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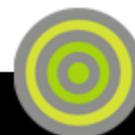
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FEBRUARY 2016

COULD YOUR PROPERTY DEBTS BE CANCELLED?



*“How, on these figures, an employee of the bank could conclude that the farming may prove to be successful, is beyond me. It seems that money was just being poured into a bottomless pit.”
(Extract from judgment below)*

If you are a bank (or other lender), or if you have borrowed money against your property and are facing financial difficulty, you need to know about a recent High Court decision declaring that a bank's loans to a farming couple had been granted “recklessly”, setting aside the loans, and cancelling the mortgage bonds.

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The pensioners who went farming; and the bank that funded them

- A couple used their pension moneys to buy a smallholding and develop it into a small scale farming venture. They then started borrowing from a bank to meet shortfalls in their cash flow. The bank secured its loans with two mortgage bonds over the property for a total of R1,151m, and took a suretyship from the couple's daughter.
- From day one it seems the farming venture was in trouble and eventually the bank approached the courts for an order to allow it to sell the property in execution. The couple (and presumably their daughter also) risked losing everything.
- However it emerged that -
 - The couple had no fixed income other than an annuity of R647 per month,
 - They were relying on loans from family to make ends meet,
 - They were already retired when the loans were granted, and would have been 85 and 80 years old respectively by the end of the 20 year loan period,
 - The bank had incorrectly taken the daughter's income into account in assessing the loan applications,
 - The farming venture's prospects of success were never good.
- The Court, commenting that the National Credit Act (NCA) obliges a credit grantor to assess the consumer's means, prospects and obligations “reasonably” before granting credit, held that the bank had failed to do so but instead had acted “irrationally”.
- In the circumstances the couple had, with the help of an expert witness, proved (it being up to a debtor to prove any allegations of reckless lending) that the loans fell to be set aside or suspended in terms of the NCA. The extent of the bank's recklessness, the fact that the couple were elderly, and the fact that the smallholding was their only home led the Court to set aside the loans altogether rather than just suspending them.

Reckless lending → Consumers off the hook, bank down R1,74m

The couple must pay the bond cancellation costs, but other than that they – and their daughter who stood surety for the loans – are off the hook altogether. The bank on the other hand is down R1,74m plus interest and legal costs.

Banks (and other credit providers): Revisit your credit granting procedures urgently!

DUAL CITIZENS – DON'T RISK LOSING YOUR SOUTH AFRICAN CITIZENSHIP!



You are a South African citizen. You decide to acquire dual citizenship. Your reasons for doing so are irrelevant – perhaps you are living/working overseas, perhaps you want a second passport just to make travelling easier, perhaps you have financial reasons. What is relevant is that **you risk losing your South African citizenship.**

You are certainly allowed to hold dual citizenship, no problem there. But our Citizenship Act provides that if “by some voluntary and formal act” you acquire citizenship or nationality of another country, you are automatically deprived of your South African citizenship.

You are exempt only if

Automatic loss of citizenship does not apply to –

1. Minors (under 18 years of age) and
2. Acquisition of another country's citizenship by marriage.

Here's how you keep your SA citizenship

The good news is that you can apply through Home Affairs for authority to retain your SA citizenship – but your application must be approved **before** you acquire your second citizenship. **Don't leave it to the last minute** – processing time is given as “3 to 6 months” and even that could be cutting it fine. If you are overseas you should find the necessary forms and instructions on your local SA Embassy/Mission/Consulate website.

You've lost it automatically – what now?

This is very much second prize, but you can still apply to get your citizenship back -

- If you were a **citizen by birth or descent** you can apply for reinstatement only if you have returned to, or are living in, South Africa permanently (you still have permanent residence, you just aren't a citizen).
- If you were a **citizen by naturalisation**, you must re-apply for permanent residence or apply for exemption thereof, before you can be considered for resumption of citizenship.
- If all else fails, seek legal advice. There is some speculation that these provisions may not pass Constitutional muster. This is definitely third prize; there are no guarantees, and you are likely to be in for some serious legal costs.

P.S. Don't let your SA passport lapse!

Although you can travel freely around the world on your second passport, you must **enter** and **depart from** South Africa on your valid SA passport. Keep renewing it!

ESTATE AGENTS: HOW TO SECURE YOUR COMMISSION



Are you an agency trading through a company or close corporation (CC)? If so, this is for you - a recent High Court (Full Bench) case in which a close corporation lost its commission because its Fidelity Fund Certificate (FFC) was only in the sole member's name and no separate FFC had been issued to the CC.

Coming short – a CC without its own FFC

1. A close corporation estate agency successfully carried out its mandate to find a tenant for a landlord.
2. Only the sole member of the CC held an FFC, which stated that it was issued to her in her 'capacity' as 'Principal (Sole Proprietor at Firm)' of the CC, with the CC's trading name also specified.
3. The agency sued for its commission when the landlord refused to pay it.
4. Holding that the FFC had clearly been issued to the member herself and not to her CC, and that this disentitled the CC to its commission, the Court dismissed its claim.

Protecting your commission

Don't put your commission claims at risk. Obtain separate FFCs for your trading entity/ies as well as for all directors/members/principals and agents. The entity's FFC is issued free of charge but you must display it "in a prominent position" on its premises.

Another risk – the "trading as" scenario

In another recent High Court case, a CC with a valid FFC had fulfilled its mandate to find a buyer for a property, but it did so not in the CC's name but in its trading name. The seller refused to pay the agency's commission, arguing that it had never given a mandate to the CC, which was neither mentioned nor named in either the agency's documentation or on its website.

The Court, finding on the facts that the CC and its trading name were effectively one and the same, awarded the agency its R78k commission. **But don't risk having to go the litigation route** - avoid uncertainty by disclosing both your legal entity's name and its trading name/s on all documents, letterheads, website etc. Take full advice in any doubt.

WHITE COLLAR CRIME AT WORK – REPORT IT!



"..... a custodial sentence is required. Society must be assured that persons who abuse positions of trust for their own gain are not allowed to walk free." (Extract from judgment below)

If you fall victim to employee crime, don't fall into the trap of dealing with it internally, without laying criminal charges. Our courts have yet again confirmed that they will act decisively to punish white collar crime, even where substantial mitigating factors apply. A recent Supreme Court of Appeal (SCA) decision illustrates –

Mother who stole must serve time

1. A paralegal assistant stole some R1,409,000 from her attorney employer's trust account over a 5 month period. She was convicted of numerous counts of fraud and one of money laundering.
2. A first offender, primary caregiver to two young children and an untreated ADHD sufferer, she had paid back to her employer whatever she had personally gained (other stolen money had gone to her husband and father to buy luxuries), had shown remorse and had rehabilitated herself, beating a drug addiction and finding stable employment.
3. Despite these mitigating factors the Regional Court sentenced her to 8 years imprisonment, of which 3 were conditionally suspended, and the High Court confirmed this sentence on appeal to it.
4. The SCA, in reducing the sentence to 3 years in prison found that the Regional and High Courts had failed to take the best interests of the children into account. Nevertheless the seriousness of the offences, involving abuse of a position of trust, **still required an effective custodial sentence**. The offender has an option for release under correctional supervision, but only at the discretion of prison authorities or a parole board, and has in any event already served 7 weeks of her sentence awaiting an appeal to the SCA.

The bottom line is that our courts in sentencing parents of young children will always ensure "that the form of punishment imposed is the one that is least damaging to the interests of the children" – but, as in this case, that certainly doesn't mean that fraudsters can avoid a stint in orange overalls just because they are parents.

Report employee crime – our courts are on your side!

SUBMIT YOUR 2016 BUDGET TIPS!

Minister of Finance Pravin Gordhan makes his budget speech on 24 February and would like to hear your tips for the budget. Follow the "Budget Tips" link under "Treasury Links" on the National Treasury website at <http://www.treasury.gov.za/> to submit your suggestions.

YOUR FEBRUARY WEBSITE: SURVIVING YOUR NEXT COMPUTER CRASH



Can you and your business afford to run the risk of losing all your important computer files and data when your computer crashes, or is stolen / lost / damaged / destroyed?

If you are still doing all your backups manually, say to another computer or external hard drive, consider this –

1. Your backup computer or external hard drive has to be taken off site for maximum security.
2. If you schedule say weekly backups, you could lose up to a whole week's work. Missing even one scheduled backup could cost you even more dearly.
3. If you save over a file by mistake, it could be gone forever unless you have saved and kept older versions separately.
4. You are wasting time and effort by backing up manually, plus you have to remember to do the backups and to take them offsite.

The answer of course is to switch to an automatic, online backup solution. Getting great reviews at the moment is CrashPlan, downloadable from Code 42 at <https://store.code42.com/store/>. You can back up to other computers (onsite or off, so you could for example set your office and home computers to back up to each other) and/or external drives.

Choose between the Free version, which gives you a daily automatic backup to multiple computers/drives plus easy access to both old and new versions of each file, or one of the Paid plans which also give you additional features like minute-by-minute backups plus unlimited secure storage in the Cloud.

Have a great February !

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