



We care about your business

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In this Issue

Directors: Check Your Liability Insurance!

- What are your new liabilities?
- Do these liabilities apply only to directors?
- Insurance and indemnification – the Good News
- The limitations

What Information Must

MAY 2013

DIRECTORS: CHECK YOUR LIABILITY INSURANCE!



The new Companies Act (the Act) became effective in May 2011. It substantially increased directors' personal liabilities but it allows for companies to take out insurance for directors with some restrictions.

This could have a significant effect on your business and on directors' personal assets.

What are your new liabilities?

The old (1973) Companies Act had many criminal sanctions but they were seldom applied. The new Act gave

A Tax Invoice Contain?

- See sample Tax Invoice with notes

Your Trademarks Are Worth Protecting

- Why is it important to your business?
- What happened in the SCA

Finance 101 – Is a Consensus Emerging in The Labour Market?

- So what exactly is happening?

Tax Corner: Reminder - Your 2013 Employer Reconciliation Must Be Completed Soon

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directors more authority (subject to the “MOI” Memorandum of Incorporation) but also imposed additional civil liabilities on directors.

The most significant actions where directors can be held liable for *loss or damages or costs* sustained by the company are -

- Any breach of fiduciary duties per the common law and duties of directors specified in the Act – these codified duties include ensuring you are informed about pertinent matters in the company and you have the requisite skills, knowledge and experience that is expected of a director;
- Allowing the company to proceed with activities prohibited by the Act;
- Being a party to reckless trading (which includes trading under insolvent circumstances);
- Acting outside the director’s level of authority;
- Being a party to publishing false, misleading, incomplete or non-compliant financial information;
- Participating in any act or omission calculated to defraud any shareholder, employee or creditor;
- Not voting against a decision contrary to the Act or MOI. These decisions revolve around matters such as unauthorised allotment of shares, the provision of financial assistance to directors and paying dividends which could jeopardise the company’s financial position.

Stakeholders such as shareholders, trade unions, employees and creditors may sue directors for losses incurred as a result of directors’ actions.

Do these liabilities apply only to directors?

Alternate directors and any members of a board committee attract the above liabilities. There is no distinction in the Act between executive and non-executive directors – this is particularly onerous on non-executive directors as they have to inform themselves of matters in the business so they can make a rational and informed decision.

“Prescribed officers” also attract these liabilities. These are senior managers who have similar roles and responsibilities to those you would expect of directors.

Insurance and indemnification – the Good News

The Act does allow the company to indemnify and/or insure directors against liabilities. The best known is “D&O” (directors and officers) Insurance.

Considering the risks attached to these liabilities, you should seriously consider taking out insurance, especially if you want to attract non-executive directors. A costly legal battle could financially ruin a director and/or your business.

The limitations

You cannot insure or indemnify a director if it is proven that the director -

- Acted in the name of the company despite knowing that he/she lacked the authority to do so;
- Acquiesced in the carrying on of the company’s business despite knowing that it was being conducted in a reckless manner;
- Was a party to an act or omission by the company despite knowing that the intention was calculated to defraud a creditor, employee or shareholder of the company, or had another fraudulent purpose;
- Incurred any liability arising from wilful misconduct or wilful breach of trust; or
- Incurred a fine as a result of a conviction for an offence in terms of national legislation.

One aspect to be aware of is that there is no indemnification or insurance cover if the director should have been aware of material information – you cannot simply say “I didn’t know”. If the facts show you ought to have known, then you incur liability. **It is thus vital that you keep a record of how you arrived at a decision** – if you knew the key facts in a matter and applied your mind in reaching your decision, you should not incur any liability.

WHAT INFORMATION MUST A TAX INVOICE CONTAIN?



TAX INVOICE

The words "Tax Invoice" must be clearly indicated.

From: Watt Electrical
 Watt Street
 Watt Valley, 0000
 Vat No: 1234567890

Supplier name, address and VAT No

Tax Invoice number sequentially

Invoice No: 0009/2013

Date: 01/05/2013

Date of Invoice

To: Joe Bloggs and Co
 Street address
 City, 00000
 Vat No: 9876543210

Recipient name, address and VAT number of recipient (if a registered vendor)

Accurate description of goods or services

Quantity	Description	Unit price	Amount
100	Light Fuses	R 150.00	R 15 000.00
1000	Batteries - Alkaline	R 8.00	R 8 000.00
Total sale value			
VAT Charged			
Total value including VAT			
Sub-Total		R	23 000.00
VAT @ 14%		R	3 220.00
Balance due		R	26 220.00

Price per unit X quantity

Notes:

- 1 The tax invoice is to be sent to the recipient within 21 days of the supply.
- 2 The currency for a tax invoice is Rand, unless it is zero-rated - you may then use the currency of the relevant country where the goods are being sent.
- 3 If second-hand goods are sold this is to be disclosed in the description column.
- 4 The description is to be "full and proper"
- 5 If the supply does not exceed R5,000 an abridged invoice may be used.
It must comply with the above invoice except for: a) the recipient's details need not appear on the invoice, b) there is no requirement to show the units or volume supplied and c) the description need not be "full and proper".
- 6 The VAT amount may also be disclosed as follows:

a).

Amount R
R 26 220

"Purchase price includes VAT at 14%" is to be stated on the invoice. The VAT is not individually disclosed, or

b).

Amount R
R 26 220
VAT included
R 3 220

- 7 If the Tax Invoice is zero-rated, a VAT charge of "Nil" is to be shown.
- 8 If there are vat-able, exempt items and/or zero-rated items on the same Tax Invoice, "VAT Status" must be shown -

Date	Description	Quantity	VAT Status	Amount R
4/4/2013	Diesel at R13 per litre	500	0%	6 500
4/4/2013	Alkaline Torch Batteries at R8 per battery	1000	14%	8 000
4/4/2013	Rental for residential purposes	1	Exempt	6 000
			VAT on R8 000 at 14%	1 120
			Total	21 620

- 9 No VAT invoice is required for amounts that do not exceed R50. Documentation must still be provided, such as a till slip or as acceptable to SARS.
- 10 For a tax credit note or tax debit note the requirements are as per above . They must be headed either "Tax Debit Note" or "Tax Credit Note" and contain information traceable to the original Tax Invoice.
- 11 Only one tax invoice, debit or credit note may be issued. If the original is lost a copy may be issued with the word "Copy" clearly displayed on the replacement document.
- 12 A vendor must be compliant with the above rules, otherwise the recipient (of the tax invoice) will not be able to claim a vat deduction.

(If the table above does not display correctly, please see the "online version" - link above the compliments slip)

YOUR TRADEMARKS ARE WORTH PROTECTING



A recent Supreme Court of Appeal (SCA) decision strongly confirmed the benefits of protecting your trademarks by registering them.

Why is it important to your business?

- If you have trademarks make sure all the compliance work in terms of maintaining your trademarks is up to date.

- If you have strategic Intellectual Property assets that are not legally protected, speak to an expert about taking out a trademark. The SCA decision confirms that this investment is a worthwhile exercise.
- If you are launching a new product or service which has similar benefits and features to an existing product or service be careful. Although this is in itself an accepted trading practice, it is worth seeking professional advice to ensure that you do not end up in the position Pepkor found itself.

What happened in the SCA

Adidas makes footwear using the famous 3 stripes on its sporting and leisure shoes. It has trademarked the stripes. The Pepkor group sold similar footwear in its stores using two or four stripes on the shoes, arguing when sued by Adidas for trademark infringement that they were “not used as trademarks, but as embellishments or decoration”. Rejecting this argument, the Court held that the stripes of the Pepkor shoes so nearly resemble the stripes of Adidas footwear as to be likely to deceive or cause confusion amongst consumers. The Court ruled that this deception or confusion could cause the consumer to mistake the Pepkor product for an Adidas shoe.

It therefore found in favour of Adidas and ordered the following -

- Pepkor is interdicted from infringing Adidas’ registered trademarks,
- An investigation be undertaken to establish any royalties and damages due to Adidas by Pepkor,
- Pepkor is to take the infringing two and four stripe marks out of its footwear. Any stock which cannot be altered is to be surrendered to Adidas,
- Adidas’ legal costs are to be borne by Pepkor.

The SCA is, after the Constitutional Court, the most senior court in South Africa. It has made a decisive ruling in favour of registered trademarks. Use this to your advantage in your business.

FINANCE 101 – IS A CONSENSUS EMERGING IN THE LABOUR MARKET?



We are constantly reminded that the biggest problem facing South Africa is unemployment (particularly among the youth). This is a global phenomenon driven for the past thirty years by globalisation and technology that has favoured capital, which has ruthlessly exploited the most productive and cost effective labour (hence the growth in unemployment in countries where labour productivity lags).

For you the business owner, this has been a source of frustration but there are promising signs that the situation is going to improve in the medium term. **This should bring increased profitability and labour harmony to your business.**

So what exactly is happening?

A recent Organisation for Economic Co-operation and Development (OECD) survey of South Africa recommended, among other things -

- Vocational and educational training for youth should be stepped up and reformed,
- Barriers to entrepreneurs (as the main drivers of employment) should be lifted with the following changes suggested -
 - That the practice whereby the Minister of Labour extends a collective wage bargaining agreement to all businesses in that sector needs to be “curtailed”. For example: if there is, say, a collective bargaining agreement in the steel sector, the Minister will extend this agreement to the entire sector despite many individual businesses not being party to the negotiations.
 - That participation in these decision-making processes be extended to other groups such as Nedlac.

The recent ANC conference at Mangaung endorsed the National Development Plan (NDP) as government’s future road-map. The NDP and the OECD are not that far apart - the NDP also strongly advocates vocational training and is also in favour of labour reform. The recent Budget made provision for a youth incentive employment program.

A significant factor is that since 1997 the number of members belonging to unions has fallen from 35% of the working population to less than 17.5% today. Throw into the mix recent court cases challenging restrictive labour practices and it does appear as if a consensus is emerging to reform labour law.

Expect the militancy shown last year to continue in the short term but any moves to make the labour market more competitive will benefit businesses, and reducing unemployment will also greatly benefit the country.

TAX CORNER: REMINDER - YOUR 2013 EMPLOYER RECONCILIATION MUST BE COMPLETED SOON

This is due by the end of May. Leave enough time for SARS to respond to your submission with any queries they may have, so you can make a final submission by the end of month deadline.

Have a Great May!

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