

**NOVEMBER 2007**

**Options To Purchase – Check The Payment Provisions!**

**Labour Pains For The Boss**

**Sectional Title – Business And Residence Don't Mix**

**Foreign Currency – The Forfeiture Factor**

**Pension Payouts Fast-Tracked On Divorce (Even Old Divorces)**

**Tenants Playing With Fire**

**Unmarried Fathers Get New Rights (And Some New Duties)**

**Website Of The Month: All The Customs And Currency Rules For Travellers**



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*The information in this document is of a general nature and does not constitute legal advice*

## **OPTIONS TO PURCHASE – CHECK THE PAYMENT PROVISIONS!**

If any sale agreement doesn't specify the time and method of payment, the purchase price is payable in cash, against delivery.

And delivery of immovable property is effected on transfer; so if your idea is that the price (or any part of it) is to be paid at any time before or after transfer - or in any manner other than cash – make sure that it's spelt out in the agreement.

Options to purchase are particularly susceptible to this sort of oversight, as evidenced in a recent Supreme Court of Appeal case. The property owner wanted out (having already sold the property to another buyer), but the Court held the option to be valid on the basis that the "cash on transfer" term is implied by law.

## **LABOUR PAINS FOR THE BOSS**

Any dismissal by reason of an "employee's pregnancy, intended pregnancy, or any reason related to her pregnancy" is automatically an unfair dismissal in terms of the Labour Relations Act.

And the Labour Court takes a dim view of such cases – in a recent matter, it penalised a small business for trying to contract out of the mandatory four months' maternity leave, awarding the employee R60.000. That was 20 months' salary (the maximum is 24 months) even though the employee actually found a better-paying job within 7 months.

If not falling pregnant is "an inherent requirement of the particular job", the dismissal may be fair – but that is not easily proved. For example, in 2006 the Labour Court awarded a dismissed employee (who had been employed as an au pair and child minder) compensation of a year's salary (R71.500), plus R25.000 damages for unfair discrimination in terms of the Employment Equity Act.

## **SECTIONAL TITLE – BUSINESS AND RESIDENCE DON'T MIX**

Sectional title ownership of property has many advantages – but it brings with it the need to take into account the rights of others in the scheme.

For example, you need the written consent of ALL the owners before you can run a business from your residential unit (or vice versa - any change of use is covered). Consent from the Trustees is not enough.

If any of the other owners refuse consent, the courts will assist you only if the refusal is "unfairly prejudicial, unjust or inequitable" to you – which, the courts have held, means that it is for you to prove that the refusal is "unreasonable". And, no matter how prejudiced you yourself may be, you are going to have an uphill battle in doing that when your change of use will prejudice other

owners – particularly where (as in a recent High Court case) your business poses a threat to the security and/or the “peace and tranquillity” of the scheme.

If you are refused consent, don't delay in seeking legal assistance – you must apply to court within six weeks of refusal.

## **FOREIGN CURRENCY – THE FORFEITURE FACTOR**

Anyone caught trying to leave South Africa with unauthorised foreign currency won't just pick up a criminal conviction – the currency is likely to be forfeited to the State as well.

The Constitutional Court has recently held that such forfeiture by the Treasury is in no way unconstitutional, provided that

1. The transgressor has an opportunity to make representations as to why the currency shouldn't be forfeited, and
2. The officials who are tasked with deciding on forfeiture exercise their discretion so as to avoid “unjust and unduly harsh consequences”.

In another case, the Constitutional Court upheld the seizure (and retention) of foreign currency as evidence in a pending criminal prosecution.

Ignorance of the law doesn't cut much ice in these cases; so if you need to acquire or export foreign currency for any purpose, make sure that you understand exactly what is and what isn't allowed. If you are travelling, get details of both local and foreign customs and currency restrictions - see the “Website of the Month” below.

## **PENSION PAYOUTS FAST-TRACKED ON DIVORCE (EVEN OLD DIVORCES)**

Being awarded a share of a spouse's pension fund on divorce has just become a lot more attractive. Recent changes to the Pension Funds Act mean that the non-member's share of benefits now accrues on date of divorce. Previously, benefits accrued only later - often decades later (on the member's eventual retirement or resignation, for example).

The Pension Funds Adjudicator held recently that these changes apply to existing divorce orders as well as future ones – so it appears that even if your divorce was years ago, you should take immediate steps to claim any outstanding share of the pension fund (assuming of course that a share was indeed awarded to you at the time).

## **TENANTS PLAYING WITH FIRE**

A recent High Court case highlights how dangerous it is for tenants to not fully appreciate the effect of the insurance clauses in the lease.

The landlord's insurers covered the landlord for damage caused to the premises by a fire. The insurers then sued the tenant for R306.000 on the basis that the tenant's employees had negligently caused the fire.

The tenant argued that it was implied or tacit in the lease that both the tenant and the landlord were co-insured in terms of the insurance policy – which would absolve it from all liability for its own negligence.

However, the Court found that the wording of the lease was such that the tenant was not covered – it should have taken out its own insurance.

Every lease will be different, so have it professionally checked before you sign; not doing so could cost you dearly.

## UNMARRIED FATHERS GET NEW RIGHTS (AND SOME NEW DUTIES)

Any father of a child born out of wedlock now has “full parental responsibilities and rights” – including automatic rights of access (now called “contact”) and joint guardianship – provided that he either: -

- Resided with the mother at the time of birth in a “permanent life partnership”, or
- Meets specific requirements to be identified as the father, and to contribute to the child’s upbringing and maintenance.

## WEBSITE OF THE MONTH: ALL THE CUSTOMS AND CURRENCY RULES FOR TRAVELLERS

You don’t want to be still trying to figure out how much currency you are allowed to take out of the country as you check in at your local airport. If you get it wrong you could be in big trouble (see above: “Foreign Currency – The Forfeiture Factor”).

You will also want to do your homework, before you leave, as to what customs controls and allowances apply in your destination country – and what airport taxes (if any) you are going to have to cough up before you can board your flight home.

The bad news of course is that every country has different requirements, and some of them chop and change at regular intervals. The good news is that the IATA (International Air Transport Association) Travel Centre website at <http://travelcentre.iata.org> covers them all, from Afghanistan to Zimbabwe.

The site will also give you personalised “Passport, Visa and Health Advice” for any destination you can think of.

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