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LawDotNews

In this Issue

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"When The Email Is Deadlier Than The Mail": Watch What You E-Agree To!

"The email of the species is deadlier than the mail." (Stephen Fry)

Last month we discussed the need for a "non-variation" clause in every agreement you sign, and the dangers of not having one.

This month we turn to the related danger of **inadvertently** concluding, amending and/or cancelling agreements by email or other electronic ("data") messaging.

The car-wash contract that died in cyberspace

Take for example the facts of a case recently before the Supreme Court of Appeal –

- The owner of car-washing units rented them out to an "operating agent" in terms of agreements with non-variation clauses. Any "consensual cancellation" had to be in writing and signed by both parties.
- The agent, in financial difficulty, discussed cancellation with the owner in an exchange of emails, each of which ended with the sender's typed name (mostly first names only).
- The agent, held the Court, had validly cancelled the agreements electronically by means of these emails.

Were the emails "written"?

Our law is clear: "A requirement in law that a document or information must be in writing is met if the document or information is -

a. In the form of a data message; and
b. Accessible in a manner usable for subsequent reference."

Clearly the emails in this case complied and were therefore indeed "written".

Were the emails "signed"?

Two types of electronic signature are recognised in our law –

1. An "advance electronic signature", which carries a digital certificate from an accredited authority, is required where any law imposes on parties the requirement for a signature.

2. But where the signature requirement is not imposed by any law but is rather something agreed by the parties (as in this case, via the non-variation clauses), all that is required is an "ordinary" electronic signature, which doesn't need to have any form of certificate. Simply put it is just data "intended by the user to serve as a signature".

   A sender's typed name at the end of an email (or other "data message") will, unless the parties have agreed on another specific type of electronic signature, suffice provided that it –

   a. Identifies the sender,
   b. Indicates the sender's "approval of the information communicated", and
   c. "Was as reliable as was appropriate for the purposes for which the information was communicated".

The Court found on the facts of this case that only an "ordinary" electronic signature was required, the emails complied with the above requirements and thus were indeed "signed".

Accordingly the contracts were validly cancelled.

What contracts cannot be electronic?

Certain types of agreement/document - most importantly property sales and wills – are specifically excluded and must be written and signed in physical form.

The bottom line – three things to remember

1. Remember that in most cases agreements are binding even when they are verbal – a recipe for confusion and dispute. First step therefore is to always insist that every contract you enter into is both written and signed, with a non-variation clause as discussed last month.

2. That said, always be careful what you agree to, not just via email, but via any type of data message (think SMSes, What's App messages, Social Media messages and so on).

3. Make sure that any agreement you are party to specifies –

   a. Whether electronic recordal, signature, variation and/or cancellation will be valid and binding,
   b. If so, specify the required format.

Home Owners Associations: Are You Still At Risk On Insolvency?

Here's a scenario that is unfortunately a real risk these days -

- You are a member of a Home Owners Association (HOA),

- Your HOA is struggling to recover arrear levies from another homeowner who has fallen into financial difficulty.

If the arrears aren't recovered, you and the other homeowners will have to chip in to cover the shortfall.

The liquidation risk revisited

And as regular LawDotNews readers will recall, conflicting High Court judgments last year exposed HOA members to an increased risk of this happening in cases where the defaulting member's estate is liquidated or sequestrated.

Fortune has however smiled on HOAs and their members in the form of two recent Supreme Court of Appeal decisions which have made collection of these arrears a whole lot easier.

In a nutshell – when the liquidator/trustee of an insolvent owner's estate sells the property, the HOA can block transfer to the buyer until the arrear levies are paid. The arrears, held the Court, have to be paid to the HOA as a "cost of realisation of the property" - in other words, before bondholders and other creditors are paid. With the happy result that (provided of course the sale price is high enough) the HOA will be paid in full.

HOAs – your checklist

Ensure that your HOA is protected in this regard by title deed conditions obliging all owners –

1. To become and remain members of the HOA and to be bound by its constitution (with rules and regulations requiring prompt payment of levies), and

2. To obtain a levy clearance certificate before transferring ownership to a buyer, who must in turn be bound to join the HOA.

In any event, prevention being as always much better than cure, insist that your HOA -

- Keeps a close eye on any levy accounts going into arrear.

- Acts immediately to collect outstanding levies, taking legal action if necessary. Slow, ineffective debt collection processes will not only put unnecessary strain on the HOA's finances, but they ultimately risk a defence of prescription being raised by the debtor.

Bondholders – your risk just increased!

There is a lot at stake here. The overall problem is a huge one – the Court heard that "just 35 members of NAMA [National Association of Managing Agents] are owed fees in excess of R28 million in respect of members whose properties were subjected to forced sales". And where the liquidation sale price is low and the arrears high, you could be writing off a substantial debt.

Employers, Employees: You And The New Fixed Term Contract Rules

The new Labour Relations Amendment Act gives significant new protections to employees on a new or renewed fixed term contract.

What follows is of necessity only a brief summary of some complex new provisions in our labour laws – your downside if you get this wrong will be substantial, so specific advice is essential!

Excluded are –

1. Employees earning over R205,433-30 (the current Basic Conditions of Employment Act threshold),

2. Small employers (less than 10 employees) and start-ups (under 2 years old and less than 50 employees – note that some specific exceptions apply here),

3. Fixed term contracts permitted by statute, sectoral determination or collective agreement.

The employee protections

If you employ anyone for more than 3 months on a fixed term contract (or succession of contracts), they effectively acquire the rights and protections of permanent employees unless –

a. The nature of the work itself is of a limited or definite duration, or

b. You can demonstrate (the onus is on you) any other "justifiable reason" for fixing the term of the contract.

What is a "justifiable reason"?

Circumstances – specifically stated to be non-exclusive - in which fixed term contracts are justified include replacing a temporarily absent employee, a temporary increase in the volume of work (12 months or less), students gaining work experience, specific projects, limited time work permits, seasonal work, retirees, and so on. There are inevitably going to be grey areas here, so take advice on your specific circumstances.

Note: All fixed term contracts must …..

1. Be in writing, and

2. State the reasons justifying the fixed term.

Rights and remedies

If you can't justify a fixed term contract, it is deemed to be an indefinite one, your employee "must not be treated less favourably than an employee employed on a permanent basis performing the same or similar work, unless there is a justifiable reason for different treatment", and must have equal rights to apply for vacancies.

Note that any fixed term contracts entered into before 1 January (the Act's commencement date) are largely excluded for 3 months, giving affected employers some breathing space to comply.

Even where fixed term employment is justified, after 24 months the employee will, with only a few exceptions, be entitled to severance pay.

Droning on . . . New Regulations "In The Wings"

Lawfully or not, we South Africans are, it seems, increasingly buying and using drones for a whole host of purposes – amidst conflicting reports as to quite how serious the legal and other risks of doing so are.

Thankfully, the Civil Aviation Authority, which last year promised a strict clamp down on illegal drone usage, has now announced that it is finalising changes to its Regulations that will specifically regulate the use of "Remotely Piloted Aircraft Systems". The proposed amendments are available on DefenceWeb's website at http://tinyurl.com/sadrones but it's not clear yet what the final version (scheduled for the end of March) will look like.

Watch this space!

Report Corruption! Official Fired For A Marie Biscuit Bribe

In “Bureaucrats and Brick Walls – Fight Back!” last month we looked at the no-nonsense approach our courts are taking to corrupt, inefficient and disinterested public officials.

Further proof of this tough stance comes from a recent Labour Court ruling confirming the dismissal of a Home Affairs official who admitted receiving a packet of biscuits in exchange for “quicker services”.

Clearly, the size of the bribe is irrelevant – report any corruption by phoning the National Anti-Corruption hotline 0800 701 701.

The March Website: Kick-Start Every Day With A Power Shower!

Entrepreneur Magazine’s “How This Showering Trick Can Make You More Energized for the Work Day” at www.entrepreneur.com/article/241614suggests a 90 second morning shower routine to give you –

- More energy
- Less stress
- A stronger immune system
- Improved blood circulation
- Increased ability to lose fat
- Help with depression.

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