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Accounting Matters

Vol. 3 Issue 2
May 2013

THE CONSUMER PROTECTION ACT - WHY HAS IT GONE QUIET?

The CPA was launched with much fanfare in March 2011. It heralded powerful new rights for consumers as the CPA is a globally recognised piece of legislation.

What is happening on the ground?

There is strong evidence that the larger retailers are aware of the CPA and act within its parameters.

But more and more we hear stories of smaller retail outlets still having signs saying "No refunds" or "No replacements or repairs". Yet the CPA stipulates that the consumer has a six month warranty and the consumer (not the supplier) has the choice, if he/she returns defective goods, of -

- Getting a refund, or
- Replacing the product, or
- Having it repaired.

In fact, the CPA has more than forty provisions relating to how potential abuses are to be investigated, moving from conciliation to dispute resolution to summoning abusers, to issuing search warrants and finally to sanction - which could mean a R1 million fine or 10 years' imprisonment. Yet, complaints to the NCC (National Consumer Commission), the watchdog for the CPA, have all too often not been responded to.

Power to the people

In South Africa there are 5 million Facebook users and 2.4 million followers on Twitter. Companies tend to respond to complaints in the social media to prevent complaints going viral. That gives consumers a lot of power, and - as the public becomes more aware of its rights - businesses who flout the CPA do so at their peril!

SOCIAL MEDIA: EMPLOYEES AND THE DAMAGE RISK TO YOUR BUSINESS!

We are all familiar with how the Arab spring was fanned by social media and how fast things can go "viral". If one of your employees makes derogatory comments about you or your business on, say, Facebook, there is a strong possibility (obviously depending on the merits of the case - get proper advice before taking any action!) that labour courts and the CCMA (Commission for Conciliation, Mediation and Arbitration) will uphold your decision to dismiss the employee. Globally, courts are coming to similar conclusions.

Employees: the dismissal danger

Employees often vent their frustrations on social media without realising the possible consequences - the danger is that you can irreparably damage relationships with your employer, leading to your dismissal. You could also find yourself facing a damages claim for defamation.

Employees are entitled to privacy but if you post a comment which you have not sought to keep amongst your network of friends, then the information is in the public domain and your employer could use it against you. Posting comments on your Facebook wall, for example, can be used against you. Further, if you have a Facebook friend who happens to know your employer, then the friend might inform your employer of the content of the posting.

Employers: what you should do

You should put in place a policy which makes clear what is and what is not acceptable. This policy should also allow you to monitor what your employees say about you in the social media (it will also assist you in complying with the Regulation of Interception of Communications and Provision of Communication-related Information Act (RICA)).

In terms of the common law the employee has to act in good faith, show loyalty to the employer and not bring the employer into disrepute. The employee cannot argue there was no policy to stop them making, for example, derogatory comments about you or your business.

If the employee has a grievance, they must take it up with the employer. Thus, it is sensible to have a grievance procedure or encourage staff to speak to you or their superiors if they have a gripe.

You don't want the hassle and bad publicity of being bad-mouthed in the social media - make sure your staff are aware of the consequences and that you have policies in place to swiftly deal with any contraventions. Finally, appoint one of your managers to monitor what staff are saying about you in the social media.

TAX DISPUTES: DOES THE "PAY NOW ARGUE LATER" PRINCIPLE STILL APPLY?

SARS have long held that if you have an objection to an assessment you must pay your tax and only then - if your objection is upheld - can you get a refund. The option to allow the taxpayer to suspend payment, until the outcome of the objection was known, has been at the discretion of SARS, and in practice this was seldom allowed prior to October 2012.

The potential for taxpayer hardship here is obvious. Say for example that you have what you believe to be a good case for a substantial reduction in a tax assessment. Yet you have to "pay now, argue later", and raising the money to enable you to do so is going to hurt your cash flow, if not actually bankrupt you. Also remember that SARS can collect money in dispute not only from you but they may appoint agents to collect monies owing by you this could be your bank or even your retirement fund.

There is, however, some good news in the form of the Tax Administration Act ("TAA") which came into effect on 1 October 2012. The TAA has given taxpayers some hope that the "pay now argue later" principle has been at least softened in line with one of the aims of the Act, that is to balance taxpayers' rights with SARS' desire to strictly enforce compliance.

The new procedure - how it works

Per the TAA, if a taxpayer requests that payment of tax be suspended as the taxpayer intends to lodge an objection, SARS may not move to collect this tax until 10 business days from the date of SARS' response have passed.

Thus, while the TAA has allowed taxpayers to buy a modicum of time, the real test is whether SARS will in the end suspend payment until the objection has been dealt with.

Once you as a taxpayer go down the objection route, you need to follow a dual approach-

1. Formally apply for payment to be suspended, and
2. Enter the dispute resolution mechanisms as laid out by the Act.

It is important to get sound tax advice as you don't want to make an error in this process - for example, you need to closely monitor whether SARS will agree to a payment suspension.

The Act lays down criteria for SARS to consider when suspending payment, some of which are:-

- The taxpayer's history of compliance (obviously your chances improve if you have a good compliance record)
- The amount of tax or whether or not SARS officials have reason to believe the risk of not collecting tax may diminish over time (such as the possibility of liquidation of the taxpayer)
- Whether there is fraud or other malfeasance involved
- Whether the taxpayer will face irreparable financial hardship if forced to pay now.

SARS may ask for security if it allows payment to be suspended.

If SARS decides not to allow the suspension of payment, then you are still obliged to pay the tax. However, the fact that SARS now has criteria it must apply when considering suspending payment, indicates at least a thaw in the 'pay now, argue later' principle.

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 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.

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.

NEW DYNAMIC INCOME TAX RETURN FOR COMPANIES (ITR14)

As part of the South African Revenue Service modernisation of Corporate Income Tax (CIT) an enhanced and customised Income Tax Return for Companies (ITR14) was introduced on 4 May 2013.

A customised ITR14 will be created according to your answers to certain questions, company type and the industry in which the company operates.

For example, a construction industry will now have specific questions around retention creditors and losses on any contracts in WIP.

The return also requires the company to state the province where majority of income is derived from.

The return has only just been released and our tax department will be working through it over the next few weeks but just to alert you to the fact that SARS are again requiring more and more information from the taxpayer.

Annual financial statements are again going to need to be submitted to SARS with the ITR14.

RETURNS OF INFORMATION TO BE SUBMITTED BY THIRD PARTIES IN TERMS OF SECTION 26 OF THE TAX ADMINISTRATION ACT, 2011 (ACT NO 28 OF 2011)

Government Gazette No. 36346 of 5 April 2013 lists persons that are required to submit returns twice a year to SARS giving details of income received on behalf of a third party. Please consult the Government Gazette for a full list but of particular interest are Estate Agents and Attorneys.

- **Persons required to submit third party returns**

- Any person, who for their own account carries on the business as an estate agent as defined in the Estate Agency Affairs Act, 1976, and who pays to, or receives on behalf of, a third party, any amount in respect of an investment, interest or the rental of property; and

- Any person, who for their own account practices as an attorney as defined in section 1 of the Attorneys Act, 1979, and who pays to or receives on behalf of a third party any amount in respect of an investment, interest or the rental of property.

- **Returns required to be submitted**

INFORMATION CONCERNING	FORM
a. Amounts paid or received in respect of, or by way of any investment, rental of immovable property, interest or royalty; and b. Transactions that are recorded in an account maintained for another person (ie. Transactional accounts like bank accounts)	IT3(b); or A data file compiled in accordance with SARS's Business Requirement Specification: IT3 Data Submission

- **Due Date for submitting a third party return**
  The Form mentioned in the Table, containing all information required in respect of the period from - 1 March to 31 August, must be submitted by 31 October; and 1 March to the end of February, must be submitted by 31 May.

TAX CORNER

1. Phishing scams

SARS has warned taxpayers to be aware of phishing email scams. These emails appear to come from SARS stating you have a refund and asking you to "verify" your banking details. Of course these are aimed at getting access to your bank account so the fraudsters can help themselves to your money! The SARS website: www.sars.gov.za has a helpful article about this including "How to Detect if a Website is Fraudulent".

2. New version of e@syFile launched

SARS has released the latest version 6.2.0 of "e@syFile™ Employer". It is available from the SARS eFiling website: http://downloads.sarsefiling.co.za/easyfilehome/easyfile.html. There are also some notes to assist you: the Release Notes for e@syFile™ Employer (Version 6.2.0) at: www.sars.gov.za Ask your accountant for advice if you have any queries.

3. 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.

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