

Corporate and Commercial Department Flyer: July 2008

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1. NEW TAX LEGISLATION MAY RESULT IN MORE TRANSACTIONS BEING REPORTED TO SARS

With effect from 1 April 2008, the new income tax legislation relating to "Reportable Arrangements" contained in Part IIB of the Income Tax Act 58 of 1962 ("the Act") became effective.

Part IIB introduced tougher anti tax avoidance legislation intending to provide the South African Revenue Service ("SARS") with an "early alert system" where companies, trusts, and now "promoters" are required to report certain types of arrangements to SARS in advance.


Previously, section 76A imposed similar reporting requirements on companies and trusts, but with effect from 1 April 2008, this has been repealed.

In comparing the old reporting requirements with the new, it is apparent that the new legislation has a wider scope and that more arrangements will have to be reported to SARS. Some of the main differences are noted below:

- Previously only companies and trusts were required to report certain types of arrangements to SARS. The new sections require that companies, trusts and "promoters" are liable for the reporting of arrangements. A "promoter" means any person (in relation to a reportable arrangement) who is principally responsible for organising, designing, selling, financing or managing that arrangement.
- Previously companies and trusts that *willfully and recklessly* did not report arrangements to SARS, were liable to a penalty (over and above the normal tax liability) which was equal to the amount of the tax benefit created by the particular arrangement. Now, where companies, trusts or promoters merely fail to report an arrangement, they will be liable for a penalty of R1 million, although SARS has the discretion to reduce this penalty.

Previously, the characteristics of "reportable arrangements" were limited. Now, any arrangement that will, might or may assumably result in a tax benefit must be reported if it:

- contains provisions in terms of which the calculation of interest (S24J), finance costs, fees or any other charges are wholly or partly on the assumption relating to the tax treatment of that arrangement;
- discloses characteristics of round-trip financing, creates accommodating or tax indifferent parties or has elements in the transaction that create offsetting or cancelling;
- will be disclosed by any participant as giving rise to a financial liability for purposes of Generally Accepted Accounting Practice but not for purposes of the Act;
- does not result in a reasonable expectation of a pre-tax profit for any participant; or
- is in a reasonable expectation of a pre-tax profit for any participant that is less than the value of that tax benefit to that participant if both are discounted to a present value.



If a promoter is a party to an arrangement, it must report the arrangement to SARS. However, in the event that there is no promoter or if the promoter is not a resident, all the other parties must report the arrangement to SARS.

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2. IMPORTING IMPLIED TERMS INTO AN AGREEMENT

An implied or tacit term is an unexpressed provision of a contract which is derived from the common intention of the parties, the express terms of the contract and the surrounding circumstances.

In the case of Nedcor Bank Ltd v SDR Investment Holdings Co (Pty) Ltd (274/07) [2008] ZASCA 11 (20 March 2008), the Court had to determine whether implied or tacit terms that were in conflict with valid and express provisions of the agreement could be imported into the agreement.

The claims arose from a public auction conducted by the appellant, Nedbank at which three adjacent wine farms situated in the Stellenboch area, belonging to the respondents, were sold.

Nedbank lent the respondents money, which was secured by two mortgage bonds registered over the three wine farms. After failing to pay, the appellant instituted action to recover its debt and launched liquidation proceedings against the respondents. On 14 November 2001, the parties entered into an agreement that postponed the liquidation proceedings, and the Court made such agreement an order of the Court.

After the respondents had been granted a number of indulgences by Nedbank, they failed to settle the debt, and Nedbank auctioned the three properties collectively for an amount of R31 000 000.

The respondents claimed damages from Nedbank on the basis that it had breached the implied or tacit terms of the agreement by not accepting a bid for R30 000 000, by not auctioning the three farms separately and, by accepting the highest bid of R31 000 000 that same afternoon.

The Court found that an implied or tacit term is not normally implied if it is in conflict with the express provisions of the contract. Terms are often implied by law in cases where it is clear that the parties would have agreed to incorporate them in their contract. Implied terms will not be applied if they are validly excluded by the contract itself.

Every breach that Nedbank was accused of, it was entitled to take in terms of the express provisions of the agreement. Furthermore, Nedbank had agreed to indulge the respondents to settle their debt before auctioning the properties, which they failed to do.

In any event, it was held that the agreement imposed no duty on Nedbank to delay acceptance of the bid, as alleged by the respondents, in fact, it entitled the appellant to accept the bid at any stage within the 14 day period, including the afternoon of the auction.

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3. CONSTITUTIONAL COURT RULES ON BUILDING PLAN APPROVAL

A far reaching judgment concerning the manner of approval of building plans by a local authority was handed down by the Constitutional Court on 13 June 2008, which has great importance in the town planning and development environment throughout the country.

In the matter of Walele v City of Cape Town and Others [2008] ZACCII, the central issue was whether the City properly approved building plans submitted by the respondents, in terms of which they sought to erect on their property, a four storey block of flats in Walmer Estates, Woodstock, Cape Town. The applicant, Mr Walele owns the residential property adjacent to the property owned by the respondents on which the flats are to be erected, and had applied to the High Court to set aside the decision by the City of Cape Town to approve the building plans for the flats.

The dispute is one between neighbours and the need to strike the right balance between the landowners right to erect a building of choice on his or her land, and the rights of owners of neighbouring properties.


The Constitutional Court set aside the judgment and order of the Cape High Court, in which that Court dismissed the review application instituted by Mr Walele where he submitted that the erection of the flats would devalue his property.

Mr Walele raised numerous objections to the City's approval of the plans, primarily that the City had failed to comply with the mandatory conditions contained in sections 6 and 7 of the National Building Regulations and Building Standard Act 103 of 1977 ("the Building Standards Act"). He also argued that the decision-maker of the City had not considered the effect that the erection of the flats would have on his property which violated his right to property protected by section 25 of the Constitution and that the City had violated his constitutional right to procedural fairness by failing to afford him a hearing prior to the approval of the plans.

The respondents and the Amicus Curiae, the City of Johannesburg, argued that Mr Walele was not entitled to a hearing in relation to building plans of his neighbour and that the City had complied with the Building Standards Act. The High Court dismissed Walele's claims and his petition to the Supreme Court of Appeal was also unsuccessful. He then applied to the Constitutional Court for leave to appeal.

In a 6-5 split decision of the Constitutional Court, it was held that the City had failed to comply with mandatory procedural requirements contained in the Building Standards Act when read together with Promotion of Administrative Justice Act 3 of 2000 ("PAJA"). In balancing a landowner's right of ownership with the rights of the owners of neighboring properties, it was held that the decision-maker must independently apply his or her mind to the question of whether building plans should be approved. The purpose of the recommendation by the Building Control Officer under section 7 of the Building Standards Act is to furnish the decision-maker with grounds for the Officer's opinion. The mere endorsement and signature by the Building Control Officer did not, therefore, constitute a recommendation as contemplated in the Act and did not provide a sufficient basis for the independent decision required of the decision-maker.

It appeared from the facts that the few documents that were submitted to the decision-maker could not reasonably have satisfied the decision-maker that none of the disqualifying factors in section 7(1)(b)(ii) of the Building Standards Act would be triggered. The documents provided were held to fall far short as a basis for forming a rational opinion and that there was no evidence that certain critical information of the Building Control Officer was communicated to the decision-maker.



The court held that Building Control Officers must ensure that adequate information is placed before decision-makers so that they can consider applications for approval of building plans properly and in a balanced way.

The court granted leave to appeal to Mr Walele, upheld the appeal with costs and set aside the City of Cape Town's decision to approve the plans and remitted the matter back to the City for a new consideration of the matter.

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4. CAR DEALERSHIP RESPONSIBLE FOR A CAR STOLEN FROM ITS PREMISES DESPITE EXEMPTION CLAUSES

Kerr AJ states that "In our law, there is a sound principle that a man, when he signs a contract, is taken to be bound by the ordinary meaning and effect of the words which appear over his signature."

In the case of Mercurius Motors v Lopez (149/2007) [2008] ZASCA 22 (27 March 2008), the Court had to decide whether a motor service depot which failed to safeguard the keys to a vehicle on its premises could rely on exemption clauses for the loss of the vehicle.

Mr Lopez left his vehicle at a service depot, belonging to the applicant, Mercurius Motors, for it to be serviced, for minor repairs to be effected and for the installation of spotlights. That evening, the depot was broken into and the vehicle was stolen.

Despite the vehicle being fitted with a satellite tracking device, the vehicle could not be traced and Mr Lopez instituted action against Mercurius Motors based on the contract of deposit, claiming damages for the loss of the vehicle.

Mercurius Motors relied on exemption clauses in its agreement with Lopez and denied that the loss of the vehicle was due to any negligence on its part.


On appeal, Mercurius Motors outlined some of the exemption clauses on which it relied. Immediately below the space for the customer's signature, the following appears in capitals:

"NOT RESPONSIBLE FOR LOSS OR DAMAGE TO VEHICLES OR ARTICLES LEFT IN VEHICLES IN CASE OF FIRE, THEFT OR ANY OTHER CAUSE BEYOND OUR CONTROL."

Mercurius Motors argued that this exemption clause was clearly visible and could hardly be missed by a person signing the form. Furthermore on the repair order form, immediately above the space indicated for a customer's signature, the following appears in capital letters:

"PLEASE REMOVE PULL-OUT RADIOS AND VALUABLES FROM YOUR VEHICLE. WE WILL NOT BE HELD RESPONSIBLE FOR ANY THEFT WHATSOEVER."

To the left of the caption referred to above, the following appeared in fine print:



"I have read and agree to the conditions of Contract on the reverse side hereof. This is to certify that no valuable or personal belongings have been left in the vehicle..."

On the reverse side of the repair order form, Mercurius Motors relied on the following clause:

"I/we acknowledge that.....[the vehicle depot] shall not be liable in any way whatsoever or be responsible for any loss or damages sustained from fire and/or burglary and/or unlawful acts (including gross negligence) of their representatives, agents or employees."

The Court held that a "person delivering a vehicle to be serviced or repaired would ordinarily expect that the depository or the service depot would take reasonable care in relation to the safekeeping of the vehicle entrusted to him or her. An exemption clause such as that contained in Clause 5 of the conditions of contract, undermines the very essence of the contract of deposit, and should be clearly and pertinently brought to the attention of a customer who signs a standard instruction form, and not by way of an inconspicuous and barely legible clause that refers to the conditions on the reverse side of the page in question."

The Court confirmed that the "caption immediately above the signature is misleading in that a customer is directed to that provision and away from the more important provision in small print on the left-hand side of the document which refers to the conditions on the reverse side of the document which are themselves not easily accessible." Furthermore, Mr Lopez's claim that the conditions were not brought to his attention was unchallenged.

In summary, by not safeguarding the keys to the vehicle, the employees of Mercurius Motors did not act as a reasonable person would have acted in the circumstances. It was clearly foreseeable that theft of the vehicle would be facilitated by the availability of the keys and no discernable steps were taken to safeguard against this.

A lesson for drafters of similar contracts is to avoid drafting clauses which appear hidden from the contents of the main agreement because, the Courts may find that such clauses do not form part of the contract. Businesses should also review their exemption clauses to ensure that they can be relied upon when needed.

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5. IS A REVOCABLE BANK GUARANTEE ACCEPTABLE FOR PROPERTY TRANSACTIONS?

The purchase price in most property transactions is secured by the purchaser providing a bank guarantee to the seller or the seller's conveyancer, confirming that on registration of transfer of the property, a certain sum of money will be paid to the seller or his conveyancer. Most of these guarantees are not irrevocable.

The recent Supreme Court of Appeal case of Koumantarakis v Mystic River (2008) 53 ZASCA dealt with an appeal against the decision of the Durban and Coast Local Division relating to an application to enforce an agreement of sale of immovable property between a seller and purchaser.

The particular sale agreement relating to the sale of a property in Springfield Park provided that a deposit of R1 million would be secured by a bank guarantee "acceptable to the seller". A bank



guarantee was accordingly provided by the Standard Bank, which guarantee was in a standard form used by the bank and which contained a clause reading as follows: "Should any new or previously undisclosed fact emerge which may prejudice the Bank's security or any circumstances arise to prevent or unduly delay registration of the abovementioned transaction/s we reserve the right to withdraw herefrom by giving you written notice to that effect, whereupon the said sum will no longer be held at your disposal."

The seller then rejected the guarantee contending that it contained a "right to withdraw" and that the seller in fact required an irrevocable guarantee. When the purchaser did not provide an amended guarantee, a notice was sent by the seller's attorneys to the purchaser to the effect that the seller deemed the agreement to be cancelled and null and void. While the parties corresponded on the issue of the guarantee, an advertisement appeared in a weekly property magazine advertising the property at an asking price of R2 million higher than that in the agreement.

The purchaser launched an application for an interim order restraining and interdicting the seller from selling the property to any other person other than the purchaser.

In finding for the seller, the Durban and Coast Local Division of the High Court held that the purchaser had to provide the seller with a guarantee which was acceptable to the seller and that this was largely dependent upon the seller's discretion regarding the nature and acceptability of the guarantee.

In the appeal, the Court was asked to consider whether the seller had acted reasonably in rejecting the guarantee provided by the purchaser.

The Court simply held that if a seller has not requested an "irrevocable" guarantee, the seller is left with the usual undertaking provided by a financial institution. If the seller required security pending transfer, it should have stipulated in the agreement that it required an irrevocable guarantee and it is not for the seller to wait to complain about this, if it did not deal with it in the agreement.

The Court further held that the seller did not act reasonably when it rejected the guarantee. The Court was further satisfied that the bank would not be entitled to a "whimsical" withdrawal of the guarantee but only limited to one that is factually based in relation to its security. Accordingly the seller was not entitled to reject the guarantee and consequently not entitled to cancel the agreement of sale.


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6. DON'T SIGN BLANK OR INCOMPLETE AGREEMENTS

Sellers and buyers of land must remember that Section 2(1) of the Alienation of Land Act provides that no sale of land is of any force or effect unless it is contained in a sale agreement signed by the parties or their agents acting on their written authority. It is not possible in our law to rely on an agreement that does not have all the material terms, even if such agreement has been signed.

In the case of Fraser v Viljoen (621/2006) [2008] ZASCA 24 (27) March 2008 the Court had to deliberate on the question of whether a contract for the sale of a flat complies with the provisions of the Alienation of Land Act 68 of 1981.



The purchaser sought to enforce an agreement to buy a flat. The flat was leased by the purchaser from the seller who was also the owner of the flat under sectional title. The purchaser sent the seller an incomplete printed form offering to buy the flat. The names of the parties were left blank as was the description of the property, and the offer was unsigned and sent to the seller.

The seller agreed to accept the offer on condition that the purchase price be increased from R180 000 to R185 000. The purchaser then altered the figure on the offer and sent it back to the seller. After the seller had signed, the purchaser then inserted the full description of the property and signed the document, forgetting to record the date of signature.

Despite efforts from the conveyancers to get the seller to sign the necessary documents to effect transfer, the seller avoided signing. The seller then decided not to sell the flat.

On appeal, the purchaser argued that the seller had appointed him as her agent for the purpose of completing the document by inserting the names of the buyer and a description of the property. The Court held that the very intention of this legislation was to prevent uncertainty, disputes and possible malpractices concerning the sale of land. To accept the purchaser's contentions would be to nullify the object of certainty. The Court accordingly dismissed the appeal holding that the agreement was void for non-compliance with the Alienation of Land Act.

Sellers and buyers of land must note the importance of a properly completed and signed sale agreement. Parties must ensure that a property sale agreement is in writing, that they do not sign any documents that are incomplete, they must always include the full description of a property, and record the date of conclusion of the agreement when they sign the document. Failure to ensure this will lead to parties being unable to enforce such agreements.

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7. DEREGISTRATION vs LIQUIDATION

Are you considering restructuring your business or winding up your company? Have you really considered your options and do you understand the differences between deregistration and winding up?

Deregistration is the process through which a company's registration at CIPRO is formally terminated and its articles and memorandum of association are cancelled by the Registrar of Companies. It is important to be aware that:

- although a company will cease to be on the register once deregistered, its directors, officers and members will remain liable and their liability can be enforced as if the company had not been deregistered;
- the debts of a deregistered company are not extinguished and are only regarded as being unenforceable whilst the company is deregistered;
- any interested party may bring an application to court for the re-registration of a deregistered company. If such an order is granted by the court, the company is restored retrospectively and is deemed not to have been deregistered. Therefore, any rights and obligations which were in existence prior to the deregistration revive and all acts



performed on behalf of the company during the period of deregistration are validated retrospectively.

Winding-up or liquidation, on the other hand, is the process in terms of which the company's management is taken over, its assets are realised and used to settle its creditors and any residue is distributed to its shareholders. Once this process is complete, the company's existence is formally terminated by its dissolution.

In terms of Section 349 of the Companies Act, a company can be wound up voluntarily by a special resolution of its shareholders. Such a resolution will not have any force or effect until it is registered by the Registrar and the Master has either been given security that the company will be able to pay its debts within 12 months or the Master has dispensed the requirement of security. There are certain formal notice obligations placed on the company after the registration of the resolution, including an obligation to send a certified copy of the registered resolution to the Master and to procure its registration in the Government Gazette, both within 28 days.

Once liquidation commences (on registration of the special resolution), the company must cease to carry on business, other than for the purpose of effecting a beneficial realisation of its assets, and the powers of its directors cease.

Once the liquidation process is complete, the Master will confirm that in a certificate which it sends to the Registrar and Registrar will record the dissolution of the company. Once dissolved, the company's directors do not continue to be liable, except possibly with regard to their conduct prior to liquidation. All claims against the company are extinguished by the dissolution following liquidation.

The liquidation and subsequent dissolution of a company is more expensive to implement than the deregistration of the same company. Therefore any decision about which option to implement should be carefully considered in each case.

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8. STATE TENDER BOARD FAILS PROMOTION OF ADMINISTRATIVE JUSTICE ACT

The State Tender Board ("STB") is an organ of state and as such, is obliged to make decisions that are lawful, reasonable and procedurally fair in terms of the law.

In the case of Chairman, State Tender Board v Supersonic Tours (Pty) Ltd (389/07) [2008] ZASCA 56 (27 May 2008), the STB's decision to disqualify Supersonic and its directors, for a period of 10 years, from tendering for state contracts, on the basis that Supersonic had acted fraudulently or in bad faith when it had submitted its tender, was set aside for being procedurally unfair.

Supersonic submitted and was awarded a tender for the supply of travel and accommodation services to the Department of Defence for 2 years. Subsequently, the STB disqualified Supersonic on the basis that there were possible misrepresentations in their tender in respect of their SARS Tax Clearance Certificate and preference points in the equity ownership that they claimed.



In disqualifying Supersonic, the STB relied on provisions of the State Tender Board Act 86 of 1968, the Preferential Procurement Policy Framework Act 5 of 2000 and the regulations thereto. These provide that, if the STB detects that an applicant had been awarded a tender on a fraudulent basis, then the STB may restrict the directors from obtaining business from any organ of state for a period not exceeding 10 years.

In response, Supersonic raised the provisions of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"), alleging that to give effect to the right to procedurally fair administrative action, STB should have given Supersonic adequate notice of the nature and purpose of the proposed administrative action and a reasonable opportunity to make representations.

The Court found that at no stage did the STB indicate to Supersonic that a finding of fraud or bad faith leading to disqualification might be made. It was on this basis that the Court found that the decision made by the STB was procedurally unfair and accordingly needed to be set aside.

This judgment reiterates the basic principles of procedural fairness that are embodied in the Constitution and PAJA. It is important for all state organs to abide by the necessary provisions relating to procedural fairness. Failure to do so may lead to judgments like these, even though there may be suspicions of fraud or misrepresentation in the tender process.

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9. TO REGISTER OR NOT TO REGISTER YOUR TRADE MARKS? THAT IS THE QUESTION

This is a frequently asked question. Although not compulsory there are sound reasons to do so. For instance registration grants the applicant a limited monopoly and an edge over competitors. Moreover, many well known companies acknowledge that much of their success can be attributed to the effective protection and enforcement of their trade marks. The purpose of this article is to throw light on the advantages and benefits of acquiring registration. In short, registration gives a face to and solidifies rights that by their very nature are notoriously intangible and fragile. In addition, registration paves the way for the effective commercial exploitation of valuable assets namely your trade marks. In particular registration of your trade marks provides a solid foundation enabling and facilitating the effective appointment and control of licensees and franchisees, Assignments (i.e. for instance if you have acquired marks or sold marks to a third person) are simplified by registration.

A number of additional benefits are summarised below :-

- Registered marks may be utilised as security for loans.
- Instituting proceedings based on a registered trade mark is far cheaper and less time consuming as it is not necessary to prove the existence of a reputation and use made of the subject mark as you would have to do if you proceeded in terms of passing-off under the common law. Moreover, statutory protection makes specific provision for damages to be claimed against the infringer.
- Registration gives notice to all interested parties of the rights claimed by the trade mark owner throughout the country.

- Registration endures indefinitely, subject only to the payment of renewal fees every ten years.
- Registration usually serves as an indemnity against an attack on the use of a trade mark. In other words it is not possible for one registered trade mark proprietor to bring an action for infringement arising from the use of another registered trade mark.
- Registration is considered to be a cost effective form of insurance paving the way for commercial exploitation protecting the underlying goodwill and reputation associated with your goods and/or services.
- Acquiring registration of your trade mark in South Africa may be advantageous in assisting you to claim a priority filing date for trade mark protection in other countries.

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10. NO NEED TO REGISTER OR ENROL WITH THE NHBRC IF YOU'RE JUST ADDING TO OR RENOVATING EXISTING PREMISES

Builders constructing new residential dwellings must enrol such buildings with the National Home Builders Registration Council ("NHBRC") established under the Housing Consumers Protection Measures Act 95 of 1998 (the "Act") and pay the required enrolment fees.

In the judgment of Maurice Leas t/a Build4You v Roeland Kerchoven and another, Case No.: 28811/2007, the Witwatersrand Local Division decisively took the view that subsequent additions or renovations to existing premises were excluded from the provisions of the Act.


At paragraph 13 of the judgment, the Court said that:

*"...it seems plain that the liabilities of home builders are restricted to the construction of a **new home** only. Subsequent additions to or renovations of the original new home by a different building contractor is excluded from the provisions of the Act. This, in my view, is also confirmed by the definition of the "business" of a home builder which refers to the construction of a home and not a renovation of or addition to a home. If the Legislator intended the ambit of the Act to be extended to subsequent additions to or renovations of already constructed homes, it could easily have included the words "addition to" or renovation of to the definitions of the 'business of a home builder', 'home' and 'housing consumer'."*

South African case law confirms that renovation takes place where the building or premises are repaired, renewed, made good or restored to their former condition.

Where the work entails conversion of part of the building from parking garages to residential apartments, this would constitute a 'renovation'. [Harlequin Duck Properties 204 (Pty) Ltd v Fieldgate t/a Second Hand Rose and Others 2006 (3) Sa 456 (C)]

It is clear that the provisions of the Act were never intended to regulate the subsequent addition to or renovation of a completed or existing home or building by any subsequent



developer or home builder. As such, additions or renovations need not be registered or enrolled with the NHBRC.

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11. WHAT SHAPE ARE YOUR TRADE MARKS IN? SOME IMPORTANT QUESTIONS TO BE CONSIDERED

- Have you registered your trading style i.e. your company or close corporation as a trade mark? Similarly, if your business name has a logo has an application for registration been made for such logo at the Trade Marks Office?
- If you have a domain name and an active website locally (co.za) and/or overseas (.com) have you acquired trade mark protection for your domain name in the relevant countries and in the relevant classes?
- If you have applied for or already have trade mark registrations do they cover **all** current and relevant goods and/or services?
- As a trade mark is on the whole territorial in nature have you ensured that the ambit of your trade mark protection has been broadened to cover additional relevant countries for instance, Namibia, Botswana, Lesotho, Swaziland, Mozambique etc.? (whichever is applicable) Moreover, if you intend to expand globally and use your mark in various overseas countries have you considered filing applications for registration in such territories?
- Do you have a logo, device, slogan or picture accompanying your word mark? If so has it been registered?
- If your get up and trade dress (appearing on packaging, wrappers etc.) is attractive and distinctive and is used to market your products and/or services have you ensured that registration has been made in all relevant classes and countries?
- If you have entered into license agreements are the royalty payments up to date and have the licensees been recorded as registered users?
- Are you continuing to renew “deadwood” hence wasting money renewing trade marks that are commercially redundant and/or are no longer of strategic importance?
- If you have applications or registrations for your trade marks are the symbols TM or ® (for an application and registration respectively) used in order to deter potential copy cats and parasites from riding on the back of the reputation and goodwill associated with your trade marks?
- If you have disposed of and/or acquired trade marks are they recorded in the name of the correct entity i.e. the entity that is currently using the marks? If not, it is essential that they are assigned to the appropriate entity without delay.

- If you have registered trade marks previously does the current manner of use in the market place coincide with the way your marks are depicted on the Trade Mark register?
- Do you have an accurate and user friendly trade mark portfolio with full particulars of all your subject marks covering all pertinent countries?
- If you are planning to launch new products and/or services under various new trade marks have you instructed us to conduct full registrability searches in all territories to assess whether the proposed marks are in fact available for use and registration **prior** to launch?

If you have answered **NO** to any of the above or are not sure of the status of your marks please contact us in order to ensure that your trade marks are properly and comprehensively protected. Identifying and addressing possible gaps and weaknesses early and without delay will typically result in significant savings in time and money.

Remember that trade marks are important yet fragile assets that require constant pruning and meticulous care and maintenance to ensure their continued existence and effectiveness.

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12. SECURITIES TRANSFER TAX ACT

The Securities Transfer Tax Act, 25 of 2007 and the associated Securities Transfer Administration Act, 26 of 2007 became effective on 1 July 2008. For the first time, the transfer of members' interest in a close corporation is now subject to tax.

The essential features of the new tax, which replaces stamp duty on the transfer of unlisted shares and uncertified securities tax on listed shares, are:

- | | |
|------------------|---|
| Rate: | 0.25% on the consideration or market value of the shares, whichever is greater |
| In respect of: | Shares or members interest in South African companies and close corporations and foreign companies registered on the JSE (" <u>securities</u> ") |
| When payable: | On the transfer, sale, assignment or cession or disposal in any manner of a security or the cancellation or redemption of that security but excluding an event that does not result in a change in beneficial ownership; any issue of a security; and a cancellation or redemption of a security if the company which issued the security is being wound up, liquidated, or deregistered or its corporate existence is being finally terminated, subject to various exemptions. |
| Date of payment: | For listed securities, payment must be made by 14 th day of the month following that in which the security was transferred. For unlisted securities, payment must be made by the company within 2 months from the transfer. |

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13. COMPETITION AMENDMENT BILL – CONFUSION REIGNS!

Anyone who has had a look at this Bill (published for comment in June 2008) knows that there are interesting times ahead for business! The Bill deals with 4 main issues, complex monopolies, concurrent jurisdiction of the Competition authorities and other sector regulators, market enquiries and personal criminal liability for directors and managers of firms found guilty of price fixing, colluding on tenders and dividing markets.

While the concurrent jurisdiction issue may not appear to many to be relevant to business, if your business is presently governed by a sector regulator and if your sector's regulation clashes with the Competition Act, you may find yourself having to deal with the Competition Commission. As I said, interesting times!

The provisions dealing with complex monopolies and personal liability are very widely framed and create more questions than answers. Here's hoping that Parliament does a lot more work clarifying the wording of the Bill before it becomes law because at the moment, confusion reigns!

We'll keep you updated as the Bill progresses on its way into law.

JENNIFER FINNIGAN

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14. COMMERCIAL MEDIATION

Willie Coetzee recently attended an intensive 5 day commercial mediation course run by the Centre for Effective Dispute Resolution, the leading provider of mediation services in the United Kingdom.

Mediation is in essence a flexible process conducted confidentially in which a neutral person (the mediator) actively assists disputing parties to negotiate the settlement of their dispute. As a result of the increasing legal and other costs involved in going to court or even arbitrating a dispute, parties have increasingly turned to mediation as an alternative dispute resolution method. Mediation has therefore become well-established in the United States, the United Kingdom, Canada and Australia and the process has been fully supported by Government in these countries.

In South Africa, Tokiso Commercial has recently been formed to provide commercial mediation services and we believe that the next King Report on Corporate Governance will be recommending that directors actively consider commercial mediation of their disputes as an alternative to litigation and arbitration.

We at Shepstone & Wylie believe that the process has much to offer, particularly when there is an ongoing relationship between parties which could be irreparably damaged by litigation. We will shortly be holding a short breakfast seminar under the auspices of Tokiso Commercial to provide further information on commercial mediation. Please let us know if you have an interest in attending.

WILLIE COETZEE

Willie can be contacted on 031-3020450 and coetzee@wylie.co.za



15. COMPANIES BILL – A PROPOSED REWRITE OF THE COMPANIES' ACT

The long awaited Companies Bill was introduced into Parliament recently. The Bill is a complete rewrite of the existing Companies Act. It proposes extensive changes to the Close Corporation Act. The intention is that once the new Bill becomes law, you won't be able to register a new close corporation (although existing close corporations do not have to convert to companies). The intention behind the act is to make it quick and easy to register a company. Whether this will happen, remains to be seen. Keep watching for regular updates on specific provisions of the new Bill.

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16. CONTACTS

Should you require additional information on any of the above issues or with regard to any other issues of a commercial and corporate law nature, please contact any one of our following team members:

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