

# 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:*

*Wishing you a Merry Christmas and  
a prosperous New Year!*

*We would like to take this opportunity  
to thank you for your continued  
support and wish to maintain our  
relationship in 2012.*

*Van Greunen & Associates Inc.*

*Directors*



## **NOTIFICATION OF BUSINESS RESCUE PROCEEDINGS TO AFFECTED PARTIES UNDER THE NEW COMPANIES ACT**

The philosophy behind the business rescue provisions in Chapter 6 of the new Companies Act is to give the distressed company "a breathing space" while affected parties work towards a rescue plan for the distressed company.

Section 129(2) of the Act provides that a Resolution, which are to be passed by the distressed company to begin business rescue proceedings, is of no effect until it has been filed with the Commission and further regulations stipulate that the notice of the resolution, and its effective date, should be published within 5 business days thereafter to every affected person (being shareholders, creditors, trade unions representing employees or employees if unrepresented) and should include a statement of the facts relevant to the grounds on which the board resolution was founded.

It is furthermore stated that a notice that is required to be given to any person can be given by direct electronic transmission to that person in a manner and form that such notice can conveniently be printed by the recipient within a reasonable time and at a reasonable cost or a notice of availability being delivered to each intended recipient with instructions for receiving the complete document, record or statement.

It is essential that there be absolute and strict compliance with the methods and time for delivery of documents subject to Regulation 7(2). As an example, delivery of a notice to a natural person can be by personal delivery, or leaving a certified copy of the document at the person's place of residence or the person's place of employment, then the date and time of deemed delivery is when the delivery was recorded.

Of great importance is that delivery to the Commission can be by entering the required information in the electronic representation of that form on the internet website (of the Commission) or transmitting the document as a separate file attached to an electronic mail message addressed to the Commission.

Most importantly, the method of delivery to a trade union is by handing a certified copy of the document to a responsible employee who is in charge of the main office of the union, or if no person is willing to accept service, by affixing a certified copy of the notice or document to the

main door of the union office. Notification to employees is by affixing the notice or certified copy of the document in a prominent place in the workplace where it can be easily read by employees and the date and time of deemed delivery is the date and time sworn to by affidavit of the person who affixed the document.

Where a company is placed under business rescue by the High Court of South Africa, the court may be asked to give directions on methods of service.

The regulations, say that in addition to delivering a copy of a court order to every affected person, it must conspicuously display a copy of the court order at the registered office of the company, on any website maintained by the company and accessible to affected persons, and if it is a listed company, on any electronic system maintained by the relevant exchange for communication and interchange of information.

The foregoing illustrates that the intention of the legislature was to ensure that all affected parties receive proper notification and that, if the notification is not properly given, the proceedings taken in contravention of the notification requirements, can be set aside.

However when the affected persons are a vast number and the process is costly and time consuming, it could be argued that a SENS announcement (Securities Exchange News Service) is sufficient enough given that this announcement gives the date of the hearing and sets out the relief sought and advises the readers that a copy of the application could be obtained from the attorneys.

Therefore ensure that you are well aware of the notifications, how and when same takes place and more specifically be sure that, if your company has resolved to business rescue proceedings that you obtain a copy of the registered resolution as submitted to the Companies and Intellectual Property Commission together with proof that same was published within 5 business days to every affected person.

Johan van Greunen  
Director

## **MONETARY LIMITATIONS IN THE MAGISTRATE COURT**

The rules relating to the limitations in the magistrate court are governed by rule 46 of Magistrate Court Act.

The two main limitations which I will discuss are shortly the following:

1. The monetary limitations that an amount of maximum R 300 000 – 00 (three hundred thousand rand) may be claimed in the Magistrate Regional Court;
2. That you may not issue summons for specific performance for a contract with out claiming damages in the alternative.

The Monetary value of the Magistrate court has now increased to R 300 000 – 00 (three hundred thousand rand) were it was, in the past only an amount of R 100 000 – 00 (one hundred thousand rand).

Other significant changes include the fact that divorces can now be adjudicated upon in the Regional Court of the magistrate court.

Historically divorces were reserved for the High Court only. One could ask why this change was only brought in recently and the answer is really a simple one, the influx of summons's that has been issued (between the monetary amount of R 100 000 – 00 and R300 000 – 00 (three hundred thousand rand)) and the extremely high divorce rate in South Africa is clogging up the High Court's roll tremendously where you could have waited up to 3 years for a trial date for a divorce.

There are significantly more Regional Magistrate courts available which help ease the burden of the High Court's role and are naturally, a more financial viable option as well.

The historic reason as to why the High Court had exclusive jurisdiction on divorces was based on the fact that the High Court was the only entity who could decide of a person's state meaning his authority to act and in what capacity would change his "locus standi" in the community simply put.

One has to ask one self again but why if a party enter into a contract, why can't I keep him to his terms and ask the court permission from them to do his part of the agreement. It would seem that the High Court once again has the sole authority to decide on the validity of an agreement should same be able to sustain itself in the law, the reason for this limitation is that the Law of contract is almost as old as time and the qualification for this argument seems to be that more senior judges decide upon the technicalities of an agreement as they have more experience.

This leaves a perfectly simple explanation for the reason why one can only asked for specific performance in the magistrate court with an alternative of damages, that should the contract not be enforceable same is cancelled and restitution should happen.

It is thus clear that the reason why these limitations are set in place is to protect the community's interest at large.

Frik van Schalkwyk

## **AN INTRODUCTION TO THE DIFFERENCE BETWEEN SHAREHOLDERS AND DIRECTORS**

By way of introduction, an artificial legal entity can act only through its human agents, i.e. its directors or officers. Although in many private companies the shareholders and directors are the same people.

The Companies Act, as amended gives no precise definition of the term 'director', merely stating that a director includes 'any person occupying the position of director or alternate director of a company, by whatever name he may be designated'. The term 'board' is the collective term used to designate the directors when they act together as a group.

The Act does however define a share as one of the units into which the proprietary interest in a profit company is divided; and a shareholder as the holder of a share issued by a company and who is entered as such in the certificated or uncertified securities register, as the case may be.

Whilst shareholders retain ultimate responsibility for the company and have the power to remove or not to re-appoint directors, they in effect delegate the day-to-day running of the company to the directors who in turn appoint and supervise management. The board of directors must manage the company within the limits of legislation and the memorandum of incorporation. Directors are the legally accountable custodians of the company who may be liable for penalties if they do not ensure the company's compliance with its legal obligations.

Directors have a fiduciary duty to the company as a whole and not to the members of that company individually, not even to a member who is a majority shareholder. The fiduciary duty is likewise not owed directly to creditors, employees or other shareholders of the company, although there is a range of circumstances in which a director may, by virtue of the neglect of his fiduciary duty to the company, be held personally liable.

In addition to a director's fiduciary duty, he has a duty to disclose any conflicts of interest and may never prefer his interest over that of the company. A director also has a duty of care and skill towards the company which he should perform all actions with regards to the company with the necessary skill and care.

Normally the powers and duties of directors are left undefined and it is implied that directors possess all powers necessary to enable them to direct the affairs of the company. The memorandum may limit these powers or specify particular duties, in which event these limitations must be strictly complied with.

Ulrich Wilgenbus



## **MARRIED IN COMMUNITY OF PROPERTY: DIVISION OF JOINT ESTATE**

It is a trite law that once two parties are married in community of property that a joint estate comes into existence.

The joint estate includes all assets, movable and immovable as well as liabilities. The aforesaid is also true for any assets be it movable, immovable or otherwise, which were owned by the parties separately prior to the marriage in community of property.

In the event of a divorce proceeding being instituted by either party, the joint estate must be divided and each party is entitled to half the assets, alternatively the value of the joint estate. The parties are also liable for the debts incurred, jointly and severally during the existence of the marriage as well as prior thereto.

An example of the aforesaid is where the parties applied for a bond to be registered in favour of a financial institution to purchase immovable property. The parties are then jointly and severally responsible for payment of the outstanding bond. In practice this means that any of the parties may be held liable for the total outstanding amount of the bond including interest and should legal proceedings be instituted by the financial institution, also the legal costs.

It often happens that during divorce proceedings that the parties cannot agree on the terms to divide the joint estate.

The parties often agree that a divorce order be made which, includes a provision that the joint estate be divided. Usually in practice the parties cannot agree on the division of the estate, subsequent to the divorce order.

In circumstances such as the aforesaid, a liquidator must be appointed to divide the joint estate.

A liquidator is a professional person, who is appointed upon application the High Court to give effect to the divorce order provision that a joint estate be divided.

The liquidator derives his powers from a court order and not from any act or statute.

The liquidator has broad powers which include

to realize the whole of the joint estate's assets, movable and immovable and sell them or any part by public auction or by private agreement which must be beneficial to both the parties, to collect debts due to the joint estate, to pay liabilities and to prepare a final account and divide the assets of the joint estate after payment of the liabilities in accordance with the account.

The liquidator may also:

- Investigate and obtain all information regarding the joint estate;
- To obtain balance sheets, books of accounts and inspect personal bank accounts, cheques paid;
- The liquidator is also empowered to locate assets of the joint estate, which is outside of the Republic of South-Africa;
- And effect any endorsement against any pensionable interest in terms of the Divorce Act, Act 70 of 1979;

It must also be stated that during the divorce proceedings the provisions regarding a liquidator may also be contained in a settlement agreement between the parties and the Court may also order same at the Courts own discretion.

Finally it must be stated that a liquidator is entitled to remuneration for the division of the joint estate in accordance with the provisions as provided for in the Insolvency Act.

The most obvious advantage of the liquidator being appointed is that the joint estate will be divided equally and fairly between the parties.

The disadvantage is however that the joint estate will be burdened by the costs of the application to have the liquidator appointed as well as his fees, which will reduce the value of the joint estate to be divided between the parties.

It is thus wise to when entering into a marriage relationship to once again consider drafting an ante-nuptial agreement which clearly states which assets belongs to the different parties and that there be no disputes regarding same when divorce proceedings commence.

Innes Steenekamp  
Director

## THE INTERACTION BETWEEN THE NCA AND THE CPA

We all know that the National Credit Act and the Consumer Protection Act are consumer-orientated.

The two acts have very much in common. But how can we distinguish between the two acts and their specific applications? A distinction that the NCA covers credit agreements and the CPA covers cash agreements is helpful, but is an extreme simplification.

The CPA deals with much more than agreements and prefers to speak of a "transaction" which is defined not only as an "agreement", but also as:

- (ii) the supply by that person of any goods to or at the direction of a consumer for consideration; or
- (iii) the performance by, or at the direction of, that person of any services for or at the direction of a consumer for consideration; or

The application of the CPA is wide and very comprehensive.

The basic purpose of both Acts is to protect consumers. Both Acts provide a list of "rights of the consumer", but the CPA is more extensive. It would be better to say that the two Acts cover different aspects of the consumer world. The NCA applies mainly to credit and the dilemma of debtors who struggle to pay. The law of contract plays a big role here. It introduces concepts like "reckless lending", "overindebtedness" and "debt review". The CPA play catch up and cover the rest of the field, e.g. franchises and lay-byes.

Agreements under both Acts should not be unlawful or unfair. The NCA's section 89 addresses unlawful credit agreements and section 90 unlawful provisions. The CPA in part G covers the right to fair, just and reasonable terms and conditions. Regulation 44 contains the so-called grey list of terms that are presumed to be unfair. Both Acts enforce fair marketing practices and proper disclosure.

A critical meeting point between the two acts we find in s 5(2)(d) of the CPA:

- (2) This Act does not apply to any transaction—
  - (d) that constitutes a credit agreement under the National Credit Act, but the goods or services that are the subject of the credit agreement are not excluded from the ambit of this Act;

The credit agreement as such may fall outside the ambit of the CPA, but not so the goods and services which the agreement "sells" on credit.

What are goods and services according to the CPA?

"goods" includes—

- (a) anything marketed for human consumption;
- (b) any tangible object not otherwise contemplated in paragraph (a), including

any medium on which anything is or may be written or encoded;

- (c) any literature, music, photograph, motion picture, game, information, data, software, code or other intangible product written or encoded on any medium, or a licence to use any such intangible product;

- (d) a legal interest in land or any other immovable property, other than an interest that falls within the definition of 'service' in this section; and

- (e) gas, water and electricity;

"service" includes, but is not limited to—

- (a) any work or undertaking performed by one person for the direct or indirect benefit of another;

- (d) the transportation of an individual or any goods;

- (e) the provision of—

- (i) any accommodation or sustenance;

- (ii) any entertainment or similar intangible product or access to any such entertainment or intangible product;

- (iii) access to any electronic communication infrastructure;

- (iv) access, or of a right of access, to an event or to any premises, activity or facility; or

- (v) access to or use of any premises or other property in terms of a rental;

- (f) a right of occupancy of, or power or privilege over or in connection with, any land or other immovable property, other than in terms of a rental; and

- (g) rights of a franchisee .... irrespective of whether the person promoting, offering or providing the services participates in, supervises or engages directly or indirectly in the service

Goods and services are the subject matter of a credit facility or credit transaction. The CPA (Part H) protects a consumer's right to fair value, good quality and safety with regard to the content matter of goods and services, irrespective of whether the agreement falls under the NCA or the CPA. The CPA deals extensively in part H with the following:

The terms "defect", "failure", "hazard", "unsafe" defined (s 53)

- Quality service (s 54)
- Safe and good quality goods (s 55)
- Implied warranty of quality (s 56)
- Warning regarding risks (s 58)
- Liability for damage caused by goods (s 61)

Let the credit provider beware – not only the agreement and the credit check of the debtor is important, but also the quality of the service or goods sold.

Dawid de Villiers

## EVICCTIONS ON REPO HOMES

The recent discussions relating to this topic has become heated and debated recently.

The situation is shortly the following, why can a bank or financial institution evict you once the home was reposed.

It is deemed that your legal basis to occupy your property is based on your bond application or agreement which provides you with a legal basis to occupy only if you keep your bond payments up to date.

Once your home has been reposed your legal basis is diminished and as such your status from legal occupation turns into an unlawful occupier based on the fact that your contract or agreement with the bank is cancelled.

It is deemed that the financial institution will be the lawful owner of the property until you pay the last bond payment, the bond acts as a notarieel bond and your home as the security once the bond is not paid the security is called up and you will in essence lose your home and your right to occupy same.

As such this is a simple situation based on security and contracts and your status will be affected due to non performance.

Odette Fouche



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