**EXECUTIVE SUMMARY**

Welcome to this month's eFile. In this issue, we look back on some of the articles in our last eFiles as a reminder of their relevance and importance today.

As always, more detailed versions of each of these articles can be found on our Web site. You can also find out more about our innovative new Legal Lite solution and how we can help fast-track your commercial transactions by providing timely, on-demand advice.

# VOETSTOOTS CLAUSE NO DEFENCE AGAINST FRAUD

The *voetstoots* clause has historically been championed as a sound defence mechanism for a seller to contract out of liability against a buyer's claim based on a discovery of a latent defect. However, recent case law has held that this defence falls away in the case of a seller behaving fraudulently.

This is evident in the recent case of *Ellis vs Cilliers*. When a buyer purchased a property and subsequently discovered that the floors were uneven, the court held that this amounted to 'latent defect.' The seller, in turn, was found to have behaved fraudulently by laying cement screed over the wooden floors and covering them with carpets and tiles to deliberately conceal the unevenness.

Despite the fact that the contract of sale included a *voetstoots* clause, the court held that the presence of fraudulent conduct meant that the seller could not rely on it to escape liability. The court found that the seller was aware of the uneven flooring and fraudulently and deliberately concealed the defect. This meant that the purchaser was entitled to relief, in the form of its proven damages, plus legal costs.

# BUSINESS RESCUE PROTECTED FROM ALL LEGAL PROCEEDINGS

If a company is undergoing business rescue, the Companies Act states that it is immune to the commencement of any 'legal proceeding,' without the written consent of the business rescue practitioner. However, the phrase 'legal proceeding' is not defined by the Act.

The Supreme Court of Appeal (SCA) was required to scrutinise two critical questions in the recent judgment of *Chetty v Hart*, namely: (i) does arbitration fall within the definition of 'legal proceeding' for purposes of the above; and (ii) if so, are arbitration proceedings (leading to a subsequent arbitration award) conducted without the consent of the business rescue practitioner null and void?

In this particular case, the SCA considered the purpose of business rescue proceedings and stated that, "It gives the company breathing space so that its affairs may be assessed and restructured in a manner that allows its return to financial viability." In addition to this, the requirement of consent from the business rescue practitioner allows them to assess the impact of the claim against the business' financial health.

The SCA held that a general moratorium on the rights of creditors is crucial in order to achieve the above objective. Given the ubiquitous use of arbitrations to resolve commercial disputes, excluding these proceedings (which can be both costly and lengthy) from the moratorium created by s. 133(1)(a) would significantly hinder the realisation of a business rescue's objectives. Accordingly, the definition of 'legal proceedings' in this context was held to include arbitrations.

It is, therefore, submitted that the SCA was correct in its interpretation of s. 133(1)(a) and that the effect of the lower court's ruling would have drastically impaired the business rescue practitioner's abilities to attempt to rehabilitate companies in business rescue, as arbitrations can be lengthy, costly and often

involve a diversion of the company's resources which may impede the effectiveness of the business rescue proceedings.

## ADDRESSING CYBERCRIME WITH THE PROTECTION OF PERSONAL INFORMATION ACT

Cybercrime is no longer a rare occurrence. Between 70% and 80% of South African adults have been victims of cybercrime, and it is estimated that cybercrime cost the South African economy approximately R5.8 billion in 2014. This ever-escalating cost to individuals and businesses requires clear legislation, which begins with protecting private information that may be vulnerable.

The Protection of Personal Information Act (POPIA) constitutes a critical step forward for South African legislation, as it is the first piece of legislation to have the protection of personal information as its core concern.

Signed into law in November 2013, it introduces minimum requirements to protect personal information by regulating how such information is processed, stored, secured, and ultimately destroyed. These minimum requirements are currently not mandatory, but this is set to change. A failure to comply with POPIA could expose businesses to fines from the regulator of up to R10 million or, in certain instances of non-compliance, a court sanctioned fine and/or a period of imprisonment of up to 10 years.

If you would like to learn more about the steps you should take to prepare for the full implementation of POPIA, visit our Web site or get in touch with us.

## SOCIAL NETWORKING AT WORK

The use of social media has become an inherent part of how society communicates. However, these pervasive platforms can affect employment relations and, in turn, employment law.

This is exacerbated by the status quo in South Africa, where there is no specific law that governs the use of social media. Employers are faced with the risk of employees not considering or understanding the consequences of their posts and how they reflect on the company they work for. Irresponsible, shaming posts may constitute an invasion of privacy, cyber-bullying and even hate speech.

Until South Africa implements its own legal guidelines on social media use, employers may use the following principles as a guideline:

- The impact of social media on the Constitutional rights to dignity, privacy and freedom of expression;
- The risks that defamatory or harassing statements may result in vicarious liability for employers;
- The risk of work place harassment and cyber-bullying and the impact of this conduct on the work environment;
- What conduct may justify disciplinary action and even dismissal; and
- That breaches of fiduciary duties and, even possible insider trading, may flow from seemingly innocuous posts on social media is also worthy of reflection.

For more details on how employers can be held accountable for an employee's irresponsible use of social media, with expanded definitions and case examples, read the full article on our Web site.

## .AFRICA DOMAIN NAMES AVAILABLE FROM JULY

The introduction of the .africa global top-level domain name to the online community has been a long process, but it will finally be available to the general public from 4 July 2017.

The Internet Corporation for Assigned Names and Numbers (ICANN) delegated .africa to Registry Africa, a wholly-owned subsidiary of the ZA Central Registry (ZACR). This development comes after years of legal battles which stood in the way of ICANN from delegating .africa to Registry Africa.

The public can expect the domain to be launched in three phases: sunrise, landrush and general. The 'sunrise' phase prioritises trademark and brand names; 'landrush' applications open applications for premium and sought-after names, after which the general public can apply from 4 July onwards.

## IP EXCHANGE CONTROLS RELAXED

South African residents who create intellectual property and invest offshore are in for some good news. In its 2017 Budget Review, the National Treasury has amended its exchange control policy to state that companies and individuals no longer need SARB's approval for standard intellectual property transactions. The reviewed policy also proposes that the 'loop structure' restriction for all intellectual property transactions be lifted on the condition that they are at arm's length and are a fair market price.

For assistance will all elements of IP Law, contact us.

## TO COMPLY WITH POPIA, START NOW

While the Protection of Personal Information Act (POPIA) may take up to two years to be fully implemented, responsible businesses should take steps now to ensure compliance. The act will shift how businesses process and regulate customer information on an integral level.

At its first public briefing on 13 February 2017, Pansy Tlakula, the Information Regulator, addressed the public on the various pressing matters pertaining to POPIA. This included the long-awaited commencement date. The Act can only be implemented once the affairs of the Chairperson's office are in order, which may take up to two years. However, she assured that, while this is a complex and time-consuming process, they understand the urgency of getting POPIA off the ground and will try their best to accelerate this process. If their efforts are successful, POPIA could even launch by the end of 2017.

We are able to guide your business through the process of POPIA compliance. For more information, contact us.

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