

# 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 time to once again 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

## THE SOLVENCY AND LIQUIDITY TEST, CERTAIN DO'S AND DONT'S

In keeping with the principles of accountability, transparency and good corporate governance, the Companies Act, Act 71 Of 2008 (hereinafter referred to as "the Act") introduced what is known as the Solvency and Liquidity Test. The test as contained in section 4 of the Act, has been introduced to avoid a company trading recklessly in insolvent circumstances by requiring that a company is both liquid (able to pay its debts as and when they become due) and solvent (the fairly valued assets of the company equalling and/or exceeding the liabilities of the company).

The test requires that the business is both solvent and liquid in the ordinary course of business for a period of 12 months after the test is applied and must be utilised in the following circumstances:

- financial assistance for the subscription of securities in accordance with section 44;
- loans or other financial assistance to directors, subsidiaries and holding companies in accordance with section 45;
- dividend payouts to shareholders in accordance with section 46;
- capitalization of shares in accordance with section 47;
- company or a subsidiary acquiring company's shares (buy backs or buy-ins) in accordance with section 48; and
- amalgamations or mergers in accordance with section 113.

Directors are required by the Act to ensure that following any of these transactions, the company would satisfy the solvency and liquidity test. It is clear that the test also includes common transactions such as dividend payments and inter-group lending.

As such, in addition to acting in good faith and the best interests of the company, directors have a duty to ensure, considering all reasonably foreseeable financial circumstances of the company at the time, that after the proposed transaction:

- The assets (fairly valued) of the company must exceed liabilities (this would include all reasonably

foreseeable contingent assets and liabilities);

- The company will be able to pay its debts as they become due in the ordinary course of business for a period of 12 months.

In light of the provisions contained in Section 4 of the Act, directors must be prudent when considering embarking on any new business ventures on behalf of the company.

Reckless trading under insolvent circumstances may result in the directors of the company being held personally liable for loss or damages suffered. Section 218 (2) of the Act specifically provides that any person who contravenes any provision of the Act, could be held liable to any other person for any loss or damages suffered as a result of such a contravention.

A director can therefore be held personally liable for any damages or loss suffered by the company while trading under insolvent circumstances should the solvency and liquidity test not be applied thoroughly. A director can also be held liable by any third party who has had dealings with the company under such circumstances and suffered a loss as a result of the director's actions.

A director will therefore be personally liable for loss, damage or costs sustained by the company as a direct or indirect consequence of his or her actions if he or she:

- Was present at the meeting where the resolution was considered or participated in the decision; and
- Failed to vote against the resolution despite knowing that it was inconsistent with the requirements of the Act or the company's memorandum of incorporation or the director did not responsibly consider its impact, which will include the any transactions entered into by the company when it was not in a position of solvency and liquidity.

Agreements entered into by the company with third parties can also be declared void by a competent court. It is therefore advisable that credit providers of companies update their credit policies to obtain a solvency and liquidity declaration before credit is approved.

## THE ENFORCEMENT OF THE SURETY "IN BUSINESS RESCUE"

Section 133 (2) of the New Companies Act states: "During business rescue proceedings a guarantee or surety by a company in favour of any other person may not be enforced by any person against the company, except with the leave of the court and in accordance with any terms the court considers just and equitable in the circumstances."

In a recent judgement the Defendant which stood surety for and on behalf of the company which subsequently filed for business rescue proceedings avert that during the business rescue proceedings, the suretyship could not be enforced by the creditor without the court's leave. The court found that on the plain wording of the Section it deals only with sureties and guarantees by the company - it is not to be interpreted as releasing persons who stood surety for the company in business rescue.

Section 133 (1) places a general moratorium on further legal proceedings. In the recent judgement in the Western Cape, the Defendant argued that as a surety he was entitled to raise the defence that the statutory moratorium in favour of the company in business rescue, a creditor is unable to proceed against the company in business rescue, so to should it be precluded from being able to proceed against the surety.

The court however found that the argument that the statutory moratorium in favour of the company in business rescue is a defence in personam for the company and not a defence is available for the surety which stands separate from the company. Accordingly the business rescue moratorium does not avail the surety and the creditor may accordingly proceed against it.

The surety raised the fact that a business rescue plan may in due course compromise the principal debt to a lesser amount than what he was presently being sued for as surety. The court found that even if the Defendant alleged that a reasonable possibility existed that the business rescue plan may result in a lesser claim, this would still not disclose a defence on behalf of the surety. The surety would have recourse against the company in due course.

The court acknowledged that whereas a business rescue plan provides that the company in business rescue may be liberated in whole or in part from its debts, a creditor may indeed lose or have reduced its claim against the company and may therefore lose its right to enforce its claim, in whole or in part. Consequently the surety would not be liable to the creditor for more than so much of the claim that survives the implementation of the business rescue plan.

No clarity was however established on the issue as to whether a creditor may force the surety to make payment of the full pre-business rescue indebtedness or the outstanding amount as agreed during post-business rescue negotiations.



## THE NATIONAL CREDIT ACT AND A NATURAL PERSON AS CREDIT PROVIDER

Farmer A sells his farm to farmer B for R 1,5 Million Rands. The terms of the purchase agreement stipulate that the purchaser pays the price in three equal instalments over two years. Interest of 10% will be added. The purchaser pays the first instalment, but fails to honour the second. When the seller holds the purchaser to his terms, the latter says he does not have to pay, since the seller is not registered as a credit provider. The seller is upset.

The National Credit Act determines in Section 40:

- (1) A person must apply to be registered as a credit provider if-
  - (a) that person, alone or in conjunction with any associated person, is the credit provider under at least 100 credit agreements, other than incidental credit agreements; or
  - (b) the total principal debt owed to that credit provider under all outstanding credit agreements, other than incidental credit agreements, exceeds the threshold prescribed in terms of section 42(1), which is presently R 500 000,00.

The seller in our example above did not know of this provision, but in terms of the law he should have been registered, depending if a credit agreement is at stake. A credit transaction is normally when payment is deferred and a charge like interest is paid, as is the case in our example.

What are the implications if farmer A (the seller) is not registered as a credit provider? Section 40 also deals with this:

- (4) A credit agreement entered into by a credit provider who is required to be registered in terms of subsection (1) but who is not so registered is an unlawful agreement and void .....

Section 89 is clear about unlawful credit agreements:

- (5) If a credit agreement is unlawful in terms of this section, despite any provision of common law, any other legislation or any provision of an agreement to the contrary, a court must order that-
  - (a) the credit agreement is void as from the date the agreement was entered into;
  - (b) .....
  - (c) all the purported rights of the credit provider under that credit agreement to recover any money paid or goods delivered to, or on behalf of, the consumer in terms of that agreement are either-
    - (i) cancelled, unless the court concludes that doing so in the circumstances would unjustly enrich the consumer; or
    - (ii) forfeit to the State, if the court concludes that cancelling those rights in the circumstances would unjustly enrich the consumer.

This does not mean that the seller automatically loses his farm. What can happen is that the transaction is reversed and the positions of the parties are restored as it was before. This may imply a registration of transfer back to the original owner. The court will have to decide who pays the costs of the defunct agreement and the effective damages sustained by it.

Therefore a word of advice to all potential creditors - Make sure of your credit provider status and play safe, and you will not be sorry later.

## CHANGE OF MATRIMONIAL PROPERTY REGIME

In the South African law, a person is either married in community or out of community, with or without the accrual system being applicable.

In order to be married out of community of property, be it with or without the accrual system being applicable, an anti-nuptial agreement must be executed prior to the marriage being entered into.

It is often that parties marry in community of property, thus without an anti-nuptial agreement and only later realise the implications of such a marriage, being that a joint estate comes into existence after the marriage where all assets and liabilities are shared equally between the parties.

The only relief which is available to such parties, is to approach the High Court with an application in terms of Section 21(1) of the Matrimonial Property Act, Act 88 of 1984 in terms whereof the Court is requested to grant leave to change the matrimonial property system and to execute and register an anti-nuptial agreement subsequent to the marriage being entered into.

The aforesaid application is a comprehensive application brought in the High Court and has various requirements including but not limited to the following:

- Comprehensive reasons should be furnished for the decision to change the matrimonial property regime;
- Advertisements should be placed;
- Notice should be given to all creditors and a report received from all the Deeds Offices in which jurisdiction the joint estate of the parties owns immovable property.

Once all the requirements as set out aforesaid have been complied with, a court still has a discretion to grant the said application.

In conclusion, legal advice regarding the various matrimonial property regimes should be sought prior to entering into a marriage and to make a correct decision regarding the advantages and disadvantages of a matrimonial property regime.

A further consideration is that the parties cannot consider a divorce and conclude a "new marriage" as a person must testify under oath before a Judge that the marriage relationship has irrevocably broken down.

An ante-nuptial agreement should be executed and registered timeously to avoid a later application.



## WARRANTS OF EXECUTION AGAINST IMMOVABLE PROPERTY

Immovable property is probably the most valuable asset you will ever own which, as a result, is the most sufficient asset for creditor's to attach in settling a debtor's outstanding debts.

Where either the Court or the Registrar declared the immovable property of the judgment debtor executable and that specific property is the 'primary residence' of the judgment debtor, a writ shall not be issued unless the Court has considered 'all the relevant circumstances'. 'Primary residence' is the same notion as the 'home of a person'. Where execution is authorised against a holiday home or second dwelling of the judgment debtor the application of the rule is not usually triggered.

Judgment debtor refers to an individual i.e., a person. Thus it applies to the primary residence owned by a person. A close corporation, company or trust owning immovable property, of which the member, shareholder or beneficiary is the beneficial resident, is not protected. This applies even if the immovable property is the member's, shareholder's or beneficiary's only residence.

### Process of issuing a warrant of execution

The judgment creditor after acquiring the court's judgment, will implement the said judgment by submitting an application for a warrant of execution against movable property, that empowers the sheriff to attach cars, furniture etc. Where the attached movable property does not satisfy the debt, the judgment creditor may apply for a warrant of execution to be issued against immovable property.

It is not possible to provide a list of circumstances that might be enough to sway a court to refuse a writ of execution. Such circumstances would usually consist of factors that would render enforcement of the judgment debt an abuse of the process, which a court is obliged to avoid.

The judgment creditor's conduct need not be willfully dishonest or vexatious to constitute an abuse.

The consequences of intended writs against hypothecated properties, although bona fide, may however be unfair because the judgment debtor may lose his home while alternative modes of satisfying the creditors demand might exist that would not cause any significant prejudice to the creditor.

Warrants of execution against immovable property will only be issued when the following elements have been considered by court:

- whether the property is the debtor's primary residence;
- circumstances under which the debt was incurred;
- the amount of the arrears outstanding;
- debtor's payment history;
- financial strength of the creditor and debtor;
- prejudice the creditor may suffer if execution is refused by court against prejudice suffered by debtor if execution is granted;
- notice in terms of section 129 of the National Credit Act 34 of 2005 was sent to the debtor prior to institution of action;
- whether or not the property was required by means of state subsidy;
- whether the property is occupied and if occupied, is it occupied by debtor;
- position of the debtor's dependents and other occupants of the house;
- whether the property is occupied and whether it is used for residential or commercial purposes;
- where the debt in question was incurred as a result of requiring the property.

## DIES NON

In law "dies non" is a day on which no legal business may be transacted.

The attention of practitioners and litigants is drawn to the fact that the rules of the High Court make provision for certain dies non, meaning "non-days", mostly comprising the period between Conciliation Day and New Year.

No summons, notices or other process shall be served on a dies non, or on a public holiday, or between the hours of six in the evening and six in the morning, except in case of urgency, with the leave of the court. In the Magistrate Court a public holiday shall be counted in any computation of time required by these rules, unless any such day shall be the last of such time, in which case it shall be excluded from such computation.

The period allowed for the lodging of applications, responding affidavits and other documents continue to run throughout the year, except for dies non days when it is interrupted. In exceptional cases, a request for relaxation can be granted and an application for condonation is essential in all cases of non-compliance.



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