

# Van Greunen & Associates Inc.

Monthly Newsletter

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## OUR SERVICES

We offer the following range of services:

- Conveyancing
- Commercial law
- Restructuring and compromises
- Business rescue
- Litigation
- Debt collection
- Insolvency Law
- Companies and Close Corporations
- Labour Law
- Matrimonial law (Divorces, custody and control of minors and maintenance)
- General litigation (Botswana, Namibia and Zambia) and International cross border litigation (France, United States of America, United Kingdom etc.) including cross border insolvency matters
- Wills, Testaments and estate planning

### Special note from Directors:

*It is that time of the month once again when we provide you with useful bits of information applicable to your business and personal life.*

*We would like to take this opportunity to thank our clients for their support throughout the past few years, without them we would be nothing. Endeavour*

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### Quote of the Month:

*The poor have to labour in the face of the majestic equality of the law, which forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread. - Anatole France*

Van Greunen & Associates Inc.  
Directors

## THE CONSUMER PROTECTION ACT - DEFECTS, WARRANTIES AND "VOETSTOOTS"

Is it now possible for a purchaser to give back the house he bought even six months after registration? This question was asked by an estate agent just the other day, commenting on the new **Consumer Protection Act 68 of 2008** (the "CPA"). One of the reasons is apparently that the "voetstoots"-clause is now invalid in sale contracts.

Unfortunately the CPA does not differentiate between the sale of movable and immovable property. When applying Part H (sections 53 - 61) of the CPA which deals with the "**Right to fair value, good quality and safety**" we are confronted with very problematic issues, for example when "defects" are discovered in a house after a sale. According to section 53, with respect to any goods or component of any goods, or services—

(a) "**defect**" means—

(i) any material imperfection in the manufacture of the goods or components or in performance of the services that renders the goods or results in the service being less acceptable than persons generally would be reasonably entitled to expect in the circumstances; or

(ii) any characteristic of the goods or components that renders the goods or components less useful, practicable or safe than persons generally would be reasonably entitled to expect in the circumstances;

(b) "**failure**" means the inability of the goods to perform in the intended manner or to the intended effect;

Strangely the term "voetstoots" is not defined here. It is never mentioned in the Act or Regulations. The old and useful distinction between patent and latent defects is also not applied. To include a voetstoots clause should be the norm when the sale transaction does not fall within the parameters of the CPA, e.g. when the supplier does not sell houses in the ordinary course of his business or when the consumer is a juristic person with a turnover per year or a total asset value of more than two million Rands. It is still possible to include the voetstoots clause in a sale agreement which is deemed as a transaction in terms of the CPA, but the effect thereof is drastically restrained.

Section 55 does not apply to goods bought at an auction, but continues generally in section 55(2) and (3):

(2) Except to the extent contemplated in subsection (6), every consumer has a right to receive goods that—

(a) are reasonably suitable for the purposes for which they are generally intended;

(b) are of good quality, in good working order and free of any defects;

(c) will be useable and durable for a reasonable period of time, having regard to the use to which they would normally be put and to all the surrounding circumstances of their supply; and

(d) comply with any applicable standards set under the Standards Act, 1993 (Act No. 29 of 1993), or any other public regulation.

(3) In addition to the rights set out in subsection (2)(a), if a consumer has specifically informed the supplier of the particular purpose for which the consumer wishes to acquire any goods or the use to which the consumer intends to apply those goods and the supplier—

(a) ordinarily offers to supply such goods; or

(b) acts in a manner consistent with being knowledgeable about the use of those goods, the consumer has a right to expect that the goods are reasonably suitable for the specific purpose that the consumer has indicated.

If it is in any way possible to apply these provisions to immovable property, it implies that a house for example, must be free of defects and must be suitable for the purpose the consumer has indicated, e.g. to reside in. It is irrelevant whether a "product" failure or defect was latent or patent or whether it could have been detected by a consumer before taking delivery of the goods. This is impractical. I have never seen a house without defects!

Fortunately sub-sections 6(a) and (b) are rescue clauses for the seller.

(6) Subsection (2)(a) and (b) do not apply to a transaction if the consumer—

(a) has been expressly informed that particular goods were offered in a specific condition;

and;

(b) has expressly agreed to accept the goods in that condition, or knowingly acted in a manner consistent with accepting the goods in that condition.

In short, this implies that the seller should still disclose any defects he may know of openly and the purchaser should indicate that he accepts the property with these defects as part of the deal.

The implied warranty of quality in section 56 contains a relatively drastic measure:

(2) Within six months after the delivery of any goods to a consumer, the consumer may return the goods to the supplier, without penalty and at the supplier's risk and expense, if the goods fail to satisfy the requirements and standards contemplated in section 55, and the supplier must, at the direction of the consumer, either—

(a) repair or replace the failed, unsafe or defective goods; or

(b) refund to the consumer the price paid by the consumer for the goods.

(3) If a supplier repairs any particular goods or any component of any such goods and within three months after that repair, the failure, defect or unsafe feature has not been remedied or a further failure, defect or unsafe feature is discovered, the supplier must—

(a) replace the goods; or

(b) refund to the consumer the price paid by the consumer for the goods.

If delivery in sub-section 2 means registration of immovable property in a Deeds Office as the term is usually understood, this creates a huge problem. Can the purchaser live five months in his new house and then cancel the sale due to some or other defect or if the home suddenly does not fit the purpose for which he bought it anymore? Who is then going to pay for the reverse registration of the property?

At the moment it is widely felt that the provisions of the Act in part H are grossly impractical and even absurd as regards immovable property. Either the Act must be amended or the courts should give strong direction.

## CONSEQUENCES OF SEQUESTRATION

1. In the previous articles in this series, the process and procedures for the sequestration of an individual and the liquidation of companies were discussed.
2. In this article an overview will be given relating to the various consequences of sequestration on a person whether the sequestration order was obtained voluntarily or in terms of a compulsory sequestration.

### The effect of sequestration on an insolvent person.

3. In the event of an insolvent person being married in community of property, the joint estate of the parties will be sequestered. The result of the aforesaid is that the consequences as discussed hereinafter will affect both the parties to a marriage in community of property.
4. The effects of sequestration on parties married out of community of property, with or without the accrual system, will be discussed later in this article.
5. The first important effect and consequence relating to insolvency is found in Section 20 of the Insolvency Act, Act 24 of 1936 (hereinafter referred to as the Act) which states that an insolvent is divested of his estate which vests with the master until a trustee has been appointed and upon the appointment of the trustee, to vest the estate with the trustee. The insolvent thus "looses" his estate which then vests with the curator.
6. A further result of sequestration is that until the appointment of a trustee, any civil proceedings instituted by or against the insolvent shall be stayed.
7. There are approximately (90) ninety different provisions in various Acts which disqualifies an insolvent person from membership of a statutory committee or commission. An example is that an insolvent person is disqualified from membership of the National Executive Council, provincial legislature, etc.
8. An un-rehabilitated insolvent is also disqualified from being a director of a company, alternatively various other legal entities. An insolvent may also not be a member of a close corporation. In this regard it must be stated that the insolvent may practice a profession, follow an occupation or take employment but must obtain the written consent of his/her trustee.
9. An un-rehabilitated insolvent may also be barred from practising as an Attorney, an Accountant or Estate Agent, etc.

10. An un-rehabilitated insolvent may also not qualify for a liquor license.
11. The effect on an un-rehabilitated insolvent's legal capacity to enter into contracts is discussed in Section 23(2) of Act. The aforesaid provision confirms that an un-rehabilitated insolvent may enter into any contract except:
  - 11.1 Where an insolvent purports to dispose of any property of his insolvent estate;
  - 11.2 Enter into an agreement, without the consent in writing of the Trustee, whereby his estate or any contribution towards his estate which he is obligated to make, is or is likely to be adversely affected;
12. A further important consequence of sequestration is found in Section 137(a) of the Act which confirms that if, during the sequestration of his estate, an un-rehabilitated insolvent does not disclose that he is insolvent to any credit granter when applying for credit in an amount of more than R20.00, it is an offence and can the insolvent be liable for imprisonment for a period not exceeding one year.

### The effect of sequestration on a spouse married out of community of property

13. In terms of Section 21 of the Insolvency Act, the property of the spouse whose estate has not been sequestered (hereinafter referred to as the "solvent spouse") will vest firstly in the Master and thereafter in the provisional trustee until the Master or the trustee releases the property of the solvent spouse which is proved:
  - 13.1 To have been the property of the solvent spouse immediately before his/her marriage to the insolvent or before the 1<sup>st</sup> of October 1926;
  - 13.2 Or to have been acquired by the solvent spouse under a marriage settlement;
  - 13.3 Or to have been acquired by the solvent spouse during the marriage with the insolvent by a title valid as against creditors of the insolvent;
  - 13.4 Or to have been acquired with any such property as aforesaid or with the income of the proceeds thereof.
14. Should it be proved to the satisfaction of the Master and trustee that the aforesaid requirements have been met, the property will be removed from the insolvent estate.
16. The consequences however are discharged upon the rehabilitation of a person.

## LEASES vs THE CONSUMER PROTECTION ACT

In accordance with the current South African legal system, the landlord can destroy a business by refusing to renew a lease.

Business owners who placed their hopes on the new Consumer Protection Act (CPA) to control the unfettered power of their landlords seem to have been let down badly.

Many lease agreements between a tenant and a landlord, specifically for business owners, stipulate that the lease is only valid for an agreed time period. Many business owners neglect to incorporate provisions in the lease agreement to entitle them to a renewal of the lease upon termination.

Other business owners negotiate a single renewal period which is also limited to an agreed period. Thus it cannot continue beyond that and will terminate.

The main purpose of the CPA is to protect the consumers. This is directed at small consumers i.e. individuals and possibly SMME's. The purpose of the Consumer Protection Act is not to protect corporations and larger businesses and the Minister has thus proclaimed a threshold equal to R2 Million (turnover and/or assets). If a business owner's annual turnover or assets is more than R2 Million it will exceed the threshold and the transaction between the business owner and the landlord will accordingly be exempted from the new Consumer Protection Act to a great extent.

The protection of small tenants has been watered down to such an extent that the CPA is virtually meaningless.

Many business owners in the industry had hoped that the new law would bring relief to business tenants who suffer from the unfettered power of powerful landlords.

The final version of the CPA stipulates that leases will only be current if the tenant is a natural person, as opposed to a juristic person such as a Close Corporation or Company.

The CPA has revolutionised the relationship between consumers and business. The law as it existed between consumers of fixed term contracts such as security company contracts, cell phone contracts and gym memberships are now allowing individual customers to cancel them with only 20 working days notice. Even though the CPA as a whole classifies Close Corporations and Companies with turnovers of less than R2 Million as consumers, the rules dealing with cancellations of fixed contracts specifically exclude juristic persons.

The relationship between a landlord and a tenant has accordingly changed significantly. Whether it is a fixed term contract or not, the validity thereof is now reduced to a twenty day period in which a landlord, if contracted



## GENERAL PRINCIPLES IN INSURANCE LAW: THE "CONDITIONS PRECEDENT"

The abovementioned seems to raise various questions, generally meaning the following: "the intention was to stipulate that the insurer would be entitled to cancel the contract if the insured did not honour the terms."

The South African courts have over the last decades moved away from the English law approached and adopted the approach that if a fundamental breach occurred on the "condition precedent" or whether the parties have agreed expressly or tacitly that the insurer may cancel, the aforesaid amounts to general principles of insurance law and the law of contract.

The following case studies have been decided in our courts:

**RESITO DAIRY (PTY) LTD VS AUTO PROTECTION INSURANCE CO LTD 1963 (1) SA 632 A:**

" the dispute concerned a clause called a "condition precedent" in the policy. In terms of this clause, the insured was expected to keep the insured vehicle in a proper state of repair. The insured failed to prove that he had complied with this "condition". The insurer raised the argument that the insured was unable to claim under these circumstances as he had not proved that the condition precedent had been fulfilled. In discussing this contention, the court remarked: " the so – called conditions of the contract are not conditions as understood in our law; they are undertakings by the insured and therefore terms of the contract. The nomenclature of the policy is that of the English law which fails to observe the distinction between a condition proper and a term of a contract. The terms of a contract cannot be changed into suspensive conditions merely by calling the conditions precedent. A term of a contract may be so material that a breach of it will entitle the other party to repudiate the contract and in

the present case the parties have used the words "conditions precedent to any liability" to indicate that the so – called are material terms of the contract"

It seems that insurers would attempt to disguise "conditions precedent" clauses in order to protect their interest however our courts have made the following remarks in this sense:

**PROVINCIAL INSURANCE CO LTD VS MORGAN 1933 AC 240 HL:**

"the insured obtained insurance cover in respect of a truck. The cover was limited to transportation in connection with the insured's business. In the proposal form the insured was asked to state the purpose for which the vehicle would be used and the nature of the goods to be carried. The insured responded that it would be used for the delivery of coal. The insured's answers were made the" basis of the contract", so that his statement in respect of future use would ordinarily have amounted to a warranty. The insured's vehicle was in fact occasionally used to transport timber. However, it was carrying coal when it was involved in an accident. The court did not regard the occasional carrying of timber as a breach of contract but found that the apparent warranty was in fact a term descriptive of risk. Since the truck was used to carry coal at the time of the accident, the insured was entitled to recover his loss."

I trust this will assist in the future when your claims against your insurance company are repudiated based on a "condition precedent". It should however be borne in mind that the nature of breach, if any, must always be approached with caution and clear thoughts when assessing a possible breach and the affect thereof.

Frik van Schalkwyk

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with an individual consumer, can be assured of its lease agreement and its tenant.

Landlords who rely upon the income of a lease agreement for purposes of obtaining finance, will now face a position where financing institutions do not hold any value to a lease agreement contracted with an individual.

It is so that the CPA tried to counter the imbalance of the powers by giving small tenants the right of first refusal when the lease comes to the end.

We anticipate that tenants will be faced with a position where they are extorted as the right of first refusal does not provide it with adequate protection. For example a new lease, upon the termination of the agreement, could be offered at R850 per m<sup>2</sup> instead of a similar or market related rent of R 100m<sup>2</sup> or a rent that may be presented to a possible new tenant. The right of first refusal will accordingly be extorted and easily bypassed.

Because the CPA does not provide this specific remedy, the extortion of lease renewals will continue with impunity.

Johan van Greunen  
Director



**Van Greunen & Associates  
Inc.**

Should you require any further information relating to our firm, or any previous issues of our monthly Newsletter, kindly visit our webpage: [www.vga.co.za](http://www.vga.co.za)

Should you require our assistance do not hesitate to contact our offices and we will endeavour to assist you with the best possible solution.

## ADOPTIONS

*There are diverse adoptable children in need of a committed and devoted home, for example, orphans, children who have been abandoned, children whose parents abuse or with intent neglect them, or children whose parents' whereabouts can't be established.*

*The principle of adoptions according to section 229 of the Children's Act 38 of 2005 is to protect and nurture the child and to encourage permanency by connecting the child to the family relationship and the connection is intended to last a lifetime.*

*The prospective adoptive parent must be a fit and proper person to be entrusted with the full parental rights and responsibilities in respect of the child and must be over 18 years of age.*

*Necessary consent must be given by either parents or the guardian of the child and the child, if the child is 10 years and older. In cases where the parents are incompetent to give consent due to mental illness or where the child has been abandoned, abuse or neglected consent will not be required.*

*The prospective adoptive parent will be assessed by an adoption social worker.*

*Thereafter an application must be made to the children's court and must be accompanied by a report by the adoption social worker containing information as to the adoptability of the child, whether the adoption is in the best interest of the child, the medical information of the child and an assessment on the prospective adoptive parents.*

*Following an adoption order which has been made by the children's court, the adoptive parents must apply at Home Affairs to record the adoption and any change in the surname of the child in the births register.*

*In terms of the regulations the social worker must enter the names of the adoptable child and the prospective adoption parents into the Register on Adoptable Children and Prospective Parents. Information in the register may not be disclosed, except to the adoptive child and the biological parent, but only with the consent of the child and the adoptive parents.*

*A straightforward, uncomplicated adoption should approximately take up to 6 months to be duly completed.*

*Odette Fouche  
Candidate Attorney*



## COMPANY DIRECTORS

*Company Directors, prescribed officers and members of board committees must ensure that they are familiar with the provisions of the Companies Act, Act 71 of 2008, as this Act contains several provisions relating to their responsibilities and liabilities. The Companies Act emphasises transparency and accountability for business conduct and management.*

*Of particular importance is part F of chapter two which deals with the governance of companies and sections 75 to 78 which contain far-reaching provisions in terms of which the legislature has attempted to codify director's conduct and liabilities.*

*Section 75 obliges directors to disclose personal or related party financial interests in respect of matters to be considered by the board. Note that the directors must leave a meeting after such disclosure and may not be regarded as present for the purposes of adopting a resolution on the matter.*

*Section 76 requires that directors do not use their position or any information obtained, to gain advantage for themselves or third parties or to harm the company. Directors must communicate to the company any material information obtained, unless they believe that information is immaterial, in the public domain or that they are precluded legally or ethically from disclosure.*

*Furthermore, directors must act in good faith, in the best interests of the company and with the degree of care, skill and diligence, which can reasonably be expected of them. Note that if a director has taken diligent steps, disclosed financial interests and reasonably acted in the best interest of the company, then the director will be regarded as having acted in the best interests of the company and with the necessary degree of skill.*

*Section 77 contains several circumstances in which a director can be held liable for loss, damages or costs of the company, which include, but is not limited to:*

- *Breach of fiduciary duty;*
- *any loss, damages or costs sustained by the company as a direct or indirect consequence of acting without authority, acquiescing in reckless trading, being a party to a fraudulent act or omission, signing, consenting to or authorising financials or prospectuses which are false or misleading and failing to vote against various unauthorised acts, despite knowing that such acts are unauthorised.*
- *Signing or consenting to the publication of AFS or a prospectus which contains a false statement*
- *Knowingly failing to vote against a share purchase which did not accord with legislative requirements*
- *For granting unauthorised options;*
- *A breach of the Company Memorandum of Incorporation.*

*Section 78 makes provision for circumstances under which a company may indemnify directors and purchase protective insurance. A company may indemnify a director in all circumstances, except where the liability arises as a result of the director's failure to act in good faith and for a proper purpose or in the best interests of the company or with the degree of care, skill and diligence required. There is also no indemnity where the liability arises from willful misconduct or willful breach of trust or in respect of any fine imposed in terms of any national legislation*

*The Act further provides that a director can be declared delinquent or under probation. The company, a shareholder, another director, the company secretary or prescribed officer, a registered trade union or another representative of the employees of a company, has the right to apply to have a director declared delinquent or under probation.*

*Under the Act, being a company director is sometimes a burden and those who fail to comply with their obligations run a serious risk of both criminal and civil liability. In the case of criminal liability, provision is made for a fine and/or imprisonment for up to 10 years. In the case of civil liability, the losses sustained by the company, can be substantial to a shareholder or third parties.*

*Ulrich Wilgenbus*

## LABOUR LAW THRESHOLD

In a previous edition I have discussed the new threshold that was increased to R172 000.00 per annum and came into effect 1 July 2011. Due to enquiries which I have received as to the consequences of those employees earning more than this threshold per annum, I thought it appropriate to expand thereupon in this edition.

The Basic Conditions of Employment Act 75 of 1995 (BCEA) was developed to protect those employees who were not necessarily in a position to protect themselves. When a jobseeker applies for a vacancy, it is presumed that he is in a disadvantaged position towards the new employer, as the employer can pick and choose between the applicants. The applicant therefore negotiates from a lower level than the employer and will therefore accept deals he would not have accepted if they were negotiating the terms and conditions of the vacancy at the same level.

The employer will thus be able to set terms and conditions that can be very unreasonable and unfair towards the applicant who accepts it due to his lower negotiation position. The BCEA in return attempts to eliminate this disadvantage by setting the minimum terms and condition on several aspects. Unfortunately sections 9-12, 17-16, 17(2) and 18(3) of the BCEA does not apply to employees earning more than R172 000.00 per annum (the threshold). Such employees have to protect their own interest when entering into an contract of employment as to limited working hours, overtime, compressed working week,

average hours, meal intervals, daily and weekly rest periods, pay for work on Sundays, nights and public holidays on which the employee does not ordinarily works .

The first question that arises in this instance is: "How do I know what my rights are if I am already employed". The answer is that this should be described in your "Contract of Employment". This is a contract describing what you have to do for your employer in return for your agreed salary. Usually other terms like your working hours are also described therein as well as your lunch breaks, leave, sick leave, etc. Your working hours should therefore be fixed. The difference is that in the instance where you are required to work overtime, you will not automatically qualify for time and a half remuneration but only normal rates. Should you be required to work on Sundays or public holidays, you once again do not automatically qualify for double time but normal pay. In this instance everything is about the stipulations in your employment contract and the common law layouts are only applicable where the contract and act omits same.

Government employees will normally receive the same treatment as their colleagues whose remuneration is less than the threshold. However this is more a privilege than a right.

But there is still something to look forward to for those earning more than the threshold, as the Act is indeed applicable to you and your employer. The threshold only excludes a few sections of the legislation.

Eddie Adendorff



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## FAMILY LAW

What rights does the alleged 'father' have?

If the alleged 'father' of a child pays maintenance for the child but he is not convinced that he is the father and the mother refuses a paternity test. What rights does he have?

If the mother of a child was married at the time of conception or birth or during the intervening period, there is a rebuttable presumption that her husband is the father of the child.

If the child is born out of wedlock and it is proved by way of judicial admission or otherwise that a man had sexual intercourse with the mother of the child at any time when the child could have been conceived, it is, in the absence of proof to the contrary, presumed that he is the father.

In both cases, the biological father has a legal obligation to maintain the child.

A father may challenge that he is the genetic material of a child and ask the mother to have a blood sample taken from her or the child. If she refuses to do so, it is presumed, until the contrary is proved, that the refusal is aimed at concealing the truth.

Section 37 of the Children's Act provides that 'if a party to any legal proceedings in which the paternity of a child has been placed in issue, has refused to submit himself or herself or the child, to the taking of a blood sample in order to carry out scientific tests relating to the paternity of the child, the court must warn such party of the effect which such refusal might have on the credibility of that party'.

Should the mother refuse to agree to blood tests and she can't be forced to consent, the paternal parent may elect to discontinue the maintenance payment. A complaint can then be submitted to the court but the court would not likely order him to pay maintenance for the child in light of the mother's refusal to consent to testing.

If the 'father' has contact with the child, he could take him or her to a clinic to take a simple mouth swab, to determine the child's DNA. This may be expensive but worth the peace of mind.

Stephan Venter