

*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.*

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#### Articles and Recent Developments:

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

#### 1. **DOMAIN NAME DISPUTES**

A domain name is the address of a web site, for example, [www.wylie.co.za](http://www.wylie.co.za) is the address of Shepstone & Wylie's web site.

Domain name disputes typically arise as a result of the fact that when a domain name is registered, the applicant is not required to show that it has any rights to the name. It is, therefore possible that a person may register a domain name which is identical or confusingly similar to your company name or trademark. There are a number of reasons for this. For example, a person may register a domain name with the intention to sell it back to the trademark proprietor at an inflated price – a practice commonly known as cybersquatting, or the person may intend to use the domain name to attract consumers to his website, who mistakenly assumes that the website and services or products offered thereon is affiliated with your business or it may merely be an innocent mistake.

If you find yourself in this position there are three options available to you. Firstly you can opt for arbitration. If the dispute relates to a dot com domain name, the Uniform Domain Name Dispute Resolution Policy ("UDRP") of the Internet Corporation of Assigned Names and Numbers ("ICANN") will be applicable. If the dispute relates to a dot co dot za domain name, the Alternative Dispute Resolution Regulations ("ADRR") issued in terms of the Electronics Communications and Transactional Act will be applicable. Under both the UDRP and the ADRR, proof of bad faith registration is required, which can be countered by the registrant proving he has rights in the name.

This often happens were you have registered a dot co dot za domain name and another party has registered the corresponding dot com domain name. Just because you are the registered owner of the dot co dot za domain name does not mean you have an automatic right to the dot com domain name. If the registrant of the dot com domain name can show that he has rights in the name you would not be able to lay claim to it. If you are successful in arbitration, the domain name will be transferred to you.

Secondly, if you have a registered trademark you can approach the court on the basis that the domain name infringes your trademark. You would however have to approach the court in which the domain name owner is resident.

Thirdly, if you have no registered trademark you are still entitled to approach the court on the basis that you have a reputation under the name and the domain name creates the impression that the registrant's business is associated with yours. Therefore the question is whether there is a reasonable likelihood that members of the public may be confused into believing that the business of the one is, or is connected with, that of another.

Having regard to the rapid growth of the Internet and that unscrupulous parties may wish to take advantage of your company's goodwill, it has become increasingly important to register a domain name and in so doing to ensure that your brand and trademark is protected on the Internet. If not, it may lead to unnecessary litigation in the future.

#### **MIA KROG**

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

## **2. RESTRAINTS OF TRADE**

There have been two recent restraint cases which have raised eyebrows and are worthy of note.

The settled law on restraints is that they are legal and that the party seeking to avoid a restraint must prove that the restraint is unreasonable and therefore contrary to public policy.

This has been further refined by the Supreme Court of Appeal. When considering whether the restraint is reasonable, an enquiry into the following 4 questions should occur:

1. Does the employer have a protectable interest that deserves protection.
2. Is that interest threatened by the ex employee.
3. Does that interest weigh qualitatively and quantitatively against the interest of the employee not to be economically inactive and unproductive.
4. Is there an aspect of public policy having nothing to do with the relationship which requires that the restraint be maintained or rejected.

This clear situation has been somewhat thrown into disarray by Judge Davis in a recent Cape High Court case in which he examines the effect of the Constitution on restraints of trade. He then comes to the conclusion that, given the importance placed by the Constitution on the dignity of work, an employer must justify the limitation on that right when seeking to enforce a restraint. The impression he creates is that he believes restraints are prima facie invalid unless the employer can prove that they are justified. He also examines the wording of the restraint in question and comes to the conclusion that unless the wording is precisely applicable to the circumstances, the Court will refuse to apply the restraint by limiting it in some or other appropriate manner.

This somewhat controversial approach is roundly criticised by Acting Judge Wallis in a more recent Durban High court case, where he reaffirms the law on restraints and points out the Constitutional Court has held that contractual obligations are enforceable unless they are contrary to public policy. He says that there is no in-principle objection to restraints (as implied by Judge Davis) and that where a business has secured a restraint from an employee, there is no reason "for the courts or the law to view this with disfavour" unless public policy bounds are "overstepped".

Acting Judge Wallis also points out that restraints are often drafted in extremely wide terms to cover all eventualities and that the Court should be quite prepared to partially enforce a restraint (for example, by reducing the time period or the geographic area), provided it does not give rise to an injustice. Therefore, if the conduct complained of falls within the terms of the restraint, the court must enforce the restraint within the principles of public policy and grant appropriate relief.

Restraints by their nature are extremely difficult to advise on, particularly if regard is had to the differing views of our judges. Although, the approach of Acting Judge Wallis is in our view preferable, we would strongly advise employers to carefully review the wording of restraint agreements and only to contemplate legal action where they have a clear protectable interest which is being threatened.

## **WILLIE COETZEE**

Willie can be contacted on 031-3020451 and [coetzee@wylie.co.za](mailto:coetzee@wylie.co.za)

### **3. SEQUESTRATION AND LIQUIDATION**

As the economic and financial constraints tighten there will inevitably be business failures leading to the sequestration of individuals or the liquidation of companies.

Sequestrations and liquidations have an obvious impact on other parties who are creditors of the insolvent individual or the liquidated company but also affect other parties where the insolvent or the company in liquidation is in possession of assets belonging to a third party.

We have often been asked what can be done in these circumstances in order to protect the rights of the third party in relation to the assets.

The assets may be with the insolvent or the company in liquidation as a loan, in terms of an instalment sale agreement or a sale with reservation of ownership.

In an ideal world these transactions would have been properly documented at the time so that the true ownership is clearly demonstrated. Unfortunately this does not always happen.

Assets may be loaned, for example, in circumstances where a manufacturer outsources part of its production process and for that purpose, lends plant and equipment to another party. The basis of the loan as well as the manufacturing arrangements should be recorded in the written contract at the time but if this has not been done, it should be addressed in order to properly record the transaction.

If there has already been a sequestration or liquidation it is obviously too late for an agreement to be signed and the third party owner will have to rely on its own records in order to prove to the trustee or liquidator that it is in fact the owner of the goods concerned.

This is important because only assets belonging to an insolvent or a company in liquidation form part of the insolvent estate. If your assets are caught up in the liquidation and you can prove that they are your assets then you have a right to have them returned to you. The better your audit trail in relation to the ownership of the assets, the sooner you will be able to secure the release of those assets from the trustee or liquidator.

A liquidator is not entitled to levy a commission in respect of assets which are not part of the insolvent estate and any attempt to do so should be resisted.

The situation is different in respect of assets sold on instalment sale or with reservation of ownership. In these circumstances, section 89 of the Insolvency Act applies and it provides that the cost of maintaining and realising any property which is subject to a right of retention is payable by the creditor or out of the proceeds of the asset. An instalment sale or a sale with reservation of ownership results in the assets concerned being subject to a "right of retention".

However assets on loan and assets sold in terms of agreements subject to section 89 can only be removed from the custody of the trustee or liquidator with the consent of the trustee or liquidator or if necessary by court order.

#### **NICK THEUNISSEN**

Nick can be contacted on 031-3020453 and [theunissen@wylie.co.za](mailto:theunissen@wylie.co.za)

#### **4. BEWARE OF THE APPEARANCE YOU CREATE – OSTENSIBLE AUTHORITY**

A person or an entity ("the Principal") who has not authorized another ("the Agent") to act on his behalf may nevertheless, in appropriate circumstances, be held liable for that Agents conduct. This is as a result of a concept known as ostensible authority.

Ostensible authority can be defined as the authority of an Agent as it appears to others. In other words a Principal conducts itself in such a manner which gives rise to the appearance that the Agent was authorized to act. For example, when a board of directors appoints a managing director, they invest in him the authority to do all such things which fall within the scope of that office. People seeing him act as managing

director are entitled to assume that he has the usual authority of a managing director. In some situations however, the managing director's authority may expressly be limited by the board, for instance the board may state that he is not allowed to order goods worth more than R100 000.00 without the board's sanction. The managing director's actual authority is subject to the R100 000.00 limitation but his ostensible authority includes all the usual authority of a managing director. The company would be bound by the managing director's ostensible authority in his dealings with those who do not know of the limitation, even if he orders goods worth more than R100 000.00 without the approval of the board.

The moral of the story is that a Principal should ensure that it is clear to third parties what limitations apply to his Agent.

#### **MIA KROG**

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

#### **5. ARE YOU REQUIRED TO COMPLY WITH THE PROVISIONS OF THE CONSUMER PROTECTION ACT?**

At the end of April 2009, the Consumer Protection Act ("the Act") was passed as law. The Act, which is not yet in operation, will come into operation in two phases and will be fully effective within 18 months after the date on which it was passed.

Suppliers of goods and services are becoming increasingly concerned about their compliance obligations under the new Act. The Act applies to all suppliers of goods and/or services who supply goods and/or services to consumers within South Africa, whether that supplier is an individual, partnership, trust, close corporation, company, or other similar entity, and irrespective of whether the supplier operates for a profit or non-profit purpose.

Despite this, the Act prescribes certain instances when a supplier is exempt from complying with the Act. One such instance is where the consumer is a company, partnership, trust or other juristic person with an annual turnover or asset value which meets, or exceeds, a prescribed threshold.

The Act requires the Minister who is allocated responsibility for consumer protection matters to determine such threshold. Juristic consumers with an asset value or annual turnover which meets, or exceeds, the prescribed threshold will not be entitled to the protection of the Act. Such juristic consumers are supposedly large entities which wield as much bargaining power as the suppliers with whom they deal and which do not require protection against unfair trade practices.

The threshold is scheduled to be published in the Government Gazette in approximately 12 months time.

#### **CLAIRE MCGEE**

Claire can be contacted on 031-3020282 and [mcgee@wylie.co.za](mailto:mcgee@wylie.co.za)

## 6. 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>
Cabby 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>
Madeleine Schubert	+23 31 302 0443	<a href="mailto:schubert@wylie.co.za">schubert@wylie.co.za</a>
Bridgett Majola	+23 31 302 0375	<a href="mailto:majola@wylie.co.za">majola@wylie.co.za</a>
Mia Krog	+23 31 302 0238	<a href="mailto:krog@wylie.co.za">krog@wylie.co.za</a>

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