothing, does not reclaim the amount it has spent from you as the claim-holder and can be held liable for an adverse costs order. **You don’t risk a cent** – provided, of course, that your particular funding agreement provides accordingly, that you have complied fully with your obligations under the agreement, and that you have chosen a reputable funder in the first place.

Previously, claim-holders had two choices. Either they had to rely on attorneys to fund a claim under the Contingency Fees Act, which some attorneys are happy to do but others not, or they could sell the claim upfront – usually for a fraction of the claim amount. Litigation funding fills this funding gap but **ask your lawyer for advice before deciding which course of action is best for you.**

When should a claim-holder consider using a litigation funder?

- The claim has excellent merits. In other words, the case is strong in law and backed by good, preferably written, evidence.
- The person or entity being sued is solvent and very likely to remain so.
- The person or entity being sued is well-resourced and intimidating, able to outspend the claim-holder, often stalling the claim, forcing the claim-holder to either abandon the claim or settle at a negligible value to the claim.
- The claim-holder is committed to the claim, and will remain so for the duration of the litigation process.

Litigation funders will manage the claim with your attorney, as they have real interest in a successful outcome.

The process

On application, a litigation funder will typically ask a claim-holder to sign a confidentiality agreement allowing them to review the claim. This has two effects - the funder cannot disclose the claim-holder’s confidential information, and it ensures that the claim-holder’s privileged documents (documents that cannot be used in evidence in a trial) retain their privilege.

At this stage all documents relating to the claim (both those in favour of the claim and those not so helpful) must be disclosed.

The funder must be in a position to make a call on the case’s merits. It’s useful to think of this as making disclosure to an insurer or medical aid. Hidden documents and facts can cause real problems later in the case, and in extreme cases, the funder may have a claim for damages against a non-disclosing party.

If the funder believes the claim has merits, and falls within its funding mandate, the funder and the claim-holder then enter into a funding agreement. This sets out the funder’s obligation to fund the case, its rights to share in an award, and the claim-holder’s obligations to assist in the conduct of the case.

Levelling the playing field

In the US, the UK and Australia, litigation funds have enabled claim-holders to obtain fair compensation, and have dramatically leveled the legal playing field for individuals

and medium sized businesses. There is no reason litigation funding will not have the same effect in South Africa.

Sectional Title Schemes: New Reserve Fund Requirement and Other Key Changes

Note: What follows is of necessity only a brief overview of some very complex new provisions and, particularly if you are a trustee or administrator, it is essential that you familiarise yourself with all the changes. Contact us if you need any help.

The Sectional Titles Schemes Management Act ("STSM") applies only to sectional title schemes and replaces the old Act's Management provisions. It came into effect on 7 October 2016, together with the related Community Schemes Ombud Service Act (see next article).

The 10 year plan and reserve fund requirements

Bodies Corporate and Trustees in particular need to know about their new responsibilities and liabilities, amongst which is the well-publicised new requirement to prepare a 10 year plan for maintenance, repair and replacement of capital items. You must support this with a reserve fund sufficient to cover the cost of future maintenance and repair of common property.

The minimum level for this reserve fund has been set at 25% of the previous financial year's "administrative fund" (the fund for operating costs) levies. If your scheme is short of this requirement (it will be if you have in the past relied on special levies to fund exceptional expenses as they arise), your levies will increase by at least 15% (in addition to any normal annual increase) until you catch up.

Other key changes

1. The Body Corporate must notify (on Form A of the Regulations) the Chief Ombud, local municipality and registrar of deeds of its *domicilium citandi et executandi* address for service of process

2. Changes to the procedures for the calling and conduct of meetings include a provision that no attendee can act as proxy for more than two members

3. There is a 3 year revaluation requirement for all buildings and improvements, the valuation to be presented to an AGM for approval of insurance schedules

4. A body corporate may charge interest on arrear levies, and other overdue amounts payable to it by a member, compounded monthly in arrear, at the maximum rate under the National Credit Act (Repo Rate + 21%).

All "Community Schemes": New Rules and a New Ombud You Need to

Know About

Note: As with the previous article, what follows is of necessity only a brief overview of some very complex new provisions and, particularly if you are a trustee/administrator/director or the like, it is essential that you familiarise yourself with all the changes. Contact us if you need any help.

The Community Schemes Ombud Service Act ("CSOSA") came into effect on 7 October, together with the related Sectional Titles Schemes Management Act (see previous article). CSOSA applies to **all** "Community Schemes" (residential, commercial and industrial) including –

- Sectional title development schemes
- Home owners associations
- Property owners associations
- Share block companies
- Retirement housing schemes
- Housing co-operatives
- Any other "scheme or arrangement in terms of which there is shared use of and responsibility for parts of land and buildings".

Community disputes – a new resolution process

If you have lived or worked in any community you will know just how easily disputes can arise, how bitter they can be, and how difficult it can be to resolve them.

A welcome innovation therefore is the new Community Schemes Ombud Service ("CSOS") which provides an alternate dispute resolution process for anyone party to, or "materially affected by" a dispute.

The range of disputes on which the Service can adjudicate is extensive and covers levy disputes, nuisance complaints, repairs and maintenance disputes, complex meetings, financial, governance and management issues, exclusive use rights and the like – the list is long and widely-worded. Legal representation in adjudication proceedings is only allowed if the adjudicator and all parties agree or the adjudicator decides that a party cannot deal with the adjudication without legal representation. Orders may be appealed to the High Court, but only on points of law.

The scheme's administrators can also ask for an order that a tenant pay rentals direct to them to clear a landlord's arrears.

The cost of using the dispute resolution service itself is minimal (R50 per application, R100 per adjudication, R8 per copy of a document) but your levies will increase when schemes have to start recovering from you (and paying over to CSOS on a quarterly basis) a Service Levy based on your monthly levies – a sliding scale from zero for levies of R500 p.m. or less, up to R40 p.m. for levies of R2,500 p.m. or more. Download CSOS's Levy Calculator here to see what you (and the scheme as a whole) will be paying. These new levies kick in 90 days from 7 October.

New duties for "scheme executives" and schemes

"Scheme executives" (trustees, directors and anyone else "who exercises executive control of a community scheme") acquire various duties and fiduciary obligations, including a duty to be informed and educated about the community scheme, its affairs and activities and the relevant legislation and governance documentation. Governance documentation means any "rules, regulations, articles, constitution, terms, conditions or other provisions that control the administration or occupation of private areas and common areas in a community scheme".

Schemes must (these are highlights only) –

- Take out fidelity insurance against loss of money through fraud or dishonesty
- Register with CSOS on form CS1, within 30 days of 7 October or incorporation
- Lodge annual returns and (within 90 days of 7 October or incorporation) governance documentation with CSOS.

Your November Website: Tapping Into a Wellspring of Creativity

Creativity has always been a fundamental resource in both entrepreneurial and personal success.

The exciting thing is that scientists, as they dig deeper into the secrets of our brain circuitry, are continuously discovering new ways for us to tap into our own wellspring of inventiveness and new ideas.

"7 Surprising Facts about Creativity, According To Science" on the FastCompany website is well worth the 6 minute read as you explore the research and the neuroscience behind 7 powerful drivers of creativity.

Steve Jobs, John Lennon, Jack Kerouac. They all found their own sources of inspiration. Join them!

Dipping into the dictionary

"Rhadamanthus", n. – "A stern, inflexible, or incorruptible judge"

Disclaimer

The information provided herein should not be used or relied on as professional advice. No liability can be accepted for any errors or omissions nor for any loss or damage arising from reliance upon any information herein. Always contact your professional adviser for specific and detailed advice.