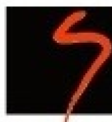
BRUNO SIMÃO



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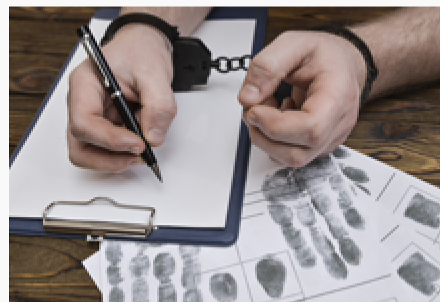
**February 2021**

## Arrest and a Criminal Record for Not Wearing a Mask

***"7,000 people have already been arrested for not wearing masks and most of them now have criminal records" (Police Minister Bheki Cele in mid-January)***



We all know that wearing a face mask is the right and the safe thing to do, but it is also a legal requirement – and it's one that you really don't want to breach.

***Firstly, can you be arrested for not wearing a mask?***

The short answer is yes, the amended Disaster Management Act Regulations providing that –

- Everyone (except children under six) must always wear a face mask (covering nose as well as mouth!) when in a public place.
- It is a criminal offence not to comply with a verbal instruction to wear a face mask by an "enforcement officer" (defined to include SAPS and SANDF

members, “peace officers” such as magistrates, Justices of the Peace, correctional services officers, municipal law enforcement officers and other designated officials). There are also reports of arrests without such an instruction being given beforehand, and as the police appear to be using their interpretation of the Regulations to conduct these “arrests without warning”, rather be safe than sorry - **assume that if you have no mask you risk immediate arrest and prosecution.**

- You are liable on conviction to “a fine or a period of imprisonment not exceeding six months, or to both such fine and imprisonment.”
- You need not wear a mask while undertaking “vigorous exercise” (not defined in the Regulations but presumably including fast running, cycling and the like – err on the side of caution here) provided that you continually maintain a distance of one and a half meters from any other person.

***You could end up with a criminal record, and that’s real trouble***

You can of course elect to go to court to fight the charge, but often you will also be given the alternative of paying an “admission of guilt” fine.

It will be a tempting offer at the time but be careful - paying a fine is one thing but if you end up with a criminal record (an entry in the SAPS Criminal Record Centre database) you will regret it. Imagine for example a scenario where you apply for a job, or a travel visa, or a firearms licence, or for credit (such as a home loan). And suddenly up pops your long-forgotten criminal record, a nasty surprise at the worst possible time.

Plans to change the law so that only some admission of guilt fines will result in a criminal record have so far come to nought. So as the law stands you will end up with a “deemed” conviction and sentence – and thus a record - if you are arrested and your fingerprints are taken. **Which is exactly what the Minister says will happen to you.**

And once you have a criminal record, it’s not at all easy to get rid of it.

***Three ways you can try to remove your criminal record***

1. Firstly, you can apply for “expungement” of the record to remove it from the CRC database, **but that option is only available to you after 10 years** and for certain “minor offences”. It will also take a long time to process - “20 – 28 weeks” per SAPS. Note that some specified minor convictions fall away automatically after 10 years – ask for specific advice.
2. Secondly, you could ask a court to set aside your conviction and sentence – costly, not an immediate fix, and not guaranteed to succeed.
3. Thirdly, you could hope that planned amendments to our criminal procedure laws will retrospectively come to your aid – speculative for now.

**The bottom line – wear your mask, and don’t admit guilt without legal advice!**

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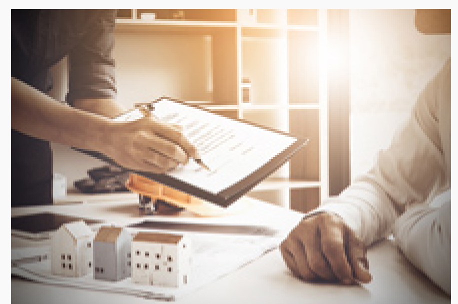
## Buying a Property: Check the Seller’s Marital Status!

***“…a third party is expected to do more than rely upon a bold assurance by another party regarding his or her marital status” (quoted in judgment below)***



If you are taking advantage of our current low interest rates and reduced selling prices to buy a property, make sure that you establish the seller’s marital status with something more than what the seller tells

you.

Your risk comes in if the seller is married in community of property. That's because, whilst our law generally allows spouses in such a marriage to "perform any juristic act with regard to the joint estate without the consent of the other spouse", there are exceptions.

And one exception relates to immovable property. A spouse needs the **written consent** of the other to sell, mortgage or burden the property (by granting a servitude over it for example). Without that written consent the transaction is void, unlawful and unenforceable.

Which is where the danger comes in. Consider this scenario – you pay for and take transfer of a property from a seller who you think is unmarried, but a spouse suddenly appears and says "I never consented to that sale so it's void. The transfer to you is cancelled so out you go and good luck getting your money back". What now?

***Competing rights and a balancing act***

There is of course a fine balancing act for courts involved here – on the one hand, the rights of the non-consenting spouse and on the other hand your rights as a good-faith buyer from a seller who you believed to be unmarried.

A recent Supreme Court of Appeal (SCA) judgment addressed exactly that situation.

***"But I thought I was buying from an unmarried seller"***

- A husband married in community of property sold and transferred a house to a buyer in 2009. At the time, his wife was not living in the house, having moved to another part of the country due to old age.

- When the seller passed away in 2013 his wife was appointed executrix of his deceased estate. Some four years later she successfully applied to the High Court for cancellation of the deed of transfer on the basis that the sale had been without her knowledge or consent.

- The buyer appealed to the SCA on the basis that the wife's consent to the sale should be "deemed" to have been given in that the relevant legislation provides for such deemed consent where a buyer "does not know and cannot reasonably know that the transaction is being entered into contrary to [the requirement for written consent]".

- He had, said the buyer, acted bona fide (in good faith) as he had not known of the marriage: "At the time I purchased the property from the deceased/seller, he was staying alone in the said property and he also confirmed to me that he was not married. He signed the deed of sale and also the transfer documents alone as unmarried."

***What the buyer must prove***

The buyer had to prove that he did not know, and could not reasonably have known, that consent was needed but lacking.

What the Court here needed to decide was whether the buyer should at the time of the sale have known of the marriage and the lack of written consent. "A duty is cast on a party seeking to rely on the deemed consent provision" held the Court "… to make the enquiries that a reasonable person would make in the circumstances as to whether the other contracting party is married, if so, in terms of which marriage regime, whether the consent of the non-contracting spouse is required and, if so, whether it has been given."

Finding that the buyer had indeed proved (1) that he did not know that the deceased was married and (2) that he could not reasonably have known this, the SCA allowed the appeal and the transfer to the buyer stands on the basis of deemed consent by the spouse.

The facts of each case will be different, and it is important to bear in mind that in this particular matter the husband’s claim to be unmarried was supported not only by the absence of any sign of a wife but also by two official documents - the deed of transfer and the power of attorney to pass transfer.

**The bottom line is that as buyer you must make “reasonable enquiries” as to the seller’s marital status and as to whether the other spouse’s written consent to the sale is needed.**

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## Be Prepared for The Cost of Dying

> ***“No matter how much you've been warned, Death always comes without knocking” (Margaret Atwood)***

No one wants to contemplate their own passing, but the reality is that sooner or later it is inevitable, and particularly in these dangerous times we need always to be prepared.

The loss of a loved one is always distressing. It can however be compounded by the challenge of dealing with their assets.

Few people appreciate all the costs involved in settling an estate. Understanding these expenses and planning for how to deal with them can make a big difference to those left behind.

***Executor's fees and costs***

Every estate must be wound up by an executor. Ensure that in your will you nominate an executor you can trust to act with integrity, professionalism and speed.

An executor can charge a maximum fee of 3.5% plus VAT. That equals 4.025% of the value of the estate. Depending on the size and complexity of your estate this fee may be negotiable.

The executor will also incur costs such as advertising to find any outstanding creditors, bank charges, accounting fees, conveyancing on the transfer of property and paying the fees due to the Master of the High Court. Together, these could run into tens of thousands of rands.

***Taxes and estate duties***

The South African Revenue Service (SARS) levies 20% estate duty on the value of any estate, but there is no estate duty payable on an estate with a net value below the R3.5 million abatement (allowable deduction). Any amount above R30 million will be taxed at 25%. An estate worth R40 million will therefore have to pay estate duties of R7.8 million (R5.3 million on the first R30 million, after the R3.5 million abatement, and R2.5 million on the next R10 million).

These taxes will not, however, be paid on any assets left to a surviving spouse. In that case they effectively 'roll-over' and will only be charged upon the spouse's death.

The estate will also have to pay capital gains tax on any assets that are sold. SARS will also conduct a final income tax assessment.

In addition, South Africans need to consider that if they have assets in other parts of the world, they may be liable to pay estate taxes in those countries as well. There are double taxation agreements in place with many countries that prevent most assets from being taxed twice, but where taxes elsewhere are higher than in South Africa, the estate will still have to pay the difference. Inheritance tax in the UK, for instance, is 40%.

***Outstanding debt***

The estate will have to settle any debt such as credit cards, loans, or bonds on property. Interest on these debts does not stop accruing when someone passes away, so it is best to deal with them as early as possible.

It is most critical to consider how to handle home loans, especially if they are held over a property in which surviving family members are still living. Sometimes these individuals may not qualify to take over the bond due to their own financial position, which means that the house may have to be sold if the debt can't be settled.

***Being prepared – check what cash the estate will have***

Even though an estate may have sufficient assets to meet all of these expenses, it can still be a problem if it doesn't have enough available cash. That is because the executor may have to sell assets to free up money.

This not only leads to potential extra costs and taxes but can be traumatic if something like a house where a loved one is living or a car that someone needs for transport has to be disposed of. This is why it is important to prepare an estate to make sure that there is enough cash available.

One way of doing this is to take out a life insurance policy that will pay cash into the estate. This will ensure that your family members aren't left with a potentially major financial burden and face additional stress after your death.

**The above is of necessity just a summary of the cost considerations involved, so speak to your attorney about how your will and estate are structured and how you can plan to meet all the costs.**

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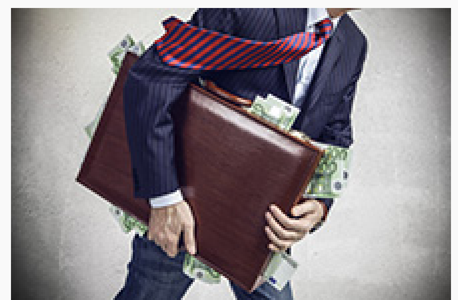
## Suing a Debtor – Make Sure Your Victory Isn't a Hollow One

> ***"Pyrrhic victory", n. A very costly victory, wherein the considerable losses outweigh the gain, so as to render the struggle not worth the cost (Wiktionary)***



With our economic woes unlikely to abate any time soon, expect an increasing number of your debtors to find themselves in financial difficulty. If you end up litigating against any of them the last thing you will want to do is to throw good money after bad.

And whilst fighting a court case and winning against a recalcitrant debtor is all very well, it's a hollow victory if by the time you come to enforce your judgment the debtor has no assets left to execute against. You may have won the battle, but you'll have lost the war. You'll be left with nothing but a large legal bill and a very sour taste in your mouth.

So what can you do if, during the litigation, you realise that the court case is nothing but a delaying tactic to give the debtor time to dispose of or hide assets? Or perhaps the debtor genuinely thinks it has a valid defence to your claim but decides to get rid of assets just in case it loses. Either way, you risk having no assets left to execute against if you eventually win.

Fortunately our law has an effective remedy for you in the form of an "anti-dissipation interdict" (sometimes referred to as a "Mareva Injunction" which is a similar English remedy). Its effect is to freeze, until your case is finalised, enough of your debtor's assets to satisfy any judgment in your favour.

***A R230m case illustrates what you must prove***

- A plaintiff suing in the High Court for R230m plus interest and costs became aware through media reports of a potential dissipation of the defendant's assets in the form of a corporate unbundling exercise.
- It obtained an order that the defendant provide security of R430m and when this security was not forthcoming the plaintiff applied for an anti-dissipation interdict.
- The Court set out what you must prove thus –
    - That the defendant "is dissipating assets or hiding assets".
    - That "there is reason to believe that such dissipation or hiding of assets is taking place *mala fide* [in bad faith] with the intention of defeating [your] claims".
    - In addition you "must satisfy the Court that all the other requirements for the granting of an interim interdict have been established." These other requirements, as set out in many other cases, are proof of -
        - A *prima facie* ("at first view") right, even if it is subject to some doubt,
        - A reasonable apprehension of irreparable and imminent harm to the right if an interdict is not granted,
        - The balance of convenience must favour the granting of the interdict, and
        - You must have no other remedy.
- Finding on the facts that the defendant (a company) was indeed disposing of its assets and would be left as only an empty shell after doing so, and that it was acting in bad faith and "with the view to frustrate the [plaintiff's] claims and to render its victory in the pending action pyrrhic", the Court granted the interdict.

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## Your Website of the Month: A Month-by-Month Personal Financial Planner for 2021

*“If you fail to plan, you are planning to fail” (Benjamin Franklin)*

We have all been battered by the economic fallout from the lockdowns. Now more than ever before we should pro-actively take control of and manage our finances through the crisis. A personal financial plan is key here. Without a plan we will drift aimlessly through 2021’s uncharted and perilous waters - a recipe for disaster.

Fortunately putting together a workable plan is not rocket science, and there are many online resources to help. See for example Business Maverick’s article “Your practical 2021 financial year planner” **here** - a simple and useful guide to tackling your personal finances month-by-month.

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