

# Van Greunen & Associates Inc.

Monthly Newsletter

Issue 9 – September 2011



## THIS ISSUE:

**LESSOR CAVEAT p2**  
**CONSEQUENCE OF INSOLVENCY: SALE OF  
IMMOVABLE PROPERTY p3**  
**SHARES IN COMPANIES p3**  
**DIFFERENT INSURANCE CATEGORIES p4**  
**THE ACCIDENT OF MISS KIM p5**  
**ANNUAL AUDITS p5**  
**BUYING A HOUSE p6**

## 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.*

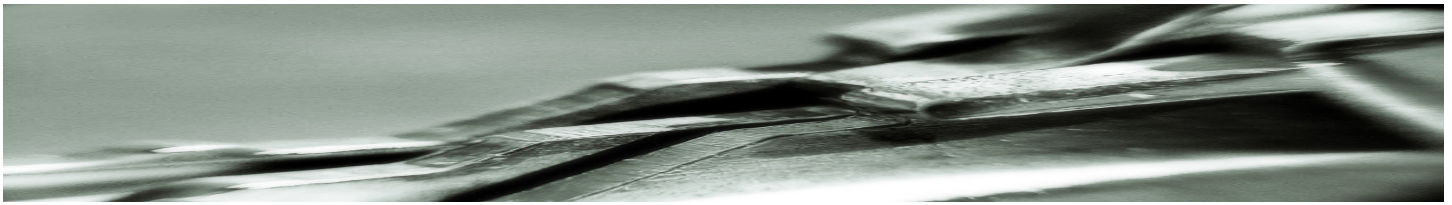
*We would like to take this opportunity to thank our clients for their support throughout the past few years, without them we would be nothing. Endeavour*

\*\*\*\*\*

### Quote of the Month:

*People crushed by laws, have no hope but to evade power. If the laws are their enemies, they will be enemies to the law; and those who have most to hope and nothing to lose will always be dangerous. - Edmund Burke*

Van Greunen & Associates Inc.  
Directors



## LESSOR CAVEAT!

The Consumer Protection Act 68 of 2008 (hereafter the CPA) has a pervasive effect on nearly all aspects of business practice and private life. With regard to lease agreements, this article explores the impact of section 49 of the Act on how these contracts could be drafted.

The superscript of section 49 reads: "Notice required for certain terms and conditions" and subsections (1) and (2) follow thereafter:

- (1) Any notice to consumers or provision of a consumer agreement that purports to—
  - (a) limit in any way the risk or liability of the supplier or any other person;
  - (b) constitute an assumption of risk or liability by the consumer;
  - (c) impose an obligation on the consumer to indemnify the supplier or any other person for any cause; or
  - (d) be an acknowledgement of any fact by the consumer, must be drawn to the attention of the consumer in a manner and form that satisfies the formal requirements of subsections (3) to (5).
- (2) In addition to subsection (1), if a provision or notice concerns any activity or facility that is subject to any risk—
  - (a) of an unusual character or nature;
  - (b) the presence of which the consumer could not reasonably be expected to be aware or notice, or which an ordinarily alert consumer could not reasonably be expected to notice or contemplate in the circumstances; or
  - (c) that could result in serious injury or death, the supplier must specifically draw the fact, nature and potential effect of that risk to the attention of the consumer in a manner and form that satisfies the requirements of subsections (3) to (5), and the consumer must have assented to that provision or notice by signing or initialling the provision or otherwise acting in a manner consistent with acknowledgement of the notice, awareness of the risk and acceptance of the provision.

These provisions put the onus on the lessor to ensure that the lessee understands and accepts each clause in the agreement, especially those that deal with risk and liability. The first type of provision as sets out in subsection (1) is of a general kind and obliges the lessor to draw the attention of the lessee thereto in a manner specified in subsections (3) to (5). The second type of provisions deals with more serious or unusual risks and also obliges the lessor to do the same and provides that the lessee must sign or initial next to the provision to acknowledge awareness and acceptance of the risk.

The manner in which the lessee should be made aware of the provisions containing risk is generally described in subsections (3) to (5):

- (3) A provision, condition or notice contemplated in subsection (1) or (2) must be written in plain language, as described in section 22.
- (4) The fact, nature and effect of the provision or notice contemplated in subsection (1) must be drawn to the attention of the consumer—
  - (a) in a conspicuous manner and form that is likely to attract the attention of an ordinarily alert consumer, having regard to the circumstances; and
  - (b) before the earlier of the time at which the consumer—
    - (i) enters into the transaction or agreement, begins to engage in the activity, or enters or gains access to the facility; or
    - (ii) is required or expected to offer consideration for the transaction or agreement.
- (5) The consumer must be given an adequate opportunity in the circumstances to receive and comprehend the provision or notice as contemplated in subsection (1).

It is suggested that the drafter of a lease agreement should directly after the preamble to the lease provisions, insert a block box named **IMPORTANT NOTICE** in which the section 49(1) and (2) of the Act are pointed out specifically.

Example:

NOW THEREFORE IT IS HEREBY AGREED AS FOLLOWS:

### IMPORTANT NOTICE

**In terms of section 49 of Act 68 of 2008 the LESSEE'S attention is drawn to the following clauses in this lease that contain a limitation of the risk or liability of the LESSOR; or constitute an assumption of risk or liability by the LESSEE; or an indemnification of the LESSOR; or is an acknowledgement of a fact:**

- Clauses 2.2 to 2.5 regulating the LESSEE'S right to withhold rent in certain circumstances;
- The LESSEE'S liability for damages to the property in terms of clauses 3.2 to 3.4 and 6;
- The acknowledgment by the LESSEE relating to the state of the property on occupation in terms of clause 11 and proper delivery of the property on expiry of the lease in terms of clause 17;
- The indemnification of the LESSOR for death or injury of the LESSEE and other persons on the property in clause 12;
- The limitation of the LESSEE'S right to make improvements to the property in terms of clause 14;
- The non-variation clause requiring all amendments of the lease to be in writing in terms of clause 22.

All these, and for that matter all other provisions, should be discussed with the lessee to ensure that he/she understands the implications thereof and accept them. He/she should then initial or sign next to each of the bullet points provided in the box.

In line with the purpose of the CPA, the provisions of section 49 are to protect and assist the "innocent" and "vulnerable" consumer, but by complying with these provisions the supplier (the lessor) is also protected in the event of dispute and misfortune.

Should you require assistance in the drafting lease agreements, kindly contact us accordingly.

Dawid de Villiers  
(acknowledgment to Christo Smith, Nelspruit)

## CONSEQUENCE OF INSOLVENCY: SALE OF IMMOVABLE PROPERTY

- 1 In the previous article the effects and consequences of insolvency on an insolvent party was discussed. It often happens that a purchaser purchases an immovable property and the seller is sequestrated prior to the immovable property being transferred and registered in the name of the purchaser.
- 2 This article will shortly set out the consequences of the sale of an immovable property in the event of the seller being sequestrated.
- 3 The general principle, where immovable property is sold by a seller who is sequestrated prior to the purchaser taking transfer of the immovable property, is that the curator (on instructions from the creditors) has the election to transfer the immovable property to the said purchaser.
- 4 The purchaser does not have the right to claim transfer of the property, even in the event of having paid the full purchase price. He will be a concurrent claimant against the insolvent estate for the purchase price, alternatively a part thereof.
5. The effect will be that if there are not sufficient assets to pay the administration costs from the free residue of the estate, a purchaser who institutes a claim against the insolvent estate might be liable for payment of contribution.
- 6 In terms of Section 18 to 22 of the Alienation of Land Act, Act 68 of 1981 (as amended) the legislature has made an exception regarding the aforesaid in that a purchaser is protected against the insolvency of a seller if a sales agreement was entered into for the sale of the immovable property in terms whereof the sales price is payable in two or more instalments over a time period of more than one year.
- 7 Immovable property should be used as a residential property and must be able to be registered at the deeds office.
- 8 In the aforesaid event the curator and the creditors may not elect to repudiate the said agreement and a purchaser may require that the property be transferred.
- 9 The purchaser must however make payment of the full purchase price, transfer costs, etc.
- 10 Should the seller become insolvent, it is the duty of the curator to give notice to any purchaser who has entered into an instalment sales agreement for the sale of such immovable property, per registered past or personally.
- 11 In the event of the property being sold, the seller will have a preferent claim against the insolvent estate for the instalments already paid.
- 12 It must be specifically stated that in the event of an Instalment sales agreement, as referred to aforesaid and where the immovable property is not able to be registered (for example a property that is still being subdivided), the purchaser will not be a preferent claimant.
- 13 In terms of Section 35 of the Insolvency Act, Act 26 of 1936 (as amended) it is stated that the seller may in writing request the curator within a reasonable time period exercise his election.
- 14 Should the curator not exercise his election within 6 (six) weeks, the seller may bring an application in court for the contract to be cancelled.
- 15 In conclusion it must be stated that a purchaser of the immovable property will find themselves in a perilous situation where the seller is sequestrated as indicated aforesaid.
- 16 A purchaser must always make sure that the seller is not in the process of being sequestrated either voluntarily or by means of a compulsory sequestration, as same may have dire financial consequences for a purchaser.
- 17 In the event that the purchaser of an immovable property is sequestrated, prior to the registration and transfer of the property into his name, the curator has the election to proceed with the transaction, or not.

Innes Steenekamp  
Director



### SHARES IN COMPANIES

The Companies Act, Act 71 of 2008 (hereinafter referred to as "the 2008 Act") have substantial changes in the way shares will be dealt with in the future. Under the 2008 Act, a company will not be allowed to create new par value shares. However the Act allows a company that has issued par value shares before the effective date of the 2008 Act to issue further par value shares of the same class from the unissued shares of that class, after the effective date of the 2008 Act. This can only be done out of the unissued shares which were in existence before the effective date of the 2008 Act. Therefore, if a company wants to continue issuing par value shares but does not have sufficient shares of that class in reserve, it should have increased its authorised share capital before the effective date of the 2008 Act.

Companies must continue to keep records of shares in issue and the shareholders to whom those shares are issued. Under the old Act the emphasis was on this being a register of "members" and separate registers were thus required for shares, debentures and pledges, cessions etc. Under the 2008 Act, the register is referred to as a "securities register" and it appears that one register is required dealing with all "securities" in issue.

The 2008 Act requires that the register must be in the prescribed form and must be maintained in accordance with prescribed standards. It can be presumed that existing companies will be able to continue to keep their separate registers, but the 2008 Act is silent on this point.

The information required to be contained in the register, is set out in sections 50(2) and 51(5) of the Act. In particular, note that the securities register must state in relation to certificated securities, details of any securities:

- where transfer of those securities has been "restricted" >>



## **DOUBLE INSURANCE, OVER-INSURANCE, UNDER-INSURANCE AND REINSURANCE.....CONFUSE? SO AM I..**

The idea behind this article is to create a sense of clarity by explaining the difference in the terms as set out hereunder.

### **DOUBLE INSURANCE:**

The term simply means that the same interest is insured by or on behalf of the same insured against the same risk with two independent insurance. This would simply mean insuring your house contents at insurance Inc. X and insurance inc. Y.

The question which is begging to be answered is, may I, as an individual, be double insured? The answer naturally, yes you may but only in the event if the value or insured amount does not exceed the value of the interest which you are insuring.

The insurance company who pays out more than its proportionate share of the loss, has a right to contribution against each of the other insurers. When double insurance is applicable, most contracts of insurance will have a clause which will compel you to disclose all policies which are applicable at the time of the loss and as such, the insurer will be bound to pay the insured only its proportionate share of the loss.

The key of double insurance is to satisfy your need for security. Therefore only insure sufficiently to indemnify yourself against your risk. The most important factor which must always be borne in mind is the fact that an insurance contract is a contract of indemnity. Once you have been compensated in full, the insurer is indemnified.

The requirements for double insurance are set out hereunder:

1. Policies must overlap;
2. Policies relate to the same interest;
3. Policies relate to the same object of risk;
4. Policies must be in force at the same time.

The most important factor to remember, and to steer clear from any fraudulent conduct, would be to always inform both insurance companies of their respective existence towards each other.

### **OVER INSURANCE**

Over insurance incurs when the sum insured is more than is required to indemnify the insured fully in the event of a total loss. In simple words you cannot recover more than your loss.

Most, if not all insurance contracts have a limit to liability clause in the agreement protecting the insurer against the risk of over insurance. Naturally this is also used when assessing the premium.

### **UNDER INSURANCE**

The above occurs when the sum insured is less than the value of the value of the insured's interest.

The practical effect of under insurance is that when an insured suffers a loss, the insurer will only cover the amount insured or actual loss, whichever amount is the smaller.

### **REINSURANCE**

This is the situation where an insurance company will transfer the insured's risk under a contract of insurance whole or in part, to another insurer. The aforesaid may be explained simply by stating that the insurer cedes a risk. One must have cognisance of the fact that once the aforesaid has taken place, the first insurer will be later described as the reinsured and the insurer to whom the risk is ceded, the reinsurer.

Reinsurance is a comprehensive field governed by both the Long Term Insurance Act and Short Term Insurance Act. The Insolvency Act in terms of Section 156 also finds application in this term, however this is not discussed in this article and is merely mentioned for the sake of completeness.

Facultative reinsurance refers to a single risk being transferred. Any additional risks needs to be negotiated and may be rejected by the reinsurer.

Treaty reinsurance relates to when a reinsurer undertakes and is obliged to take over all or part of the former's risk in a particular category and specified period of time.

I trust the above sheds light on the terms with which we are confronted daily

Frik van Schalkwyk

<<

- *that have been placed in trust*

An appropriate numbering system distinguishing a company's shares, or each class of shares, and other securities, is only required if all the shares of a company do not rank equally for all purposes. However, even if equal ranking shares are not required to be numbered, each share certificate for those shares must be numbered. Upon the transfer of shares, the certificate must be endorsed with a number (or similar "device") in order to identify each preceding shareholder.

If a share certificate issued by a pre-existing company does not comply with the requirements in the 2008 Act, this does not constitute a contravention and does not invalidate that share certificate.

Ulrich Wilgenbus



## **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.

## **GUILTY: MANSLAUGHTER, CULPABLE HOMICIDE OR MURDER?**

*The media has proceeded to dump loads of information on the general public without fully explaining the factual position and is merely exhorting the public for thrills.*

*An incident occurred during September 2011 where a taxi driver was charged with attempted Murder when a taxi driver scratched a woman's, Miss Kim, vehicle. The woman got out of her vehicle in an attempt to discuss possible venues to resolve the incident at hand. During the attempted discussion the taxi driver knocked her over and the woman somehow got lodged under the vehicle and the taxi driver merely sped off, dragging her along for over a 200 meters.*

*In this case, the answer is simple. The act that was committed by the taxi driver is not one of assault with the intent to do grievous bodily harm but constitutes manslaughter bearing in mind the fact that the taxi driver sped off with the woman still caught under the taxi for such a long distance, despite various motorists indicating for him to slow down.*

*A further question which arises in the event that Miss Kim passes away is whether or not the taxi driver's intent was indeed death. The prosecutor will in all probability change the charge to one of murder. However, have cognisance of the fact that the state needs to then prove the element of intent. If the taxi driver caused the death of Miss Kim negligently, it will constitute manslaughter. If the state can prove that the taxi driver caused the death with intent, the charge will be one of murder.*

*The taxi driver's defence is that of self defence and should this version be true, he will not be convicted for either murder or manslaughter.*

*The taxi driver will however need to prove that he acted in self defence and that his retaliation was in the perimeters thereof and not out of its bounds. A simple example of a failed self defence claim would be when a person strikes you with an open hand and you retaliate by firing a shot from a fire arm to escape the harm. The retaliation needs to be in line with the attack. It may in certain circumstances be more than the attack but not ridiculously so.*

*I verily believe that the version of the accused will in all probability not stand at trial because the onus of proof lies upon him. There are many circumstances and up hill battles he needs to overcome.*

*Odette Fouche*



## **ANNUAL AUDITS**

*The New Companies Act law and its regulations, will exempt the vast majority of registered companies from an annual audit.*

*The long-awaited overhaul of the almost four-decade-old Companies Act has been plagued by chaos, sloppy drafting and clumsy regulations.*

*The reforms introduced in the new Companies Act will be so momentous that business owners would do well to familiarise themselves with the content regulations thereof.*

*These are some important features for owner-managed businesses:*

- *the majority of companies will not have to have their books audited annually*
- *Only listed and state-owned companies have to be audited, as well as those that hold money from the public, such as banks. This appears to include any business that offers lay-by facilities, irrespective of its size.*
- *The regulations introduced in the Companies Act and amongst other, the concept of an "independent review" of a company's books. This is not an audit as is known to many of us by an auditor. An independent review is quicker and a less expensive process*

*A few companies will have to submit to independent review however.*

*Exemptions*

1. *Companies with assets of less than R50-million and a turnover of less than R20-million a year must have annual financial statements compiled independently, but will not have to be independently reviewed.*

2. *The regulations provide for an ownership exemption. No independent review is necessary if the shareholders of a company, irrespective of its size, are also its directors.*

3. *Businesses part-owned by family trusts and other juristic persons are therefore one step closer to an annual independent review, but the R20-million turnover threshold is so high that the vast majority of companies are exempt.*

*The new Companies Act has an important effect on the relationship between business owners and their accountants. The new Company's Act stipulates that preparers of financial statements, whether they are employed by a business or hired from outside, will be personally liable for inaccuracies, and can be fined or even jailed. Accountants can therefore be expected to be more resilient in drafting interesting accounting reports*

*Existing companies will have a two-year transitional period to adopt a new memorandum of incorporation to replace their existing memorandum and articles of association.*

*In terms of the new act, shareholders' agreements may no longer be inconsistent with the company's memorandum of incorporation (as was the practice in terms of the old act), and accordingly, shareholders will have to amend their shareholders' agreements to align with the new Companies Act.*

*We envisage that this may open the door for renegotiations as the company's consent will be required. Do not delay and wait for the last minute – act immediately.*

*Johan van Greunen  
Director*

## BUYING A HOUSE

*"Caveat emptor" - Let the buyer beware! Seek legal advice before you sign any deed of sale or offer to buying a house.*

*Buying a house is probably the biggest and most important investment you will ever make.*

- *Examine the house thoroughly. Enquire about the roof, gutters, electrical wiring, foundation etc. Should you have any doubts at all, consult an expert to examine the house. Should there be any defects, make provisions in the deed of sale for either repairs by the seller at his cost or for the reduction in the purchase price.*
- *Before you sign a deed of sale, give the document to your attorney to examine. Ask about anything that is not clear.*
- *Enquire about any additional costs, such as rates and transfer costs - your attorney will have the answers. Ensure that your finances are sound. Should you need a bond, also make provision for the costs or valuation of the property and of registration - once again your attorney can tell you about this.*

*Furthermore, ensure that you can afford the monthly bond payment.*

- *If you are not certain whether you will be able to obtain a loan to provide for the purchase price and / or other costs, make the sale subject to the obtaining of a loan.*
- *Ensure that the deed of sale provides for the issue of a beetle free certificate at the expense of the seller in the Cape Province and Natal, and for a certificate of compliance in respect of the electrical installation.*
- *Does the seller require a deposit on the selling price? Should this be the case, arrange for payment thereof into the trust account of the relevant attorney for safekeeping in a special savings account pending transfer to your name. With the consent of both parties the attorney may invest these monies subject to the condition that the interest earned will be for your own account.*
- *Take note of the date of occupation in the deed of sale. Should you move in before the house is in your name, you would be expected to pay rent. Make sure who is responsible for the payment of taxes, levies and insurance premiums during this period. Should the sale fall through after you have moved in, you would naturally have to move out again with the consequential expense and inconvenience.*

*Stephan Venter*



### **Van Greunen & Associates Inc.**

**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**

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