

*This e-mail flyer is produced by the Corporate & Commercial Department of Shepstone & Wylie and includes commentary on new Legislation, the latest reported decision of the Supreme Court of Appeal and other information of interest for its clients.*

*The content of this flyer is published for your information only. It does not purport to be comprehensive or to provide specific legal advice. Shepstone & Wylie will not be liable for any loss or damages whatsoever arising out of or reliance upon the contents of the information contained in this newsletter.*

*To be removed from or added to this mail list contact [chettys@wylie.co.za](mailto:chettys@wylie.co.za).*

Articles and Recent Developments:

1. **TCT LEISURE (PTY) LIMITED v COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICES**
2. **UNHAPPY WITH THE MUNICIPAL PROPERTY RATES ACT?**
3. **DEFY V SARS**
4. **BEWARE OF PRODUCT LIABILITY UNDER THE NEW CONSUMER PROTECTION ACT**
5. **COMPETITION ACT AND PROPERTY TRANSACTIONS**
6. **SARS V FASCINATING WIG**
7. **"FIRST TIME CHANCERS" NEED TO PLAY BY FIFA RULES**
8. **CONTACTS**

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

1. **TCT LEISURE (PTY) LIMITED v COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICES**

In this case the taxpayer sold shares and other discreet rights, such as points, which conferred a right of occupation. The special Court held that the taxpayer dealt in timeshare interests which was included in the definition of fixed property in the VAT Act and accordingly that those interests were goods, the supply of which fell within the ambit of section 7(1) of the Vat Act.

On appeal the taxpayer argued that what was supplied were financial services in the form of equity securities which were exempt from VAT. In order to succeed, the taxpayer had to show that the occupation rights form part of the bundle of incorporeal rights comprising the shares which were sold. The Court after considering oral evidence, and looking at the articles and share certificates, came to the conclusion that the right to occupy was supplied not as an incident of share ownership, but as a discreet element (in the form of rights to points). It was not necessary for the Court to establish a value for the shares and discreet rights sold as the taxpayer conceded that if the rights to accommodation supplied to members did not form part of the right attaching to shares, the full consideration was subject to VAT.

Taxpayers involved in schemes involving the sale of fractionalization shares or other similar types of schemes in respect of the use of immovable property, should carefully consider the potential application of the Vat Act, and given recent amendments to the Transfer Duty Act the possible application of that Act.

### **ANTON LOCKEM**

Anton can be contacted on 031-3020443 and [lockem@wylie.co.za](mailto:lockem@wylie.co.za)

## **2. UNHAPPY WITH THE MUNICIPAL PROPERTY RATES ACT?**

Now is the time to speak up on proposed changes to the Municipal Property Rates Act ("the MPRA"). The MPRA affects the municipal rates payable by each one of us, as it creates a national framework which regulates municipal powers when imposing rates.

Since its implementation by municipalities, the MPRA has caused great unhappiness amongst ratepayers. The Department of Cooperative Governance and Traditional Affairs ("the Department") has now conceded that the MPRA is lacking in certain areas and has invited the public to comment on and attend public hearings on proposed changes to the MPRA. One such proposed change is to amend the MPRA so as to address the inconsistencies in the valuation of properties.

Any comments on the proposed changes, as well as any other suggestions, must be submitted to the Department on or before 3 May 2010. Furthermore, residents of Johannesburg, Durban and Cape Town will be given an opportunity to air their views at public hearings to be held on 26 April, 28 April and 30 April 2010 respectively. The Durban hearing will be held at the Chamber, KwaZulu-Natal Provincial Legislature, 239 Langalibalele Street, Pietermaritzburg

### **MIA BEAVON**

Mia can be contacted on 031-3020238 and [beavon@wylie.co.za](mailto:beavon@wylie.co.za)

## **3. DEFY V SARS**

In terms of section 64B(5)(c) of the Income Tax Act (the "Act"), a dividend qualifies for exemption from secondary tax on companies ("STC") if it is distributed in the course or in anticipation of the liquidation, winding up or deregistration of a company and if it is shown by the company to be a distributions of 'profits of a capital nature' (subject to a qualification which is not material to the case at hand).

In this case the Court had to determine what constitutes a capital profit for the purpose of the exemption from STC. The dispute arose from a decision by the shareholders of Defy to dispose of its business and then to wind up the company. Defy was an investment company whose assets comprised all the shares in the number of subsidiaries. One of the subsidiaries was Defy Appliances (Pty) Limited (Appliances) which was the main operating company in the group. Defy sold to the purchaser all the shares in the subsidiaries except for Appliances, who sold the whole of its business to the purchaser as a going concern. It was accepted that the sale of the Defy shares in its subsidiaries yielded an exempt capital profit, which was not subject to STC. The

question centered around the nature of the distribution from Appliances to Defy which was in turn distributed by Defy to its shareholder in the course of being wound up. The Court held that profits are of a capital nature if the asset that yielded the profit was a capital asset. The Court went on to say that the monies earned by Appliances were exempt because the gain was from the disposal of capital assets. The distribution received by Defy was not yielded in the same way. Instead, Defy received its monies in extinction of its claim to be paid a declared dividend in an equivalent amount. The Court therefore found that the dividend received by Defy did not constitute a capital profit and was not exempt from STC.

#### **ANTON LOCKEM**

Anton can be contacted on 031-3020443 and [lockem@wylie.co.za](mailto:lockem@wylie.co.za)

#### **4. BEWARE OF PRODUCT LIABILITY UNDER THE NEW CONSUMER PROTECTION ACT**

Section 61 of the Consumer Protection Act, 2008 ("the Act") introduces drastic remedies for consumers who suffer death, injury or illness, or the loss of, or physical damage to, movable or immovable property as a result of having been supplied unsafe or defective goods, or if they are given inadequate warnings or instructions regarding hazards which may arise from using the goods supplied.

Although the Act is only expected to come into full operation on 24 October 2010, once it comes into effect, a consumer will be entitled to claim compensation for harm suffered in respect of any defective goods supplied to that consumer since 24 April 2010.

The inadequate protection offered by current consumer protection legislation will be repealed and replaced by the Act, which contains a plethora of consumer rights aimed at protecting consumers from having to agree to unfair contract terms when purchasing goods or services. This article deals only with the product liability provisions contained in section 61 of the Act.

In terms of section 61, all manufacturers and suppliers of the goods which have caused harm to consumers in the manner specified in the section, are jointly and severally liable for that harm, as well as for any economic loss which a consumer may suffer indirectly as a result of that harm. Section 61 applies to all goods which are supplied to a consumer, even if the supplier is exempt from complying with the provisions of the Act.

Therefore, to claim compensation in terms of section 61 of the Act, a consumer need only prove that the supplier supplied the goods to the consumer and the consumer suffered harm as a result of using the goods. This is commonly referred to as "no fault liability" because the consumer does not have to prove negligence on the part of the supplier. Any party in the supply chain is open to a product liability claim by the consumer due to liability being joint and several.

Amongst other things, if the supplier can prove that the defect did not exist in the goods at the time they were supplied by that supplier to another supplier, or that it would be unreasonable to expect the supplier to have discovered the defect considering the

supplier's role in supplying the goods, the supplier may escape, or minimise, its liability under section 61.

A consumer's claim under section 61 prescribes within 3 years after the harm is suffered or discovered, or 3 years after the latest date on which the consumer suffers economic loss as a result of such harm. It seems that if a consumer suffers a loss of income which continues for an indefinite period, the consumer's claim may never prescribe.

Since liability will effectively arise from 24 April 2010, we strongly recommend that suppliers of goods take immediate action to assess their risk and implement preventative measures to minimise their liability under the Act with effect from 24 April 2010. In particular, suppliers should ensure that their insurance cover provides sufficient cover for product liability claims. Since product liability cover is required for consequential and foreseeable loss, it is anticipated that such cover will come at a substantial cost to the supplier. It is quite likely that such costs will be passed on to the consumer in the form of higher prices.

When the Act is fully operational, suppliers of goods and services will not be permitted to contract with consumers on terms which have the purpose, or effect, of depriving consumers of any of the consumer rights contained in the Act. This means that suppliers will no longer be able to contract out of, or contractually limit their product liability as they have done in the past

#### **CLAIRE MCGEE**

Claire can be contacted on 032-3020282 and [mcgee@wylie.co.za](mailto:mcgee@wylie.co.za)

### **5. COMPETITION ACT AND PROPERTY TRANSACTIONS**

Developers must check whether their property acquisitions are reportable "mergers" in terms of the Competition Act for which they may need permission from the Competition authorities. Failing to report a notifiable transaction may result in a "divestiture order", which means that the transaction is unwound, and big fines are imposed. While the merger notification thresholds increased on 1 April 2009, it's still easy to hit these thresholds, particularly in substantial property transactions. Unfortunately, deciding whether a transaction is reportable or not can be complicated. While for threshold purposes, you look at the asset values and turnovers of the parties, the critical issue is whether the transaction causes control of all or part of a business to change hands.

While the Competition Tribunal has ruled that acquiring a bare asset is not a merger for the purposes of the Competition Act, the Tribunal went on to say that the real question is whether the transaction improves the acquiring firm's competitive position. That is a much trickier proposition because, on the face of it, capital investments are aimed at improving market share. Unfortunately the Tribunal didn't clarify this test and we can only hope that it does when next it deals with this question.

Competition law now pervades almost every aspect of corporate life. Companies must factor it into their thinking at a practical and compliance level, for example, by limiting data use and storage on networks to necessary information only, the company can minimise disruption during possible dawn raids by the Competition Commission.

**JENNIFFER FINNIGAN**

Jennifer can be contacted on 031-3020418 and [finnigan@wylie.co.za](mailto:finnigan@wylie.co.za)

**&**

**SIFISO MSOMI**

Sifiso is in our Property Department and can be contacted on 031-3020207 and [msomi@wylie.co.za](mailto:msomi@wylie.co.za)

**6. SARS V FASCINATION WIG**

This case involved an Appeal against the decision of the North Gauteng High Court concerning the correct tariff classification for custom duty purposes of synthetic fibres, stitched as wefts, and used to adorn hair. If the particular items were classified under the tariff classification heading 'finished items' it would attract customs duty, whereas a tariff classification under the heading 'unfinished items for use in making wigs' would not attract customs duty.

The High Court held that the imported goods were not dutiable as it was not finished products. The Supreme Court of Appeal considered that the wefts were not separate components but rather finished articles and the fact that expertise and time was needed to adorn it to hair or to a scalp did not entail that a new product was made. The Supreme Court thus held that the particular wefts should be classified as finished products which attract customs duty.

**ANTON LOCKEM**

Anton can be contacted on 031-3020443 and [lockem@wylie.co.za](mailto:lockem@wylie.co.za)

**7. "FIRST TIME CHANCERS" NEED TO PLAY BY FIFA RULES**

If you are thinking about getting on the last minute World Cup band-wagon and hosting an event during the World Cup, you better think twice because FIFA are not playing games when it comes to laws regulating the hosting of events in the host cities during the World Cup.

With less than 60 days until the tournament kicks off, the eThekweni Municipality released an advert in The Mercury (12 April 2010), requiring applications to be forwarded to them by people who intend holding an "event" which will take place "within municipal boundaries" during the World Cup. The application process is aimed at "first time chancer's" who will target the tournament from an opportunist perspective by hosting events and aim to benefit during this unique period. This is commonly known as "ambush marketing".

In terms of the notice, an "event" has been described as a parade, procession, race, concert, show, exhibition, festival, ceremony or any similar event of a sporting, cultural or recreational nature, (including but not limited to "fan camps", "public viewing areas", temporary accommodation, 2010 concerts and parties) as well as camping or "backpacker accommodation" at schools.

The practical effect of this application process is twofold: firstly, the Strategic Projects Unit and 2010 Programme must by 26 April 2010, have received all applications for consideration with regard to proposed events which are to be held between the period 04 June to 16 July 2010. Secondly, written approval confirming whether the event is either approved or deemed to be "not approved" and illegal, must then be provided by the Strategic Projects Unit and 2010 Programme.

The application process, has short time constraints and this will create major problems and confusion. Another problematic consideration is whether the general public, event organizers and the so called "first-time chancer's", are even aware of these requirements which must be complied with.

Furthermore, the definition of what is described as an "event" seems to be so wide and far reaching, that one is left puzzled as to what is and what is not encompassed within the bounds. The print advertisement merely provides that a gathering of more than 13 people will require an application to the SA Police Services (in terms of Gatherings Act 205 of 1993) and further approval from City By-Laws and FIFA Regulations are required for the event to take place.

For event organizers, brands and sponsors who usually host events and have established a good understanding of the procedures which are to be followed when seeking the Municipality's approval – business will be as normal, in comparison with "first time chancer's" who have no relationship with Municipal offices and often have minimal knowledge and experience.

Enforcement of these By-Laws will be dealt with on an ad hoc basis by the Municipality and one can only hope that the family braai, small get together and wedding (even on match days), are still a safe bet. However, problems will arise when the small party and festivities extend to a marquee with a big screen hosting quite a crowd of people. This is clearly a contravention of the By-Laws and will land the "first time chancer" in hot water, with a fine not exceeding R10 000 or a prison sentence not exceeding 6 months, punishable in terms of the eThekweni Municipality 2010 FIFA World Cup South Africa By-laws.

## THELANI LUTHULI

TheLANI can be contacted on 031-3020210 and [luthuli@wylie.co.za](mailto:luthuli@wylie.co.za)

## 8. 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:

Willie Coetzee	+27 31 302 0451	<a href="mailto:coetzee@wylie.co.za">coetzee@wylie.co.za</a>
Nick Theunissen	+27 31 302 0453	<a href="mailto:hnt@wylie.co.za">hnt@wylie.co.za</a>
David Warmback	+27 31 302 0409	<a href="mailto:warmback@wylie.co.za">warmback@wylie.co.za</a>
Kabby Esat	+27 31 302 0457	<a href="mailto:esat@wylie.co.za">esat@wylie.co.za</a>
Jenny Finnigan	+27 31 302 0418	<a href="mailto:finnigan@wylie.co.za">finnigan@wylie.co.za</a>
Diana McIlrath	+27 35 780 7250	<a href="mailto:mcilrathd@wylie.co.za">mcilrathd@wylie.co.za</a>
Claire McGee	+27 31 302 0282	<a href="mailto:mcgee@wylie.co.za">mcgee@wylie.co.za</a>

Erika Petersen-Holmes	+27 31 302 0470	<a href="mailto:petersen@wylie.co.za">petersen@wylie.co.za</a>
Cathryn Bode	+23 31 302 0467	<a href="mailto:bode@wylie.co.za">bode@wylie.co.za</a>
Mia Beavon	+23 31 302 0238	<a href="mailto:beavon@wylie.co.za">beavon@wylie.co.za</a>
Anton Lockem	+23 31 302 0443	<a href="mailto:lockem@wylie.co.za">lockem@wylie.co.za</a>
Thelani Luthuli	+23 31 302 0210	<a href="mailto:luthuli@wylie.co.za">luthuli@wylie.co.za</a>
Alan Wallis	+23 31 302 0236	<a href="mailto:wallis@wylie.co.za">wallis@wylie.co.za</a>

**VISIT OUR WEB PAGE**

<http://www.wylie.co.za>