

# Van Greunen & Associates Inc.

Monthly Newsletter

Issue 10 – October 2011



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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.*

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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



## TRANSFER OF OWNERSHIP: AN EASIER WAY

Ownership of land can normally only be transferred from one person to another by means of a deed of transfer. There are however some exceptions, depending on circumstances. Transfer of ownership can also be affected by endorsements on the existing title deed. This is a cheaper and less cumbersome procedure than employing a deed of transfer. In practice, the old deed of transfer is stamped with the wording that reflects the change of ownership.

Section 45 of the Deeds Registries Act 47 of 1937 provides for four types of endorsements:

1. A person who is married in community of property and shares ownership in immovable property with his/her spouse on a fifty-fifty basis. If one of the partners dies, ownership of one-half share of the property vests in the estate of the deceased. The surviving spouse may receive the right to inherit this half share by way of a provision in the will of the deceased, or he/she may buy this share into his/her name by way of a redistribution agreement. The other half share he/she already owns. If the surviving spouse has lawfully acquired the share of the deceased spouse in the property, the title deed can be endorsed, so that the surviving spouse becomes the sole owner of the whole property.
2. To reflect this change only an endorsement is needed on the title deed of the property in question. This is done by way of application to the Registrar of Deeds, lodged with certain other documents. The endorsement will reflect that the surviving spouse can now deal with the acquired share as if he/she has taken formal transfer of it into his/her name.
3. If immovable property forms an asset in a joint estate and the spouses divorce and

one of the spouses has lawfully acquired the share of the other spouse in the property, the title deed can be endorsed so that the spouse becomes the sole owner.

3. On divorce, ownership of one-half share of the property normally vests in each of the divorcees. This position can be changed by a settlement or redistribution agreement, so that one of the spouses owns the whole property.
4. To reflect this change only an endorsement is needed on the title deed of the property in question. The endorsement affixed by the Registrar of Deeds will reflect that one of the spouses can deal with the acquired share as if he/she has taken formal transfer of it into his/her name.
5. If immovable property forms an asset in a joint estate and a court makes an order that changes the matrimonial property regime, so that one of the spouses has lawfully acquired the share of the other spouse in the property, the title deed can also be endorsed so that one spouse becomes the sole owner.
6. If immovable property forms an asset in a joint estate and a court makes a divorce order in which the property is awarded to both spouses in undivided shares, the title deed can be endorsed so that each spouse becomes the sole owner of an undivided share. This implies *inter alia* that a person can alienate their undivided share without the permission of their former spouse.

We at Van Greunen & Associates Inc will gladly assist you if the need arises, to enact any of the above endorsements.

Dawid de Villiers

## THE EFFECTS OF THE RECENT AMENDMENTS TO THE SECTIONAL TITLES ACT

Recently there were certain changes made to the Sectional Titles Act and one has to consider the effect it has on the current occupier and owner of a sectional title.

I will accordingly deal with the extensions relating to the property and how to interpret the new act. In this regard the following sections were amended, section 24 and 25 of the principal act. The effect of the amendments are the following respectively; If the floor area of a section in question is increased by extension, a revised schedule must substitute the schedule referred to in section 7 (2)(b) reflecting the participation quotas of all the sections as modified after taking the increased floor area of the section in question into account.

The following must be obtained: a certificate from the conveyancer and surveyor or architect stating that there is not a deviation of more than 10 per cent in the participation quota of the relevant section as a result of the extension. If there is a deviation of more than 10 percent, a certificate by a conveyancer stating that the mortgagee of each section in the scheme has consented to the registration of the sectional plan of an extension of that section.

It is further of importance to note that should your deviation be more than 10 percent as a result of the extension, a notice must be sent by registered post to each mortgagee or where the mortgagee is a financial institution, to its headquarters, giving details of:

- a. The mortgage bond;
- b. The mortgagor and reference number of the mortgage loan;
- c. The proposed extension in relation to its size and location;
- d. The impact on security of such mortgagee as to the diminution of the participation quotas allocated to the mortgaged unit.

Taking into consideration the extent that the act has now laid down specific regulations on how to approach same, these guide lines will assist greatly when considering further extensions on current property.

Odette Fouché

## INSURANCE CONTRACTS

### **Insurance contracts: Should your goods be kept in a locked safe?**

As many of us are insured or should be insured, most of the general public have been confronted with terms in their insurance policy which is not always clear, for example: "if you have jewellery which exceeds X amount, same must be kept in a locked safe if not worn; if one has laptops exceeding X amount, same must be locked away in a safe whilst not in use".

We often ponder on what would happen if these items were stolen whilst not in a safe although they usually are?

Let's consider the following hypothesis:

"Pursuant to a so-called multi-peril policy, the insurer insured the insured against inter alia loss arising from the theft of any of the insured's vehicles 'left in the open' on its premises. During the term of the policy one such vehicle was stolen. The insured claims its value. The insurer repudiated liability on the grounds that there had been a breach of what is termed "memo 2" (the memo) in the 'Theft' section of the contract. In terms of this provision, the insured 'warranted that all vehicles left in the open must be kept locked at all times out of business hours and all keys must be removed and kept in a locked safe'. Though the vehicle in question (which was stolen out of business hours) was locked, its keys were not kept in a safe. Instead they were retained in a cupboard in the insured's (locked) premises."

Further note one must always consider and make reference to section 63(3) of the Insurance Act, inter alia:

"the aim of s 63(3) was to remedy this by protecting claimants under insurance contracts against repudiations based (in the words of Krieglner AJA in *Qilingele v South African Mutual Life Assurance Society* 1993 (1) SA 69 (A) at 74B) 'on inconsequential inaccuracies or trivial miss-statements in insurance proposals.'"

When considering and interpreting section 63(3), one must consider the principles of the law of contract based on the hypothesis above:

"The consequence of this is to be considered in conjunction with the insured's concession that the fact that the keys of the vehicle were kept in a cupboard (where they were found after the theft) rather than in a locked safe, did not at any time materially affect the assessment of the risk. So this element of the section does not feature either. In these circumstances, and since it was common cause that the policy under consideration is a

domestic one, the narrow question that arises is whether the memo, though warranted, is a representation within the meaning of s 63(3). If it is, the section would operate to save the insured from the consequences of the warranty having been breached. In this event the insured's claim was rightly allowed. On the other hand, if, as the insured contends, the memo was simply a term of the policy, s 63(3) would not apply and the insured should therefore have been non-suited and must succeed"

If one should interpret the above, it becomes clear from the essence of the agreement, was there in any manner a representation to the insurer relating to where the keys of the vehicles would be kept? In my opinion there has not. It is further fact that the plain language principle and interpretation of the above is: ('all keys must be . . . kept in a locked safe') is unequivocally that of a contractual undertaking.

There was recent court decisions on this very same point and the court came to a decision where it decided that the contractual obligation which was accepted by both parties concerned, warranted the repudiation of the insured's claim as the insured in terms of its breach of the contractual obligation, breached the insurance contract.

The cold hard fact is that insurers cannot repudiate all claims based on inaccuracies and trivial matters, section 63(3) does pose some form of protection to the insured under circumstances where one should always carefully peruse your insurance contract as not all clauses relating to, let's call it, "SAFE CLAUSES", are the essence of the insurance policy. If it is not a material term of the agreement, in this instance such repudiation by an insurer will, in all probability, not succeed as the ambit of section 63(3) offers sufficient protection.

One is always faced in this day and age with complex insurance contracts with terms and conditions which may be construed as simple legal jargon and the effect of these terms may, if they are material to the contract of insurance, have a grave effect on you if not fully understood.

One should always request a copy of the insurance contract after same has been concluded. Upon receipt thereof, carefully peruse same and consider the merits. Should there be any discrepancies in your agreement, immediately phone your insurer and get clarity on the matter. Ask for the recording number and a transcribed copy thereof, as this will protect you in future litigation, should it be necessary.

Frik van Schalkwyk



### FICA OBLIGATIONS

Accountable institutions have extra duties in that they must identify their clients and verify these client's identity before any transaction takes place. In this regard they have to:

- Keep record of specific information i.e. client's contact information;
- Appoint a compliance officer who will oversee compliance with anti money laundering legislation;
- Draft internal rules to ensure compliance
- Train the employees in their compliance obligations;

An accountable institution will include, but not be limited to attorneys firm, board of executives or trust company, bank, money lender, foreign exchange agent, a financial services provider, post bank, and even development finance corporations etc.

It is important to know that registered auditors aren't listed as accountable institutions. But if a registered auditor is also a financial services provider in that he is also providing investment advice, he will also be regarded as an accountable institution.

In accordance with the FIC Act, every business and employee must be report certain suspicious activities to the Financial Intelligence Centre (FIC).

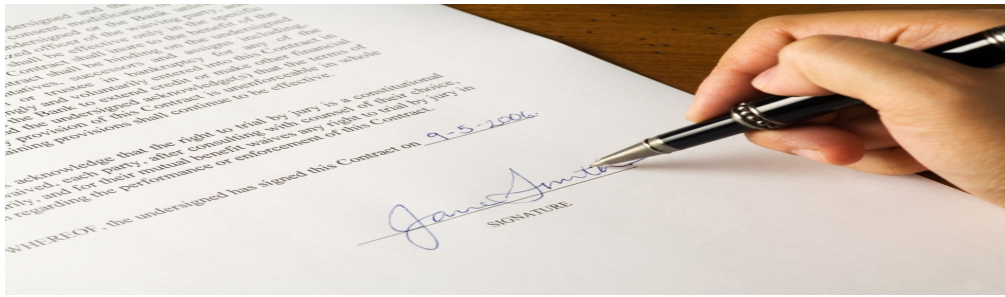
Accordingly an accountable institution should report any suspicious activities to the FIC.

FIC views the following as "suspicious":

- If a business receives or is about to receive money from illegal activities or related activities.
- If a business is a party to a transaction that is conducted to avoid having report a suspicious transaction, may be connected to a tax evasion investigation, facilitates money laundering, facilitate or is likely to facilitate money from illegal activities being transferred, does not seem to be legal.

Kindly note that if you are convicted of money laundering, you can be fined up to R1 Million, or sentenced to jail for 30 years.

Johan van Greunen



## THE TURQUAND RULE AND THE DOCTRINE OF CONSTRUCTIVE NOTICE UNDER THE CURRENT REGIME

The Turquand Rule and the Doctrine of Constructive Notice are principles that have evolved for many years and are tools which the courts have applied quite extensively when deciding whether a company should be bound to a contract with a third party. This will typically happen when a company claims that the person who bound the company to the agreement did not have the necessary authority to do so and as such the agreement is unenforceable.

According to the Doctrine of Constructive Notice, a third party, when dealing with a company, is deemed to have knowledge of the contents of a company's public documents. As such, the third party, when contracting with the company, should appraise themselves with the contents of the Memorandum and Articles of that company in order to confirm that the individual representing the company in the contractual negotiations is, in fact, authorised to do so. In the event where such a person did in fact act beyond the scope of his or her authority, the agreement will be regarded as being ultra vires and would not be enforceable against the company.

The Turquand Rule acts as a counter against the Doctrine of Constructive Notice. The Turquand Rule becomes applicable where the terms of the Memorandum and Articles provide for an internal procedure to be followed in order for an individual to have the authority to represent a company, for example where a resolution needs to be passed by the company in order for the authority to be valid. The Turquand Rule therefore provides that it is permissible for the third party contracting with the company, to presume that such internal procedures have been complied with.

If the internal procedures have not been followed and the person binding the company to the agreement did not have the required authority, the contract remains enforceable, but can be cancelled, not by the company, but by the third party. The ability of the third party to exercise this right is based on the fact that, when contracting with this individual, it believed in good faith that the individual was

properly authorised to act on behalf of the company.

Under the new Companies Act, an agreement entered into by an individual who lacks the proper authority to do so, is still regarded as being ultra vires. Section 19(4) does however change the scope of the Doctrine of Constructive Notice. This section specifically provides that a third party is not deemed to have knowledge of the contents of any of the company's public documents. As such, it can no longer be argued that a third party contracting with a company has appraised himself with the Memorandum of Incorporation of the company. There is however one exception which is contained in Section 19(5). This section states that a third party is deemed to have received notice and has knowledge of any provisions of a company's MOI if the company's notice of incorporation or notice of amendment has drawn attention to the provision. It may therefore be seen that the New Act abolishes the doctrine of constructive notice, except in cases where attention is drawn to special conditions.

On the other hand, the Turquand Rule has been legislated. In terms of section 20(7) of the new act, a person dealing with a company in good faith, other than a director, prescribed officer or shareholder of the company, is entitled to presume that the company, in making any decision in the exercise of its powers, has complied with all the formal and procedural requirements in terms of this Act, its memorandum of incorporation and any rules of the company, unless the person knew or reasonably ought to have known of any failure by the company to comply with such requirement.

It would therefore seem that the new Companies Act abolished the protection afforded to companies under the Doctrine of Constructive Notice but retains the protection afforded to third parties when contracting with companies.

The only way for a company to protect itself in this regard is to make specific provision when converting its Memorandum of Association to a Memorandum of Incorporation. These provisions are called "RF" or "Ring Fenced" provisions and specifically marked as "RF provision" in order to draw the necessary attention to them. Conversion of your Memorandum of Association must not be taken lightly.

Ulrich Wilgenbus

## TO SEQUESTERATE OR NOT

In past issues of the Newsletter, the procedures and consequences of sequestrations brought voluntarily or compulsorily were discussed. The question invariably arises when a person should make the decision to bring an application for the voluntary surrender of his estate.

It is a foreseeable fact that a person will, at some stage during the course of their lifetime, experience financial difficulties. Financial difficulties may be brought on by various circumstances which are not within the control of the said individual, for instance loss of employment, ill health and various other financial burdens for which provision were not made.

A situation may arise where the value of the person's assets still exceed his liabilities and he is unable to make payment of his month-to-month commitments as a result of insufficient "cash flow".

As a result of the aforesaid, various creditors may advance against the debtor in person, by issuing summons, obtaining judgment and proceeding to either attach a person's assets and sell same, alternatively to institute debtors' court procedures. Should the creditors advance and obtain judgment, same will be effective for 30 years and a creditor may attach the assets and/or proceed in the Debtors' Court at any time during those 30 years.

The National Credit Act 34 of 2005 (as amended) has made provisions for a debt relief remedy commonly known as debt review procedures. The debt review application may be opposed by various creditors. In the event of a person not having sufficient disposable monthly income to make an instalment payment to the various creditors, the application will not succeed. A further pitfall of the debt review procedure is that interest on the debt still accumulates whilst the payment terms and periods are re-scheduled. Debt review procedure does not "take away" the debt.

Should an individual find himself in such a precarious situation, sequestration should be considered. The primary objective of a sequestration application is that all debts, from the date of the sequestration order, will then fall into the insolvent estate and the curator will be in a position to sell the assets and pay a dividend to the various creditors. The creditors will, after the date of sequestration, no longer have any claims against the "new estate" of the debtor which begins on the date of sequestration. As mentioned in a previous article, a person may rehabilitate after sequestration.

In conclusion, a person must consider an application for sequestration should he not have sufficient income to meet his month-to-month obligations.

Innes Steenekamp



## SELLING YOUR PROPERTY

Are you planning to sell your house?

Don't lose your most valued investment; know the legal aspects involved.

Always follow these important guidelines:

- Consult your attorney concerning your rights and obligations.
- Approach one or more estate agent of your choice to list your property. Do not give sole rights to sell the property to one agency without considering it very carefully. Your attorney will be able to inform you about this.
- Should you instruct more than one estate agent, consult your attorney before you sign an offer to purchase or a deed of sale. If the property was introduced to the purchaser by more than one agent you would be liable for double sales' commission.
- When you find a buyer, do not sign any offer or deed of sale before your attorney has examined the document.
- Give the estate agent the name of your attorney - your attorney will deal with the legal aspects and ensure that the house is transferred to the buyer. He will also organise the finances and ensure that you receive your money.
- The following is a list of the most important requirements that should be met in a deed of sale - however it should be noted that this list is not complete as each transaction has its individual requirements. By the way, should you wish to do so, your attorney can draw up the Deed of Sale:
- Indicate who will be responsible for the costs involved in the drawing of the sale.
- The names, identity numbers and marriage status (e.a. Married in or out of community

of property) or capacity (when a company is involved) of the parties concerned, as well as the purchaser's and the buyer's address.

- The description and size of the property or stand as detailed in your deed of transfer.
- The name of your attorney handling the transfer.
- The provision that the buyer is responsible for all taxes and other municipal charges from the day of taking possession.
- The provision that the house is sold "as is" (in other words without any guarantee on your part regarding visible or hidden faults).
- Should the date of occupancy be before the date of transfer, ensure that the buyer pays interest on the sale figure or rent until the date of transfer. The amount and manner of payment must be stipulated.
- The fact that no change to the deed of sale is valid unless in writing and signed by both parties.
- Whether a beetle-free certificate should be obtained (Cape Province and Natal) and if so, who should pay for the inspection and any work required.
- Whether the sale is subject to the buyer obtaining a bond or the sale of the buyer's house. Your attorney can advise you with regards to these conditions. A special deed of sale should be drawn up should the buyer wish to pay off the selling price over an extended period of time. This is a relatively complex issue which also holds certain risks and you are strongly urged to allow your attorney to draw up the deed of sale.

Stephan Venter



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.

### Van Greunen & Associates Inc. Attorneys

106 Panorama Avenue, Rooihuiskraal,  
Centurion 0157  
PO Box 68492, Highveld, 0169

Tel: +27 (0)12 661-2065  
Fax: +27 (0)12 661-5494

Email: [info@vga.co.za](mailto:info@vga.co.za)  
Website: [www.vga.co.za](http://www.vga.co.za)

Directors: J. Van Greunen  
I.R. Steenekamp

Associates: DW de Villiers • FCJ van  
Schalkwyk • UA Wilgenbus

Candidate Attorneys: O Fouche

VAT No.: 4230227680  
REG No.: 2007/015007/21