

This e-mail flyer is produced by the Litigation Division of Shepstone & Wylie and includes commentary on latest reported decisions of the High Court of South Africa, Legislation and other information of interest for its clients.

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We trust that you will find the content of this email flyer to be of interest.

1. Balls, Balls and More Balls (Law of Nuisance)

Seventy two years after the Milnerton Golf Course was established, a sub division for the development known as Sunset Links was approved. The plaintiff, a Mr Simonis and his family moved into their home which they had built approximately half-way along the sixth hole which is a Par 5 approximately 400 meters long.

From December 2003 to March 2006, 875 "badly aimed" golf balls found their way on to their property. Even a 4.7 metre high net on two sides of the property had not prevented the property from being hit by golf balls. To solve the problem it was suggested that the hole be reduced to a Par 4 dog leg with a new tee location. Another expert suggested the erection of barriers (preferably trees or vegetation or netting) be erected in front of and to the right of the tee to intercept virtually all golf balls that started off on an angle.

Our Supreme Court of Appeal followed an Australian decision to the effect that a neighbour should not suffer a daily peppering of golf balls which posed a threat to the property as well as to physical safety of people on the property. Either the golf hole had to be altered or appropriate schemes, natural or artificial or a combination of both had to be erected to prevent the nuisance.

The fact that the golf course had existed for decades before the property was built was not considered relevant because the owners when they bought the land did not know the 6th hole was badly designed.

The SCA applied the common law principle that an owner cannot allow acts emanating from his property to constitute a nuisance to a neighbour's property. The conclusion in our law of nuisance is that it is a question of degree. In this instance 875 golf balls ending on a neighbour's property is excessive in the extreme. The situation of course could be different for home owners on an existing golf estate who purchased their property aware of the risks and dangers inherent with living on a golf estate.

Simon Chetwynd-Palmer

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2. SAA Takes Pain (Information Act)

A recently reported case matter involved the Promotion of Access to Information Act 2 of 2000 ("the Act") and South African Airlines ("SAA"). The Act was promulgated to develop a culture of transparency and accountability in public and private bodies, by giving the right to access information to the general public.

The facts before the Supreme Court of Appeal was that a retired airline pilot had worked for South African Airlines for thirty years and as part of his retirement package was entitled to two free business class tickets on any of any international flight every year. On one such occasion the pilot had booked two international tickets to New York and was due to return to Johannesburg on 20 August 2004 when he tried to move to an earlier flight.

The pilot and his companion were informed by SAA at the time that there were still seats available in business class and furthermore and that the seats would only be allocated once booking had closed. Upon the closure of the booking instead of being served first, the pilot was then told to queue at the back and he witnessed passengers being upgraded from economy to business class.

When the pilot was finally served at the counter he was informed that only one seat was remaining in business class and either he or his companion would have to travel by economy class. The pilot declined the offer.

The pilot intended to sue SAA for damages in respect of breach of contract and thus needed to establish whether there were indeed seats available in business class at the time in question. The response from SAA was that the information would not be divulged.

The pilot proceeded to send a series of emails to SAA requesting the booking sheet information but to no avail. Eventually the pilot submitted a request under the Act. The response from SAA some three months later was both unhelpful and evasive and simply indicated that there had been thirty seven passengers in business class and 220 in economy class.

The pilot took the view that the information was insufficient and thus launched an application to the Pretoria High Court seeking an order compelling SAA to furnish him with records reflecting the exact booking schedules.

SAA opposed the application and argued that the pilot was not entitled to the information as he did not have a prima facie right or claim against SAA by reason of an interpretation of the underlying contract.

On appeal to the Supreme Court of Appeal, Combrink AJA held that the very point of Act was to allow for the free flow of information thus avoiding litigation and not propagating it. Combrink further held that as long as there was a prima facie case for SAA to answer it was obliged to provide the information that had been requested and not to deliberately evade the questions.

Consequently, the appeal was upheld and SAA ordered to provide the pilot with the booking sheet information so that he could decide whether his contractual rights had been infringed. As a mark of displeasure at the dilatory conduct of SAA the Judge ordered SAA to pay the legal costs on a punitive scale.

Jason Kidza-Sewanyana

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3. Debit at Your Peril (National Credit Act)

In the past there were a number of laws governing the granting and receiving of credit. These has been repealed by the enactment of the National Credit Act 34 of 2005 ("the Act"). The Act has wide-spread implications that go beyond the credit for home or vehicle finance.

One instance that is often over looked is the application of the Act to debit orders. Suppliers or service providers often require their customers to sign debit order authorisations in order to secure monthly payments for the services or purchases that are made.

A debit order authorisation falls within the definition of a credit agreement and must accordingly comply with the provisions of the Act. For example, the Act has various clauses which impact on the use of a "*debit order authorisations*", including section 90 of the Act which details "*unlawful provisions of a credit agreement*":

Section 90(2)(n) states that a credit agreement cannot include a clause that "*... purports to authorise or permit the credit provider to satisfy an obligation of the consumer by making a charge against an asset, account, or amount deposited by or for the benefit of the consumer*

and held by the credit provider or a third party, except by way of a standing debt arrangement , or to the extent permitted by section 124; ... "

Section 124 deals with collection and repayment practices and provides that it is lawful for a consumer to provide a credit provider with an authorisation to make a charge or series of charges as contemplated in section 90(2)(n) quoted above provided that the charge is :

- against an asset or account which has been specifically named by the consumer for that purpose;
- to satisfy an obligation set out in the credit agreement and if it is a series of obligations then they must be recorded in the authorisation.

In addition, the date, or dates, on which the debit will take place must also be specified and the amount specified or calculated with reference to the obligation in the credit agreement. Without this information being included the debit order authorisation may well be unenforceable and unlawful.

The implications that flow from this is that you cannot submit a second debit for a lesser amount from the consumer's account following a dishonoured direct debit nor can you make a double debit if there was a previous dishonour of the debit. In most circumstances if a debit is dishonoured it will be a breach of the agreement and accordingly a basis to cancel, but be warned that you can no longer "*run the debit order for a lesser amount*" or "*double debit the following month*" in the hope of getting paid.

Section 133 of the Act deals with prohibited collection and enforcement practices. In terms of section 133 it is an offence for the service provider to rely on certain information, including the consumer's bank account details, when collecting a debt under a credit agreement.

In the circumstances, apart from where there is an authorisation in terms of section 90 read with section 124 of the Act, using the bank account details of a consumer to attempt a "second direct debit" after the first is dishonoured is a contravention of this section.

If you use debit orders to collect money from consumers, you should ensure that your debit order authorisations and collection procedures comply with these sections to avoid falling foul of the provisions of the Act, and being guilty of an offence.

Judy von Klemperer

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4. When Is a Marriage Really a Marriage? (Civil Union Act)

The Civil Union Act of 2006 ("the Act") which came into effect on 17 November 2006 has redefined the parameters of marriage. Instead of amending the existing Marriage Act of 1961 to allow for same sex couples to get married, the legislature introduced the Act, which provides both for marriages of heterosexual couples and same sex-couples.

The term civil union is defined in the Act as "the voluntary union of two persons who are both 18 years or older, which is solemnized and registered by way of either a marriage or a civil partnership in accordance with the procedures prescribed". The parties must elect whether to call the civil union a marriage or a civil partnership.

The Act permits two people (irrespective of their sex) to enter into a civil union provided that they comply with the formalities set out in the Act. These formalities are largely the same as those provided for in the Marriage Act of 1961 in that, both have to solemnized by a marriage officer, witnesses have to be present at the solemnization, both have to be registered and both can be terminated by death or divorce. Similarly, the same prohibitions apply.

The legal consequences of entering into a civil union in terms of the Act are the same as those of a marriage concluded in terms of the Marriage Act, and parties entering into civil unions are also entitled to conclude an ante-nuptial contract to govern their matrimonial regime. If they fail to do so, community of property and profit and loss will apply to their union.

In short, there is no significant difference between heterosexual parties choosing to enter into a marriage in terms of the Marriage Act or a civil union in terms of the Act. However, same-sex couples can only conclude a civil union but they can call their civil union "a marriage."

There are still some issues which will have to be "*ironed out*" when the Act is applied. One such example is that in a marriage the husband's domicile at the time of the marriage and the laws of that country, is what governs the proprietary consequences of the marriage at time of divorce. This could pose a problem for same sex partners in deciding whose domicile should be used.

Many women living in relationships with their (male) partners are under the mistaken impression that by the effluxion of time (7 or 10 years), they have formed a "*common law marriage*" with that person and are therefore entitled to the same or similar benefits as

married women when the relationship ends ie maintenance and/or claim against their partner's assets.

It is worth mentioning that in the draft of the Act provision was made for a "domestic partnership" which is not registered to have the same or similar consequences as a registered civil union or marriage. This was, however, not included in the Act when it was promulgated, but will no doubt be the subject of legislation in the future.

There is currently no legislated recourse for couples living together and parties to these relationships must ensure that they have the appropriate contracts to cover potential disputes about the distribution of assets in their relationship. This is cold comfort for many women who are financially dependent on their (male) partners and therefore not able to leave them, yet those same partners will not commit to any formal kind of union or marriage which will allow the female partner financial security and recourse.

It seems clear however that our law or legislature is moving in the direction of offering some protection to partners in a permanent domestic relationship.

Joelene Nel

Joelene can be contacted on 031-302 00302 and nel@wylie.co.za

5. The levying of municipal rates under the new rates act – does it spell doom for ratepayers?

Before the 2nd of July 2005, the levying of rates by municipalities throughout the Republic of South Africa was governed by provincial ordinances, and the manner of valuation of immovable properties for the purposes of rates differed from province to province. In the Province of KwaZulu-Natal, the levying of rates by municipalities was governed by Part 6 of the Local Authorities Ordinance, No.25 of 1974 ("the Ordinance"), which was repealed by the new Local Government: Municipal Property Rates Act, No.6 of 2004 ("the Rates Act") with effect from 2nd July 2005.

Under the Ordinance, the valuation of immovable properties for the purposes of rates was based on the value of the land and the buildings thereon, less depreciation. Consequently, you will find that certain properties in some of the affluent areas of the eThekweni Municipality, such as the outer west, were paying relatively low rates in comparison with other affluent

areas of eThekweni, such as Durban North. The valuation of properties under the Rates Act, on the other hand, must be based on the market value of the property, that is, an amount which a willing seller would be prepared to pay for the property in an open market.

Therefore, bearing in mind the sharp increase in property values over the last few years, there is a very good reason for any property owner to be concerned about the implementation of the Rates Act. The blessing in the sharp increase of your property has all of a sudden become a curse, and you are now eagerly waiting that dreaded valuation notice from your municipality so that you may challenge the high valuation of your property.

Unfortunately, we cannot even blame our respective municipalities for our predicament because the four years they were allowed to implement the Rates Act is due to lapse on 1st July 2009, by which date no municipality will be entitled to continue using a valuation roll that was in force prior to the commencement of the Act. In fact, our only hope as ratepayers lies in a decision by our municipal council to keep the rate randage as low as possible, that is, provided that the national government does not proceed with its recent proposal to limit the rates payable in respect of government buildings.

Notwithstanding the foregoing, there is no doubt that the Rates Act will bring some form of relief to owners of units in sectional title schemes which are heavily indebted to municipalities for arrear rates and service charges. Unlike the Ordinance, under the Act a rate on property which is subject to a sectional title scheme must be levied on the individual sectional title units in the scheme and not on the property as a whole. This will resolve the problem of bodies corporate having to run after recalcitrant unit owners to recover their rates contributions. At least, some good will be derived from the implementation of the Rates Act.

Vusi Nkosi

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6. Litigation Trivia

- Prescribed legal rate of interest = 15,5% (remains unchanged since 1 October 1993).
- Tariff of legal costs: High Court last amended in May 2000.

- Court delay for trial allocations:
 - Durban - 24 months
 - Pietermaritzburg - 12 months
 - Pretoria - 24 months
 - Johannesburg - 18 months
 - Cape Town – 30 Months
- Age of majority reduced from 21 to 18.
- Constitutional Court Judges Moseneke and Sachs are on long leave and are replaced by Judges Jafta and Kroon.

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Should you require additional information on any of the above issues or with regard to any other issues of a litigious nature, please contact any one of our following team members:

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