

MAY 2008

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SHOOTING TO KILL IN SELF-DEFENCE – THE LIMITS

With politicians urging the police to “shoot to kill” criminals who threaten them or the community, it is vitally important to bear in mind the very strict limits that our law imposes on members of the public who use force in “self-defence” (not to be confused with the statutory restrictions which apply to law enforcement officials and others when effecting arrests).

The law recognises your right to use force to protect yourself and others from unlawful attack, but only subject to the principle that the level of force used must be *reasonable* and *proportionate* – no more than is absolutely necessary in the circumstances.

The tests for reasonableness and proportionality are particularly stringent where deadly force is used. It is only likely to be regarded as justifiable where it is necessary to prevent loss of life or serious injury, and then only if “no less-severe alternative is readily available” - shooting to kill must always be a last resort.

For example, in a recent Supreme Court of Appeal case, the appellant had shot another man, allegedly to defend himself from an attack by the deceased. The court commented that “the primary question is whether or not there had been a threat to the appellant’s life” – finding that there had been no such threat, the court confirmed a conviction of murder, and a sentence of 12 years imprisonment.

ESTATE AGENTS - NO CERTIFICATE RISKS NO COMMISSION!

If you are an agent struggling to get your current fidelity fund certificate out of the Estate Agents Affairs Board, be aware that a recent Supreme Court of Appeal judgment highlights a very significant danger for you.

But first the good news - even though the legislation provides that “no estate agent shall be entitled to any remuneration or other payment in respect of or arising from the performance of any act [of an estate agent] unless at the time of the performance of the act a valid fidelity fund certificate has been issued to ... such estate agent”, you can keep commission *if it has already been paid over* – the seller cannot reclaim it.

The bad news is that, if the commission *hasn’t* been paid yet, you will find it very difficult to enforce a claim to it – because the court held further that an agent without a valid certificate “will be prevented from enforcing his or her claim” and “is prohibited from enforcing a claim for remuneration that has become due”. Moreover, claiming “remuneration” in such a case is actually a statutory offence.

Don’t delay - get your fidelity fund certificate now!

CLOSE CORPORATIONS: ANNUAL RETURNS NOW NECESSARY

If you have a CC, note that, from 1 May 2008, you must lodge annual returns to CIPRO – the same returns as companies have been lodging since 2005 (mostly statutory and turnover detail). Returns must be submitted in electronic format, and delay will incur penalties. Failure to lodge for 6 months risks deregistration. Returns are due by the end of the month following the anniversary of incorporation.

FILLING IN THE BLANKS IN PROPERTY SALES

If the other party to a property sale agreement asks you to fill in material information on the agreement, ensure that he/she signs the additions or changes. If you don't, the sale will be invalid - even if you acted as the other party's fully authorised agent.

In a recent case before the Supreme Court of Appeal, the seller had supposedly appointed the buyers as her agent to fill in (1) their names as purchasers, and (2) a description of the property.

Because the seller had never signed these material insertions, the sale was void.

THE NO-WIN WORK PERMIT PROBLEM

Here's a knotty problem for you if you employ a foreigner whose work permit expires.

Illegal employment of a foreigner is a criminal offence in terms of the Immigration Act, but the Labour Court has now held that the relevant labour legislation continues to afford protection to the employee – so you cannot necessarily dismiss such a foreigner solely on the basis of expiry of the work permit. In the case in question, the matter was sent back to the CCMA “to consider whether the dismissal was fair.”

The message is clear - take proper advice before employing any foreigner, and consider recording undertakings by the employee in regard to his/her residence and work permit status.

THE SERVICE DEPOT THAT LOST A JEEP, AND HAD TO PAY

If your business involves having custody of other people's property, you should have customers sign standard conditions of contract, with “exemption clauses” limiting your liability for loss of, or damage to, such property – without them, it's up to you to prove that you are not at fault.

But your exemption clauses must be adequately brought to the attention of customers. What is “adequate”? That will vary from case to case, and there is no substitute for a contract drawn to cover your particular business and circumstances.

A recent Supreme Court of Appeal case illustrates the danger of not doing this correctly. A car was stolen from a service depot's premises after being brought in for warranty repairs - through, it seemed, the depot's failure to properly safeguard the vehicle's keys.

The depot relied on a widely-worded clause in its contract designed to relieve it of liability for such loss. However the court held the depot liable – the exemption was contained in an “inconspicuous and barely legible clause that refers to the conditions on the reverse side of the page in question” – it should have been “clearly and pertinently brought to the attention of a customer who signs a standard instruction form”.

NEW ASBESTOS BAN IN FORCE

New regulations from the Department of Environmental Affairs and Tourism prohibit the use, manufacturing, import and export of any asbestos or asbestos-containing materials.

There is a 120 day grace period for certain merchants to clear existing stocks, and provision for a phase-out (subject to registration) of certain products for which there is no immediate alternative.

Heavy penalties are provided for contraventions.

A HADDOCK BY ANY OTHER NAME

Although misleading advertising is strictly forbidden, it appears that long usage will, on occasion, justify calling an “apple” an “orange”. Thus, the Advertising Standards Authority Directorate recently endorsed the packaging of smoked, coloured hake as “Oak Smoked Haddock”. The real haddock is, it seems, a (rare) inhabitant of the North Atlantic, and hasn’t been imported into South Africa for over 50 years. The practice of selling hake as haddock has been around that long, leading the ASA to conclude that: “... the only consumers who will know that there is a difference in the two types of fish are those [who] have been overseas or have been exposed to it before”.

Critically, the consumer was, and is, able to ascertain the correct nature of the product through the simple expedient of reading the package’s ingredients panel – which must (by decree of the Department of Health) disclose hake as the product.

In any event, for lovers of this particular fishy treat, a “Hake By Any Other Name” is going to taste just as delicious! But, if it’s critical to you to know what it is you are ingesting, read those ingredient labels on food packaging - even the small print.

WEBSITE OF THE MONTH: LAPTOPS FOR BLACKOUTS

Reduce the pain of load shedding with a laptop computer – when the power’s off, the battery is king!

If you decide to buy one, and need advice, try the About.com website: -

- Start off with “Laptops - Tips for Using & Choosing a Laptop” at http://mobileoffice.about.com/od/laptopstabletpcs/Laptops_Tips_for_Using_Choosing_a_Laptop.htm;
- Then read “Before You Buy A Laptop” at <http://mobileoffice.about.com/cs/laptops/bb/bylaptop.htm>;
- Now have a look at the “Tips and Resources to Using Your Laptop” page at http://mobileoffice.about.com/od/usingyourlaptop/Tips_and_Resources_to_Using_Your_Laptop.htm;
- Don’t skip “10 laptop battery basics” at <http://mobileoffice.about.com/od/usingyourlaptop/tp/laptopbattmtc.htm> - batteries have a limited life span, and replacements are expensive!

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