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January 2019

PATERNITY LEAVE AND MINIMUM WAGES – HOW WILL THE NEW LAWS AFFECT YOU?

Employers and employees need to know about four new Acts which will usher in important changes to our labour laws.

The summary below is a short one of only those changes likely to affect a significant number of people and businesses, so take advice on your specific circumstances.

In a nutshell -

Parental leave extended

Until now, mothers have been entitled to unpaid leave when welcoming a new child into the world, in the form of 4 consecutive months’ “maternity leave”. Plus they can claim maternity benefits from the UIF if they are contributors. New fathers however have been limited to at most 3 days’ family responsibility leave.

That will now be extended to –



- **“Parental leave”**: “Parents” (i.e. including fathers and same-sex partners) - 10 consecutive days’ parental leave.
- **“Adoption leave”**: Adoptive parents of a child under 2 years old - either 10 consecutive weeks’ adoption leave or 10 consecutive days’ parental leave (where there are two adoptive parents, they decide between them who gets 10 weeks and who gets 10 days).
- **“Commissioning parent leave”**: Commissioning parents in a surrogacy agreement – same provisions as for adoptive parents.

Parents taking unpaid leave as above also become eligible for UIF benefits.

Employers with maternity leave policies, and those who offer paid as opposed to unpaid maternity leave, should take advice on reviewing these policies.

Minimum wages introduced

The new national minimum wage is set as follows –

- Farm workers - R18 per hour
- Domestic workers - R15 per hour
- Workers in an ‘expanded public works programme’ – R11 per hour
- Other employees - R20 per hour.

Separate allowances apply to those in learnership agreements.

Employers who cannot pay the minimum wage will be able to apply for exemption for up to a year, but regulations allow for only a 10% exemption.

Failure to pay the minimum wage will expose employers to fines of the greater of 2x the value of the underpayment, or 2x the employee’s monthly wage (going up to 3x for second or further non-compliances).

Strikes, lockouts and picketing

An “advisory arbitration panel” can be (and presumably will be) appointed to help resolve protracted or violent strikes or lockouts, and those causing or exacerbating an acute national or local crisis.

New picketing regulations are also in the wind.

BEWARE THE BUILDING DEADLINES WHEN BUYING-TO-BUILD

Here’s yet another warning from our courts to take seriously the building deadlines commonly imposed on buyers of plots in residential estates. Failure to comply with them could expose you to heavy fines, recurring penalties and even the risk of losing your plot altogether.



- A Home Owners Association (HOA) imposed “double levy” penalties totalling R105k on the owners of a plot when they failed to start development before deadline.
- Taken to court, the owners challenged the validity of the penalties on a variety of technical and other grounds, but failed on every count.

- The end result is they must now pay the penalty levies, late payment penalties, and attorney-and-client legal costs for both the original magistrates' court hearing and for the unsuccessful appeal to the High Court.

3 lessons for HOAs and buyers

The HOA's victory in this case highlighted several important factors that both HOAs and buyers would do well to take note of –

1. The HOA's power to raise "recurring penalties" was upheld only because of the wording of its articles of association. They specifically gave the HOA the power to "*impose a system of fines or other penalties*". Had the wording only allowed "a fine", its attempt to impose a recurring penalty would have been shot down (exactly that happened to another HOA in an earlier case).
2. Penalties must be proportionate to the prejudice suffered by the HOA, but courts are unlikely to interfere unless "the penalty is unduly severe to an extent that it offends against one's sense of justice and equity". Here, the double-levy penalties were upheld because the "ongoing delay in developing their property in accordance with their obligation ... prejudiced the underlying rights of other owners ... to enjoyment of a fully developed estate."
3. The title deed gave the HOA the right to claim the plot back for breach of the building clause, but, held the Court, that right did not replace the right to claim penalties; it was an additional right available to it.

The bottom line for "buy to build" plot purchasers is this - **make absolutely sure before buying that you will actually be able to build by deadline.**

VICTIMS OF CORRUPTION TAKE HEART – "BIG CHIEF" GETS 15 YEARS BEHIND BARS

"... it is necessary for an unequivocal message to be sent out that corruption on the part of politicians, especially those holding high office, will not be tolerated and that punishment for those who act as Mr Block has done in this case will be severe" (extract from SCA case below)



We are all of us tired of reading about the rampant corruption in our society, and even if you aren't one of the many businesses or individuals directly affected, everyone is ultimately a victim.

Let's take heart then from two recent Supreme Court of Appeal (SCA) decisions.

Firstly, to set the scene...

Minimum sentences for corruption

- Corruption in terms of the Prevention and Combating of Corrupt Activities

Act is an offence which, when more than R500,000 is involved, carries a minimum sentence of 15 years' imprisonment, even for first offenders, "unless there are substantial and compelling reasons justifying a lesser sentence".

- The R500k threshold is reduced to R100k where a "common conspiracy" is at play and to only R10k where a law enforcement officer is involved.
- Confiscation orders are also common, being designed to deprive criminals of the benefits of their corruption. In the case below for example, a R60m confiscation order (and +R1m fines) accompanied the jail sentences.

"Big Chief" gets 15 years for a corrupt relationship

- The first SCA case involved a former high ranking politician and provincial Finance MEC (known to at least one of his subordinates as "Big Chief") on the one hand, and on the other a businessman with interests in a property group.
- Both were convicted of corruption relating to "gratifications" paid to the politician for using his "considerable political clout" to help the property group lease premises to government departments on favourable terms and at inflated rentals, without following proper tender procedures.
- It was irrelevant, held the Court, that the gratifications were only paid after the event, they were "paid and received as part of an on-going corrupt relationship where it was accepted by both sides that one hand would wash the other, so to speak, in respect of other favours already made or anticipated in the future."
- Neither did claiming that the payments were made for "consultancy services" and "business assistance" cut any ice at all with the Court.
- An attempt to appeal to the Constitutional Court having failed, the 15 year sentences must now be served.

Beyond the grave: Still payback time

The second SCA case involves the same matter but another politician and former provincial Head of Department, who faced much the same charges as the others but died before her trial ended.

That didn't stop the state from obtaining a High Court order forfeiting to the state both the shares given to the deceased in one of the property-owning companies (worth R28m at the time), and her R2m house.

On appeal the SCA upheld the share forfeiture order but, on the principle that forfeiture is designed to remove the incentive for crime rather than to punish it, set aside the forfeiture of the entire property and instead ordered the executor of the deceased estate to pay R758k to the state's criminal assets recovery account.

Victims of corruption – what to do

Whether you have lost out on a tender, are on the wrong end of a bribe solicitation, or are in any other way a direct victim of corruption, report it!

Our laws and our courts are behind you.

PROPERTY DEVELOPERS BEWARE: DEEMED ACCRUALS CAN SERIOUSLY DISRUPT YOUR CASH FLOW

***“Never take your eyes off the cash flow because it’s the lifeblood of business”
(Richard Branson)***



A recent Supreme Court of Appeal (SCA) judgment has confirmed that when a property developer enters into an agreement with a buyer to transfer the property, even if the developer only actually gets paid in a subsequent tax year, the income is deemed to have accrued to the developer at that date. The developer must therefore include the full proceeds of the sale in its income tax return for the year the agreement was signed.

This has the effect of the property developer paying tax before receiving the proceeds of the sale, putting the developer out of pocket until transfer to the purchaser takes place.

A R1.9m tax assessment challenged

A property developer in Cape Town entered into sales agreements for 25 units. Each agreement called for a deposit of R5,000 with the balance of the money to be paid on completion of the development. Purchasers could take possession once the full sale price had been secured or within 60 days of the sale. By the end of the first year 18 purchasers had taken possession and in all 25 cases the purchase price had been fully secured.

Transfer of the properties took place in the next tax year. The developer did not include the sale proceeds in his tax return for the year of concluding the agreements but showed the proceeds in the next tax year.

The Court upheld the decision by SARS to tax the developer in full in the first tax year. The assessment at just under R1.9m was based on taxable income of R6.8m.

Why the developer lost

Property developers assume a substantial risk when they undertake a development – they spend millions of Rand upfront and if they can’t sell the developed properties they make a considerable loss. They mitigate this risk by selling the properties upfront – usually before they commit to building. Clearly they will not get paid until the property is transferred, so they accept a deposit plus a guarantee (usually from the purchaser’s banker) for the balance of the selling price, or alternatively the buyer placing the funds in the conveyancer’s trust account.

Once the developer is assured of selling the properties it then proceeds with the development. On this basis, banks will advance the cost of the development to the developer.

However, in terms of the law as now confirmed by the SCA, the proceeds of the sale of the properties are deemed to have accrued to the developer and are taxable in the year the agreement is signed.

Developers need to be aware of, and plan for, the cash flow implications.

YOUR WEBSITE OF THE MONTH: “READY, STEADY, LOADSHED!”

Media reports suggest that loadshedding is likely to be with us for some time yet, and whether you happen to be at work or at home when one of the dreaded blackouts strikes, there’s nothing worse than being caught off guard.



Avoid unpleasant surprises by knowing exactly when your area will go down. At least then you can get your office/factory/home-sweet-home ready beforehand.

First step is to download one of the apps developed to help South Africans navigate the minefield of daily announcements and loadshedding schedules. Read about some of the best in “Be prepared for loadshedding with these apps” on [IOL](#), and if you happen to live in an area that has enough of its own generating capacity to lessen the incidence and severity of loadshedding (Cape Town being one example), make sure that your chosen app incorporates that.



***“Have a Healthy,
Happy and Successful
2019!”***

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