

## **APRIL 2007**

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**A creditor's right to sell in execution prevails websites of the month: Half a million fee e-books online**



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## **LATE ACCEPTANCE OF AN OFFER – CAN THE SELLER CANCEL?**

You put in an offer for a property, and give the seller a period of time within which to accept. The seller accepts your offer, but his acceptance is a few days late – is there a sale or isn't there?

It has always been clear that you are entitled to reject the late acceptance if you so wish, on the basis that the offer had lapsed before acceptance; in which case there is no deal.

On the other hand, if you accept the late acceptance, can the seller get cold feet and rely on his own late acceptance to get out of the sale?

Now for the first time the High Court has held that the seller cannot escape the sale - the expiry date of an offer is there for the buyer's benefit alone, and the buyer can decide to waive it. In other words, you as buyer can accept the late acceptance, and then the seller is bound – but make sure that you do your part of the accepting (and tell the seller in writing that you are doing so) within a reasonable time.

## **RECLAIM YOUR NAME**

"A person's name is to that person the sweetest and most important sound in any language" (Dale Carnegie).

Quite so, and if your business bears your name, you will want to protect its use. If for example you are the "Smith" in "Smith & Jones Services", and you and Jones decide to go your separate ways, you will want to have a say in whether or not Jones can continue to use the "Smith" part.

The Supreme Court recently dealt with a situation where two attorneys agreed to practice from shared premises using both their names; they were never actually in partnership, but shared facilities and certain overheads. When they split, the one continued to use the joint name. The other objected on the basis that he did not want his name to be associated with the practice now that he had left it; the court agreed with him, but remarked that there may in certain cases be public policy considerations justifying such an impingement on one's identity.

The danger is that a business' name (and the associated goodwill) is an asset of the business. In other words, the only certain way to control use of your name is to have a written agreement (with the business and with everyone else holding an interest in the business), regulating what will happen to the name if you leave.

## **INDEPENDENT CONTRACTOR OR EMPLOYEE? THE TESTS, AND THE CASE OF THE NOT-SO-INDEPENDENT ESTATE AGENT**

The CCMA has no jurisdiction over disputes involving independent contractors, and the Labour Relations Act affords no protection to them.

But, as confirmed in a recent Labour Court decision, the mere fact that an engagement contract calls a person an "independent contractor", provides only for payment of commission, and excludes deduction of PAYE and UIF, doesn't necessarily mean that the person isn't an employee.

The courts will go beyond all that to "uncover the underlying and true nature of the relationship", applying such tests as

- The amount of "control and supervision" exercised by the employer, and
- Whether or not the 'dominant impression' of the relationship is that of a contract of employment

In the case in question, a person engaged by an estate agency as a commission agent was held to be an employee, the court taking into account factors such as an obligation to comply with "office rules", a restraint of trade, the imposition of a roster regulating her activities, and an obligation to report absence from work to a manager.

## **ROYALTIES ARE TAX DEDUCTIBLE**

If you are paying royalties to a holder of intellectual property, you may well have had your expenses in that regard disallowed by SARS.

However the Supreme Court has now held that recurrent annual royalty payments in terms of a trademark licence agreement qualify as "expenditure incurred in the production of income", and are deductible; provided, it seems, that the expenditure neither creates nor preserves any capital asset for the taxpayer. So you must be paying for the use - not the ownership - of someone else's IP.

## **WRONGLY WORDED CONTRACTS; RECTIFICATION, AND TROUBLE FOR A TENANT**

If a written contract doesn't correctly reflect what you and the other party actually agreed, you can apply to court to rectify it to correctly reflect your "common intention". But of course a much better option is to make sure that the contract is worded properly in the first place.

In a recent Supreme Court case, a prospective tenant intended to operate a restaurant in premises in a mall, and relied on an assurance from the letting agent that the landlord's policy on tenant mix would exclude a major competitor from the mall. However the tenant then signed the lease, not noticing that it had a clause denying exclusivity "to any particular type of business being conducted in the building".

The problem came when the landlord changed its policy, and allowed the competitor in.

The Court held that the landlord had merely authorised the agent to convey its current policy on tenant mix, which it had correctly done at the time of the initial negotiation. The landlord was entitled to change its mind on the policy, and the tenant was stuck with the offending clause – yet another warning to read and understand all the little bits of every contract before signing!

## **INSTALLING A SECURITY GATE ACROSS A RIGHT OF WAY**

If your property has a road or path through it that is subject to a right of way servitude, are you entitled to erect security gates and impose on the servitude user the inconvenience of having to open and close the gates at every use? With the burgeoning use of high walls and electrified fences for security, this situation is bound to arise regularly.

The answer, held the High Court recently, is that you may do so provided that you do not thereby deprive the user of his “free and unhindered use” of the road. In the case in question, the landowner’s offer to provide the road user with remote controls and codes for the touch pads, and keys to the pedestrian gate, was sufficient; the resulting inconvenience to the user (and his service providers and guests) was not unreasonable in the circumstances.

## **A CREDITOR'S RIGHT TO SELL IN EXECUTION PREVAILS**

Must you stop a sale in execution of a debtor’s property if the debtor quickly sells the property to a third party before you have judicially attached it?

There have been conflicting decisions in the past on this point, and a 1996 judgment held that an execution sale cannot proceed when you are given notice of the prior sale before you attach the property. This could be a real problem for you if the debtor unscrupulously fabricates a sale (perhaps to a family member at a discount) to frustrate your enforcing your judgment.

Fortunately for creditors however, the Supreme Court has now settled the point by holding, in a recent case, that an attachment and sale in execution were valid even though notice had been given of a prior sale.

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