Prokureurs, Notarisse en Aktevervaardigers

Attorneys, Notaries and Conveyancers

Reg. No. 1999/022245/21

CELEBRATING 30 YEARS OF EXCELLENCE

ALWAYS REACHING FOR THE NEXT LEVEL IN SERVICE - LEVEL 2 BEE-CONTRIBUTOR

NEWSLETTER – JUNE 2019

This newsletter is for our valued clients and is intended to inform them of recent developments in our law and of other matters of interest. This newsletter and other articles are available on our website. Kindly advise should you not wish to receive this newsletter in future and feel free to distribute it to your friends or other interested parties if you so wish. Contributions are made by our directors and professional assistants. Please also refer to our ***disclaimer*** *at the bottom of this newsletter.*

THIS MONTH:

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(1) SAFEGUARDING THE SELLER

In our conveyancing department, we regularly see situations wherein a Seller of an immovable property draws the short straw in that they sign an Agreement of Sale for their property (Offer to Purchase) (OTP) subject to suspensive conditions, effectively taking the property out of the market for a specific period of time.

Direkteure / Directors:
Elmo-York Stuart – BLC, LLB
Jo-Hanna Nell – BLC, LLB (Aktevervaardiger / Conveyancer)
Bianca van Wyk – LLB, LLM (Mercantile Law)

Assosiate / Associates:
Annelize M.J. Joubert – LLB
Hannelie Hattingh – BPolSci, LLB (Aktevervaardiger / Conveyancer)
Leslie A. Stuart – BComLaw, LLB
Juanné Bester – BALaw, LLB
Quraisha Dawood – LLB
Quintin Frederik Badenhorst – LLB

Tel: (012) 346 2302 / 346 2431 / 346 2093
Faks / Fax: (012) 346 1849
Faks Aktes / Fax Conveyancing: (012) 346 5564
E-Pos / E-Mail: eys@eyslaw.co.za
Webwerf / Website: www.eyslaw.co.za

Suite 202 Waterkloof Gardens Office Park
Mainstraat 270 Main Street
Brooklyn 0181
Posbus / PO Box 6492 Pretoria 0001
Docex 111 Pretoria

"Make sure you do not sign an Agreement of Sale / Offer to Purchase / OTP before speaking to us."

In the event that the Seller is our Client, we normally recommend that a *"continuous marketing clause"* be inserted in such an agreement, to allow our Client to continue marketing the property while the Purchaser is working on fulfilment of the suspensive conditions. The reasoning behind this is that there is never any guarantee that the Purchaser will successfully fulfil the suspensive conditions, which may include:

1) Bond approval;
2) Due Diligence investigation;
3) Zoning applications, etc.

A continuous marketing clause may be to the detriment of the Purchaser, but Purchasers needs to understand that the Seller may need to sell his/her/its property urgently and cannot afford to take the property out of the market for an indefinite period of time. *A continuous marketing clause* stretching until delivery of guarantees, however, should not be acceptable for any Purchaser. Continuous marketing should only be allowed to operate until suspensive conditions are fulfilled.

It is very important that the Agreement is structured correctly and in the event of *a continuous marketing clause*, that same is worded so as to effectively manage the process.

We would like to invite yourselves,
our clients, to contact
Ona Nell, Hannelie Hattingh or **Quraisha Dawood**
in our Conveyancing Department
in the event of making or receiving an Offer to Purchase, pertaining to immovable property, to enable us to check the terms and conditions on your behalf.

Ona Nell - Director

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(2) UNIFORMITY TOWARDS UNIFORM RULE 43

This article contemplates the breakthrough case law towards rule 43 applications, in terms of the full bench judgment of ***E v E; R v R & M v M****, in the High Court of South Africa, Gauteng Local Division, Johannesburg (Case No: 12583/17; 20739/18 & 5954/18) reportable*.[1]

Rule 43 Matrimonial Matters

(1) This rule shall apply whenever a spouse seeks relief from the court in respect of one or more of the following matters:
(a) Maintenance pendente lite;

[1] E v E; R v R & M v M in the High Court of South Africa, Gauteng Local Division, Johannesburg (Case No: 12583/17; 20739/18; 5954/18) reportable.

(b) A Contribution towards the costs of a pending matrimonial action;
(c) Interim custody of any child;
(d) Interim access to any child.

*(2) The applicant shall deliver a **sworn statement in the nature of a declaration**, setting out the relief claimed and the grounds therefor, together with a notice to the respondent as near as may be in accordance with Form 17 of the First Schedule. The statement and notice shall be signed by the applicant or his attorney and shall give an address for service within eight kilometers of the office of the registrar and shall be served by the sheriff.*

*(3) The respondent shall within ten days after receiving the statement deliver a **sworn reply in the nature of a plea**, signed and giving an address as aforesaid, in default of which he shall be ipso facto barred.*

*(4) As soon as possible thereafter the registrar shall bring the matter before the court for **summary hearing**, on ten days' notice to the parties, unless the respondent is in default.*

*(5) The **court may hear such evidence as it considers necessary** and **may dismiss the application or make such order as it thinks fit to ensure a just and expeditious decision**...*[2]

The judgment in ***E v E; R v R & M v M*** has finally shed some light towards rule 43 applications. Until recent, rule 43 applications have been approached with much unpredictability by the courts. The effect was that rule 43 applications have more than often been dismissed on the sole ground that the papers filed before the court were prolix and/or voluminous.

Rule 43, due to its special nature does not make provision for a third set of affidavits. The applicant is therefore confined to what is set out in the founding affidavit. This prohibition causes the applicant to say more than what is generally required, knowing very well that there will not be another opportunity to say more. This further results in a lengthy answer by the respondent.[3]

Issues determined by the full bench:

<u>While rule 43 generally require the submission of a succinct set of papers, does the court have the discretion to permit the filling of applications that have departed from the strict provisions of rule 43(2) and (3)?</u> [4]

Bringing a rule 43 application has become a matter of going to court with the consternation that one's application might get dismissed on the physical appearance thereof, in that the papers are too voluminous yet not enough is said regarding allegations made in the respondent's answer. To this extent, Judge Spilg warned that a one size fits all approach

[2] Rule 43(1) – (5) of the Uniform Rules of Court in terms of Section 43(2) of the Supreme Court Act, 59 of 1959 (as amended)
[3] E v E *supra* nr 1 at page 9
[4] E v E *supra* nr 1 at page 2.

cannot suffice and will never be in the best interest of a child seeking maintenance. The length of an applicant's affidavit should not disentitle her to relief. What is important, is whether the contents of the affidavit and the annexures are ***relevant***.[5]

The unanimous conclusion was that according to the rule, the court does not currently have such a discretion unless it decides to call for further evidence in terms of Rule 43(5). The view, however, is that there should not be limitations to the number of pages filed for as long as it is relevant and admissible.[6]

A second breakthrough was the decision to implement a compulsory **detailed financial disclosure form under oath** in all opposed divorce matters. By making such a disclosure mandatory the parties will not have to file lengthy affidavits to make or defend their case. Parties will therefore be forced to be transparent, at the outset.

If the court does not have such a discretion, should the Practice Manual direct that all rule 43 applications conform to a specific form, particularly in terms of length? Would the imposition of a restriction on the length of rule 43 applications withstand constitutional muster?

The problem was clearly acknowledged, namely that the respondent will almost always raise issues that the applicant will not be able to reply to due to the restriction. It is suggested that the applicant should have an **automatic right** to file a **replying affidavit** and that the rules be amended accordingly. It was argued that it is constitutionally and practically necessary to amend the practice manual to permit rule 43 applications being filed without restrictions.

If the Court does have such a discretion, what are the factors to consider in order to reasonably exercise this discretion?

The judgment clearly outlines that the issue is not so much the number of pages or annexures, but whether it is ***relevant***. It is decided that the provision should go further in that where long and irrelevant affidavits are filed, the court have a discretion to penalise one or both parties with an adverse order to costs.[7]

Conclusion

The courts have often failed in its obligation to make a proper determination under rule 43 by virtue of the issues underlined above. In conclusion the court ordered in ***E v E; R v R & M v M*** that an affidavit in terms of rule 43(2) and (3) shall no longer be dismissed on the sole basis of prolixity. If the court finds that the papers filed by a party contain irrelevant

[5] E v E *supra* nr 1 at page 12.
[6] E v E *supra* nr 1 at page 19.
[7] E v E *supra* nr 1 at page 23.

material, the court only has the power to strike out the irrelevant and inadmissible material and make an appropriate cost order in that regard.[8]

Financial disclosure will enable the court to properly assess every party's position properly, to present argument based on a more informed position, for the court to be able to make a more informed decision.[9]

It was finally ordered that the Judge President amends the Practice Directive to give effect to the judgment and order in ***E v E; R v R & M v M***.[10]

****** Financial Disclosure Form attached ******

Mienke Stuart - Professional Assistant

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(3) COMPENSATION FOR OCCUPATIONAL INJURIES AND DISEASE AMENDMENT BILL, 2018 – RECOGNIZING THE RIGHTS OF ALL EMPLOYEES IN THE CASE OF *MAHLANGU V THE MINISTER OF LABOUR*

Labour law in South Africa is currently undergoing an inspired legal transformation – most recently in compensation for occupational injuries.

On the 31st of March 2012, Maria Mahlangu slipped and fell into an uncovered swimming pool while on duty at work. She was washing some windows. She drowned as she could not swim. Her employer found her body hours later. The employer was asked to compensate her family and he offered an amount of R 2 500.00 in accordance with what he claimed he could afford.

Maria Mahlangu was a domestic worker, who, much like any other employee can be injured on the job. Section 1(xix)(v) of the Compensation for Occupational Injuries and Disease Act, however, does not include domestic workers in its definition of an "employee".

Sylvia Mahlangu, her daughter, subsequently approached the Department of Labour and enquired about getting compensation for the death of her mother. The Department of Labour informed her that she could not get any compensation or insurance benefits for her loss. During 2016, Sylvia challenged the constitutionality of this exclusion in the case of Mahlangu v The Minister of Labour.

The Compensation for Occupational Injuries and Disease Amendment Bill, 2018

On the 18th of October 2018 the Minister of Labour published the Compensation for Occupational Injuries and Disease Amendment Bill, 2018 for public comment – hereinafter

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[8] E v E *supra* nr 1 at page 23.

[9] TS, R v TS, T in the High Court of South Africa, Gauteng Local Division, Johannesburg (Case No: 28917/2016) unreported.

[10] E v E *supra* nr 1 at page 23.

referred to as “The Bill”. A general note accompanies the bill and lists but a few matters which the subject of the proposed amendments will be – one of which are that the amendment aims:

> *“to provide coverage for domestic employees, to provide for rehabilitation, re-integration and return to work of occupationally injured and diseased employees”*

Compensation for Occupational Injuries and Diseases Act, 1993 (Act No 130 of 1993)

The Bill was open to written representations within 60 days from its publication date; however, we cannot fully appreciate the possible implications of the proposed amendment is finally promulgated.

The Act is a legislative document which provides for compensation for workers who are injured or contract diseases in the course of their employment which also extends to death resulting from the said injury or disease.

If you are an employer, this piece of legislation is applicable to you and you are obliged to comply with the Act by registering with the Labour Department (Compensation Fund) and later obtaining a certificate of good standing.

The Act provides that employers must pay fees to the Compensation Fund which will be determined by considering the total projected salary expenses for the financial year in calculation of the fee amount due to the Compensation Fund.

These fees contribute to the Fund from which employees can claim for injury or disease sustained in the course and scope of employment.

Mahlangu v The Minister of Labour

On the 23rd of May 2019, the North Gauteng High Court declared the exclusion of domestic workers from the Act unconstitutional, handing down an order to that effect.

A look at the inclusion of domestic workers as employees in the Act

One of the new features of the Bill is the inclusion of domestic workers in the definition of what constitutes an employee; which may afford domestic workers coverage which they previously did not enjoy under the Act.

What could this potentially mean for employees?

Employees who are covered by the Act and have suffered injury or disease whilst on duty, will reap the benefits of having a claim against the Fund. Where domestic workers are concerned, the Bill would assist a large population by finally recognizing their Constitutional rights to fair employment, dignity and healthcare.

What could this mean for employers?

With the addition of domestic workers in the definition of employees – the employer would have to bear the costs of registering with the Compensation Fund together with payment of fees due to the Fund. Furthermore, if the employer is found to be non-compliant with the provisions of the Act, they could be subject to penalties. Employers could bear the financial burden of penalties as well as fees payable to the Fund.

Conclusion

In closing, this Bill is not in effect. It can be said that the potential benefits to employees where the Bill is concerned, may far outweigh the inherent burden placed on the employer. The order handed down in the case of Mahlangu v The Minster of Labour, however, appears to be a stride in the direction of influencing the inclusion of domestic workers in the definition of employees by being alive to the fact that domestic work is work too.

Thando Meth - Candidate Attorney

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(4) PRECAUTIONARY ACTIONS TO CONSIDER IF A FAMILY MEMBER OR RELATIVE IS DIAGNOSED WITH DEMENTIA

"Dementia" is a general term used to described severe changes in the brain that cause memory loss. The most common type of dementia is Alzheimer's Disease.

Different diseases can cause different types of dementia.

Dementia is a progressive disease, meaning that it gets worse over a period of time.

We have often assisted clients with advice concerning loved ones or relatives with an advanced state of dementia and most often diagnosed with Alzheimer's Disease.

It is difficult to judge when the time will arrive that a person diagnosed with Alzheimer's Disease ("the patient") or other type of dementia will become unable to have legal capacity to act.

It is therefore necessary to plan for the future and to take care of financial- and legal matters.

The most important matters to attend to for such a patient is to:

- get his Will finally in order, as he may not be in a position to change his Will at a later stage;

- arrange your financial affairs (to the extent that you can) to avoid a scenario where all assets and cash are tied up in the estate of the patient, leaving family members with no access to funds;

- Consider the appointment of a *curator bonis* to take charge of your assets and financial affairs.

We must caution that a Power of Attorney authorizing a spouse or other person to act on behalf of the patient, is not sufficient where the patient is no longer in a position to revoke the Power of Attorney.

Provision is made for appointment of curators in respect of persons under disability in terms of Rule 57 of the Uniform Rules of the High Court. I will not deal with the technical nature of such an application, but the essence of such application is as follows:

1) A *Curator ad Litem* is appointed by the Court for such patient;

2) The *Curator ad Litem* is usually an advocate or attorney;

3) The *Curator ad Litem* will investigate the circumstances of the patient, which includes investigation into the mental- and physical health of the patient, his financial means and resources, to confirm that the patient is of unsound mind and incapable of managing his affairs and to investigate and recommend who would be suitable to be appointed by the Court as curator to the patient's person or property;

4) An application must be supported by at least one person to whom the patient is well-known and affidavits by at least two medical practitioners confirming the patient's mental disorder and incapacity of managing his own affairs;

5) The *Curator ad Litem* will submit a report to the Master of the High Court for consideration and to report to the Court.

6) Upon receipt of the Master's report, the matter will be re-enrolled and the reports of the *Curator ad Litem* and of the Master will then be considered.

7) If satisfied, the Court will then appoint a curator to the person or property (or both) of the patient.

8) It can take up to 12 months to finalize the appointment of a curator for the person or property of a patient.

9) Costs for such application can easily exceed R50 000-00.

Problems which a loved one or close relative can face where a curator is not appointed, include:

- Agreements such as lease agreements and cellphone contracts cannot be terminated;
- No access to investments, bank accounts or funds held with financial institutions;
- Property, movable and/or immovable, cannot be disposed of;
- Licenses, such as vehicle licenses and/or firearm licenses cannot be renewed;

- Actions instituted against a patient cannot be defended;

- The patient cannot conclude any contracts and his relatives may be burdened to enter into contracts on behalf of the patient for the patient's required means, accommodation, medical services, etc.

It is advisable to carefully consider the implications facing a family member or relative suffering from some form of dementia and to plan for the future in time.

Elmo Stuart - Director

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(5) ABOUT US

To view our previous newsletters, please visit our website on **http://www.eyslaw.co.za**.

Kind regards,

EY STUART
EY STUART INC.