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KEEPING YOU IN TOUCH

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In this Issue

BOUNDARY WARS: WHAT TO DO WITH AN ENCROACHING NEIGHBOUR

"Good fences make good neighbours" (wise old proverb)

You find out that the fence/wall/house your neighbour is building, or has built, is actually on your land – what can you do about it?

No problem of course if you are happy to sell the land in question to your neighbour at an agreed price, or if your neighbour voluntarily removes the encroachment. But if instead you come to blows and end up in court, what will the outcome be? Regrettably, as a recent Supreme Court of Appeal (SCA) case shows, there is no easy answer to that question, hence the practical advice at the end of this article.

A most misleading fence causes confusion

To illustrate, the facts in this matter were these –

- A had bought a number of properties, on one of which was a substantial but incomplete "structure".
- A thereafter sold 27 of its properties to B, blissfully unaware that the incomplete structure partially encroached on one of the properties it was selling.
- A had been lulled into a false sense of security by an existing fence on the property as to where the property's boundary was, hence its belief that the incomplete structure was entirely on its own land.
- When, two years later, A discovered the encroachment, it asked the High Court for an order that B be forced to transfer the land in question back to it.

Demolition? Or damages and transfer?

Confirming the High Court's refusal to force such a transfer, the SCA commented that "adjudication in relation to encroachment is fraught with complexities", and the hard fact is that, unless and until new legislation is put in place to specifically address these complexities, you are faced with many grey areas.

Broadly, the many court cases relating to encroachment over the years suggest that –

- Your primary remedy is – in theory at least – a demolition order. You may even be able to enlist the assistance of your municipality in this regard.
- However our courts have in many cases, after weighing up what is reasonable and fair in all the circumstances, refused demolition and instead ordered payment of damages as compensation for the encroachment. Regrettably there is no certainty as to exactly how a court will calculate these damages.
- Although in practice a court ordering damages rather than demolition is also likely to order that the land in question now be transferred to the encroacher, that won't necessarily happen. Indeed the SCA in this case queried whether Constitutional considerations around arbitrary deprivation of property might prevent such an order. One can imagine the practical problems that would ensue if that happens.
- One thing that is now certain, per the SCA's decision, is that an encroacher cannot just go on the offensive and force you to transfer the land to it. It can defend itself against your application for demolition if you make one, but, like the landowner in this case, you could just sit back passively exercising your ownership rights.
- A relevant factor will always be whether the encroaching structures comply with planning, zoning, building and environmental regulations. The fact that the building in this case was an illegal structure (for want of approved building plans) was another nail in the encroacher's coffin.
- Another thing to bear in mind - any delay on your part in objecting to the encroachment increases the risk of the court refusing to order demolition.

The bottom line – what you should do

You really don't want to risk a court action with all those complexities and grey areas in the law.

So, prevention being as always much better than cure, before you build anything make 100% sure that you are indeed building on your own land. Remember that old fences and boundary walls may, as happened in this particular case, not always reflect the boundaries correctly.

On the other side of the fence (as it were), take legal advice immediately you learn of any encroachment, planned or actual, onto your property.

GARNISHEE ORDERS - ARE 2 MILLION OF THEM NOW INVALID? AN ACTION PLAN FOR EMPLOYERS, CREDITORS AND DEBTORS

"The ability of people to earn an income and support themselves and their families is central to the right to human dignity" (Extract from judgment below)

"Garnishee" orders (more properly "Emoluments Attachment Orders" or EAOs) are often used by creditors to attach a debtor's earnings. The debtor's employer is served with a court order to deduct specified amounts from the debtor's salary or wages. The employer pays those deductions over to the creditor until the debt and legal costs are settled in full.

Misuse! The facts that alarmed the High Court

Supporters of this process argue that, fairly obtained and implemented, garnishee orders are not only an efficient and cost effective method of debt recovery, but less traumatic for debtors than executions against property.

The problem however lies in the potential for misuse, as shown in the recent high-profile High Court case brought on behalf of a group of low wage earners. After defaulting on loan repayments, they had each been persuaded to sign consents to judgment with an undertaking to pay off the debt in instalments, consent to the issue of a garnishee order, and consent to the jurisdiction of a court in another district. The debtors denied that the documents were properly explained to them or that they signed them voluntarily.

Garnishee orders were duly issued, leaving the debtors in many cases with completely unaffordable deductions. For example, over half of one employee's salary was attached. Another employee had almost her whole salary attached in terms of three orders granted against her on the same day.

Orders invalidated – the practical result

The problem lies in the Magistrate's Court Act which governs the issue of garnishee orders. It imposes no limit on the number of orders that may be granted against a debtor, nor any limit on the amount that may be deducted. Moreover, these orders can be issued by clerks of court giving rise, in at least some district courts, to a "rubber stamping" exercise based solely on whether a debt judgment has been obtained or not. Debtors can also consent to the jurisdiction of a court far away from where they live and work, effectively depriving them of their right of access to the courts.

These provisions, held the Court, are unconstitutional, and the garnishee orders in question are therefore unlawful and invalid.

The practical result (pending a likely appeal, subject to referral to the Constitutional Court for confirmation, and subject to amendments to the Act reportedly being prepared as a matter of urgency by the Department of Justice and Constitutional Development), is that, in the Western Cape at least –

1. Garnishee orders may no longer be issued by clerks of court. They must be issued under "judicial oversight", in other words by a magistrate – no doubt after a full enquiry into the affordability to the debtor of the deductions sought.

2. In cases where the National Credit Act applies (which will be most cases like this) only the court where the debtor lives or works will have jurisdiction – making it much easier for the debtor to appear in court and be heard.

Employers, Creditors and Debtors: Your action plan

So what happens now? Garnishee orders that comply with the above new criteria are still valid and enforceable. But with media reports suggesting that as many as 2 million existing garnishee orders may now be invalid, all role players – including employers, creditors and debtors – need to check any existing orders urgently.

What you don't want to do is risk breaching a valid court order, so unless and until a

garnishee order is actually set aside by a court (or you have the creditor's written agreement to stop deductions as an interim measure), treat it as at least provisionally valid unless your lawyer gives you specific advice to the contrary.

Don't rely on the various reports and opinions you will read in the media – a lot of them are confusing and some are completely misleading. Take full advice in any doubt!

TAX SEASON STARTS 1 JULY: YOUR DEADLINES

Tax Season for individuals and trusts is upon us once again.

Your important dates for filing your ITR12 Tax Return for the period 1 March 2014 to 28 February 2015 are -

- **30 September 2015:** Manual submissions, or
- **27 November 2015:** Returns submitted via eFiling or electronically through the assistance of a SARS official at an office of SARS, or
- **29 January 2016:** Provisional taxpayers via eFiling.

EMPLOYERS, EMPLOYEES: EARNINGS THRESHOLD UNCHANGED

Overtime limits and pay, working hours regulation, meal intervals, rest periods, night, Sunday and Public Holiday work – these are some of the basic protections and benefits in terms of the Basic Conditions of Employment Act (BCEA) which don't apply to employees whose earnings exceed a specified threshold.

Every year in the past the Department of Labour has announced a 1st July annual increase in the threshold, but this year the threshold remains unchanged at R205,433-30 p.a.

POPI: DON'T PANIC!

"Don't Panic" (Douglas Adams, Hitchhiker's Guide to the Galaxy)

Almost every business in South Africa will be affected by POPI (the Protection of Personal Information Act), but don't be misled by the many articles and media reports doing the rounds that imply you are at immediate risk of non-compliance. No general commencement date has yet been set, and even when it is, we will still have at least a full year thereafter to comply.

Having said that, there's certainly merit in being prepared. In a nutshell, build your compliance program around identifying what personal data you hold, why and under what authority you hold it, and how secure it is.

But don't panic if you haven't started on that yet. When a commencement date is actually announced (hopefully in the not-too-distant future, now that the way is cleared for the appointment of an Information Regulator) we'll let you have some practical advice on how to go about preparing for compliance.

THE AUGUST WEBSITE: ONLINE LEARNING FOR ENTREPRENEURS

If you own a small business, if winter's chill

means less time in the Great Outdoors and more time indoors, and if you don't want to waste a golden opportunity to grow your business savvy – then start mining the treasure trove of educational resources available to us all on the Internet.

Business News Daily has a convenient list of "10 Online Programs to Boost Your Business Skills" on its website at http://www.businessnewsdaily.com/7780-online-business-education-programs.html.

Many of them are free, and they offer everything you can think of in the way of useful business education. Choose a course that fits your needs and available time, then immerse yourself in a variety of learning channels like video tutorials, articles, online chat, seminars, even opportunities for collaboration and hands-on learning.

Then again please don't stay locked up indoors all winter long! Science has confirmed again and again just how good it is for us to get outdoors regularly – see for example "Surprising science-backed ways to boost your mood" on BusinessInsider's website at http://www.businessinsider.com/science-backed-things-that-make-you-happier-2015-6.

Have a Great Women's Month this August!