

# Van Greunen & Associates Inc.

Monthly Newsletter

Issue 2 – February 2012



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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 with pleasure that we provide you with our monthly newsletter bearing 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:

*To believe in a just law of cause and effect, carrying with it a punishment or a reward, is to believe in righteousness. - Ernest Holmes*

Van Greunen & Associates Inc.  
Directors



## DISPOSITIONS AFTER WINDING UP WHAT CAN A LIQUIDATOR CLAIM?

*It often further happens that a debtor makes a payment when it is financially distressed.*

*The creditor is often not aware that the company or close corporation from whom it is receiving funds, is financially distressed, thus unable to pay its debts and that a liquidation application has been launched against the company or close corporation.*

*To consider the effect of a liquidation for such a creditor the following case study will illustrate the effect and risk:*

1. On 1 March a liquidation application against A (Pty) Ltd is issued, based on the fact that A (Pty) Ltd is unable to pay its debts.
2. On 1 April a person or legal entity (hereinafter referred to as B), is paid by A (Pty) Limited or Close Corporation.
3. On 1 May a liquidation order is granted by the Court

*The "previous" Companies Act, Act 61 of 1973 (as amended) and the "new" Companies Act, Act 71 of 2008 contain the following provisions relating to the aforesaid case study:*

1. Section 341:
- (2) **Every disposition of its property (including rights of action) by any company being wound-up and unable to pay its debts made after the commencement of the winding up, shall be void unless the Court otherwise orders.**

2. Section 348: Commencement of winding-up by Court:

*A winding-up of a company by the Court shall be deemed to commence at the time of the presentation to the Court of the application for the winding up.*

*As indicated in the case studies, the liquidation application is issued and therefore the date of liquidation is deemed to be 1 March in terms of section 348, even though the liquidation order is only granted on 1 May.*

*In the case study, the payment is made to the creditor of the liquidated company on 1 April.*

*In terms of Section 341(2), the disposition of made to the creditor of A (Pty) Ltd after the commencement of the winding up, as referred to aforesaid, shall be **void** unless the Court otherwise orders.*

*In terms of the aforesaid provisions of the "previous" Companies Act, which is also incorporated in the "new" Companies Act, Act 71 of 2008, the payment made by A (Pty) Ltd to B, is void and as such, the liquidator may bring an application, alternatively institute an action that the disposition / payment be "returned" to the insolvent estate.*

*In conclusion, due care should be taken to ascertain if a debtor has a pending liquidation application against it, when payment is received, or settlements are negotiated, as a creditor might find itself in a precarious situation whereby the payment will be considered to be void and will be reclaimed by the liquidator.*

Innes Steenekamp  
Director

## PARENTAL PLANS

Sections 33 and 34 of the Children's Act 38 of 2005 came into operation on 1 April 2010.

*The Act does not provide a definition of a parenting plan. However, looking at the provisions of the Act and its Regulations dealing with parenting plans, one could define it as a written agreement between co-holders regarding parental responsibilities and rights.*

*The contents of parenting plans can vary, however according to section 33(3) of the Act:*

- a parenting plan may determine any matter in connection with parental responsibilities and rights,
- including, where and with whom the child is to live;
- the maintenance of the child;
- contact between the child and any of the parties;
- and any other person;
- the schooling and religious upbringing of the child.

*It should be taken into account that a Parental Plan must be in writing, dated and signed by both parents. A parental plan must be made free from any threats, pressure or intimidation.*

*Although the parental plan you make with the other parent is not in itself legally enforceable, you may either register the parental plan with a Family Advocate or you can go to the High Court at any time to make the parental plan an order of court.*

*The court will have to consider the terms of the most recent parenting plan when making a parenting order in relation to your children. The Court would not blindly make a parental plan an Order of Court, but would first need to be convinced that it is in the child's best interests.*

*The advantage of making a Parental an order of Court is that it forces all parties to comply with it or they would be in contempt of Court.*

*There for should you be a parent who has conflict regarding the right and responsibilities of his/her children, considering to acquire a parental plan is the wiser option to protect one's rights as well as the interest of your children.*

*The question which may be posed is what is better, having the parenting plan registered with the Family Advocate or made an Order of Court? In our view an Order of Court will be a wiser option for mandatory parenting plans as this will force all parties to comply with it or they would be in contempt of Court.*

Odette Fouche



## CESSIONS, WHAT ARE THEY?

In the modern business environment, people transact with each other on a daily basis and more often or not these transactions are made and subject to some form of security. An example of such security is a cession. A cession is a bilateral act by which an incorporeal right is transferred from a cedent (the debtor) to a cessionary (the creditor). There are two types of cessions to choose from namely:

- an out-and-out cession in terms of which the ceded right is transferred completely by the cedent to the cessionary and the cessionary is obliged to re-cede the right back to the cedent if the secured debt is discharged.
- a cession in securitatem debiti in terms of which the cedent retains a reversionary interest in the ceded right so that the ceded right automatically reverts to the cedent to the extent that the secured debt is paid by the debtor.

When discussing cession, two aspects immediately come to mind, namely, the successful transfer of the right, and ownership. It is of the utmost importance that a deed of cession clearly defines the intended type of cession, the rights to be transferred and the performance in terms of the agreement. The courts have found that if the intention of the parties is not clearly defined in the deed of cession, the courts will assume that the parties intended to only enter into a cession in securitatem debiti. This can be detrimental to the security held by a creditor, as it has a severe impact on ownership.

The deed of cession must also clearly provide for the transfer of the right. The courts have found that the words “cedes, transfers and

assigns” is sufficient to effectively transfer the rights to the cessionary.

A cession in securitatem debiti can also entail a cession of a debtor’s entire book debt. This means that a cedent cedes all rights, title and interest in any claims which it may have against its book debtors, effectively transferring its right to claim performance from a third party to the cessionary.

In respect of ownership, a cession in securitatem debiti ownership is transferred to the cessionary but **automatically** reverts back to the cedent once the debt has been settled. True ownership is therefore only transferred by an out-and-out cession. This would be the case when a cedent delivers share certificates together with a signed transfer documentation to the cessionary. In South African law it can be argued that a cession in securitatem debiti of an incorporeal right is similar to a pledge of a corporeal thing.

In the case of an out-and-out cession, the parties can draft the cession on which is superimposed an undertaking that the cessionary will re-cede the security to the cedent on satisfaction of the secured debt.

When a cedent fails to perform in terms of a cession, the cessionary will be entitled to, in the case of a cession in securitatem debiti, to take ownership of the incorporeal right in order to recover any outstanding amounts due to the cessionary by the cedent.

In the case of an out-and-out cession, the ownership is already vested in the cessionary. For argument sake, the cessionary may then realise the shares transferred in accordance with the out-and-out cession.

## RETRENCHMENT – BE CAREFUL!

The need often arise for an employers to retrench employees – for various reasons. Sometimes retrenchment is taken as a supposedly handy tool. But beware: there are many potholes on the way.

Importantly, the reason for retrenchment must be valid. According to the Labour Relations Act 66 of 1995 employees can be retrenched only for operational requirements, that is: changing economic, technological, structural or similar needs of the employers.

This road should not be used to rid an employee who underachieves, has chronic illnesses or just one you do not like.

Say for example, the employer has lost a big contract and has to reduce its’ staff the following procedure should be followed:

1. Wide consultation as prescribed;
2. The employer must issue a written notice inviting the other party or parties to consult and he must disclose certain basic information, e.g. the reasons, alternatives considered, severance pay proposed, assistance to find other jobs, possible re-employment, etc.
3. The parties should meet and try to reach consensus on appropriate measures to avoid dismissal, minimize the number of dismissals, change the timing, mitigate adverse effects, the method used to select the employees, the amount of severance pay.
4. The employer must allow the other parties to make representations and respond fully to these suggestions.

Only after this process has been concluded, the employer can retrench the employees in writing, setting out all the details and implications.

Since this exercise can be very complex, it is suggested that a legal consultant should be involved from the start and possibly lead the negotiations. To prevent bad blood, the employer must keep a low profile and the consultant should act as a facilitator, rather than representative.

Employers: do not abuse retrenchment. Play safe, according to the rules.

Dawid de Villiers

## GOVERNMENT PROCUREMENT

Statutory juristic persons and organs of state has in terms of the Public Finance Management Act, a supply chain management policy that requires that the procurement and tendering should be fair, equitable, transparent, competitive and cost effective.

However, it is not obliged to comply with its supply policy in the circumstances as set out in Regulation 16 A 6.4 which provides that:

- (i) If in a specific case it is impractical to invite competitive bids, the accounting officer or accounting authority may procure the required goods or services by other means, provided that the reasons for deviating from inviting competitive bids must be recorded and approved by the accounting officer or accounting authority.
- (ii) an accounting officer or the chief executive officer to deviate from a competitive process subject to conditions. First, there must be rational reasons for the decision. This is a material requirement. Second, the reasons have to be recorded. That is a formal requirement.

State organs are as far as finances are concerned, first of all accountable to the National Treasury for their actions. The provision of reasons in writing ensures that Treasury is informed of whatever

considerations were taken into account in choosing a particular source and of dispensing with a competitive procurement process. This enables Treasury to determine whether there has been any financial misconduct and, if so, to take the necessary steps.

It has been recently held that there is no indication that the regulations contemplate that the requirement of recording was mandatory or material or was introduced for the sake of the public and not only for the sake of good financial government, or that collateral attacks on rational decisions bona fide taken were contemplated as a possible remedy.

It further held that no "nietigheidsbedoeling" could be found lurking in the regulations or in the Act.

Competitive bidders in the commercial sphere should therefore be careful when considering moving or exercising any recourse for failure to obtain or failure to allow it to compete in competitive bids with any organ of state.

Johan van Greunen  
Director

## ANIMALS AND LEGAL SUBJECTIVITY

South Africa as a multicultural developing country has a wide variety of religions, traditions and customs. Many of these rituals involve the slaughter of animals in an inhumane manner. It should be taken into account the fact that communities will differ from one another and it will ultimately have an impact on the decision of the lawmaking.

The question therefore arises whether animals should be granted with legal subjectivity and whether the South African community would be ready for the full implication of legal administration to animal handling.

It should be borne in mind that the impact of the granting of legal subjectivity to animals will have legislative complexity seeing that various institutions such as abattoirs, the culling of animals, where overcrowding has an adverse impact on the environment, and the use of animals for various cultural traditions will be adjusted.

Under the current South African law, animals are considered to be property and not as non legal subjects. The South African legal system allows for the protection and the overall welfare of animals as contained in two laws, namely, the Animal

Protection Act 71 of 1962 and the Performing Animals Protection Act 24 of 1935.

Even though the legislation is comprehensive and the objective is to preserve and protect animals, gaps still exist in respect of criminal liability and sentencing of individuals who violate the laws.

In this instance it is important to make a distinction between the welfare of animals and the rights of animals. The aim of giving animals rights are set out to take away the objective status and to give animals the same rights and dignity as human beings.

This means that an animal will be put on the same status as humans and that its rights will be protected by law such as the bill of Human Rights. The aim of welfare is to improve the circumstances under which animals live.

The protection of animals is very important and together with organisations such as Animal Rights Africa we can improve their living circumstances.

Theo van Niekerk



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.

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