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We trust that you will find the content of this email flyer to be of interest.

1. **PRACTICAL GUIDELINES FOR PLANNING AND MANAGING CONSTRUCTION PROJECTS**

The last five years have been bullish for the construction industry with phenomenal growth in residential and large scale capital construction projects. This growth has further been fuelled by public sector spending including the Gautrain, Durban's new King Shaka International Airport, the extension and upgrade of O R Tambo International Airport, 2010 World Cup infrastructure (stadiums, roads, etc), Eskom power generation projects and the controversial arms deal offsets amongst others.

The general view is that South Africa can expect capital and infrastructural spending to continue well beyond 2010, electricity shortages notwithstanding.

During this time clients have found themselves facing the daunting task of undertaking capital intensive engineering and building projects often without previous recent experience and without an awareness of the many hazards and pitfalls involved. Poor or inadequate planning is the result, leading to amongst other things long delays in completion (with associated loss of production and profits), substantial unbudgeted cost escalations, costly and protracted disputes with contractors and substandard workmanship and/or materials.

One of the problems is that clients do not have in-house experience as capital projects are by their nature few and far between but carry substantial time, cost, profit and reputation implications. Contractors on the hand are project smart as they deal with projects on an ongoing basis. This can create huge bargaining and positional disadvantages and dangers for clients the gravity of which is often not appreciated thus exacerbating the problem.

Clients can help alleviate the situation in many practical ways. The following are some of the key actions which clients can take that will save the clients and their managers time and/or cost as well as help to alleviate or manage risk of loss, damage and injury to persons, property and reputations more efficiently:

- Establish a sufficiently sized and resourced internal "owner's team" consisting of appropriately qualified and suitably experienced competent professionals including a project manager or project engineer, where appropriate. These professionals should be loyal and committed, have the client's best interests at heart and must be capable of saving the client time and money where possible without compromising on quality, safety and legal compliance. Their experience and competence should assist in countering inherent client disadvantage when dealing with experienced contractors;
- Plan carefully and get key external consultants including construction attorneys involved at an early stage. Often construction attorneys are brought in at a very late stage when it is too late to rescue the situation;
- Irrespective of the size and experience of the owner's team, external project attorneys should be involved early on to assist with planning for the selection and appointment of the owner's team and external consultants, legal compliance including the securing of public and private approvals, procurement methodology, environmental impact assessment and other studies e.g. traffic studies, choice of contract, selection of appropriate technologies, intellectual property including patents, designs, copyright and trade marks, land issues, project management, insurance, tax including VAT and import duties, BEE and even capital expenditure, recruitment and internal approval issues;
- Do not under-estimate the importance of making the correct procurement decisions at the outset e.g. the decision whether to go for orthodox procurement, a turnkey arrangement or a managed solution can have vastly different financial and time consequences;
- As far as possible clients should select contractors only through a properly structured and managed open bid/tender process with or without a formal pre-selection process. Although such a process can result in the client incurring

initial cost or delay the overall project saving in terms of a lower contract price, better design/quality, etc, will far exceed this cost. Mistakes in tender planning are common and costly and often lead to court action particularly where the client is an organ of state and the procedures do not comply with legislative and common law requirements;

- Corruption, collusion and breaches of confidentiality or secrecy are a much bigger and more costly problem than most clients and organs of state realise. Clients have a legal duty to report corruption coming to their attention above a specified threshold. Proper probity and secrecy policies and guidelines must be in place to ensure that everyone involved including the owner's team, external consultants and bidders know the rules and play fair whilst protecting the client's valuable intellectual property, confidential information and trade secrets;
- Client should draft or select the main construction contract and should at all times keep full control of the master. No bidder, contractor or consultant should be allowed to make changes except as agreed through a centralised legal draftsman acting for the client. In general bidders are required to submit compliant bids without material changes to the contract. Remember that agreeing to key changes requested by a contractor after tender award may breach legal requirements for public tenders or at least be unfair to other bidders who have not had an opportunity to tender on the changed contract;
- Start public approval processes as early as possible as these can cause costly delays e.g. an Environmental Impact Assessment process can often take more than 18 months to final approval. Proper legal advice early on can also determine what approvals are necessary and what approvals can be avoided by making suitable project adjustments;
- Establish a project library with a suitable project secretary and keep a meticulous retrievable documented chronological record of all project materials including plans, specifications, designs, signed contracts, letters of appointment, public approvals, insurance policies, health and safety documents, compliance records, project instructions, variation orders, reports, invoices, payment and milestone certificates, minutes of site and management meetings, contractor documents and all communications (whether by email, mail, fax, hand delivery, telephone notes or otherwise). All incoming communications should be date-stamped and filed. There should be suitable hard, electronic and off-site back-up. A well kept project library can prevent disputes or be the difference between winning and losing a dispute with a contractor or supplier. Conversely poor record keeping can have serious time, cost, reputational and compliance implications;
- Keep track of project professionals that resign or are no longer on the team as they may later be required to give statements or evidence in court or at arbitration or other dispute resolution proceedings;
- Apply the contract fairly but strictly. Allowing repetitive indulgences or sloppy management can cost the client dearly. Claims are the biggest source of disputes so be extra careful and get prompt legal assistance before responding or issuing determinations. Organs of state have less discretion in dealing with

claims particularly in view of legislation such as the Public Finance Management Act;

- Ensure that all the payment and milestone certificates as well as defects lists and other required project documents are issued correctly on the prescribed formats and on time. Get legal assistance when preparing project templates.

The above list is not exhaustive and there are many other management tools and guidelines that can help to make for a successful project.

CABBY ESAT

Cabby can be contacted on 031-3020457 and esat@wylie.co.za

2. DTI's NEW INCENTIVE PROGRAMME

DTI has launched a new grant incentive programme called the Manufacturing Investment Programme ("MIP"). The MIP is aimed at promoting foreign and local investment into South Africa's manufacturing sector.

The MIP offers an incentive grant (capped at R30 million) to small and large businesses of between 15% and 30% of the investment costs for either establishing a new production facility or expanding an existing production facility.

In addition, foreign-owned investment projects may qualify for an additional grant for the cost of transporting qualifying machinery and equipment to South Africa.

Additional weighting is given to businesses with strong BEE credentials and businesses located in areas of high unemployment or IDZ's.

ERIKA PETERSEN-HOLMES

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3. ANNUAL RETURNS FOR CLOSE CORPORATIONS

With effect from 1 September 2008 it is compulsory for all registered close corporations to lodge annual returns by the end of the month following the month in which the anniversary of its registration occurs. A fee is payable to the Registrar depending on turnover. Late submission attracts a penalty of R150 and may result in de-registration of the entity.

The annual return requirement was introduced for public companies and external companies in August 2003. In May 2005 the requirement was extended to private companies and section 21 companies.

Effectively all registered entities are now obliged to electronically file annual returns and pay the annual fees.

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4. SARS POSITION ON THE TAXABILITY OF INTEREST FREE LOANS

The South African Revenue Services ("SARS") has issued a draft interpretation note ("Note"), dated 13 October 2008, which sets out the manner in which SARS will implement certain tax principles that were confirmed by the Court in the case *Commissioner, SARS v Brummeria Renaissance (Pty) Ltd* (2007) SCA 99 ("the Brummeria case").

The Court confirmed the following principles:

- the right to use loan capital interest-free has a monetary value;
- even though the receipt or accrual of the right is in a form other than money, and although it cannot be alienated or turned into money, it does not mean that the receipt of the right has no monetary value;
- the value of the receipt or accrual in a form other than money constitutes an "amount" that "accrues" to the taxpayer and should be included in the gross income of the taxpayer for the year of assessment in which the right is received by or accrued to the taxpayer; and
- for a benefit of this nature to be taxable it is not necessary to fall within the provisions of paragraph (i) (value of fringe benefits) of the definition of "gross income" in section 1.

In its Note, SARS indicates that it will implement the *Brummeria* principles as follows:

- it will apply these principles to all cases where benefits in a form other than money (such as the right to use an interest-free loan) are granted in exchange (or as a quid pro quo) for goods supplied, services rendered or any other benefit given;
- it will require that the receipt or accrual in a form other than money should be valued and included in the gross income of the taxpayer in the year of assessment that it is received or accrued;
- the test to determine the value of the receipt or accrual in a form other than money is an objective one and arm's length principles of valuation, with due regard to the facts and circumstances of the case as well as the intentions of the parties should be applied;
- the right must be evaluated on its own merits and all facts and circumstances pertaining to the right to use the interest-free loan should be taken into account in the valuation. The fact that the Court in the *Brummeria* case accepted the weighted average prime overdraft rate of banks (applied to the average amount of interest-free loans in possession of the taxpayer in the relevant year of assessment) as an appropriate method to place a value on the right to use a loan interest-free, does not necessarily mean that it would always be the most appropriate method of valuation in each case where a right to use a loan interest-free is granted;

- the timing of an accrual in a form other than money should be determined in accordance with the general principles of the tax law- i.e. the time at which the taxpayer is unconditionally entitled to the amount in question;
- the shareholder or group-company that grants the right to use an interest-free loan may not necessarily intend the right to be in **exchange** for goods sold, services rendered or some other benefit granted by the borrowing company and in such a case, there is no tax benefit for the granter of the loan and the *Brummeria* principles cannot apply.

The Note, also contains a General Binding Ruling relating to the granting of life rights to units in a retirement village. This General Binding Ruling will be applicable with effect from the commencement of years of assessment ending on or after 31 December 2008 and will apply for an indefinite period.

MADELEINE SCHUBERT

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5. KNOW YOUR COPYRIGHTS

Are you an author, software developer, an artist involved in musical or artistic productions cinematograph films, sound recordings, publishing or computer programs? If so, you may be worried about your work being copied and reproduced without your permission.

The Copyright Act 98 of 1978 ("the Act"), which came into force in January 1979, protects the ownership of intellectual property.

Unlike other intellectual property Acts, such as the Trade Marks Act, Designs Act or the Patents Act, the Copyright Act does not require any registration to protect rights. In fact a registration procedure is only necessary for films.

Anything from literature, stage directions, broadcasting scripts, advertising, sermons, computer programs, paintings, sculptures, drawings, engravings and photographs, works of architecture either buildings or models of buildings, technical and engineering drawings, cassettes, CD's, records, to radio and television broadcasts, are protected by the Act. The protection is not dependent on the literary quality, mode or form in which the work exists.

However, the Act does not protect ideas. It protects works that are original and in tangible form. This means that for a work to be protected it must be the efforts of the author or creator which brings the work into existence and the work must be in material form, for example, a document or a CD. Furthermore, the author or creator of the work must either be a citizen, resident or domiciled in South Africa or a legal body incorporated in the country.

In the case of *Peter-Ross v Ramesar and another*, 2008 (4) SA 168 (C), the Cape Provincial Division held that: "*though there is no copyright in ideas, a literary work is most often a vehicle for ideas. Once ideas have been captured in words on paper, the ideas are an important part of the literary work.*" In this case, Peter-Ross and Ramesar

collaborated on a draft of an article, however, when submitting the final draft of the article for publication in an industry journal, Peter-Ross cited herself as the sole author of the article. Ramesar objected to the publication of the article on the ground that he believed the article to embody work done jointly by him and Peter-Ross. The court held that the article unlawfully infringed Ramesar's joint copyright in the draft.

If you own copyright in a work, it is important, but not obligatory, to mark it as such in order to avoid innocent copying by people who do not know that copyright exists, or by people who have malicious or fraudulent intentions. In terms of the regulations to the Act, marking may be achieved by using the symbol c or the words "all rights reserved" followed by the name of the owner of the copyright. However, it is also acceptable to use the international copyright symbol © followed by the name of the author and the year in which the copyright came into existence, for example © BJM Consultants CC 2008.

Generally speaking, the owner of the copyright in a work is said to be the creator or author of the work, although there are some exceptions. Where a person commissions the taking of a photograph, the painting or drawing of a portrait, the making of a cinematographic film or a sound recording, and pays or agrees to pay for it in money or other means to the same value, that person is effectively the owner of any copyright subsisting in the work. Where a work is made in the course of the creator's or author's employment under a contract of service, the employer is the owner of any copyright subsisting in the work. In the case of a computer program the author and owner of the copyright is "the person who exercised control over the making of the computer program". These consequences can be amended by contracts between the parties.

In terms of the Act the copyright in literary, musical and artistic works (excluding photographs) lasts for 50 years from the end of the year in which the author of the work dies. For computer programs the period is up to 50 years from the year in which legitimate copies were first made available to the public. In respect of published cinematographic films, sound recordings, radio and television broadcasts and other programme-carrying signals, the period is up to 50 years from the end of the year in which the work was first published.

If you are the owner of a copyright, that ownership entitles you to prevent the unauthorised copying or adaptation of your work. If someone infringes your copyright you may apply for an interdict preventing the unauthorised person from infringing your copyright. In terms of the Act, it is a criminal offence to import, sell, distribute, deal in, or offer for sale, work which you know to be an infringement of copyright. The owner may also claim damages for infringement of copyright.

There are however, certain acts which do not constitute an infringement of copyright. Some of these include the use of a literary or musical work for private study; criticism or review of that work; the reporting of current events; or any publication, broadcast or sound or visual recording used for teaching purposes provided that it is properly referenced, with mention of the name of the author and the source of the extract being made.

If you reproduce a lecture or an address or other similar work which has been delivered in public, it is not an infringement of a copyright if it is for information purposes. Official

text books of a legislative, administrative or legal nature, speeches of a political nature or those delivered in the course of legal proceedings, and news of the day cannot be held to be infringement of copyright either.

BRIDGETT MAJOLA

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6. ROYALTY DEDUCTIONS / TAINTED INTELLECTUAL PROPERTY

With effect from 1 January 2009 section 23I of the Income Tax Act ("the Act") will prohibit a SA taxpayer from claiming an income tax deduction for a royalty paid to another person if it relates to Intellectual Property ("IP") that is deemed to be tainted.

The following are the most important examples of tainted IP:

- if the IP was the property of a SA taxpaying entity (which includes a foreign company's branch or other non residents' permanent establishments), who sold it to a non-resident, but retained a right to use it in order to generate an income in SA;
- if the IP is currently the property of a SA tax resident (excluding certain tax exempt entities); or
- if the IP was discovered, devised, developed, created or produced by a SA taxpaying entity or any connected SA tax resident and the latter, either alone or together with a connected party, holds at least 20% of the participation rights (shares and/or voting rights) in a foreign company to whom the royalty income accrues.

However, the prohibition as set above is subject to the following relaxations, despite the fact that the IP may be tainted, namely:

- if the recipient of the royalty includes that amount in its "income".

For example, a royalty payable by one SA Company to another will be tax deductible in the hands of the payer because the royalty is not exempt in the hands of the recipient company i.e. the royalty will be "income" for purposes of the Act.

- if the royalty is not "income" in the hands of the recipient, but withholding tax of at least 10% was paid, the payer is permitted to deduct 1/3 of the royalty expense as a tax deduction.

For example, if a SA Company pays a royalty to a German Company, the royalty is exempt from income tax in the German Company's hands because in terms of section 10(1)(l), it will be exempt from Income tax. Section 10(1)(l) exempts royalties payable to non-residents from income tax but subject it to withholding tax in terms of section 35. In terms of section 35, a withholding tax of 12% is payable on royalties payable to non-residents, however, this rate is subject to a reduction that may arise as per a double taxation agreement between SA and another country. In the case of the SA/ Germany double taxation agreement it is possible to reduce the withholding tax on royalty to nil (provided certain conditions are met).

Therefore, if the royalty paid by the SA Company to the German Company was subject to a 12% withholding tax, then the SA Company is permitted to claim 1/3 of the royalty as a tax deduction, despite the fact that the royalty relates to tainted IP.

If the IP is not tainted, the SA Company will be entitled to claim 100% of the royalty as a tax deduction, despite the actual rate of withholding tax paid by the German Company.

If the IP is tainted and no withholding tax was paid by the German Company, the SA Company will not be permitted to claim any income tax deduction.

MADELEINE SCHUBERT

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7. CONSUMER PROTECTION BILL: ARE YOUR AGREEMENTS IN PLAIN LANGUAGE?

The Consumer Protection Bill (or "CPB") which is expected to be passed into law early next year, will impact most documents used by the suppliers and marketers of goods and services, from advertisements to public notices, standard terms and conditions of trade and supply agreements.

The CPB requires all documents relating to transactions between a supplier and consumer of goods or services to be drafted in plain language which can be understood without too much effort by an ordinary consumer for whom the goods or services are intended, and who has "average literary skills" and "minimal experience" as a consumer of those goods or services.

Suppliers who do not ensure that their documents are drafted in plain language may face problems in enforcing those documents at a later stage. In determining any matter involving a transaction between a supplier and consumer, a court will consider the extent to which the documents relating to such transaction meet the plain language requirements of the CPB.

Suppliers who wish to exempt themselves from liability or require the consumer to assume any risks in respect of a transaction must not only ensure that these terms are expressed in plain language, but must also make sure that such terms are drawn to the consumer's attention before the consumer is required to enter, or pay for, the transaction, and that the consumer is given an adequate opportunity to read and understand those terms.

The CPB will be fully effective within 18 months after the date on which it is signed into law by the President. The plain language requirements will apply to all transactions between suppliers and consumers entered on, or after, the date on which the CPB becomes fully effective.

CLAIRE MCGEE

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8. "COOLING OFF" THRESHOLD TO BE INCREASED IN IMMOVABLE PROPERTY TRANSACTIONS?

Many more purchasers of immovable properties are likely to be able to enjoy the considerable benefits of the "cooling off" right when purchasing immovable property, if recently announced legislative proposals are eventually adopted by Parliament.

The Department of Trade and Industry, which administers the Alienation of Land Act 68 of 1981 ("the Act") governing certain immovable property transactions, is contemplating increasing the 10 year old prescribed monetary threshold from R250 000,00 to R500 000,00, in respect of a purchaser's right to revoke an offer or terminate a deed of alienation.

The Minister of Trade and Industry gave notice in the Government Gazette on 12 December 2008 calling upon interested parties who wish to comment on the proposal to increase the threshold, to submit written representations to the Department by no later than 29 February 2009.

The right of a purchaser to revoke an offer or terminate a deed of alienation, commonly referred to as the "cooling off" right, was introduced into the Act in 1998 and was intended to protect certain purchasers of immovable properties who perhaps felt pressurized into concluding a property purchase or perhaps did not have enough time to consider the consequences properly. The cooling off period effectively gives a purchaser a 5 day period to reconsider a purchase, and if not satisfied, to get out of such sale.

The right only applies in certain circumstances, including those where a property is purchased for R250 000,00 or less, where the purchaser is an individual (not a company, trust or close corporation), where the property was not purchased at an auction, and where the purchaser has not reserved the right to nominate another person to take over his rights and obligations.

While the R250 000,00 monetary threshold may have been appropriate in 1998, with the rapid escalation in property values over the last 10 years, there have been less and less transactions which fall within the threshold which has become wholly inappropriate for purposes of protecting the very persons it was designed to protect. While the proposed increase will no doubt be welcomed by purchasers who may enjoy its substantial benefits, many in the real estate industry, notably sellers and estate agents, will view any proposed increases with some trepidation. When the legislation was first introduced in 1998, experience has shown that the cooling off right can lead to much confusion and uncertainty in delicate property negotiations and furthermore it was evident that the right is open to abuse by certain purchasers.

Those wishing to make representations may do so to Segoane Monnye of the Consumer and Competition Policy and Law Consumer and Corporate Regulation Division, Private Bag X84, Pretoria 0001, on fax 012-3942525 and by email to segoanem@thedti.gov.za.

DAVID WARMBACK

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9. 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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