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Closing Down the Guesthouse Next Door: Notes for Owners and Neighbours

"You can be a good neighbour only if you have good neighbours" (Howard E. Koch, playwright)

You decide – for whatever reason - that your neighbour's new guesthouse is definitely not first prize in your sleepy and peaceful suburb, so you investigate.

You find out that the local municipal zoning scheme doesn't allow anyone to trade as a guesthouse without a special departure permit, and that your neighbour doesn't have one.

What are your rights and what must you prove to get assistance from our courts? Must you prove, for example, that you have suffered some form of damage or is it enough to prove only the lack of a permit?

A recent High Court decision illustrates, and would-be guesthouse owners as well as their neighbours should take note.

Shattering the peace - wild parties and nuisance guests

- Residents of a quiet suburb with 'single residential' zoning asked the Court to interdict their neighbour from running a guesthouse next door.

- They alleged a number of nuisance disturbances including a wild party of over 50 people “drinking, swearing, yelling and urinating in the street”. That all-nighter was, they said, only temporarily interrupted by a visit from SAPS at 3 a.m. – it finally ended at 7 a.m. after a second police intervention. Other allegations related to disruptive behavior by guests arriving and departing in buses, taxis, trucks and construction vehicles.

- The guesthouse was being operated without the special permit required by the local zoning bye-laws.

- The guesthouse owners said that they had twice applied for special permission in the correct format and had twice been given consent to continue operating the business pending final approval. This was hotly disputed and in any event, held the Court, “such informal authority cannot be the authority … envisaged by the relevant ordinances and regulations in this regard. After the proper procedure had been followed, and in particular after proper notices have been given to the property owners in the vicinity of the guesthouse, and notices in the local Newspaper, only then after proper consideration may consent be granted for the special use as a guesthouse. Up until that stage the guesthouse on the property is being run illegally.”

- Nor did it help the owners to deny the allegations of nuisance behavior by guests. Such denial, said the Court “does not detract from the continued illegality of [their] use of the property.”

- The owners also argued that a complaining neighbour has no right to ask for a court’s intervention without proving that it suffered some “special damage”. The Court disagreed - zoning schemes confer rights on affected property owners and they “are entitled to require that neighbouring owners comply with the applicable zoning scheme”. That’s an important decision - it makes it a lot easier for affected neighbours to get redress.

- The Court also rejected the guesthouse owners’ application for a suspension of the interdict pending the outcome of their permit application.

- The end result is that the guesthouse must close (after a short grace period to allow longer term residents to find alternative accommodation).

Opening a guesthouse? It boils down to this …

Each municipality will have its own bye-laws in regard to exactly what is and what isn’t allowed in each zoning category. Where a formal municipal permit is required to operate a guesthouse, that permit must be applied for and must be granted before the business opens. Otherwise your neighbours can ask a court to close down you down, proving nothing more than the lack of a required permit.

First prize is always to negotiate all your neighbours onto your side from day one, and in any event it’s worth getting legal help for your permit application to ensure your position is unassailable.

And a final note for suffering neighbours

Stand up for your rights, although of course even if you are 100% in the right, going to war with your neighbours should be the very last resort – there are no winners in a fight like that. But if a polite request to “please close your doors” or “please stop disrupting our peace” doesn’t help, seek legal assistance immediately.

P.S. What about Airbnb?

There are grey areas around how zoning restrictions apply to short-term lets in South Africa, and municipalities all have their own requirements for bed and breakfast and other types of guest accommodation. Take advice on what your local council’s requirements and limitations are.

Creditors and Debtors: Important New Prescription Judgment

"Running into debt isn't so bad. It's running into creditors that hurts" (Unknown)

Debts prescribe (become uncollectable) after a specified period of time - 3 years for most run-of-the-mill debts but 30 years for others such as judgment debts, mortgage bond debts, property rates and tax debts. Various other periods apply to specific statutory debts and a few other exceptions – take advice if you need more detail.

It's important to know that the prescription period can be "delayed" in certain cases. For example where the debtor is a minor or insane, or under curatorship, or out of South Africa etc (there's a long list).

Prescription can also be "interrupted", most commonly by serving summons on the debtor or by the debtor making an "express or tacit" admission of liability.

It's that last scenario we're going to discuss, because of course it's both an opportunity for creditors to extend the prescription period, and a danger for debtors waiting hopefully for their debts to prescribe. Unscrupulous but savvy debtors will accordingly try their utmost to avoid making any form of admission of liability.

A very prejudicial "without prejudice" admission

Now a new SCA (Supreme Court of Appeal) decision has just added a significant twist that both creditors and debtors should take note of.

It revolves around the principle that during settlement negotiations we can safely make admissions "without prejudice". The idea is that, in order to encourage us to avoid the expense, delay, hostility and inconvenience of litigation, we can speak frankly without fear that our admissions can later on be used against us in court. The only exception to that rule has (until now) been that an "act of insolvency" can be proved by admissions made by a debtor in without prejudice negotiations.

Developer v estate agency – R2m at stake

- An estate agency claimed R2.147m in sales commissions from a property developer.
- The developer in turn sued the agency for R1.023m for a variety of counterclaims against it.
- During settlement negotiations the developer admitted its liability for the commission claims but suggested, on a without prejudice basis, that the two sets of claims be set off against each other, and tendered payment of the net balance.
- The agency rejected this offer, a court battle ensued, and the developer raised the defence that most of the agency's claims had prescribed as being older than three years.
- The SCA rejected the prescription defence, holding that the three year period had been interrupted by the developer's admission of liability - despite it having been made without prejudice.

That's new law, and it's important both -

- For creditors to recognise the new opportunity they now have to extend prescription, and
- For debtors to recognise the new danger of hiding behind the "without prejudice" shield when making admissions.

- The end result - the claims haven't prescribed and the developer must fight on in the main action.

Note that the new exception to the without prejudice rule is limited solely to interrupting prescription. Admissions made without prejudice still can't be used to prove that you owe money, nor to prove how much you owe. They can only be used to interrupt prescription, and even then as the Court put it: "The exception itself is not absolute and will depend on the facts of each matter. And there is nothing to prevent the parties from expressly or impliedly ousting it in their discussions."

Lessons for creditors and debtors

Creditors: Prevention as always is a lot better than cure, so avoid arguments over prescription arising in the first place. Don't delay in collecting debts, suing for damages or recovering any other form of claim. **Serve summons on your debtor before you lose your claim forever.**

Debtors: We should of course all try to honour our debts. As the Roman writer Publilius Syrus pointed out over two millennia ago "A good reputation is more valuable than money". But if you plan to fight any claim against you, you lose a valuable defence if you in any way admit liability, "without prejudice" or not.

Employer v Employee: Can You Use Evidence Obtained under Threat of Prosecution?

"… you are going to be a very sorry man you (sic) probably going to sit in jail tonight" (a "dirty dozen threat" quoted in the judgment below)

When we hear of employers and employees at loggerheads with each other in our court system, we normally think of labour disputes – strikes, disciplinary hearings, unfair dismissals and the like.

But at times such disputes end up in our normal civil courts, dealing with issues which potentially apply to all civil claims. An interesting SCA (Supreme Court of Appeal) case provides a good example.

An accused diamond thief sued for R6m

- A business which processes mine dumps to find and then sell rough diamonds employed a 'Final Recovery Manager' in a senior position of trust.
- Monitoring of workplace CCTV surveillance raised suspicion that the manager had been stealing diamonds.
- Confronted, he made a videotaped confession, signed a R5m acknowledgment of debt, paid over R530,000 cash as part proceeds of stolen diamonds, and

assisted in the recovery of other stolen diamonds. He later gave his employer a copy of his full confession to the police and also consented to a second interview, similarly recorded.

- He was prosecuted but acquitted after the criminal court found that his statement to the police had not been freely and voluntarily made. The CCTV surveillance footage was not put in as evidence at the criminal trial – relevant because the civil court later found it to provide evidence of theft.

- The employer then sued the manager for R6.015m. He objected to the admission in evidence of his various confessions, admissions and statements on the grounds of unlawful duress.

- The High Court however allowed the admissions in as evidence, a decision upheld on appeal by the SCA.

"Spilling the beans" after the "dirty dozen" threat

In his first interview the employee initially denied the allegations of theft, but "spilled the beans" after he was exhorted to tell the truth and was presented with a "dirty dozen" option, including threats of arrest, prosecution, and adverse publicity if he lied.

The SCA held that -

- "The admissibility of evidence in a criminal trial stands on a different footing from a civil dispute", partially because "a criminal matter is a contest in which the might of the State is pitted against an individual. In a contest of this kind, a bad result for an accused person may lead to a loss of freedom. Such a consequence is incomparably different from any outcome in a civil dispute."

- "An employer is not only entitled to confront an employee about an allegation of wrongdoing, but is also obliged to do so, even before a formal disciplinary hearing is convened." That's because of the basic rule in our law that both sides of a story must be heard and taken into account.

- There were no threats of physical violence nor of anything unlawful.

- What was said to the employee immediately before he began to confess to his theft was not extortion or blackmail, nor was it *contra bonos mores* (against public policy) – "it did not result in [the employer] exacting or extorting something to which it was not otherwise entitled. The contrary is true."

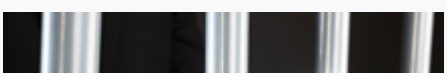
- "Even in our law of criminal procedure an exhortation to tell the truth will not exclude a confession … Not even a threat of the probability of arrest constitutes undue influence … After all, the test is whether there is 'any fair risk of a false confession.'"

The employee had therefore failed to prove that his admissions were obtained by any "legally recognised duress", nor had his constitutional right to a fair trial been breached.

Clearly, it will depend on the facts of each case whether a threat of prosecution and/or adverse publicity constitutes unlawful duress. Take legal advice before making accusations or relying on any admissions flowing from such threats.

Child Maintenance in Arrears? The Contempt of Court Enforcement Option

"It has regrettably become all too common in divorce



litigation that allegations are traded back and forth between the parties, with scant regard for the obligation to comply with orders issued by the court … The rights of the child become relegated to matters of secondary, or sometimes no importance, while the battle between the spouses takes centre stage" (Extracts from judgment below)

Our law, in protecting the interests of children in particular, provides you with an array of options when it comes to enforcing payment of maintenance orders. One of them is to ask the court to jail the defaulter for "contempt of court".

The idea of course is that the threat of a stint behind bars is likely to extract payment out of even the wiliest of maintenance dodgers.

How does it work and what must you prove? A High Court case illustrates -

"Pay up or go to prison" – what you need to prove

- A husband was ordered by the High Court to pay his wife R10,000 p.m. as maintenance for her and for their minor son, pending finalisation of protracted divorce proceedings.
- After he had run up arrears totalling R393,500 the wife asked for him to be jailed (on a periodical imprisonment basis) for contempt of court.
- The Court was on the facts totally unimpressed with the husband's pleas of poverty, and in any event pointed out that our laws require compliance with court orders which, "whether correctly or incorrectly granted, have to be obeyed until they are properly set aside". If the husband was genuinely unable to pay he should have applied for a variation of the original maintenance orders.
- Note that to succeed with a contempt of court application you need to prove two things beyond reasonable doubt, namely that the defaulter has both -
    - Deliberately and wilfully disregarded the court order, and
    - Acted "*male fide*" (in bad faith) to deliberately and intentionally violate the "court's dignity, repute or authority".
- Finding that the wife had on the facts succeeded in this regard, the Court ordered the husband to pay, within 30 days, the R393,500 arrears, an outstanding R161,000 contribution to costs, arrear interest, and legal costs on the punitive "attorney and client" scale. Failure means him spending 30 days' worth of weekends (from 5 p.m. on Fridays to 7 a.m. on Mondays) in a prison cell.

Your Website of the Month: 5 Ways to Stay Mentally Strong When You Think You're About to Crack

Stress – it's good for us up to a point, but an overload won't just reduce our work performance and make our lives a misery, it'll eventually kill us. Where's the

balance? Have a look at Uplift's 'Stress:Performance Curve' in "The Difference between Good Stress and Bad Stress" here.

Then take 39 seconds to watch Time Magazine's video "5 Ways to Stay Mentally Strong When You Think You're About to Crack" here.
