ISSUE 01 | 2020

120 YEARS STBB

THE BIG SMALL BRIEF

Unpacking "expropriation without compensation"

I've bought a house without approved plans – what now?

Time for sectional title schemes to 'go green'

Impact of state of disaster on rights and obligations.

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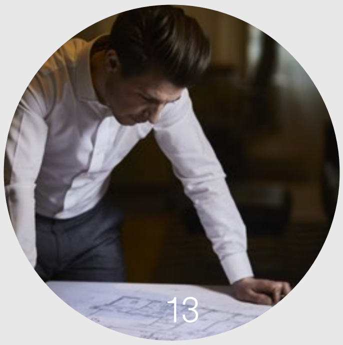

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Art direction & design: www.infestation.co.za

1900
STBB founded

1901
First Nobel Prizes were awarded in Stockholm

1903
First full length silent movie went on general release

From the desk of Jonathan Steytler

JONATHAN STEYTLER
Managing Partner

This was meant to be a year of celebration for STBB. The firm has been practising for 120 years and this gave us reason to celebrate.

We started the year in very high spirits with a number of new initiatives;

We have empowered teams within STBB to assist our clients in the property industry with their efforts to implement POPI which we anticipate will effect clients' businesses substantially

We have set up support structures to assist business partners in the real estate industry to comply with the new dispensation introduced by the Property Practitioners Act;

We have prepared a range of lectures on interesting topics to be used for training the sales staff of those business partners in the real estate industry

We have expanded our Development Law Unit to accommodate teams in both Gauteng and the Western Cape to support land development clients, providing all necessary services to clients across the range of residential, retirement and commercial projects, from high-end developments to subsidy-based housing. Another Development Law Unit Function with high level speakers was planned to take place in the Cape Town Convention Centre in May.

We have worked hard to expand the usefulness of our STBB Direct App, which we believe is a game changer for all participants in the property industry

We have launched our Facebook platform which is filled with video content of interest and assistance to everyone in the property industry,

We have continued our upgrading of the smaller branches in the firm by selecting new premises for the Fourways Office. The renovation and decoration process is under way at present.

We are well advanced with our planning for this year's STBB4Good MTB and Twilight Run at Overgaauw Wine estate. This is our 10th holding of the event and in recent years we have supported the Miles for Smiles Initiative and raised sufficient funds to pay for operations for 240 kids who were born with cleft lips and or palates but who now have smiles with which to face the world.

We record our great thanks to our event sponsors, The Amdec Group and Balwin Properties and to all the other sponsors and participants in the event.

Our celebration of our 120th year of existence was planned to revolve around an interschool choir competition in conjunction with First Thursdays in Cape Town. The initial event took place in the Groote Kerk and was a great success. Further functions were to culminate with a Youth Orchestra and combined Youth Choir performance in the City Hall.

Of course the COVID-19 virus outbreak and measures to combat its spread are going to have a great impact on what we achieve in the rest of the year. Certainly there is no longer reason to celebrate this year and certainly our plans for the year will change. However we have survived two World Wars, the Spanish Flu Epidemic, the Great Depression, the Credit Crunch and numerous other challenges over the 120 years of our existence.

With the hindsight of institutional wisdom learnt from those 120 years, we are far more than the Business Minded Lawyers depicted in our marketing material. We are resilient and with the determination and commitment of our dedicated staff, we are consulting telephonically and via our video conferencing facilities. We are conducting seminars and meetings on line and our paralegals and support staff are joining our attorneys in practicing from home. Our secure centralised data system allows us to access our clients remotely and our sophisticated accounting systems allow us to make crucial payments remotely. We are determined to attend to the needs of every client, particularly during lockdown and the difficult months which will follow.

In conclusion, we are big enough to survive the threat of the Coronavirus and we are small enough, particularly within our branch structures, to be able to adapt to the specific needs of our clients and provide for those needs despite the difficulties which the world is facing at the moment.

To coin a phrase, we are the Big Small Firm and we look forward to being your attorneys of choice for many years to come.

STBB The Big Small Firm

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120th Birthday Choir Evening

To celebrate our 120 years of existence this year, we launched a Choral Celebration series for which we invited youth choirs all over the Cape Peninsula to take part.

The celebration and performance times was in partnership with First Thursdays, a cultural event held in Cape Town on the first Thursday of every month, allowing the public to explore the inner city after hours on foot and experience the cultural wealth the city has to offer. All performances were scheduled to take place on a First Thursday.

The grand opening took place on Thursday, 5 March 2020 at the magnificent Groote Kerk, built in 1841, in Adderley Street, Cape Town, with the Cape Town Youth Choir under the baton of Leon Starker. With the national lockdown that followed shortly after, we were unfortunately not able to continue with this initiative. Fortunately, a lovely recording of the 5 March performance is available to listen to and **view here**

How real is your so-called real right?

The allocation of rights to the exclusive use of a portion of a sectional title scheme's common property (being the part of the scheme which belongs in equal shares to all owners) is somewhat of a contentious topic in communal living in South Africa.

By Liezl Solomon, Attorney

In instances where an owner or owners have not properly acquired rights to exclusive use and enjoyment of a portion of a scheme's common property – whether in terms of the Sectional Titles Act and/or by specific provision therefore in the rules of that scheme - trustees, on behalf of bodies corporate, have been known to conclude informal arrangements with an owner or owners in terms of which the owner or owners are allocated "rights" to use and enjoy a portion of the scheme's common property.

Such informal arrangements often lead to disputes amongst owners when the holders of these alleged "rights" attempt to assert these against fellow members of the scheme who may or may not be aware that due process was not followed by the body corporate or trustees when granting these privileges. The general rule is that such informal arrangements are not binding on the body of owners and

the holder of these "rights" does not acquire lawful rights to use and enjoy a specified portion of a scheme's common property.

An owner or owners will be deemed to be the holder of a lawful exclusive use right to a particular portion of a scheme's common property, if that particular owner has acquired the right by virtue of one of the below mentioned processes:

- to the extent that a scheme was formed pursuant to the provisions of the old Sectional Titles Act, 66 of 1971 ("the 1971 Act"), rights of exclusive use rights may have been allocated to an owner or owners in terms of the scheme's management rules, or in terms of an agreement concluded when the 1971 Act was applicable;

- the members of the body corporate resolved by way of a unanimous resolution adopted at a general meeting to amend the scheme's management rules to allocate to an owner or owners exclusive use rights to a portion of the scheme's common property;

- the members of the body corporate resolved by way of a special resolution adopted at a general meeting to amend the scheme's conduct rules to allocate an owner or owners exclusive use rights to a portion of the common property;

- the owner acquired title to the exclusive use area when he purchased the unit in the scheme. In other words, when the scheme was established, provision was made for the creation of units and exclusive use areas. Both were delineated on the sectional plan which was registered in the deeds office and owners could therefore obtain a title deed to that area; or

- where such exclusive use areas were not delineated on the sectional plan when the scheme was first registered, the owners have subsequently resolved by way of unanimous resolution adopted at a general meeting to create, register and confer exclusive use rights on an owner or owners in terms of section 27(2) of the Sectional Titles Act, 95 of 1986 (the "STA") read with section 5(1)(e) of the Sectional Titles Schemes Management Act, 8 of 2011 (the "STSMA").

1971 ACT

In Teresa Angela Biccari & Another v Body Corporate of Shoreham & 48 Others, the Court was required to determine whether certain owners had acquired exclusive use rights to parking bays in terms of the management rules of the scheme, or whether the rights to the parking bays had been acquired in terms of an agreement in force when the 1971 Act applied.

In determining whether the owners had acquired rights of exclusive use to the scheme's parking bays, Loots AJ explained that one would be required to consider whether the rights had been allocated by way of a written cession in terms of the scheme's management rules. In this particular instance, certain owners had received written certificates from the developer pursuant to a provision contained in the scheme's management rules.

To the extent that the aforementioned

1910
Formation of Union of South Africa by Former British Colonies of the Cape and Natal, and the Boer Republics

1918
First World War ends

1919
South West Africa (Namibia) under South African administration.

owners had received written certificates from the developer, Loots AJ held that the owners were deemed to be holders of rights of exclusive use over the parking bays allocated to them. As such, the holders of certificates from the developer were entitled to take transfer of the exclusive use rights by the registration of a notarial deed.

Insofar as the remaining owners were concerned, the procedure as provided for by the scheme's management rules had not been followed and the remaining owners had not received certificates from the developer. Consequently, and as explained by Loots AJ, one was required to determine whether agreements concluded pursuant to the 1971 Act (not recorded in

Informal arrangements often lead to disputes amongst owners ...who may or may not be aware that due process was not followed by the body corporate or trustees when granting these privileges.

the management rules) were applicable.

Given that none of the remaining owners were original owners (owners who had purchased their units from the developer), and given that the remaining owners had acquired their respective units after the STA had been promulgated and after the certificates had been issued to the owners by the developer in 1989, Loots AJ held that rights of exclusive use had not been transferred to the remaining owners and therefore they were not entitled to take transfer of their alleged rights of exclusive use by the registration of a notarial deed.

To the extent that the abovementioned owners were not entitled to take transfer of the exclusive use rights, Loots AJ held that the remaining exclusive use rights had vested in the body corporate, free from any mortgage obligation. Consequently, the body corporate could lease the relevant parking bays to its owners, or alternatively the body corporate could alienate the parking bays in terms of the applicable legislation.

It is evident from the abovementioned case that an owner or owners could be holders of rights of exclusive use to a portion of the scheme's common property if the rights had been allocated by the developer in terms of a process provided for by the scheme's management rules.

AMENDMENT OF SCHEME'S RULES

Section 10(7) of the STSMA stipulates that the body corporate may make management or conduct rules which confer rights of exclusive use and enjoyment of parts of the common property upon an owner or owners of the body corporate.

In this regard, and in terms of section 10(2)(a) of the STSMA, the scheme's management rules may, subject to the approval by the Chief Ombud, be substituted, added to, amended or repealed by way of unanimous resolution of the body corporate adopted at a special general meeting or by way of round robin resolution.

Alternatively, and in terms of section 10(2)(b) of the STSMA, the scheme's conduct rules may, subject to the approval by the Chief Ombud, be substituted, added to, amended or repealed by way of special resolution of the body corporate adopted at a special general meeting or by way of round robin resolution.

Section 10(8) of the STSMA stipulates that, "the rules contemplated in subsection (7) must include a layout plan to scale on which is clearly indicated the locality of the distinctively numbered exclusive use and enjoyment parts." Moreover, section 10(8) stipulates that, "the rules contemplated in subsection (7) must include a schedule indicating to which owner each such parties allocated."

Finally, and to the extent that the owners of the body corporate resolve to amend the management or the conduct rules (the "rules") to confer exclusive use rights to the common property parking bays upon an owner or owners, section 10(5) of the STSMA requires the Chief Ombud to scrutinise and approve the amendment to the rules before the amendment may be enforced. Insofar as the Chief Ombud approves the amendment to the rules, he/ she shall issue a certificate to that effect and the amendment will become enforceable.

NOTARIAL DEED

Lastly, Section 27(2) of the STA, read with section 5(1)(e) of the STSMA, stipulates that a body corporate may, upon unanimous resolution by the owners adopted at a special general meeting, request an architect or land surveyor to apply to the Surveyor-General for the delineation on a sectional plan of a part or parts of the common property for the exclusive use by the owner or owners of one or more sections: Provided that no such delineation shall be made on the sectional plan if such delineation will encroach upon a prior delineation on the sectional plan of a part of the common property for the exclusive use by one or more of the owners.

A right to the exclusive use of a part or parts of the common property, delineated in terms of section 27(2) of the STA, may be transferred to the owner or owners by the registration of a notarial deed entered into by the owner or owners and the body corporate.

CONCLUSION

For the avoidance of any doubt, and in an attempt to avoid disputes arising amongst owners and trustees alike, STBB is of the opinion that bodies corporate must regularise the allocation of exclusive use rights to portions of a scheme's common property. ■

1922
Tutankhamun's tomb discovered.

1927
Electronic Television was first successfully demonstrated in San Francisco on Sept. 7.

1933
FM radio was patented by inventor Edwin H. Armstrong.

Impact of state of disaster on rights and obligations

After the lockdown was announced, we were inundated with inquiries from clients wanting to know what the effect of the declared state of disaster, and particularly the closure of businesses, may have on their rights and obligations under agreements they have entered into.

By Jacques Blignaut

The position is particularly relevant in respect of lease agreements. Everybody seems to offer advice, some of it helpful and some of it dangerous. Having considered the legal position and taking cognisance of commercial and economic realities, the following guideline should assist in navigating your way forward if you are party to a contract that is, whether real or perceived, affected by so-called permanent or temporary "impossibility of performance" resulting from the lockdown and the related complications of the Corona virus. In most cases, there will be difficult decisions.

Our law recognises that a supervening impossibility to perform obligations under a contract, discharges the contract. The events giving rise to such impossibility will be any events that are unforeseeable with reasonable foresight and unavoidable with reasonable care. Acts of state, such as the current declared state of disaster, would fall into this category.

The event must render performance objectively impossible. The fact that the supervening event has made it uneconomical for a party to perform in terms of the agreement, does not mean that performance has become impossible. In the context of a lease, an earthquake that destroys a building, makes it impossible for the landlord to fulfil its obligation to deliver the premises to the tenant and the agreement will fall away with the parties being excused from performing their respective obligations. The fact that a tenant has had a bad trading month resulting in limited cash flow, does not render its performance (payment of the rental) objectively impossible.

Our law recognises that a supervening impossibility to perform obligations under a contract, discharges the contract.

1940
Churhill's famous speech: "We shall fight them on the beaches..."

1941
The first oiperational jet engine was invented and flighted by Hans von Ohain, a german enginer.

1944
President Roosevelt is elected to a fourth term in the United States, becoming the only person to ever do so.

Whether a supervening event is of such a nature that it excuses a party to a contract from performing its obligations in terms of the contract, must be considered in the light of all the surrounding circumstances, such as the nature of the event, the nature of the respective parties' businesses and, most significantly, the terms of the specific agreement.

We urge our clients not to make any knee-jerk decisions until all relevant, surrounding circumstances have been considered. Depending on each client's unique circumstances, the legal position may be viewed differently and although certain general propositions can be stated in broad strokes, there is definitely no single answer and one size does not fit all!

IN THE CURRENT CONTEXT, THE FOLLOWING MAY BE SAID:

- The declared state of disaster constitutes a supervening event that may, in certain circumstances, render performance under an agreement objectively impossible;

- Whether performance under a contract is rendered objectively impossible, must be examined in the light of all the surrounding circumstances. Significantly, this includes a thorough examination of the agreement and what the respective parties have agreed to contractually;

- The party wishing to rely on the state of disaster to excuse its performance under the contract, bears the burden of proving it;

- A failure by a party to perform its obligations because it mistakenly relied on the declared state of disaster, will constitute a breach of contract, which entitles the other party to its normal legal remedies;

- A so-called force majeure clause in an agreement may deprive a party of its right to rely on a supervening event to excuse its performance and will in most cases regulate the steps that the parties need to take to deal with such an event. A failure to comply with such provisions will amount to breach of contract;

The state of disaster will have an extremely limited impact on parties' rights and obligations under residential leases, which will, in addition to the specific contract terms, be governed by the provisions of the Rental Housing Act and the Consumer Protection Act.

We once again urge our clients not to act precipitously and take steps that may have negative consequences. We are available to assist you in considering the terms of your specific contracts and all the circumstances and to advise you on the correct course of action to take. In relational agreements, such as lease agreements, which will continue to endure beyond the current state of disaster, we suggest that the parties enter into discussions to explore ways of managing their relationship through the current circumstances.

Should you require any assistance or advice, please contact our commercial department:

- *Jacques Blignaut; jacquesb@stbb.co.za; 082 451 0690, or*
- *Andreas Tsangarakis; andreast@stbb.co.za; 076 112 7524.*

1945
The United Nations officially came into existence.

1947
The first supersonic flight on record.

1948
The historic Universal Declarations of Human Rights was adopted by the United Nations General Assembley

Signing agreement and documents electronically

The lockdown order issued by President Ramaphosa in the middle of March this year has necessitated a lot of re-thinking and finding ways of doing things differently, for private persons as much as for businesses, no matter their size.

By Maryna Botha, Director

One realisation is that a tremendous bulk of daily transactions are based on the strength of individuals appending their hand-written signatures to forms and agreements, thereby signifying acceptance of rights and obligations of various sorts. A person's signature safeguards authenticity of the transaction agreed upon and, in the event of a dispute, will constitute solid proof of the agreement, acceptable in a court.

But we are no longer in a pen-and-ink era and so much daily transacting takes place via email communication. How then can one achieve the same level of authenticity and proof of the terms of the agreement without doing so with a pen and ink signature?

In terms of South African legislation (Electronic Communications and Transactions Act, "ECTA") there are the following two options:

01 | For most agreements requiring "signature", this will be constituted and complied with if there is a "digital signature", ie a signature that is added to or included in a data message that can be reasonably verified to be from the person in question. This can be achieved in any of these ways:

- **Where you draw your signature using your finger or a stylus on devices that allows for this.** If you have access to a touchscreen, you can use your finger to create an electronic signature directly in your document. This is particularly helpful when you are signing on a mobile device or tablet.

- **Upload an image of your signature.** Use your phone or camera to take a picture of your paper signature. Once it's uploaded, it can be converted to a .png file that overlays over the signature line in your document.

- **Use your cursor to draw your signature.** Using your mouse or your touchpad, you can drag your cursor along the signature line to create a unique electronic signature.

- **Use your keyboard to type in your signature.** This is the easiest way to create your electronic signature. Once you've typed in your name, you can select a font that best matches your paper signature.

We are no longer in a pen-and-ink era and so much daily transacting takes place via email communication.

Where an agreement stipulates that parties must append their signatures thereto to show agreement - and no further requirements regarding the signature is stated - a handwritten signature or any of the above ways of signing, will suffice.

02 | Where it is required by law that a document must be signed by a party, an Advanced Electronic Signature ('AES') is required. This is defined in ECTA as "an electronic signature which results from a process which has been accredited by the Authority as provided for" in terms of the ECTA. The authority referred to is the Department of Communication.
Examples where there is legislation that requires signature, is the signing of a suretyship or signing as Commissioner of Oaths. (The Commissioner can sign an electronic copy of an original paper document with his or her AES and create a certified electronic copy of the original.)

1951
The first regularly scheduled colour TV programme was introduced

1952
Britain's Princess Elizabeth took over the responsibility of ruling England at age 25 after the death of her father, King George VI.

1953
Mt Everest conquored. The discovery of the double helix, the twisted ladder structure of deoxyribonucleic (DNA)

EXCEPTIONS
ECTA excludes the following from being concluded electronically, whether or not an AES was used by the parties to sign:

- **Agreements for the sale of immovable property**
  The Alienation of Land Act requires that agreements for the sale of land must be in writing and signed. But ECTA makes it clear that its provisions (allowing the use of data messages and electronic signatures where a law requires writing and signature) do not apply to agreements concluded in terms of the Alienation of Land Act
- **Long-term leases of land exceeding 20 years**
  This is a bit of a misnomer in that long-term leases of land in our law is understood to refer to those leases described in the Formalities in Respect of Leases of Land Act, where a long-term lease is a lease of 10 years and longer. However, as ECTA currently reads, no 20 year lease of land (or longer) can validly be concluded via electronic means.
- **Signature on a will:**
  The Wills Act requires a will to be in writing, signed and witnessed. ECTA stipulates that its provisions do not apply to the execution, retention and presentation of a will. In other words, signing a will by electronic means, even if it is an advanced electronic signature, does not constitute compliance with the Wills Act.
- **Bills of exchange**
  The Bills of Exchange Act deals with bills of exchange, cheques and promissory notes (referred to as negotiable instruments). This Act requires that these negotiable instruments be in writing and signed, and ECTA specifically provides that it does not apply to these instruments. ■

1954
First irrefutable evidence that those who smoked 35 or more cigarettes per day increased their likelihood of dying from lung cancer

1955
Vietnam War started. The first Disney themepark opened in California, USA.
The Civil Rights movement started in the USA

1956
Elvis debuted on national television in the USA for the first time. The TV remote was invented.

Time for sectional title schemes to 'go green'?

With load shedding having spiralled to stage 6 recently and water restrictions in many municipal jurisdictions and ever-present concern, it has become commonplace for owners of free-standing properties to install so-called 'green' alternatives where they can afford to. These include equipment such as solar panels and water tanks for rainwater harvesting.

By Tashreeq Jaffar, Associate

These options are also available to owners in sectional title schemes. However, due to the peculiarities of these schemes, the green solutions have additional related practical and cost factors to consider before these alternatives can be incorporated. Therefore, when a body corporate (on behalf of the scheme as a whole) or an owner (for his or her own unit) considers "going green", it is necessary to be aware of the hurdles to negotiate upfront before the alternatives may lawfully be installed.

We provide a brief guideline of the correct procedure for implementation of green solutions, whether it is initiated by the body corporate on behalf of the scheme as a whole or by an individual owner for the benefit of his or her section in the scheme.

Body corporate decision in respect of the whole scheme

When a body corporate, as represented by its trustees, seeks to introduce 'green' options to the scheme, these are likely to involve changes to the common property. The body corporate will have to follow proper procedure and obtain the required approvals in order to proceed.

The difficulty arises in determining whether or not the addition of solar panels (for example) on the common property for the benefit of the scheme, constitutes an improvement that was "reasonably necessary" (Management Rule 29) or not. If the improvement is reasonably necessary then a special resolution is required; if not, then a unanimous resolution must be obtained.

Nowhere in the Act, its regulations or prescribed Rules is the concept "reasonably necessary" circumscribed. Principles of interpretation then dictates that the ordinary meaning of the phrase must prevail. The enquiry then becomes whether it can be said that the installation of solar panels is reasonably necessary in the particular scheme, before determining what form of resolution is required.

It is submitted that against the backdrop of escalating costs of electricity supply, the strain placed on the environment and the reality of load shedding, a strong argument can be made out that the installation of 'green' alternatives is reasonably necessary. Since the enquiry as to "reasonably necessary" is particular to the relevant scheme, other factors will of course also play a role, including that scheme's financial ability to carry the cost of such installations.

In terms of Management Rule 29(2) (a) (c) the body corporate is allowed to implement proposed alterations or improvements to the common property that are reasonably necessary, subject to the following taking place:

- All members are given at least 30 days written notice of the proposed alterations or improvements, with details of- (a) the estimate costs related to the improvements; (b) details on how these costs will be covers; and (c), a motivation for the proposed

1961
First man in space, Yuri Gagarin.
South Africa declared a republic, leaves the Commonwealth

1963
Martin Luther King's famous speech "I have a dream..."

1964
The Beatles vault to the #1 spot on the U.S. singles charts for the first time, with "I Want to Hold Your Hand," changing rock-and-roll

... the body corporate is allowed to implement proposed alterations or improvements to the common property that are reasonably necessary

improvements with any drawing related thereto.

- Any member may during the notice period call for a general meeting to discuss the proposal.
- If no general meeting is called for, the alterations may proceed.

It is suggested that it is probably good practice for the trustees to call for a special general meeting when providing the written notice for proposed improvements, so as to ventilate all the implications.

GUIDANCE AND SUGGESTIONS FOR THIS MEETING

It is clear that before the installation of any solar unit may proceed, a written notice which contains the proposed installation of a solar unit or generator, the related costs of the purchase and installation, the manner in which costs will be covered (i.e by raising a special levy or taking out a loan) with drawings or diagrams indicating the possible size and placement of the solar unit or generator, must be prepared and shared with all owners.

When collating the proposal, every effort should be made to advise owners of the estimated installation costs, the costs of maintenance thereof and how this would affect individual levies in the scheme. This will place owners in the position to make an informed decision.

One consideration that should not slip the mind of the draftsperson, is the impact on insurance. The body corporate will have existing insurance in place in respect of the buildings and common property in the scheme. The proposed installation may affect the insurance cover and it is prudent to review the insurance policy to confirm whether the product being installed is covered.

Additional items to include in the proposal would be: →

1966
Star Trek, the classic science fiction television series, debuts with its first episode, titled "The Man Trap."

1967
Chris Barnard performs the world's first heart transplant in South Africa

1969
Apollo II landed on the moon and Neil Armstrong claimed America's victory at being the first to do so.

- Estimate savings as a result of the installation and the impact on the maintenance levy contribution.

- The size and placement of the installation and the effect on the appearance of the buildings in the scheme. It will be undesirable if such installations impact negatively on the value of the units in the open market.

An owner 'greening' his or her unit only

Here is where things might get a little tricky. But we've got your back!

In terms of Management Rule 5(1), an owner or occupier of a section may not, without the *written consent of the trustees,*make a change to the external appearance of the section or any exclusive use area unless the change is minor and does not detract from the appearance of the common property.

In most circumstances the solar panels will be installed on the roof of the building comprising the scheme (if it is a single building like a block of flats) or on the individual roofs of units (if the scheme has free-standing units). In both cases, the outside roof area will (in most instances) be common property and hence, the same procedure as advised before, will be applicable.

However, a key difference is that there is the strong likelihood that the proposal, as request from a single owner only, would be considered an improvement to common property which is not reasonably necessary. This means that the body corporate would need to approve the proposal by way of unanimous resolution (Management Rule 29(1)).

GUIDANCE/ SUGGESTIONS

The reality is that the ease or difficulty of obtaining a unanimous resolution depends from scheme to scheme. The responsible and diligent owner that attends every meeting will know whether it would be easy or difficult to obtain a unanimous resolution. The owner who is less au fait with the goings-on may find input from the trustees or managing agent as to the likelihood of such proposal being received positively.

The solar panels are installed on common property but for the benefit of one owner. Because of this, the cost of maintenance is a factor that requires attention. Under section 3(1)(l) of the STSMA the body corporate is responsible for the maintenance of all the common property and to keep it in a state of good and serviceable repair. This would mean that all owners will bear the cost in maintaining the solar panels.

This can be resolved by creating an exclusive use area in favour of the owner in respect of the relevant area, in which event the body corporate would then be entitled to claim additional levies for the maintenance of the exclusive use area; or the body corporate can amend the rules to specify that the owner is responsible for such costs.

Such an exclusive use area can be designated on the sectional plans and registered as a separate part of the common property (to which an owner holds exclusive rights) in the Deeds Office; or can be created in the rules of the scheme and recorded as such with the CSOS. In both instances a unanimous resolution would be required.

> ...against the backdrop of escalating costs of electricity supply a strong argument can be made that the installation of 'green' alternatives is reasonably necessary.

These two methods have their own advantages and disadvantages as they differ in cost, time-frame to establish, and underlying legal structure. Contact our offices for a consultation in order to determine the method most suitable to your situation.

DON'T FORGET THE BY-LAWS!

Each municipality is authorised to issue By-laws dealing with an array of issues relating to the land use in its jurisdiction. It is therefore important to check whether the suggested "green" solutions comply with the requirements imposed by any applicable By-law.

For example, in terms of the City of Cape Town Electricity Supply By-law 2010, all solar PV systems (these are solar panels that convert solar energy to electricity) must be registered with the City of Cape Town. This regardless of whether the installation is connected to the grid (ie to the internal electrical wiring of your property and the municipal grid) or off-grid (e.g. when it is connected only to your pool pump).

The company you approach for the installation of your system/product should be able to advise on the municipal registration procedure (if any), its related costs and time-frames. ■

1970
The first jumbo-jet, the Boeing 747, makes its debut commercial flight from New York to London.

1971
The first microprocessor, the 4004, is released by Intel.

1973
First cellular telephone call was made by a Motorola researcher from a handheld device

I've bought a house without approved building plans – what now?

It often happens that after the conclusion of a sale agreement in respect of immoveable property, it transpires that the building[s] on the land have been built or renovated without approved Municipal building plans. Where does this leave the Purchaser, and what recourse does the Purchaser have against the Seller, if any?

By David Martin Ogilvie Thompson, Director

The first port of call in any potential dispute is to look at the contract between the parties. When dealing with the sale of immoveable property, the contract in question is, in the majority of occasions, in the form of an Offer to Purchase ["OTP"]. The OTP contains all the *express terms* that have been agreed to between the Seller and Purchaser. However, the common law might also require that additional terms be incorporated into the OTP as *implied terms*, which are terms that can be read into all contracts [if it is of general application] or all contracts of a specific type [i.e. the sale of immoveable property]. Some *implied* terms can be excluded by agreement between the parties and some can't.

If the OTP contains an express term, which records that approved Municipal building plans will be provided, or that they are in place, then the issue is relatively straight forward in that the Purchaser may then rely on such an express term to compel the Seller to provide or procure approved Municipal building plans in circumstances where such plans have not been provided. Any failure on the part of the Seller to comply with this express term may well result in the Purchaser suffering damages, either in the form of having to procure Municipal approval of building plans, and / or the cost associated with attending to any remedial work to the building[s] in order to make it compliant, which will be for the Seller's account.

The issue is not so straight forward when the OTP is silent on the question of approved Municipal building plans. So, how does one resolve a potential dispute in these circumstances? As previously noted, the parties would have to refer to the OTP, but if the OTP doesn't contain any express term relating to building plans, may the Purchaser argue that there is an implied term in every OTP that the building[s] on the property has been built in accordance with approved Municipal building plans?

In answering the above question, one must keep in mind that even though an OTP might be silent on the issue of building plans, there may still be other express terms in the OTP that can assist in resolving the potential dispute. One such term generally found in in OTPs is the infamous voetstoots clause, which is a clause in an OTP that excludes a Seller's liability for latent and patent defects in the property being sold. In other words, the Purchase buys the property "as is" →

1975
Bill Gates founded Microsoft.
The Vietnam War ends.

1976
Steve Jobs and Steve Wozniak create the Apple Computer Company.

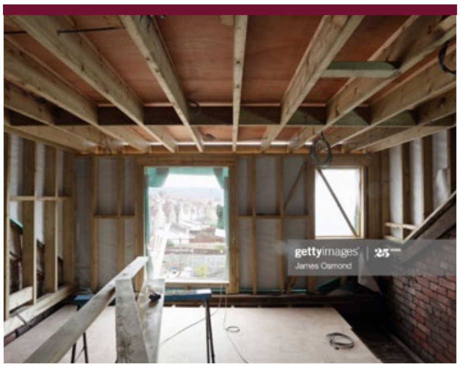
1978
The very first "Garfield" comic strip debuts in 41 U.S. newspapers.
Louise Brown, the very first test tube baby, is born.

or "as it stands", together with all of its defects. The importance of this is that our Courts have held that the lack of Municipal approved building plans constitutes a latent defect in the property [see ***Odendaal v Ferraris** [2008] 4 All SA 529 (SCA)].*

Therefore, if an immoveable property is sold in circumstances where the building[s] on the land has been built or renovated without approved Municipal building plans, then the property suffers from a latent defect, which may then result in the Purchaser taking action against the Seller, either by cancelling the OTP and / or instituting a damages claim against the Seller, which damages may include the cost of procuring Municipal approval of building plans, and / or the cost associated with any remedial work required in order to make the building[s] compliant.

However, because the lack of approved Municipal building plans constitutes a latent defect in the property being sold, the Seller will be able to invoke the protection of the *voetstoots* clause to avoid being exposed to the consequences alluded to above. If the Seller invokes the protection of the *voetstoots* clause, the onus then shifts to the Purchaser to avoid its protection. To this end, the Purchaser will have the onus to prove that the Seller knew of the latent defect and did not disclose it, and that the Seller deliberately concealed it with the intention to defraud [see ***Haviside v Hendricks and another** (2013) JOL 30968 (KZP)]; **Odendaal v Ferraris** [2008] 4 All SA 529 (SCA); **Van der Merwe v Meades** 1991 (2) SA 1 (A)*]. If the Purchaser is able to prove this, then the Seller will lose the protection of the voetstoots clause and may be faced with a damages claim or a potential cancellation of the OTP, as mentioned above.

But does the Purchaser have a separate and alternative claim under the provisions of the common law vis a vis implied terms regarding approved building plans? In other words, can a Purchaser argue that notwithstanding the voetstoots clause, there is an additional implied term in every OTP warranting the existence of approved Municipal building plans? As was mentioned above, some implied terms can be excluded by agreement and others can't. Does the voetstoots clause then amount to a prohibited exclusion of an implied term in an OTP that a building[s] on land has been constructed and / or renovated in accordance with approved Municipal building plans? It is submitted that the answers to these questions can be found in our case law.



even though an OTP might be silent on the issue of building plans, there may still be other express terms in the OTP that can assist in resolving the potential dispute

In the case of ***Odendaal v Ferraris** [2008] 4 All SA 529 (SCA),* Counsel for the Respondent sought to place reliance on the decision in Van Nieuwkerk v McCrae 2007 (5) SA 21 (W), where the Court held that such an additional implied term does exist. Goldblatt J held as follows:

"in a sale of residential property a buyer is entitled to assume that the building on a property was erected in compliance with all statutory requirements and that it could be used to its full extent. The assumption, he said, was so obvious that it was implied as a matter of law in any agreement relating to the sale of property. And so, he concluded, it was an implied term (or at least a tacit term) of such an agreement that alterations to a building that the seller had effected complied with statutory requirements". Emphasis added

However, the learned Judge in the Odendaal matter went on to disagree with Goldblatt J's reasoning in the Van Nieuwkerk matter and held as follows: *"Goldblatt J's implied term warranting statutory compliance is apparently no more than a reiteration of the rule that the seller of a merx warrants that it is free of latent defects. It is not … an additional term, which exists side by side with and supplements the latter warranty. The whole purpose of a voetstoots clause, the contracting parties agree, is to exempt the seller from liability for defects of which he or she is not aware. And where a seller's statutory non-compliance concerns latent defects in the property, as in this case, the seller ought to be entitled to invoke the exemption. The appellant's belated reliance on Van Nieuwkerk to escape its consequences is therefore misplaced".* Emphasis added

In summary, whenever a Purchaser intends buying an immoveable property it is advisable to undertake the necessary due diligence and for the Purchaser to ensure that he / she is fully aware of the status of the building plans in respect of the building[s] on the land. If the OTP is silent on the issue of building plans, and it later transpires that the building[s] on the land do not have approved Municipal building plans, the Purchaser will have the onerous burden of having to escape the protection afforded to the Seller by the voetstoots clause. It is also doubtful, in light of the Odendaal decision, that a Purchaser will be allowed to rely on any *implied* terms regarding building plans, or lack thereof, as this issue is covered by the voetstoots clause and is not a separate or additional term of the OTP.

1981
AIDS recognized by the Centres for Disease Control and Prevention.
Lady Diana Spencer and Charles the Prince of Wales are married.

1985
SA ends ban on inter-racial marriages.
The first version of Microsoft Windows is released.

1987
Disposable contact lenses are first sold.
"The Simpsons" make their debut.
Margaret Thatcher is elected as the British Prime Minister for the third time.

Spite can bite back: distribution of sensitive material

Revenge pornography and the Films and Publication Act

By Shirné Grobler, Associate

Break-ups are never pleasant and more often than not bring out the worst in someone you once loved and trusted. If your former partner is in possession of private and risqué content which would be harmful to your reputation and threatens to expose you, this would naturally cause you added emotional and psychological distress in an already difficult situation.

Our law has always protected an individual's right to privacy by providing certain remedies where this right has wrongly been infringed upon. With the speed that social realities change, it is necessary for legislation to interpret the 'modern' threats and to provide more 'custom-made' remedies; in this way legislation simplifies the law for the man in the street and makes it somewhat easier to institute action. No better example of the aforementioned exists than the provisions introduced in the Films and Publications Amendment Act, 2019, which were signed into law towards the end of last year. (The Amendment Act's provisions are not yet operational as at date of this publication; a date for this will be published still in the Government Gazette.)

Some of the details of the new provisions are discussed below, specifically as regards the publication of private videos that have sexual content. As an introductory note, the explanation of the Minister of Communications, Ms Faith Muthambi, in an interview prior to her presenting the bill to Parliaments Portfolio Committee on Communications gives a good backdrop to the discussion. She stated that "we are witnessing a failure of self-regulation in certain sectors of the industry and therefore, a much co-ordinated co-regulation model that provides for the involvement of industry and government is required. ...The Department of Communications is not seeking to control the internet, but safeguard minors and vulnerable persons in the in the best way possible". The amendments thus do not seek to create a new regulatory regime but rather to strengthen the current law by closing the gaps identified in the Films and Publications Act in relation to online content regulation.

'REVENGE PORNOGRAPHY' AND THE AMENDMENT ACT, 2019

The Amendment Act varies and expands on certain provisions of the Films and Publications Act to state plainly that anyone who knowingly shares or distributes nude or sexually explicit material without the consent of the person featured in it, may be criminally prosecuted.

If found guilty, the transgressor can be slapped with a hefty fine or even time behind bars. (The existing common law actions remain in place, in addition.)

CATH ME IF YOU CAN

"Sharing" and "distributing" includes, as the Amendment Act specifically mentions, publication via the internet, any form of social media or other electronic mediums. This covers a wide range of sharing platforms such as, but not limited to, Facebook, WhatsApp, Twitter, Instagram, Snapchat, Text Message, E-Mail and websites.

To assist with bringing perpetrators of this reprehensible violation to task, the Amendment Act has made provision for the perpetrator to be identified through a technological fingerprint. The internet service provider will be compelled to disclose to the investigating officer the identity of the person who published the private sexual content.

"Sharing" and "distributing" includes, as the Amendment Act specifically mentions, publication via the internet, any form of social media or other electronic mediums.

CONSENT TO MAKING OF THE RECORDING

Even if the individual appearing in the explicit content has consented when taking part in the production thereof, this can in no way be construed as consenting to the distribution.

The Act also differentiates between instances where the person in the content is or is not identifiable. In instances where the person is not clearly identifiable, the perpetrator shall be guilty of an offence and liable upon conviction to a fine not exceeding R150 000 or to imprisonment for up to two years or to both.If the person in the footage is identifiable, the fine can be as high as R300 000, the period of imprisonment can be as long as four years or an order can be made for a combination of both a fine and imprisonment.

These amendments prescribe a hefty price tag for vengeance and will hopefully make begrudged former partners think twice before sharing intimate content with third parties. ■

Planning by-law amendment to create income generating opportunities

One of the purposes behind the City of Cape Town's 2019 amendment to its Planning By-law, which took effect on 03 February 2020, is the intention to unlock further earning potential for local property owners.

By Lamees Daniels, Associate

This is achieved by lifting some of the development limitations that apply to properties that fall within certain residential zoning areas. Owners now have more options to consider developing their properties by adding additional buildings to be let or sold off, or to conduct short-term letting businesses in instances where it previously was not allowed.

THIRD DWELLING ALLOWANCE

It is well known that within the jurisdiction of the City of Cape Town municipality, there is limited land available for development and a yearly increase in head count. The effect hereof has prompted the City to generate and enable opportunities to increase residential supply. The process was jumpstarted by the amendment to the current Municipal Planning By-Law to allow for properties which are zoned as Single Residential 1 and 2 ("typical" free standing or vacant plots in residential areas) to be burdened with up to three dwellings. The City's consent to such construction of additional dwelling/s is not required, although the owner of the property will have to submit building plans for the City's approval, as is the normal course of events for any construction undertaken on properties within the jurisdiction of the City of Cape Town.

Previously ….

REQUIREMENTS

The third dwelling allowance requires compliance with various conditions listed in the City's now Consolidated Planning By-law, including that the total floor area of the third dwelling may not exceed the total floor area of the main dwelling. The City may further require that the architecture of all three dwellings must be uniform in order to create a community impression or a townhouse development look-and-feel.

IN THE CASE OF TITLE DEED CONDITIONS TO THE CONTRARY

What is the position if there are conditions in the property's title deed that prohibits the erection of further dwellings? Many residential suburbs within the City of Cape Town jurisdiction are subject to conditions that prescribe that only one dwelling may be erected on the property. Typically such restrictive conditions are registered against all the properties in a specific township (suburb) and were imposed by the developer or municipality at the time of obtaining municipal approval for the township development.

HOW TO DEVELOP YOUR PROPERTY IN ORDER TO MAXIMIZE THE VALUE?

The restriction on the number of dwellings that may be erected on a property is usually registered both in favour of and against all the owners in a specific township: every owner in the township may enforce the condition by objecting to his/her neighbour erecting more than one dwelling on the property. These types of restrictive title conditions originate from development conditions imposed by a municipality or by developers in the township approval process, to maintain the sizes of erven in certain areas and to regulate building density, both which add to an area's character and inhabitants' feelings of well-being. Title deed conditions trump Municipal Planning By-Laws and the effect of such restrictive title conditions is therefore that, even though the amendment to the By-Law now allows for the construction of up to three dwellings per erf, building in contravention of title deed conditions is still not permissible.

REMOVAL OF CERTAIN RESTRICTIVE CONDITIONS

The good news is that the restrictive

1989
The fall of the Berlin Wall and Communism at the end of the Cold War.

1990
Mandela released after 27 years in prison. East and West Germany are reunited after the collapse of the Soviet Union.

1993
FW de Klerk and Mandela were jointly awarded the Nobel Peace Prize for their work in ending Apartheid

title deed condition may be removed in order for the property to be developed by erecting further dwellings. The process for removal of restrictive title deed conditions is now dealt with by the City of Cape Town's Planning Department. The City has, as part of the new amendment to the By-law and along the same lines as the old Removal of Restrictions Act, been granted the power to remove certain restrictive title conditions to enable owners to invoke the third dwelling allowance.

The process for removal of the condition commences with an application to the City by the registered owner or his representative. In most instances the owner appoints a town planner or land surveyor to attend to the application on his behalf. These are additional costs which the owner would incur, in addition to the fee payable to the City in respect of the application.

The City, on receipt of the application, advertises the owner's intention to have the title deed condition removed to all the owners in the township (who are entitled to enforce the condition as against that owner). The advertisement calls on any interested party to lodge an objection to the application with the City. In the event that the City rejects the application as a result of objections, the (applicant) owner may appeal the outcome. The objections will be put forward to the owner (or his representative) who then has an opportunity to deal with these in his appeal.

In the event that the owner's application is successful, the City issues a consent to removal of the condition. A conveyancer must then be instructed to have the condition formally removed from the property's title deed by way of an application in the deeds office.

Once the restriction on the number of dwellings have been removed, the owner may proceed to submit building plans to the City for the erection of the additional dwellings, up to a maximum of three dwellings (at present) in the relevant areas.

MAKING USE OF THE OPPORTUNITIES OFFERED

An owner seeking to maximise potential income from his property by adding additional dwellings, can proceed in one of three ways:

- Subdivision into two or more separate land parcels that are capable of being transferred to a new owner;
- Register a sectional title scheme over the property which will convert the erf into a scheme with three units capable of individual ownership (each which can be on-sold), together with common property that the individual owners own jointly in undivided shares.
- Interesting permutations are possible by way of creating "exclusive use areas", meaning that the unit owners can arrange to have exclusive rights to parts of the common property.

RENTING OUT THE ADDITIONAL BUILDINGS TO TENANTS.

In the event of options 1 and 2, it is best to involve a conveyancer to advise on the best specialists to involve in the planning of the project, as each area within the jurisdiction of the City Cape Town is subject to different building restrictions and conditions, which the conveyancer and his or her suggested land development specialists are best suited to assist with. ■

1994
ANC wins first non-racial elections.
Mandela becomes president.
Government of National Unity formed.

1997
Scientists at the Roslin Institute unveil "Dolly" the first successfully cloned sheep.

1999
The Euro is introduced as a competitive tool to stem the power of the dollar and maximize the economic power of the European Union.

Does the enrichment action of *condictio indebiti* have a place in 2020?

As at the year 2020 there exists numerous causes of action that forms the basis for instituting formal action against another party, and the world of technology is constantly pushing the boundaries so that of our legislation as well as the interpretation thereof is continuously adapting.

By Leani Steenkamp, Senior Associate

New laws have been introduced specifically to deal with the fast-growing technological civilization. Examples are the Protection of Personal Information Act, 4 of 2013 and the Electronic Communications Act, 36 of 2005. Considering the new litigation way, does our Roman Dutch litigation heritage still have a place today, especially those underlying actions based on so-called "unjustified enrichment"?

"Unjustified enrichment" can be summarized as forming the basis for an action for corrective justice: in other words, to restore economic benefits to the person at whose expense they were obtained where the retention of the benefit has no legal, or stated differently, where one person's estate has been enriched at the expense of another without legal cause. In our South African law, this action provides a remedy in various cases which may include a claim based on payment made in error or in the instance of a void agreement.

One of the categories of unjustified enrichment is that of the ***condictio indebiti***. The condictio allows for the person who became impoverished, to try to attain the return of money or property transferred, where the money or property was not owing or due to the person who acquired it.

In deciphering the value of this cause of action, it is important to understand what scenario a claimant must be able to present to a court. This is:

- Ownership of goods or money passed from the impoverished party to the one that was enriched.
- The transfer must have taken place without the money or goods being owed to the person who received it, in other words without being justified by means of a valid and binding agreement.
- The transfer was thus in error, or in the mistaken belief that the payment or transfer was actually due.

These requirements are discussed in more detail below:

In principle the main purpose of this action remains to restore property or money which was transferred without cause and enriched one person while impoverishing the other.

01 | Transfer of money, movables or immovable property

This requirement has been broadly defined over the years and is now considered wide enough to encompass terms such as *habitatio*. (This could be applicable, for example, where access to premises were erroneously given to a tenant and in the absence of a valid lease agreement, the impoverished 'landlord' could terminate the tenancy and claim the amount of rent which the inhabitant would have paid for the lease of such dwelling.

When considering the question of act of transfer in respect of money the case of Klein NO v South African Transport Services and Others 1992 (3) SA 509 (W) the bank paid over a sum of money to a client's creditor by virtue of a guarantee for payment from the bank's client. The client had in the meantime been sequestrated. In this specific instance the curator of the insolvent

2001
Both World Trade Centre buildings, the tallest in the world at the time, collapse after terrorist attacks on September the 11th.

2004
Bill Gates founded Microsoft. Facebook founded by Harvard university student Mark Zuckerberg.

2008
SA ends ban on inter-racial marriages. The US elects its first black president, Barack Obama

estate never issued the mandate to the bank. The court held that the Bank would be able to claim the money paid by means of the *condictio indebiti*, but not the insolvent nor curator. Though the bank's position was not really in question, it was found that only the bank was impoverished by their own volition in making the payment in error.

02 | Performance without cause

The performance must have taken place without cause, or with the mistaken belief that it was in fact due. In the widest sense of this requirement it would relate to the absence of any legal basis for performance; the absence of a contract or obligation that stems from a valid agreement between parties. It is further not only a requirement that the payment or transfer of ownership was made without cause, but also that there was an intention to fully extinguish a debt.

An example is found in the judgment in *Nkosi v Totalizator Agency Board* (Tvl) 1980 1 SA 122 (T), where Nkosi (a punter at a race meeting) presented his so called "winning ticket" for payment, →

2009
Mandela released after 27 years in prison. The oldest skeleton of a human ancestor is uncovered in Ethiopia

2010
FW de Klerk and Mandela were jointly awarded the Nobel Peace Prize for their work in ending Apartheid

2011
The world's first synthetic organ transplant. Global population reaches 7bn

Unjustified enrichment restores economic benefits to the person at whose expense they were obtained where the retention of the benefit has no legal, or stated differently, where one person's estate has been enriched at the expense of another without legal cause.

stating that he had the correct sequence of numbers. The winnings were paid out to Nkosi and after the fact, Totalizator claimed the funds back with the ***condictio indebiti*** because it transpired that its clerk had accidentally overlooked the fact that Nkosi's ticket did not have all the winning numbers. The court held that because the ticket did not have the correct sequence, there was no natural agreement. A payment was made with the mistaken belief that it was due and could be reclaimed with the *condictio*.

03 | Performance in error

In order for a claim of ***condictio indebiti*** to exist the performance needs to have been made in the mistaken belief that it is due or an excusable error. The transfer must also have taken place voluntarily.

In the case of Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue 1992 (4) SA 202 (A) the court held that for these purposes, there is no distinction between an error of fact and an error of law. This case dealt with an ***error iuris*** (an error in law) as basis for invoking the ***condictio indebiti***. The facts were that in 1984 Willis Faber and Co (Pty) Ltd made payments amounting to R 209 627.15 to the Receiver of Inland Revenue (as it was called at the time) for taxes it believed were due and payable in terms of the law. (In December 1985 Willis Faber and Robert Enthoven and Co merged to trade as one company, Willis Faber Enthoven (Pty) Ltd.)

It later transpired that the payment was in fact not due to the Receiver, but that the error was one in law and not one of fact. Previously, an error in law could not form the basis for a claim based on the condictio. The Appellate Division (now the Supreme Court of Appeal) decided that there is no logic in the distinction drawn between errors in fact and errors in law for the purposes of the ***condictio indebiti*** and that either would be sufficient to succeed with a claim brought as a result.

THE EXTENT OF LIABILITY

Having reviewed all of the requirements it is important to also consider the extent of liability in understanding the place of this action in 2020. In principle the main purpose of this action remains to restore property or money which was transferred without cause and enriched one person while impoverishing the other. It can safely be stated that the payment and the property being transferred need to be restored to the impoverished party. When considering property (movable or immovable), the property together with the improvements must be returned to the impoverished party. The courts have also held that should the enriched party be unable to restore the property a surrogate or the value of the performance must be tendered. Further to this the property need only to be tendered in the condition it was in at the time of institution of action.

CONCLUSION

The main object of a claim of unjustified enrichment is to achieve self-correction and a necessary tool to achieve what society deems to be just and fair, namely that restoration is a fair outcome when a person is impoverished without cause and erroneously, whilst another is enriched as a result.

Throughout this article I have considered all of the requirements together with relevant case law to substantiate the requirement itself. However, in doing so it can be clearly seen that the cases presented are still relevant factual arguments that can occur in our modern world. Even more so the technological era has increased the possibility of this claim with the use of electronic methods of payment. The electronic transfer of payment into an incorrect bank account clearly falls within the ambit of this action and for this reason the unjustified enrichment action of ***condiction indebiti*** may be considered as a modern day action for the restoration of justice in these circumstnaces.

2012
The Mayan calendar reaches the end of its current cycle.

2013
The first creation of human embryonic stem cells by cloning. Uruguay becomes the first nation to allow full legalisation of cannabis

2015
Elizabeth II becomes the longest reigning monarch in British history – surpassing the record held by Victoria, her great-great grandmother

Be informed rather than fearful

Expropriation without compensation and the suggested amendments to the constitution

By Maryna Botha, Director

President Cyril Ramaphosa made it clear in an address delivered during January 2020 that the government plans to accelerate the return of the land to those who work and need it and that this drive will include a mechanism to expropriate land without paying compensation. He assured that this will be done in a manner "that promotes economic growth and sustains food security".

His statement followed the release early in December 2019 of the draft Constitution Eighteenth Amendment Bill for public comment. (Written comment on the Bill had to be sent to the parliamentary committee by 31 January 2020) The Bill was welcomed as it finally provided insight into the actual text changes that are mooted for amendment to section 25 of the Constitution, the so-called "property clause".

CHANGED ACT WON'T OPEN UP LEGAL 'LAND GRAB' POSSIBILITIES

The release of the Bill sparked further press releases which kindled fears that private property ownership is under threat. There is no indication whatsoever that the final version of the new Expropriation Act – which will be the enabling mechanism for this whole drive – will in any way open up legal "land grab" possibilities or arbitrary deprivation of property.

The Constitution has not changed in this regard and arbitrary deprivation of property is still constitutionally impermissible and will remain so. Most role-players understand that this value is too deeply entrenched in a Constitution that was forged under difficult times, and too valuable for all South Africans, to be tampered with. Granted, this is often not perceived from some statements made by government spokespersons and other politicians. →

What is the current position and what will be changed?

The now

Section 25 of the Constitution states that no-one may arbitrarily be dispossessed of property. It also states that expropriation may only take place in terms of a law of general application in the public interest and for a public purpose. This means that expropriation is allowed for:

- 'Public interest' purpose refers to "the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources";

- 'Public purpose', although not defined in the Constitution, refers to projects such as building of hospitals and roads.

It goes on to sketch a process, where land is to be expropriated in the aforementioned context, of agreed compensation. In other words, that the landowner and expropriating authority come to an agreement on the amount of compensation. If they cannot do so, then the parties must approach a Court for a determination. The Court, as objective third party, will then make determination of the amount of compensation, and must be guided by certain factors, being:

a. the current use of the property;
b. the history of the acquisition and use of the property;
c. the market value of the property;
d. the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
e. the purpose of the expropriation.

This is where the 'sweet spot' lies: Taking these factors into account, a Court clearly has a very wide discretion to arrive at a determination of an amount of compensation. The discretion is so wide that, as argued by many academics (and the parliamentary committee agreed with them), that a court may determine that no compensation is payable in a given instance. In other words, the current wording already makes expropriation without compensation, possible.

This is the reason why it is stated that the amendment to the current wording of section 25 should make it 'explicitly' clear that expropriation may validly and within the constitutional framework, proceed in circumstances where no compensation is paid.

The then

Essentially, the draft amendment suggests an addition to the current wording of section 25 to state, explicitly, that a court may, where land is expropriated for land reform purposes, determine that the amount of compensation to be paid is nil. The draft Bill further states that national legislation must set out the specific circumstances where a court may determine that the compensation amounts to nil rand. These instances should therefore be indicated in new expropriation legislation.

Previously, section 25 read that expropriation may occur "25(2)(b) … subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court." The suggested amendment adds the following to section 25(2)(b) so that it providers for expropriation "provided that in accordance with subsection (3A) a court may, where land and any improvements thereon are expropriated for the purposes of land reform, determine that the amount of compensation is nil." Section 25(3)(a) is also amended to state that national legislation must "set out specific circumstances where a court may determine that the amount of compensation is nil." This will likely be in a new Expropriation Act. The circumstances listed in the aforementioned must of course be consistent with constitutional directives and may not have the effect or aim to allow arbitrary dispossession of land – at all.

Unfortunately, in an interview on ENCA and reported on www.businesstech.co.za on 23 January 2020, chairperson of Parliament's ad-hoc committee on the constitutional amendment, Mr Motshekga, alleged that many in the ANC do not support a clause in the envisaged Expropriation Bill which would give the courts the power to determine which land should be taken without compensation, but that the committee allowed it to be drafted that way so that the proposal could be gazetted without controversy. Motshekga said the proposed formulation was worded as it is to avoid controversy, and to allow the proposed amendment to be gazetted. Doing it any other way would have derailed the process, he said. It is exactly such public statements that causes concern. The reality is that the Constitution forbids arbitrary deprivation and no system put in place to expropriate land, can undo that injunction.

Thoughts on when Rnil compensation will be the determination

The draft Expropriation Bill, listed the following categories of land that may be susceptible to expropriation without compensation:

Abandoned property
Nil compensation could be fair "where the owner of the land has abandoned the land". It does not specifically refer to hijacked buildings in central business districts, but legal opinion speculates that such buildings would be easy targets for expropriation without compensation.

Property owned by the likes of Eskom and Transnet.
Not paying compensation could be just "where the land is owned by a state-owned corporation or other state-owned entity." The more than 700 state entities in South Africa include many with extensive land holdings surrounding various facilities – including such urban gems as Eskom's Megawatt Park headquarters north of Johannesburg.

Land held for speculation
It may be equitable to pay nil compensation "where the land is held for purely speculative purposes", the draft reads. It does not specify how to differentiate between land snapped up for future development and land bought "purely" with the intention of selling it for a profit.

Land into which the state has already invested more than its value
Expropriation without compensation could be done when the market value of the land is less than the value of "direct state investment or subsidy" spent either to buy it, or on capital improvements made. There is speculation that this would include, for example, failed land reform projects, where government has heavily subsidised community farming projects.

Who will qualify to be land beneficiaries?

The Department of Rural Development and Land Reform has recently published a new national policy focusing on land allocation in South Africa. Gazetted on 3 January this year, the policy notes that despite various land reform policy efforts initiated in the post-1994 period, more than two decades later the inequity of land ownership has been left relatively intact. To help address these issues, the policy sets out a number of principles which aim to redistribute land more equitably.

It is safe to ignore some of the uninformed statements that some political figures make, as the process is regulated by legislation and rights are protected in this way.

The policy does not specifically make mention of land expropriation, but is generally considered to be considered a key part of the land redistribution process.

The policy states that the following people will not qualify under the proposed system:

- Non-South African citizens including previously advantaged South African citizens;
- Foreign nationals and illegal immigrants;
- Employees of the Department of Agriculture, Land Reform and Rural Development;
- Politicians: holding public office; however, there shall be a cooling period of 12 months after leaving the public office;
- Current beneficiaries of the land redistribution programme, where the person has been allocated a property or farm and has abandoned the property, vandalised the property, mismanaged state assets or misused funds provided by the state.
- Farmers/individuals/legal entities currently leasing a state property unless he or she intends to hand the current property/farm back to the state.
- State employees shall qualify provided he/she undertakes to resign from state employment upon being allocated a farm and must prior to their application being considered, submit an affidavit which discloses their status as public servants and undertake to terminate any relationship that creates the public duty. There shall be a cooling period of 24 months for State Employees should they wish to apply for allocation of land after resignation.
- Employees of any company, public entities or entity where Government (all three spheres) of the Republic of South Africa is a majority shareholder and employees of any company or entity that has been created by an Act of Parliament shall qualify, provided they undertake to resign from public duty upon being allocated a farm and signing of a lease agreement, if not, the State shall reverse the approval of the lease. A cooling period of two years shall apply.
- Traditional leaders who are recognized under any legislation in the country shall qualify provided they disclose their status and remuneration by the state and have proven that they are involved in farming at various scales; the minister shall make the final determination.

What does this mean for private home and landowners and investors?

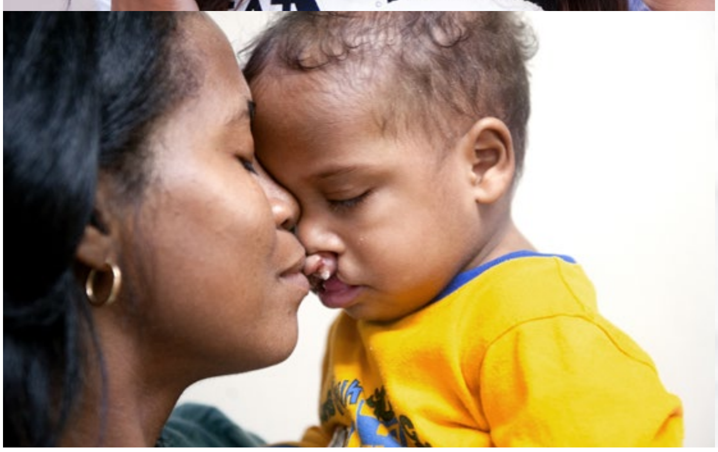
Botha says the good news for property owners (and would be owners) and investors in South Africa include the following:
(1) The ultimate decision is still in the hands of the courts;
(2) There are constitutional safeguards;
(3) No-one – not even the ruling party, would benefit from anarchy;
(4) It is safe to ignore some of the uninformed statements that some political figures are making as the whole process is regulated by legislation and rights are protected in this way.

With regards to decision-making on the type of property to buy, homeowners and property investors can look at residential homes and holiday homes as ownership of these properties won't be affected. However, until the expropriation bill is published, there remains some uncertainty with regards to government's reform plans towards agricultural land. ■

2019
US copyright begins to expire, starting with all works dated from 1923

2020
The Covid-19 virus creates an unprcedented international crisis, sending the world into lockdown to save lives. This in turn forms a global recession and wipes out the world's economies.

2020
STBB celebrates 120 years of excellence, resillient and robust to change, against a backdrop of landmark events and moments.



STBB4Good MTB and Twilight Run challenge

On 11 and 12 October 2019, STBB4GOOD hosted its 9th annual STBB4GOOD MTB Challenge: Powered by Amdec and its 3rd STBB4GOOD Twilight Run: Balwin Partnered for a cause so close to our hearts.

Both sporting events' beneficiary is Miles for Smiles, the organisation that raises funds for Operation Smile to facilitate corrective surgery for children born with cleft lips and palates. The incidence of children born with a cleft in their lips or palates is more common than one may perceive: Statistics show that worldwide, every three minutes a child is born with a cleft lip or cleft plate and in South Africa, it is as many as one in every 100 children born.

It makes a dramatic impact on such child's life. Not only do many not see their first birthdays due to lack of nutrition, feeding complications, neglect and abandonment, those who survive are often ostracised because they are so different.

The R 1, 350 million raised for this charity over the past three years is an important milestone: to have given smiles to approximately 240 children who otherwise would perhaps have gone lacking.

Changing these lives forever whilst having fun? Yes, indeed! We thoroughly enjoy preparing for and hosting these events as do our running and riding participants and their supporters. With food tents, beer on tap, Overgaauw wines, a host of sponsor offerings, the two events have become well-known not-to-be-missed events on the Western Cape sporting calendars, so much so that we are often struggling to keep up with ticket demands. The success relates in part to the privilege to use the unique Bottelary Renosterveld Conservancy, traversing no less than 22 wine farms. Our MTB is the only event that is hosted on these trails.

We thank the supporters of this event for their continued contribution as well as our event organisers, Chocolate Orange, that leaves no stone unturned to make it even better, every year.