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LEADING THE WAY IN PROPERTY LAW



With Compliments

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Property: Trouble with Trusts

- *The twist with trusts*
- *The farm sale that failed*
- *“Trust me, I’m a trustee”*
- *Trustees – your personal risk*

Business Buyers: Don’t Drop This Ball!

- *Bye-Bye Business*
- *Creditors – your protection and its limits*

Protect Your Intellectual Property! (And What Is IP Anyway?)

- *Why protect your IP?*
- *What is it and how can you protect it?*
- *Trade Marks, Copyright, Patents, Designs and Plant Breeders’ Rights*
- *Don’t forget International protection*

The February Websites: Budget 2014 – Submit Your Tips And Watch The Speech

PROPERTY: TROUBLE WITH TRUSTS



“The best time to buy a home is always five years ago” (Ray Brown)

Whether or not 2014 lives up to the forecasts of accelerating strength in the property market, you need to know that your sale or purchase of land will be invalid unless it complies strictly with these

legal requirements –

1. The sale must be recorded in a written agreement of sale, and
2. The sale agreement must be signed by both seller and buyer, either personally or by an agent authorised in writing to sign on that party’s behalf.

The twist with trusts

There’s an additional twist to be borne in mind when one of the parties is a trust – trustees must act in accordance with the requirements of the trust deed, and where they are required to act jointly (which will be the case unless the trust deed provides otherwise), a trustee acting alone must be properly authorised to do so by the others before he/she signs the agreement.

The farm sale that failed

Not checking for such trustee authorisation can be disastrous – witness a recent High Court matter in which a trust had bought a farm for R13,5m and paid a deposit of R2m to the seller. When the trust failed to raise a loan for the balance of R11,5m and the sale fell through, the seller refused to release the buyer’s R2m deposit pending formulation of a damages claim against the buyer.

The trust as buyer sued the seller for return of its R2m, pointing out that only one of four trustees had signed the sale agreement, and that the signing trustee had no joint resolution or written authority from the other trustees to do so as required in the trust deed. Thus, argued the trust, the sale agreement was invalid and its deposit must be refunded.

“Trust me, I’m a trustee”

The Court agreed with the trust and declared the whole sale void. The result - the seller has lost control of the R2m deposit which it must repay to the trust (thus losing its “possession is nine-tenths of the law” advantage), it is lumbered with the costs of the legal action, and it must start all over again if it wants to sue the trust for damages.

Don’t make the same mistake as the seller. **Don’t trust a trustee’s declaration of authority.** If you sell land to or buy land from a trust, sign nothing until your attorney -

1. Has checked the trust’s deed,
2. Has confirmed that all formalities required by the trust deed have been complied with, and that whatever authority the signing trustee/s require/s from the other trustees (normally a resolution signed by all trustees) has indeed been given, and
3. Has been given written proof of such authority (oral authority being “no authority at all”). Note: this authority must be in place at the time that the sale agreement is signed – an unauthorised sale is invalid from the start, and cannot be ratified retrospectively.

Trustees – your personal risk

There's also a warning for trustees here, with the seller in this case threatening to sue not only the trust, but also the signing trustee personally for R2m for "having falsely represented in the sale agreement (under his signature) that he was duly authorised whilst he was not."

As a trustee, make sure that you never act outside your powers – if you do, you risk personal liability not only to the trust and its beneficiaries, but also to third parties.

NOTE FOR ATTORNEYS: Judgment in *Jansen NO and Others v Ringwood Investments 87 CC (59771/2009) [2013] ZAGPPHC 129* is on [Saflii](#).

See also section 2(1) of the Alienation of Land Act 68 of 1981, available on the [South African Council for Professional and Technical Surveyors website](#).

BUSINESS BUYERS: DON'T DROP THIS BALL!



Before you buy any business, its goodwill or its assets, take legal advice as to whether or not the sale must first be advertised in terms of the Insolvency Act.

Bye-Bye Business

If the Act requires the sale to be advertised and it isn't, you risk losing everything – both the business and your purchase price. Your risk is that if an unadvertised sale is challenged by a liquidator/trustee (or by a creditor if there is no liquidation/sequestration) within 6 months of the sale, it is likely to be declared void. In that event, you will be lucky to get even a portion of your purchase price back - with the seller in financial difficulty your concurrent claim is probably worthless.

The sale to you will only be valid without advertisement if -

- The sale was made "in the ordinary course of business" (unlikely where the business subsequently fails), or
- It was made for "securing the payment of a debt" (unlikely to be under your control as buyer), or
- The seller wasn't a "trader". As "trader" is widely defined in the Act, and as the onus of proof here is squarely on you, that's not going to be easily proved.

In general therefore it's probably safest to insist on the sale being properly advertised before you pay a cent of the purchase price, but there are grey areas and pitfalls here so take specific advice.

Note also that the Act's requirements for the timing and manner of advertisement are strict and must be followed to the letter.

Don't drop the ball here, it will cost you!

Creditors – your protection and its limits

The advertising requirement is of course there to protect you as a creditor of the business being sold – otherwise you could suddenly find yourself claiming from a worthless shell which has surreptitiously sold away its business and/or assets beyond your reach.

But as a recent Supreme Court of Appeal decision illustrates, not every creditor of a business can take advantage of this protection – you must be able to prove that your claim is one "in connection with" the trader's business. In the case in question, the creditor's claim was for brokerage due on the sale of a membership interest in the trader (a close corporation). That, held the Court, was "not a claim that arises in connection with the primary or core business of [the trader]". The sale was accordingly valid, and the creditor lost out.

NOTE FOR ATTORNEYS: Judgment in *Axal Properties 2 CC v Kotze (712/2012)* [2013] ZASCA 110 is on [Saflii](#).

PROTECT YOUR INTELLECTUAL PROPERTY! (AND WHAT IS IP ANYWAY?)



Every business should understand both why it should protect its “IP” (intellectual property), and how to go about doing so.

Why protect your IP?

This part is easy. Your whole business model is jeopardised if a competitor is able to –

- Copy your trading names, branding, inventions, creative works or designs
- Use your bright ideas, trade secrets and other confidential information or
- Entice away your staff who hold valuable intellectual property about your business in their minds.

What is it and how can you protect it?

In the narrow sense, Wikipedia’s Intellectual property (“IP”) definition is useful – “a legal concept which refers to creations of the mind for which exclusive rights are recognised” is a good summary of the concept. But it is important also to understand the differences between the various types of IP - Trade Marks, Copyright, Patents, Designs and Plant Breeders’ Rights which we will discuss below and which enjoy legal protection under our laws.

In the wider sense, your bright ideas, confidential information and trade secrets such as customers, suppliers’ details and the like of your business as well as its valuable staff members also constitute your IP. However this kind of IP generally needs protecting by contracts and it is a highly specialised field of law for which expert legal advice is essential.

When it comes to trade marks, copyright, patents, designs and Plant Breeders’ rights the table below is a greatly simplified guide to -

- What each type of protection covers,
- How it works in practice, and
- How you can acquire it (and keep it).

Note - this again is a specialised field of law with many grey areas and potential overlaps, so take advice on specifics!

PROTECTING YOUR IP

1 - TRADE MARKS

What does it cover?	How long does it last?	How do I get protection?
<p>Your brand name/s and other branding such as your logos, slogans etc – things such as words, images, shapes etc that –</p> <ul style="list-style-type: none"> • Can be represented graphically and • Tell your customers and clients who you are and differentiate your products and services from your competition's. 	<p>In perpetuity (subject to renewal every 10 years).</p>	<p>Registration in the SA Trade Marks Register via CIPC*.</p> <p>Note that unregistered marks may be defended under our common law of "passing off" (a form of unlawful competition) but it is generally much easier to defend a registered mark.</p>

**Companies and Intellectual Property Commission*

2 - COPYRIGHT

What does it cover?	How long does it last?	How do I get protection?
<p>Your original artistic and creative works such as literary works (books, reports, lectures etc), artistic works (paintings, drawings, photos, sculptures etc), musical works, sound recordings, dramatic works, films, computer programs and the like.</p>	<p>50 years.</p> <p>Generally the 50 year period runs from date of publication / usage, but in the case of literary works it runs from the author's death.</p>	<p>Protection is automatic in terms of our Copyright Act and no registration is necessary.</p> <p>Specific rules as to citation, attribution and/or obtaining of permission to copy works apply, with currently much legal debate over the line to be drawn between "fair usage" and unlawful plagiarism - particularly as regards online content - so <i>take advice on specifics.</i></p>

3 - PATENTS

What does it cover?	How long does it last?	How do I get protection?
Your new inventions (products or processes) in the fields of agriculture, commerce or industry.	20 years (subject to annual renewal).	Registration via CIPC*. Note that <i>secrecy is essential here</i> until your provisional patent application is lodged – any usage or disclosure of your invention endangers your right to protection if it destroys the requirement for “absolute novelty”.

****Companies and Intellectual Property Commission***

4 - DESIGNS

What does it cover?	How long does it last?	How do I get protection?
The shapes and features, whether “aesthetic” or “functional”, of your product.	Aesthetic designs – 15 years.	Registration via CIPC*.
An aesthetic design must be “new and original” and a functional design must be “new and not commonplace”.	Functional designs – 10 years. (Both subject to annual renewal).	As with patents, “absolute novelty” is required and although with designs you have 6 months after public disclosure to register your design (there is no such grace period at all with patents), rather play it safe and register <i>before</i> disclosure.

****Companies and Intellectual Property Commission***

5 - PLANT BREEDERS' RIGHTS

What does it cover?	How long does it last?	How do I get protection?
New plant varieties bred by you – must be a type of plant as “declared” in the Plant Breeders’ Rights Act.	Vines and trees – 25 years. All other annual varieties – 20 years.	Registration via the Registrar of Plant Breeders’ Rights.

(If the tables above do not display correctly, please see the “online version” – link above the compliments slip)

Don't forget International protection

A final thought: Take advice on whether you need any form of international protection or whether local (South African) protection is all you need – in some

cases you have to apply separately in other jurisdictions for foreign protection.

NOTE FOR ATTORNEYS: CIPC provides details of registration procedures and costs for Trademarks, Copyright, Patents and Designs – click on “Intellectual Property” on the top bar of its [website](#) and obtain online forms from its webpage “All Forms”.

For information on the Plant Breeders’ Rights Act, Act 15 of 1976, the Act itself and application forms, see the Department of Agriculture, Forestry and Fisheries’ webpage “Genetic Resources”.

THE FEBRUARY WEBSITES: BUDGET 2014 – SUBMIT YOUR TIPS AND WATCH THE SPEECH



“The government is like a baby’s alimentary canal, with a happy appetite at one end and no responsibility at the other” (Ronald Reagan)

Finance Minister Pravin Gordhan will present the budget speech to Parliament on 26 February 2014 at “around 2 p.m.”

Help him sort out government’s digestive system issues with your Budget Tips. Submit them online via the National Treasury website at <http://tinyurl.com/sabudget2014>.

Then watch the speech live online, with real-time commentary and analysis, on CNBC Africa’s website at <http://www.cnbcfrica.com/abn-pro/>.

Have a great February – and don’t forget ♥ Valentine’s Day ♥ on the 14th!

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