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April 2021

Who Gets the House on Divorce?

"I am a marvellous housekeeper. Every time I leave a man, I keep his house" (seven-times-divorced actress Zsa Zsa Gabor)

Historically 44% of South African marriages have ended in divorce, and there has reportedly been a 20% surge in new divorce applications since lockdown.

For those unfortunate couples whose marriages do eventually fall apart, often the most important asset in play from both a financial and an emotional perspective is the family home. So it is crucial for any couple contemplating marriage, or currently married but considering a split, to understand what our law says about who gets what on divorce.

Your divorce order as issued by the divorce court will be the "final word" here. If you have been able to agree on a split of assets and liabilities your agreement will typically be contained in a "consent paper", and agreement is of course very much "first prize" here. Particularly if you have children – exposing them to a bitter fight over assets and to the risk of having to leave their childhood home and neighbourhood will only add to the disruption and trauma in their lives. In any event if you can't agree terms, you are in for some emotional, time-hungry and expensive litigation before a court finalises the split for you.

A variety of factors will be at play here, all linked to the question of what "marital regime" applies to your marriage so the first question you need to ask is whether you are married in or out of community of property - and if out, does accrual apply?

If you are married in community of property

This is the default marital regime for South African marriages, and if you didn't sign an ante-nuptial contract ("ANC") before you married, all your assets and liabilities at date of divorce (with a few specific exceptions) will automatically belong to both of you in "undivided shares" i.e. 50/50.

Typically, your divorce order and/or consent paper will provide for one spouse to become the 100% owner, with a suitable financial adjustment between you to account for the value of the other spouse's 50% share.

No formal transfer of the property in the Deeds Office is needed, your attorney will just arrange for an endorsement on the property's title deed to transfer ownership.

If you are married out of community of property

You have two separate estates and what you bring into the marriage remains yours, as does any growth in asset value during the marriage.

As to who keeps (or gets) the house, and as to how much if anything the other spouse must pay in return, that will depend on a host of factors including the terms of your ANC and whether you were married with or without "accrual".

"With accrual" is the default unless you specifically opt to marry "without accrual". In practice most modern couples specifically opt for accrual, in which event the combined growth in value during the marriage of your two estates will be split between you.

If the house is currently registered in only one of your names and that spouse is to keep the house, no formal transfer nor endorsement of the title deed will be necessary. If however the other spouse is to become the registered owner, a full transfer of ownership in the Deeds Office is needed. Although an exemption from transfer duty applies in this case, there will still be other transfer fees and costs to consider.

If you are co-owners of the property (in other words, if you are jointly recorded as owners on the title deed) you will almost certainly want to transfer full ownership to the one spouse. Again, a full transfer will be needed (see above re costs). There is however nothing to stop you agreeing on a temporary or permanent continuation of the co-ownership after divorce, perhaps to minimise disruption to your children's lives, or perhaps while you jointly market and sell it at the best price (in which event your agreement should specify in detail who will pay what costs, what the minimum purchase price will be and so on).

Who pays off the mortgage bond?

If you are currently registered as co-owners, both of you will be equally liable for the full remaining debt owing to the bank. If one of you is the owner and the other is to take transfer, the current owner remains solely liable for the loan debt until released by the bank.

Whichever spouse keeps (or takes over) sole ownership of the house will have to make a new loan application to the bank in his/her own name and be substituted as the sole debtor/mortgagor.

If you get the house, how will you pay out your ex-spouse?

As above, normally there will be a financial adjustment between you to compensate the other spouse, and if you don't have the funds available you may need to ask the bank for a second mortgage.

You could of course also agree to sell the house and split the proceeds after settling the existing bond.

What if our house is owned by a trust or company?

Houses and other properties have historically often been held in trusts or companies for estate planning and asset protection purposes, and our courts are regularly called upon to resolve bitter disputes along the lines of "it was all a sham, the house never really belonged the trust, so please Judge order the trust to put it back into the pot as a

personal asset".

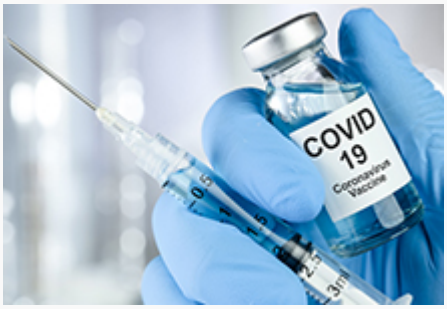
The spouse making such a claim will generally have to prove some form of "abuse" of the trust before a court will order that the house in fact belongs to the other spouse personally. But there are grey areas here and professional advice specific to your particular circumstances is essential.

Prevention being better than cure….

Your house could well be your marriage's most important asset both financially and emotionally. Rather than fight over it when divorce looms, seek professional advice before you tie the knot on what marital regime is best for you, and on how best to sort out who gets the house if you should be unlucky enough to part ways down the line.

Can an Employee Who Refuses Vaccination be Fired?

"This virus is unprecedented in our lifetime and requires an unprecedented response" (António Guterres, UN Secretary-General)



Most of us will celebrate the day we are offered a COVID-19 vaccination, but here in South Africa as overseas it seems inevitable that a significant number of people will refuse to be vaccinated. The reasons given for this stance have been many and varied, some mainstream and reasonable, others less so.

Perhaps some of those refusing will reconsider if and when they find they are denied opportunities available to those vaccinated - travel restrictions spring to mind but another example could be establishments like hotels and restaurants getting sticky on the issue if customer demand for safety grows.

A knotty problem for employers

Nevertheless, there will still be many "refusers" – all convinced that they are being entirely reasonable in refusing - and they could pose a knotty problem for you as an employer. On the one hand you have both legal and moral obligations to keep your workplace as safe as possible, but on the other hand refusers have their own strong legal and moral rights, both as citizens and as employees. For example, health, bodily integrity and privacy concerns, and concerns related to religious and cultural beliefs, raise issues of constitutional protection.

It boils down to a series of competing questions. Can you fire employees for refusing vaccination? Can your vaccinated employees and/or health officials hold you accountable for allowing unvaccinated employees into the workplace? Can employees who are vaccinated at your behest hold you liable if they suffer adverse reactions or health problems?

Between a rock and a hard place…

That all leaves employers walking a tightrope between competing sets of risks and employee rights, with the added complication of statutory requirements to provide a safe working environment.

There is unfortunately no clarity on what line our courts will take when addressing the

many disputes that will inevitably arise, but amidst all the speculation there does at least appear to be broad consensus that a case-by-case approach is probably the safest and the fairest way to proceed.

That suggests that the most prudent course, at least until there is some clarity from the courts, is to tread carefully and lightly, and to act strictly in line with the general principles of our employment laws.

Some general principles to bear in mind

- Government has made it clear that despite our unprecedented National State of Disaster, vaccination is voluntary. It will try to persuade us to get the jabs, but it won't force us to. So, expect no intervention from that source other than on the educational side – see for example "COVID-19 Coronavirus vaccine myths and facts" on the Government Information website.

- The fundamental employment law principle of fairness in both procedure and reasons for dismissal will remain critical to the outcome of any legal dispute.

- Beware "automatically unfair dismissal" in the form of discrimination on any "arbitrary ground", specifically including grounds such as "…age, disability, religion, conscience, belief, political opinion, culture..." – any or all of which might underlie an employee's objections to vaccination.

- Amongst other constitutional protections we all have the right to "bodily … integrity" so it is vital to adequately address individual health concerns, such as those around adverse reactions and side-effects. Ongoing reports of some vaccines being paused from use internationally (at date of writing, said to be an over-reaction by the countries in question) will contribute to these concerns, and the cautious will need reassurance.

- As always, and without losing sight of the need to address each individual employee's concerns on a case-by-case basis, aim for agreement and consensus in the workplace via consultation. A full risk assessment specific to your workplace, and the educational resources mentioned above, could be invaluable here.

- Set a workplace policy on vaccination – contravention of a fair and reasonable policy will lay the groundwork for any charge of misconduct. Decide whether a flexible policy would suffice or whether mandatory vaccination is essential. Consider every possibility and circumstance – for example, can concerned staff be allowed to work remotely? Would employee fears be alleviated by access to specific medical advice? Do you operate in a sector (health care or retirement perhaps) where vaccination will be considered essential? And so on…

Every business will have its own particular business activities, needs and employees. **So most importantly, take advice specific to your workplace!**

When Company Directors and Shareholders Come to Blows….

"…the mere exercise of majority shareholding voting rights does not amount to oppression…" (extract from judgment below)

What happens when a company's directors and shareholders fall out and

cannot reconcile their differences?

"Relief from oppressive or prejudicial conduct"

If you should find yourself in such an unfortunate situation, our Companies Act offers you several possible remedies.

Professional advice specific to your case is essential here but be aware of a particularly versatile remedy in the form of a court application for relief from "oppressive or prejudicial conduct". This relief is available where -

a. "any act or omission of the company, or a related person, has had a result that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant",

b. "the business of the company, or a related person, is being or has been carried on or conducted in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant", or

c. "the powers of a director or prescribed officer of the company, or a person related to the company, are being or have been exercised in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant."

If you can prove any of the above, the court has a wide discretion to make any order "it deems fit", including (a long but not exhaustive list) an interdict against the improper conduct, liquidation if the company is insolvent, business rescue if appropriate, amendment of the Memorandum of Incorporation, "to create or amend a unanimous shareholder agreement", issue or exchange of shares, appointing additional or replacement directors, declaring persons "delinquent or under probation", refund of consideration paid for shares, varying or setting aside transactions and agreements, requiring production of financial statements or an accounting/reconciliation, compensation orders, rectification of company registers or records, or trial of any issue.

The critical part, as a recent SCA (Supreme Court of Appeal) judgment shows, is to be able to prove one of those three categories of wrongful conduct. Without that, and no matter how bitter the dispute between you and your nemesis may be, the court has no discretion to grant any of the above relief.

The facts and outcome of the SCA matter are a case in point -

Majority shareholder v fired director

- In a long-established and closely-held fencing manufacturer with only two shareholders but substantial value (the total value of the shares seems to be in the region of between R46m and R74m), the two fell out over a range of issues.

- The fall out culminated in the minority (46.67%) shareholder being removed from his directorship by the majority (53.33%) shareholder. After his removal as director he was also dismissed from his employment as a general manager after being found guilty at a disciplinary hearing of four counts of gross misconduct (one of which involved dishonesty). The misconduct complained of included abuse of trust, conflict of interest and abortive attempts to have the company placed under business rescue and liquidation.

- Long story short, the dispute ended up first in the High Court and ultimately before the SCA, the minority shareholder alleging that he had been excluded from the management of the company, denied management and financial information, excluded from decision making, removed as director to be replaced by the majority shareholder's husband and brother-in-law, and unlawfully and unfairly dismissed from employment.

- The Court however found on the facts that he had failed to prove that the

majority shareholder's conduct towards him was oppressive or unfairly prejudicial, or that his interests had been unfairly disregarded. He had been validly removed as a director of the company at a properly constituted shareholders' meeting (as the Court put it "…the mere exercise of majority shareholding voting rights does not amount to oppression…), and his dismissal as general manager did not amount to oppressive or prejudicial conduct.

- That finding, held the Court, meant that none of the avenues of relief listed above were available to the minority shareholder despite findings that the shareholders' relationship had broken down irretrievably and was not capable of being resolved.

- As a result, the High Court's order that the majority shareholder sell her shares to him – an attempt by the High Court "to design or craft a mechanism which would result in a 'clean break' between the parties" because "it was not in their best interests to remain 'in the same bed'" could not stand. Equally the minority shareholder's new request that the majority shareholder be ordered to buy his shares from him could not succeed.

Domestic Workers and Employers: The New Injury and Illness Cover Explained

"Domestic employees" are now covered under the Compensation for Occupational Injuries and Diseases Act (COIDA) and will now be entitled for compensation from the Compensation Fund in the event they are injured or contract diseases while on duty.

The new benefits

Note: The benefits set out below are recorded in summary only and awards are subject to conditions and to limits; so seek specific professional advice in need.

Compensation payable to a qualifying employee by the Fund

Temporary Total Disablement (TTD)

This is for an employee booked off for 4 days or more by a doctor to recuperate, maximum 24 months

Permanent disablement lump sum

A permanent disablement lump sum is paid to an employee who has received a final medical report from the treating doctor indicating that the employee has reached maximum medical improvement. The permanent disablement should be 1 - 30% disablement for the Compensation Fund to pay this benefit.

Permanent disablement pension

The permanent disablement pension is paid to an employee who has received a final medical report from the treating doctor indicating that the employee has reached maximum medical improvement. The permanent disablement should be 31 - 100% disablement for the Compensation Fund to pay this benefit.

Compensation payable to dependants of employees who died as a result of injury on duty or occupational disease

Under this heading there is cover for some funeral expenses, a widow's lump sum award, a widow's pension award, a child pension award, a partial or wholly dependency award payable to parents or siblings in the absence of a surviving spouse or child.

Orthotics and Rehabilitation

Qualifying applicants can claim for youth bursaries, a "Return to Work" programme, "assistive devices" like wheelchairs and prosthetics, and rehabilitation and re-integration programmes.

Medical benefits

Medical benefits/claims and chronic medication are provided for in this section.

Employers - you must now register, submit annual returns, and pay annual tariffs

All employers of domestic employees are now obliged to register as employers with the Compensation Fund and to submit the necessary returns. You will be assessed and billed annually. To calculate how much your annual tariff payment will be, take the employee's annual salary, divide it by 100 and multiply it by the current "assessment rate" applicable to domestic employees (1.04) – e.g. at a monthly salary of R4,500 the calculation is: R4,500 x 12 / 100 = R540 x 1.04 = R561-60 for the year.

Although there is reportedly no deadline for registration set at the moment, keep an eye on the media as this is bound to change.

For more detail, download the Department of Employment and Labour's "Notice on The Registration of Domestic Worker Employers in Terms of Section 80 of The Compensation for Occupational Injuries And Disease Act As Amended" from **GPW Online**. See page 9 for the registration procedure and "Industry Classification" (get this right, high-risk industry employers pay a lot more!), page 10 for the ROE (Return of Earnings) and assessment procedures (plus how to register online) and page 11 for the claims submission process. The necessary forms are on pages 12 onwards.

Your Website of the Month: Train Your Brain to Unlock Creativity and Innovation

"Creativity is intelligence having fun" (Albert Einstein)

Continually nurturing creativity and innovation in your business is not just a profit driver, for most businesses it's a matter of survival - there is always a disruptor or two in the wings just waiting for you to stagnate and fall behind.

But as Dr Srini Pillay (a South African-born, Harvard-trained psychiatrist, brain scientist, technology entrepreneur and musician) points out: "Creativity is not just for artists or people in business. Creativity is for any person who wants to find an unusual way to take their lives to the next level." Listen to the full article "Train your brain to unlock

creativity and innovation" on **Maverick Life**.

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