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### Security Estates: Are Your Rules Enforceable?

*"It is well established that contractual provisions are against public policy '... if there is a probability that unconscionable, immoral or illegal conduct will result from the implementation of the provisions according to the tenor'" (extract from judgment below)*



When you choose to buy into a security estate or other community scheme, you will invariably become a member of a Home Owners Association (HOA), Body Corporate or the like, and you will be bound to comply with all its rules and regulations.

It's essential to check that you are happy with them all before you buy because our courts have often confirmed that you will be held to whatever you agree to.

But there are limits, as a recent High Court judgment illustrates...

#### **Speeding fines and dusk-to-dawn curfews**

- A large Golf Estate, comprising a mix of freehold and sectional title properties with extensive common areas and communal facilities, included in its Conduct Rules two sets of provisions –

- Enforcing a 40 km/hr speed limit on estate roads, and
  - Restricting domestic employees to, amongst other controls, a 6 p.m. to 6 a.m. curfew, limited use of estate roads, and annual renewal of access cards.
- A homeowner locked horns with the Estate over its enforcement of these rules, initially around its suspension of his and his family's access to the Estate (and thus to their own home) over unpaid speeding fines.
  - The Court held that both sets of rules are unlawful and invalid, but gave the estate 12 months to regularise them.

#### ***First set of rules: Speed limits and traps***

Holding that although the roads in question are within the estate's boundaries they are still "public roads" as defined in our Road Traffic laws, the Court held that the Estate could not lawfully impose speed limits nor enforce them without the necessary authority from the relevant MEC or municipality.

The Court suspended its invalidity ruling for 12 months to allow the Estate time to apply for such authority. Presumably that's likely to be given to the extent that the authorities consider the rules to be reasonable in light of the Estate's expressed need to protect children, pedestrians and wildlife on the roads.

#### ***Second set of rules: Restrictions on domestic employees***

These, held the Court, severely restricted the constitutional rights of the employees in question and affected their basic rights to human dignity, equality, freedom of association, freedom of movement, freedom of occupation and fair labour practices. "Their position within the estate", said the Court, "is reminiscent of the position that prevailed in the apartheid era: while they are good enough to perform domestic duties for their employers on the estate, which include the task of pushing perambulators on the roads, they are precluded from exercising any rights derived from public law and the Constitution."

Thus, held the Court, "to the extent that these rules restrict the rights of domestic employees from freely being on and traversing public roads in the estate, I consider them to be unreasonable and unlawful." This invalidity ruling was also suspended for 12 months.

#### ***A warning to all estates***

All HOAs and Bodies Corporate need to check their rules and regulations for legal validity. The Court again: "If in fact there are other associations and/or estates in the country who, like the first respondent herein, either through ignorance or plain arrogance on their part, have seen it fit not to comply with statutory provisions, it's time that they did."

### **Employees be Warned! A Conflict of Interest Can Get You Dismissed**

***"Honesty is the best policy"  
(Benjamin Franklin)***

Employees have a general duty to act loyally, honestly and in their employers' best interests, and amongst other things that entails avoiding any possible conflicts of interest.



A recent Labour Court decision confirms that any breach of this duty risks dismissal.

### ***A long-service municipal employee dismissed***

- An employee with a 29 year service record failed to disclose to his employer several possible conflicts of interest relating to businesses (which were official “vendors” to the municipality) run by his wife and brother respectively.
- The employee was bound by his employer’s “Private Work and Declaration of Interests” policy, the practical effect of which was that “he could not give jobs to friends and family” and had to declare any possible conflicts of interest as they arose.
- Because the employee and his wife were married in community of property, he benefitted directly from his (and his wife’s) failure to disclose a potential conflict when the wife’s business applied to become a vendor to the employer.

It was irrelevant, held the Court, whether he did or did not actually influence the municipality in assigning work to his wife’s business. What counted was whether his failure to disclose possible conflicts of interest amounted to dishonesty, and that required the answers to three questions:

- Was there a rule about conflict of interest?
- If so, did the employee knowingly breach it? And
- If he breached it, was this breach serious enough to warrant dismissal?

In the end result, the Court confirmed the dismissal, holding that the employee was guilty of “serious misconduct amounting to gross dishonesty”, that “his long service does not diminish the gravity of the misconduct” and that “the sanction of dismissal was fair in those circumstances”.

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### **Don’t Lose Your Claim to Prescription - Know the Law!**

***“Ignorantia iuris nocet” (old Roman proverb meaning “Not knowing the law is harmful”)***

Most of us know how important it is to sue our debtors well before prescription permanently takes away our right to claim.



But what if you did nothing until it was too late because you didn’t even know you had a claim in the first place? As a recent Constitutional Court illustrates, the answer depends on what the nature of your ignorance in this regard is.

### ***A damages claim for unlawful arrest***

- An illiterate resident of a rural area was arrested and detained by police for four or five days.
- He only became aware that his arrest had been unlawful years later when discussing the matter with his neighbour (an attorney). When he then sued the Minister of Police for R350,000 in damages, the Minister raised the defence of prescription.

The Court held that in this particular case the claim had indeed prescribed

- The Court held that in this particular case the claim had indeed prescribed. Central to this decision was the question of whether the claimant's ignorance of his right to claim was factual or legal.

### ***If your ignorance is factual...***

Prescription only starts to run when you have "knowledge of the identity of the debtor and of the facts from which the debt arises".

So ignorance of the facts underlying your claim will delay prescription until you become aware of them. Just note that you can't act unreasonably here – you are "deemed to have such knowledge if [you] could have acquired it by exercising reasonable care."

### ***But what about ignorance of legal consequences?***

The claimant here did not, he said, know that he had a legal remedy against the Minister until it was too late. He didn't know the law around the 48 hour limit on detention. He was "innocent, ignorant and uninformed about the legal conclusions or consequences of facts" in his possession.

That ignorance - that the police's action was "wrongful and actionable" - was, held the Court, not ignorance of a "fact" but ignorance of a "legal conclusion". And since ignorance of the law doesn't stop prescription running, his claim had prescribed.

### ***Your remedy***

That sounds like hard law and perhaps it is in an unfortunate case such as this, but the reality is that such time limits are necessary to bring "certainty and stability to social and legal affairs". The highest Court in the land has spoken – you can't hide behind ignorance of your legal rights when it comes to prescription.

There's only one remedy – **don't delay in getting legal advice!**

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## **Trustees: Your Risk of Personal Liability in Property Sales**

Firstly, a warning to anyone selling or buying property to/from a trust - have your lawyer check upfront that you are adequately protected by the terms of the sale agreement.

The problem is that contracting with trusts has its own specific set of rules and, as a recent High Court case illustrates, standard sale agreements don't always provide adequately for them.



### ***A seller sues an unauthorised trustee for R2m - personally***

1. A company sold a "real right of extension" (a right to build additional buildings in a sectional title development) to a trust,
2. The agreement of sale was signed by only one of two trustees,
3. The sale agreement was invalid because the trustee who signed had no authority to sign alone,

4. The seller sued the trustee in an attempt to hold him personally liable for payment of the purchase price of R1,45m (almost R2m with interest),
5. The seller relied on a clause in the sale agreement – standard in such agreements – in which the trustee “warrants and binds himself in his personal capacity” that he had authority to sign and that the trust would perform in terms of the sale,
6. A further provision bound any unauthorised signatory as surety and as the purchaser in his/her personal capacity. The seller’s problem here was that this provision specifically only applied to anyone signing for a company or close corporation yet to be formed. There was nothing specifically binding an unauthorised trustee to similar personal liability,
7. The seller tried to persuade the Court that the trustee was nevertheless liable as a surety, or that there was an implied term in the agreement holding him personally liable, but the Court was unimpressed on both counts and dismissed the seller’s claim.

### ***The risk for trustees***

As the Court pointed out, the seller could have sued the trustee personally not for the purchase price as such, but rather for damages arising from the trustee’s “breach of warranty”.

There’s a warning there for all trustees - you risk a damages claim in your personal capacity if you don’t make sure that you are fully authorised to sign, that you hold the necessary letter of appointment from the Master of the High Court, that your trust has the power to do whatever you are binding it to do, and that all the terms of the trust deed have been complied with.

### ***And a lesson for property sellers and buyers***

On the other hand the seller, to succeed in such a damages claim, would have had to prove the extent of its loss, causation of that loss, mitigation of its damages and so on. Its position would have been much clearer, safer and easier had it, before signing the sale agreement –

1. Checked for all the necessary signing authorities, compliance with the trust deed etc (prevention being as always better than cure), and
2. Inserted a clause giving it clear and strong personal remedies against any unauthorised trust signatory.

The same advice applies of course to anyone buying property from a trust.

Mistakes here will be expensive – take legal advice before you sign anything!

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## **Your Website of the Month: Timing is Everything**

*“Right timing is in all things the most important factor” (Hesiod, ancient Greek poet, philosopher and economist)*



There are many “Secrets to Success” (in both our business and personal lives) but

perhaps one of the most important and basic starting points is to understand how to time all the various things we do for maximum effectiveness -



- What is the best time of day to be creative?
- When should we focus on decision-making, analysing, negotiating deals?
- When are we at our most productive?
- Do different rules apply to “Night Owls”?
- What can we do to optimise performance when we have no choice but to do something at a non-optimal time?
- What time of day should we schedule doctor’s appointments and surgery for?
- When should we be most careful on the roads?
- What’s the best age to marry?
- Should you time the Bad News or the Good News to come first?

Read what science has to say about all this in “This Is the Best Time to Do Anything: 4 Powerful Secrets from Research” on the Barking Up the Wrong Tree blog [here](#).

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