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

1. A NEW EXCHANGE CONTROL AMNESTY

The Exchange Control Department of the South African Reserve Bank has published a draft Exchange Control Voluntary Disclosure Programme ("draft VDP") as well as an amendment to the Exchange Control Regulations, 1961 ("the Regulations") for public comment.

The Amnesty relates to both individuals and corporates. Much like the Amnesty in 2003 some transactions will require a disclosure without a levy whilst other transactions, such as the re-investment of foreign assets into South Africa (looping structures), will upon disclosure and approval require a levy of 10% if paid from funds abroad and 12% if paid from local funds.

The application for Amnesty must be submitted in prescribed form and must contain sufficient information about the transaction history.

The draft VDP is currently open for public comment and is expected to come into operation on 1 November 2010 with a window disclosure period of 12 months.

ANTON LOCKEM

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2. BEWARE, YOUR CC MIGHT BE DEREGISTERED

With effect from 1 September 2008, it has become compulsory for every close corporation ("CC") to lodge an annual return with the Registrar of Close Corporations ("the Registrar") on payment of a prescribed fee. Even if a CC is dormant, in other words it is not doing business at the moment but intends to do so in the future or only owns a private residential property, it still has to comply with the annual return requirements.

The lodgement of annual returns has two purposes. Firstly, it provides the Registrar with the latest information of the CC, such as its contact numbers and address and information regarding its accounting officer. Secondly, it enables the Registrar to determine whether the CC is still in business. It should be noted that the lodgement of an annual return does not exempt your CC from lodging other returns like a change of membership or accounting officer.

The annual return must be lodged electronically on the Companies and Intellectual Property Registration Office's ("CIPRO") website, www.cipro.gov.za, within 2 months of the anniversary of the registration date of the CC. Failure to file an annual return within the time limits will lead to a penalty being levied and ultimately, the deregistration of your CC. If deregistered, it means that your CC will lose its status as a separate legal entity and the members can be held personally liable to the CC's creditors for all outstanding liabilities. Furthermore, all the CC's assets are forfeited to the state.

Now is the time to be more vigilant, as CIPRO has indicated that it will be clamping down on non compliant CC's this year.

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3. PROPERTY IN A COMPANY, CLOSE CORPORATION OR A TRUST

Historically, certain individuals acquired their residence in a company, close corporation ("CC") or trust, primarily to avoid the imposition of transfer duty. Since the introduction of capital gains tax ("CGT") and transfer duty on the disposal of shares in residential property companies, members' interests in CC's and beneficial interests in trusts, the advantages of these property holding entities have to a large extent diminished, coupled with the fact that the primary residence exclusion from CGT is only available to natural persons.

During 2002, there was a 2 year window period and in 2009 a restored window period, whereby relief was granted to taxpayers in order to transfer their residential properties from companies, CC's or trusts with no CGT, transfer duty or secondary tax on companies (STC) consequences.

In the Taxation Laws Amendment Bill 2010, it is proposed to extend the roll-over relief on these property transfers to the end of 2012 subject to the following qualifying criteria:

- The company, CC or trust must dispose of the property in anticipation of or in the course of de-registration, liquidation or winding-up which must take place within 18 months after the disposal of the property. This requirement was in part introduced to reduce the number of 'unnecessary' companies on register;
- A natural person, (which includes the spouse of such person) must own all the shares in the company or members' interest in the CC, and the property must be transferred to the shareholder or to the shareholder and spouse jointly. In the case of a trust the residence must be transferred to the trust donor (i.e. the person who donated the property to the trust or the person who provided the trust with necessary finance to purchase the property);
- The residence must represent at least 90% of the value of the company/CC/trust and must be used for residential purposes by the shareholder/member/donor, and/or his family. Therefore investment properties will not qualify for the relief under these provisions.

If the disposal qualifies for relief, the company, CC or trust will not be liable for CGT, STC (in the case of a company) and likewise the shareholder will not be liable for CGT on the surrender (disposal) of the shares, transfer duty or the new dividends tax when introduced. Upon completion of the transfer the base cost of the residence to the transferees will be the same as that held by the company, CC or trust.

If the existing shareholder previously acquired the shares in a residential company or CC, the base cost upon distribution of the property to such a shareholder will be equal to the shareholder's cost in acquiring the shares or members' interest plus subsequent qualifying expenses.

The practical effect of the proposed legislation can be illustrated by the example below:

Mr. A and his wife formed company B in 1997. Company B acquired a residence in 1997 at a cost of R500 000. Mr. A, his wife and children live in the house. In 2010 the residence is worth R2 000 000. If the residence is transferred to Mr. A and/or his wife, the roll-over relief will apply provided the company has taken steps to liquidate, wind up or deregister and therefore no CGT, Transfer Duty or STC is payable.

If the shares in Company B are held by Mr. A's family trust the roll-over relief will not apply as the shareholder is not a natural person.

Assume the residence is held by Trust C. Mr. A and his wife originally made a loan to Trust C in order to purchase the residence. Mr. A, his wife and children live in the house. Trust C has no other assets. The roll-over relief will apply if the residence is transferred to Mr. A and/or his wife in their joint names provided Trust C is dissolved within 18 months.

If the residence is transferred to a beneficiary other than the donor(s), the roll-over relief will not apply.

The extension of the roll-over relief provides another opportunity to taxpayers to transfer their primary residence into their names without incurring any CGT, STC or Transfer Duty on such transfer.

In terms of the latest proposals by Treasury, it is proposed that the distribution requirement be extended to other qualifying beneficiaries and shareholders in addition to the original funder(s). It is also proposed to extend the ambit of the exemption to multi-tier structures which may include holding company and trust holding structures in qualifying companies. The revised Bill will be released towards the end of August at which time the scope of these extensions will be known, whereafter we will communicate these to you.

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4. AN ABBREVIATED SUMMARY OF THE NEW CONSUMER PROTECTION ACT

When the Consumer Protection Act ("the Act") comes into effect on the 24th October 2010, suppliers will no longer be free to decide the terms and conditions on which they supply goods or services to consumers. Most of those terms and conditions will be dictated 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.

Suppliers will not be able to contract with consumers on terms which have the purpose or effect of depriving consumers of any of their rights, or avoiding any of the obligations, contained in the Act. Suppliers who contravene the Act can be slapped with an administrative fine of up to R1 million rand or 10% of the supplier's annual turnover. A court may also order a supplier to pay damages to a class of consumers for collective injury suffered by that class of consumers generally.

WHO WILL BE PROTECTED BY THE ACT?

The Act aims to create a consumer market that is fair and accessible to consumers by protecting *vulnerable* consumers from exploitation and unfair marketing practices. All consumers who are natural persons, as well as small companies, partnerships, trusts and similar juristic consumers which have an annual turnover or asset value below a certain threshold (to be announced) will be covered by the Act. In future, suppliers will have to consider the asset value and annual turnover of each new juristic consumer to determine whether it is required to comply with the Act in respect of that consumer.

WHAT TYPES OF TRANSACTIONS WILL BE COVERED BY THE ACT?

Subject to a few exceptions, the Act only applies to transactions which take place in the ordinary course of business in return for payment (in any form, including money, barter, tickets, credits or coupons). If a person therefore enters a transaction which would not form part of the usual business carried on by that person, that transaction will not be subject to the provisions of the Act. For example, a once off sale of one's motor vehicle would not be subject to the Act.

The supply of tangible and intangible goods, information and advice, accommodation and entertainment, access to premises or facilities, leases of

immovable property, franchise agreements and a range of other goods and services supplied in the ordinary course of business are subject to the Act.

Goods or services which a club, trade union, association, society or any other similar entity supplies to its members in the ordinary course of business are subject to the Act, even if the members are not required to pay for such goods or services.

PLAIN LANGUAGE REQUIREMENTS

The Act will impact all documents relating to transactions between a supplier and consumer, from advertisements to public notices, standard terms and conditions of trade and supply agreements.

All such documents must 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 draft their documents in plain language may face problems in enforcing those documents at a later stage. In deciding 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 Act.

NOTICE OF SPECIFIC TERMS AND CONDITIONS

Suppliers of goods and services will not be able to enforce agreements which contain terms which amongst other things, are excessively one-sided, inequitable or are not drawn to the consumer's attention in the manner specified by the Act.

The *existence, nature and effect* of any notice or provision of an agreement which limits a supplier's risk, causes a consumer to assume a risk or requires a consumer to indemnify the supplier for any reason must be drawn to a consumer's attention in a way which would attract the attention of an ordinary alert consumer *before* the consumer concludes a transaction, starts participating in an activity or is required to make any payment. The consumer must also be given sufficient time to read and comprehend the notice or provision.

Suppliers will have to spell out any limitation of liability or indemnity in language which is simple enough for the relevant consumer to understand without much difficulty. In future, all liability and indemnity provisions will be interpreted to the consumer's benefit so that they are limited to the extent that a reasonable person would ordinarily expect in the circumstances. A supplier may not limit its liability for gross negligence or the harm covered by the strict liability provisions of the Act.

STRICT LIABILITY

Section 61 of the Act provides 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.

In terms of section 61, all manufacturers and suppliers of goods which have caused death, injury or illness, or the loss of, or physical damage to, movable or immovable property, 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. This section also applies to suppliers of services who supply or install goods as a part of the services which they offer.

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 "strict liability" or "no fault liability" because the consumer does not have to prove any 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.

IMPLIED WARRANTY OF QUALITY AND VOETSTOOTS

In every transaction for the supply of goods, the Act creates an implied warranty that the goods supplied to a consumer are suitable for their intended purpose, are of good quality, in good working order and are free of defects. If the goods fail to meet these standards, within 6 months after receiving the goods, a consumer may return them to the supplier and may elect that the goods be repaired or replaced or that the consumer be refunded.

If a supplier expressly informs a consumer that the goods are offered in a "specific condition" and the consumer accepts the goods in that condition, the implied warranty will not apply to those goods. The current position in our law is that you can sell goods "voetstoots" or "as is" without specifying the specific condition of such goods provided that you disclose any latent defects of which you are aware. Under the Act, it is not clear how specific the supplier has to be when disclosing the "specific condition" of the goods to the consumer.

FIXED TERM AGREEMENTS

When the Act comes into effect, consumers will be able to cancel any pre-existing fixed term contract by giving the supplier 20 business days written notice of cancellation. The supplier will only be able to charge the consumer a reasonable cancellation penalty if the supplier gave the consumer any goods, services or discounts in contemplation of the agreement enduring for its full term.

A supplier may only cancel a fixed term agreement if the consumer breaches the agreement and does not rectify its breach within 20 business days after the supplier gives the consumer a written notice requesting the consumer to do so.

If a consumer does not cancel or renew the agreement, on its expiry, the agreement will automatically continue on a month to month basis. Fixed term agreements may no longer be automatically renewed.

CONCLUSION

Suppliers need to understand the implications of the Act from an operational and risk management perspective. As a starting point, suppliers should assess their product liability and adjust their insurance cover to meet the increased risk brought about by the Act, obtain legal advice on all public notices, and revise their standard terms and conditions of trade and supply agreements to ensure that they will be enforceable under the Act.

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5. IMPORTANT JUDGMENT ON CONSTITUTIONALITY OF DEVELOPMENT FACILITATION ACT

The Constitutional Court in the case of City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and others CCT 89/09 recently handed down an important judgment effectively declaring Chapters V and VI of the Development Facilitation Act 1995 ("the DFA") as unconstitutional and thus invalid.

The DFA was established in 1995 primarily to redress inequalities left by the policy of separate development with the aim that reconstruction and development should occur a lot quicker than that which was able to be accommodated within the framework of various Provincial Planning Ordinances regulating town planning processes. The intention of the DFA was to make provision for low cost housing and facilities for those previously impoverished.

The mechanisms available under the DFA were however, and still are, extensively used for non-RDP projects including upmarket commercial and residential developments. One of the main advantages for developers using the DFA is that the DFA Tribunal has the power to suspend and override provisions of certain legislation which usually delays the development process in the normal course of events under various Provincial Planning Ordinances. This includes the Subdivision of Agricultural Land Act and the ability of the DFA Tribunal to suspend certain title deed conditions applicable to a property.

A dispute had arisen between the City of Johannesburg ("Johannesburg") and the Gauteng Development Tribunal ("the Tribunal") which is a provincial organ established by the DFA. The DFA empowers the Tribunal to approve applications for the establishment of townships and rezoning of land. A provincial ordinance, like others nationally, also empowers Johannesburg to deal with the same matters. Johannesburg then applied to the South Gauteng High Court challenging the constitutional validity of the DFA and requesting a review of two of the Tribunal's decisions relating to specific planning matters in Johannesburg. The High Court dismissed the application and Johannesburg appealed to the Supreme Court of Appeal ("SCA") which held that the relevant chapters of the DFA were invalid. Johannesburg

appealed to the Constitutional Court seeking confirmation of the invalidity order, and also leave to appeal against the dismissal of the appeal in relation to the review of two decisions of the Tribunal.

The Constitutional Court was requested to determine whether the constitution empowers the provincial sphere of government or the municipal sphere, or both, to deal with matters relating to township establishment and rezoning.

Johannesburg was unhappy that developers were using the DFA effectively to override parts of the Town Planning Scheme, and it contended that powers to establish townships and rezone land are components of "municipal planning", a function assigned to municipalities by Section 156(1) of the Constitution, read with Part B of Schedule 4 to the Constitution.

The MEC for Local Government and Traditional Affairs KZN, the Department of Agriculture, Rural Development and Land Administration: Mpumalanga, and the eThekweni Municipality joined the proceedings, and the South African Council for Consulting Professional Planners and the South African Property Owners Association were admitted as *amici curiae* in support of the respondents.

Jafta J, writing for a unanimous court, endorsed the SCA finding that "planning" in the context of municipal affairs had assumed a particular, well established meaning which included the establishment of townships and the zoning of land. He held that the powers to consider and approve applications for township establishment and land rezoning are elements of "municipal planning" and consequently chapters V and VI of the DFA were constitutionally invalid because they assign municipal powers to organs of the provincial sphere of government.

The Court suspended the Order of invalidity for 24 months to allow parliament to rectify the defects in the DFA or pass new legislation. As Johannesburg and the eThekweni Municipality have capacity to exercise these planning powers, the Order prohibited development tribunals from hearing new applications within the jurisdiction of these two authorities. The Tribunals must however finalize all pending applications in these jurisdictions and the declaration of invalidity will not have a retrospective effect when it comes into force.

Importantly the Court also restricted Tribunals from suspending any Act of Parliament or bylaw, which they had previously done successfully for developers. Rather than secure the approval of the Department of Agriculture, Tribunals were able to suspend provisions of the Subdivision of Agricultural Land Act, requiring permission from the Minister of Agriculture prior to the subdivision of agricultural land.

The judgment is no doubt a serious setback for developers who have used the DFA very successfully since it was first brought onto the statute books many years ago.

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5. 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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