Volume 46: November 2019

**legal risk In the Cloud**

Executive Summary

This month we are pleased to welcome commercial associate Simon Pennefather to the cleaned up, revamped crew at Harty Rushmere where we emphasize true team work to support our clients. Cassandra Savides has also joined the team as a consultant.

For further details on any of these stories, check out our Web site. You can also find out more about our innovative Legal Lite solution and how we can help fast-track your commercial transactions by providing timely, on-demand advice.

As customers are becoming more tech-savvy, so the pressure is increasing for businesses to become faster and more efficient in servicing their clientele on a daily basis. In keeping with an increase in demand from clients, many businesses are now moving to the cloud.

While the cloud has a beneficial impact on efficiency for businesses and customers alike, there are a number of legal considerations. Businesses must be mindful of the regulatory environment in which they operate and of internal data hygiene processes, such as complying with data protection and legislation. Any cloud infrastructure should be anchored in good corporate governance regarding risk mitigation as any business that uses the cloud is responsible for their own compliance requirements and should be aware of the specific requirements for certain sectors.

Many Cloud Service Providers produce useful materials that assist businesses in understanding the cloud, including the regulatory requirements that could be applicable for their specific sector. As a business, you can do the following to prepare yourself for a move to the cloud:

* Consider an internal data hygiene analysis/due diligence to determine what type of data your company has, where it currently stored and who has access to it.
* Once you have determined all the aspects of the internal data hygiene analysis, you will be in a better position to identify the risk that is attached to moving any if not all the data on to the cloud.
* Performing an internal data hygiene analysis will also assist your business in complying with data protection legislation such as the Protection of Personal Information Act (POPI), as well as identifying what possible further steps may need to be taken in order to comply with the requirements of legislation, any move to the cloud should be aligned with your business’ data governance policy.
* It is also important for your business to identify and understand mitigating risk outside the cloud service provider and to have in place, internal measures to mitigate any risk.
* When negotiating with a Cloud Service Provider, establish an open communication relationship with the service provider, establishing elements such as, what is the Cloud Service Provider’s contingency plan, what is the data storage plan is it based locally or abroad and what is their access to data?

If you approach a move to the cloud with a strategic focus, a clear knowledge of your data makeup and a focus on risk compliance, you will be well positioned to choose a cloud service provider that will meet the requirements for your business.

*If you would like strategic advice on how to move to the cloud while remaining legally compliant, contact us.*

# **LOANS UNDER THE NATIONAL CREDIT ACT - BEWARE**

One of the most contentious issues arising from the National Credit Act is when is it obligatory to register as a credit provider. On the 28th September 2018, the Supreme Court of Appeal, finally clarified this issue in the ruling of *De Bruyn v Karstens*. The Supreme Court of Appeal ruled that it is obligatory to register as a credit provider, even in the instance of a single provision of credit if the amount is not less than R500,000.00 and is an arm’s length transaction. This is regardless of whether the lender is an active participant in the credit industry or not.

This ruling has the following effects:

* The person or business must register as a credit provider even if they are not participants in the credit market and it is a single arm’s length transaction.
* Sale of Shares, property and loan accounts may take longer to finalise with the registration as a credit provider, taking up to three months in terms of the National Credit Act.
* The credit provider will have to comply with legislation and conditions such as FICA, the provisions of the NCA and applicable provincial legislation for the province in which they conduct registered activities.
* Should a person or business fail to register as a credit provider, if the principal debt exceeds R500,000.00 and is at arm’s length, it will be deemed unlawful and the result will be that the agreement will be void.

Borrowers of money will now be protected in terms of the National Credit Act in that fees charged will have to be within the prescribed parameters in the National Credit Act. The overall decision has been welcomed as it aims to protect the borrower.

*If you would like legal insight on your business’s registration as a National Credit Provider, please get in touch.*

**NEW COMMERCIAL ASSOCIATE AND CONSULTANT**

***Simon Pennefather (Commercial Associate)*** joins us from Durban, where he served his articles of clerkship (at Adams & Adams Attorneys) and then spent a further two years at Warrick de Wet Attorneys. During this time, he worked primarily in the fields of commercial law, intellectual property law and litigation, both in South Africa as well as throughout Africa.

In October 2019, Simon joined Harty Rushmere to focus on commercial and IT law. Combined with his experience in the intellectual property arena, he is able to apply his commercial and legal knowledge in a practical manner that serves him well in providing effective solutions and advice to clients.  
Communication is one of Simon’s major strengths; he is fluent in English, isiZulu and isiXhosa. His confidence and ability with languages places him in a position where he is able to communicate effectively and create interpersonal links. Nelson Mandela once said, “If you talk to a man in a language he understands, that goes to his head. If you talk to him in his language, that goes to his heart.”

Simon is extensively involved in a wide range of community outreach projects. One of his personal highlights has been obtaining funding and facilitating the building of a new pre-primary classroom and playground at Mbotyi Junior Secondary School, a severely under-resourced school in the Eastern Cape.  Simon is passionate about sport and the outdoors. He enjoys playing football, running, surfing, kayaking and hiking.

***Cassandra Savides (Consultant)*** is experienced in and focuses on corporate law, with specific emphasis on mergers and acquisitions, Black Economic Empowerment transactions and legal due diligence investigations in cross-border and local transactions and we look forward to working with her.

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