



# Susan B Cohen

*Attorneys, Notaries and Conveyancers*



## WITH COMPLIMENTS

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June 2015

### Landlords: Can You Switch Off Your Defaulting Tenant's Lights?

Your tenant isn't paying rent and refuses to move out – can you turn the electricity off?

*First - commercial or residential?*



The judgment discussed in this article relates to a commercial occupier and as is noted below, residential occupiers enjoy additional protections to commercial occupants. There will no doubt be much debate in legal circles as to what extent this new decision might or might not assist landlords of residential premises. As always, take advice upfront!



### ***Lights out for a nightclub***

A case in point was decided by the High Court recently –

- A landlord leased part of its building to a nightclub/bar business, owned by a close corporation.
- The landlord paid electricity for the whole building to the municipality, and then the night club and other tenants had to refund the landlord *pro rata*.
- When the nightclub fell into arrears (to the tune of over R300,000) the landlord asked the High Court for an order allowing it to cut the tenant's electricity supply, pointing out that it needed to mitigate its damages and that all its other tenants would be prejudiced if the building's electricity supply was cut for non-payment of the municipal account.
- The close corporation turned out to have been deregistered, and therefore the "lease" was totally invalid (for more on the dangers of deregistration see "When CIPC Deregisters Your Company" in last month's issue of LawDotNews).
- Although there was no valid lease, the Court granted the disconnection order, holding that the building owner was effectively subsidising the nightclub's business "which cannot be allowed to continue."

### ***Don't take the law into your own hands!***

Don't be tempted to take the law into your own hands by cutting off your defaulting tenant's electricity yourself. If you do, you face an immediate "spoliation order" application for unlawful dispossession (the rights and wrongs of your claims against the tenant are irrelevant at this stage), and that will put you in the wrong, waste time, and expose you to unnecessary legal costs and perhaps even a damages claim.

Rather – like the successful landlord in this case - take immediate advice on approaching the Court for assistance. Bear in mind that this may be a lengthy process, and that there are no guarantees here, particularly as the facts here were somewhat unusual, with the night club not actually being a "tenant" (the "lease" was never valid), and the arrears relating directly to non-payment for electricity. Also factor in that there was no element of residential occupation (which could have brought into play additional protections for occupiers/tenants), and that our courts may not always be as understanding of the landlord's position as this one was.

### ***Prevention - still better than cure***

So whilst this judgment has been widely welcomed in media reports as a victory for landlords, the bottom line is that prevention is still better than cure – start off with a properly drawn lease (preferably supported by personal suretyships), do your credit checks properly, and make sure that any corporate entity you deal with is in fact still registered with CIPC.

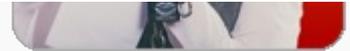
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## **Selling A Business With Goodwill: Beware This Implied Prohibition**

When you sell a business including its "goodwill", you will likely be prevented from opening up in competition with your old business by a "restraint of trade clause" in the sale agreement.



### ***Your 5 year restraint period lapses – what next?***



Restraint clauses have to be reasonable in duration, so somewhere along the line your restraint period will lapse. And when that happens, you may think that you are now completely free to set up shop again.

But as an important High Court decision has highlighted, this is not entirely correct. In this particular case the restraint clause itself lapsed after 5 years, whereupon the key individuals involved (effectively the owners of the company that had sold the business), started up again in competition with the buyer. One can perhaps understand their confident assertion that they were perfectly entitled to do so and to actively canvas their former customers – after all, the buyer had happily agreed to the 5 year non-competition period.

#### ***But that's not all .....***

However, held the Court, the restraint clause was not the only restriction on the seller. Because the sale had included “goodwill”, the seller was, even after 5 years, still bound by an “implied prohibition” against the canvassing of former customers.

Critically, held the Court, such an implied prohibition applies to the seller regardless of whether or not the parties have agreed on a specific restraint clause. In this case therefore, **although the buyer and seller had specifically agreed on only a 5 year restraint period, the seller still remained at least partially bound after the 5 years lapsed.**

#### ***Sellers, Buyers – word your restraint clause correctly***

**Sellers:** Even if by some chance there is no specific restraint clause in the sale agreement, you are still subject to an implied prohibition against canvassing existing customers if the sale includes the “goodwill” of the business. Avoid doubt and dispute with a restraint clause that specifically overrides any implied prohibitions (unless of course you are happy to never trade in the same field again).

**Buyers:** The implied prohibition in your favour is certainly better than nothing, but as illustrated in this case it leaves you vulnerable in certain critical respects –

- Only the seller itself is bound by the implied prohibition, not key individuals. Thus the seller in this instance (a company) was bound, but the individuals who were merely the seller’s representatives were personally off the hook after 5 years,
- The prohibition is limited both as to which of a business’ customers it applies to and as to what activities it actually prohibits (a restraint clause will typically prohibit more than just canvassing of existing customers), and
- Your remedy for certain breaches of the prohibition is a damages claim rather than an interdict – and you may find it hard to prove what damages you have actually suffered.

Have your lawyer check that you are covered by a comprehensive and tightly-worded restraint clause.

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### **Renting in a complex? Read the rules!**

***“..... parties are free to contract as they please.  
The law permits perfect freedom of contract.***



***Parties are left to make their own agreements, and whatever the agreements are, the law will enforce them provided they contain nothing illegal or immoral or against public policy” (extract from judgment below)***



Be warned – whether you buy into a residential complex or rent a house in one – the High Court has again upheld the right of Home Owners Associations (HOAs) to enforce their rules and regulations.

#### ***Owner defaults – tenant suffers***

In this particular case a homeowner/landlord failed to pay fines imposed by the HOA for breach of its aesthetic rules. The HOA then restricted the tenant's right to buy the electricity and water vouchers he needed to top up his pre-paid meters. The tenant approached the High Court for assistance, citing amongst other things his constitutional and statutory rights to basic services.

Critically however, both the owner and tenant had agreed to be bound by the HOA's rules, which included the provision that "no electricity shall be provided or sold to any occupier or owner of any erf in respect of which levy payments are outstanding for a period of 60 days or longer, until such time as all outstanding levy payments are paid in full". The tenant, held the Court, had freely agreed to be bound by the rules, and accordingly the HOA had acted within its rights.

**When you buy or rent in a complex, read and understand all the rules and regulations – you are bound by what you agree to!**

#### ***A note for HOAs***

Homeowners should always be obliged to become and remain HOA members, bound by your rules and regulations. Ensure that owners cannot give occupation to anyone else without the occupier likewise agreeing to be bound.

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### **Family Responsibility Leave – Your FAQs**

When can an employee take fully-paid leave to deal with family matters and not have it deducted from his/her annual leave entitlement? This is often a source of confusion for both employers and employees, but it needn't be. The BCEA (Basic Conditions of Employment Act) sets everything out clearly, although note that some employers grant more favourable terms than the statutory minimums, either in their discretion or in terms of a "collective agreement" with a trade union.



#### ***Am I entitled to family responsibility leave?***

Yes, if you are covered by the BCEA (most employees are) and -

- You have worked for over 4 months, and
- You work 4 days a week or more.

#### ***When can I take it?***

- When your child is born (often referred to as “paternity leave” and not to be confused with “maternity leave” – more on that in a future newsletter), or
- When your child (note that “child” means under 18 years old) is sick, or
- In the event of the death of your spouse or life partner, parent or adoptive parent, grandparent, child or adopted child, grandchild or sibling.

#### ***How many days can I take?***

You have 3 days (5 days for domestic workers) in each annual leave cycle – these days cannot be accumulated and lapse if not taken.

#### ***What proof must I give my employer?***

Employers may require “reasonable proof” of the birth, illness or death.

#### ***Small businesses: can you contract out?***

If you are a defined “small business” (i.e. you employ less than 10 employees, and conduct only one business which is not formed by division or dissolution of an existing business), you can agree in writing with your employees that family responsibility days will count against their annual leave. This does not apply to domestic employees or public servants.

## **Your June Websites: Keeping Warm And Well This Winter**

### ***“If Winter comes, can Spring be far behind?” (Shelley)***

Whether you are employed, self-employed or happily non-employed, you can’t afford to let Winter 2015 give you the blues or put you in your sick bed – Eskom’s ongoing contribution to our woes notwithstanding.



**Be particularly careful of the flu this season.** It hit the Northern Hemisphere hard and is trending higher in South Africa than in previous years (see the “Explore flu trends - South Africa (Experimental)” graph at <https://www.google.org/flutrends/za/>).

Enjoy Winter and stay on top form all the way through to Spring with these random websites to help you keep warm, healthy and happy –

- “7 Scientific Tips for Staying Warm” on the LiveScience website at <http://www.livescience.com/49050-staying-warm-scientific-tips.html>
- “8 Ways to Enjoy the Winter Months” on the Aurora Mental Health Centre website at <http://www.aumhc.org/enjoying-winter.html>
- You Tube’s short video “8 Sick Remedies That Actually Work - Scientifically!” at <https://www.youtube.com/watch?v=bYXZP8eZKCw>
- ‘Solopreneurs’: Use the Time Management Matrix and other tips in “When Illness Strikes, the Entrepreneur is Ready to Fight” on the That’s The Idea website at <http://thatstheidea.ca/when-illness-strikes-the-entrepreneur-is-ready-to-fight/>

- “Beat Seasonal Affective Disorder (SAD) and the Winter Blues” by Good Health at <http://www.goodhealthsa.co.za/health-articles/article/thread/beat-seasonal-affective-disorder-sad-and-the-winter-blues>
- Take everyone out for a meal without breaking the bank. Google “Winter Restaurant Specials” for your area, or have a look at EatOut’s “Winter restaurant specials: our 2015 list” at <http://www.eatout.co.za/article/winter-restaurant-specials>
- Or stay in with a special Winter treat – see how “How to Make Sipping Chocolate” on Food52 <http://food52.com/blog/12064-how-to-make-sipping-chocolate>

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