GARLICKE GB BOUSFIELD

ATTORNEYS, NOTARIES AND CONVEYANCERS

Commercial, Finance and Construction Law Department June 2020 Newsletter

Contents

CONTRACT

The arrival of the pandemic clause

With 2 months of lockdown at levels 5 and 4, the arrival of June could not have come quickly enough. This month sees the economy being unwrapped to level 3 with several million staff being given the green light to return to work.

Dangerous, dark and uncertain months still lie ahead of us and we can only marvel at countries like China, New Zealand and Singapore to name a few, that have managed to overcome, even avoid, the worst of the pandemic and who are largely able to reopen their economies so that the lives of their citizens can return to some semblance of normality.

Our contracting philosophies and perspectives have taken a brutal hit, unprepared as we were for the stark realities of conducting commerce under the cloud of a pandemic. Certainly, the time is ripe for firms to take stock of the full spectrum of their contracts including their standard trading terms and conditions, as the bedrock of their day to day business operations.

One should expect some new pandemic styled clauses to be included in the standard contracts of suppliers of goods and services. The procurement terms and conditions of buyers of goods and services that are fortunate enough to have enough buying power to impose them, will equally have pandemic clauses consistent with their own needs and ability, or preparedness to take on risk.

The largest overheads in a firm are generally tied to the cost of premises be they factories, offices, workshops, warehouses, staff accommodation and so on. Landlords will want to ensure that tenants are legally obliged to continue paying rentals irrespective of any complete or partial inability to utilise premises due to lockdowns, whilst tenants will be aiming to contractually formalise relief for their businesses.

Firms cannot run without human capital and we are yet still some way away from mass automation, self-drive vehicles and firms being run with the aid of artificial intelligence. Employers will be looking to include measures such as salary cuts, temporary lay-offs, furloughs and staff rotation in employment contracts and standing policies, in order to give them greater flexibility when dealing with pandemic type events.

Standard trading terms, purchase orders, supply agreements and distribution agreements of all types will need to be reviewed to see if they adequately deal with pandemic type situations, including the adequacy of force majeure definitions and processes to deal with them.

Inability to make payment of consideration due to force majeure events are often a major concern because either contracts exclude them wholesale, without taking into account differing situations (e.g. a failure of the banking system versus a mere inability to pay due to lack of funds) or do not deal with them at all.

These principles apply equally to procurement documentation, including invitations to quote, bid or tender, as well as to engineering and construction contracts, where standard form contracts differ widely in approach and do not necessarily provide for optimal outcomes.

Merger and acquisition agreements will need attention with regard to material adverse change clauses usually framed as conditions precedent but only very rarely invoked. A sudden deterioration in the economy, as has occurred, with the resultant impact on the prospects of a target firm may be construed as a material adverse change permitting a buyer to exit the deal prior to closing depending on the language of the contract. This is reported by the press as the basis of the current dispute between

Tongaat Hulett and Barloworld as the purchaser of the starch business with a reported value of R5,3 billion.

In summary all firms should undertake a review of their entire spectrum of contracts to ensure that pandemic, force majeure and other related risks are adequately addressed in the context of the current crisis, taking into account any relief that may or should be available, such as insurance, and the management systems that are, or should be, in place.

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Can an offer by WhatsApp give rise to an enforceable contract?

In *Kgopana v Matlala* the Supreme Court of Appeal ("SCA") had to decide whether a WhatsApp message contained an offer which upon acceptance could give rise to an enforceable contract.

In July 2015 Mr Morris Kgopana ("Morris") won R20.8 million on the National Lottery. The amount was deposited into his account and six months later he sent a WhatsApp message to Ms Mohlaki Rosina Matlala ("Rosina"), the mother of one of his seven children, that read, "if I get 20m I can give all my children 1m and remain with 13m. I will just stay at home and not driving up and down looking for tenders".

Morris, an employee of the South African Revenue Service, resigned after receiving his jackpot and concealed his winnings from Rosina, alleging to have resigned due to health reasons and that he expected pension benefits of approximately R600 000. Morris proposed to pay R100 000 in full and final settlement from his pension benefits to maintain his child, to erase the existing maintenance order of R1 000 per month. Rosina agreed to the proposal and a meeting with the maintenance officer was scheduled. At the meeting Rosina informed Morris that she knew about his winnings, however, Morris denied this stating his source of funds was the pension benefits. The parties could not reach consensus regarding the amount and the meeting concluded without a solution. Notwithstanding this, Morris still paid R100 000 into Rosina's account and thereafter made no further payments.

In January 2016 Rosina again visited the maintenance officer, who told her that Morris had indeed won approximately R20.8 million and exhibited bank statements that reflected the payment. She thereafter sent a WhatsApp message to Morris advising him that she knew about his winnings and on the following day Morris replied with his now infamous message.

Sometime in September 2016 Rosina issued Summons against Morris, relying on the message claiming R900 000 (R1 Million less R100 000). Morris in his plea denied winning the R20.8 Million and denied that he sent the message and pleaded in the alternative that he had no animus contrahendi (intention to conclude a contract). Morris later admitted the same facts before trial and testified that he sent the message to get rid of Rosina and had no intention to make an offer to contract.

The Polokwane High Court held that the message was clear and unequivocal and contained an offer that was certain and definite in its terms. The Court further held, an offer had been made with the necessary animus contrahendi and Rosina had readily accepted the offer. Morris was therefore contractually liable in accordance with the message, even if he might not have intended to make an offer to contract, because Rosina reasonably regarded the message as an offer that was open to acceptance.

On appeal the SCA disagreed with the Polokwane High Court. The SCA pointed out that contractual liability is based on a true agreement or consensus ad idem. In the absence of such (i.e. dissensus), contractual liability stems from quasi-mutual assent based on the reliance theory, wherein one party is led by the other, as a reasonable person, to believe that a contract was intended on particular terms. The SCA held, the message was sent in response to a statement that Rosina knew that Morris had won the lotto prize, therefore constituted a denial of winnings. In this context, Morris never intended to agree to part with a portion of his winnings, thus the message related to what Morris could possibly do in the hypothetical future event of him receiving R20 million.

In respect of manifestation of intention, Rosina never responded to the message, and did not immediately claim payment. The message clearly did not contain an offer that could, upon acceptance be converted into an enforceable agreement. The Court further outlined that this was not a case where the offeror's true intention differed from his expressed intention, as Morris subjectively had no intention to contract and the message did not suggest otherwise thus eliminating the room for the application of the doctrine of quasi-mutual assent. Morris was accordingly successful with his appeal.

This case should not be interpreted as meaning that a contract cannot be formed by a WhatsApp message, that was not the Court's finding, it held that Morris had no intention to make an offer to contract when sending his message. The Electronic Communications and Transactions Act 25 of 2002 recognises data messages as a viable method to conclude legally binding contracts. For a data message, such as a WhatsApp to impose a legal obligation all the usual requirements for a binding contract would have to be present.

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COVID-19 REGULATIONS

Covid-19 Regulations declared invalid

On 2 June 2020 Judge Norman Davis sitting in the Gauteng High Court in Pretoria, in the matter of *De Beer v The Minister of Co-operative Governance and Traditional Affairs*, declared the regulations promulgated for Alert Levels 4 and 3 in terms of section 27(2) of the Disaster Management Act 57 of 2002, to be unconstitutional and invalid. The Court held that, in a substantial number of instances, the regulations were not rationally connected to the objectives of slowing the rate of infection or limiting the spread of the Covid-19 virus. The Court further held that insofar as the regulations did not satisfy the "rationality test", their encroachment on and limitation of rights guaranteed in the Bill of Rights were not justifiable in an open democratic society based on human dignity, equality and freedom as contemplated in Section 36 of the Constitution.

The declaration of invalidity was suspended for a period of 14 days to allow the Minister to review, amend and re-publish the regulations. However, on 4 June 2020 the Cabinet announced that it would appeal the judgment. There have been several criticisms of the judgment and it is likely that the Minister's appeal will succeed. Criticisms include that the Court did not apply the rationality test correctly and further declared all the regulations invalid without conducting an assessment of each of the various regulations.

COMPANY

Directors are not liable to shareholders for a diminution in value of their shares

In a recent hearing before the Gauteng High Court, *Hlumisa Investment Holdings RF Ltd v Kirkinis*, the minority shareholders of a holding company attempted to use provisions of the Companies Act, No. 71 of 2008 ("the Act") to claim damages from the directors of the company for the reduction in value of their shares.

A key provision upon which they relied was Section 218(2) of the Act, which provides that: *"(a)ny person who contravenes any provision of the Act is liable to any other person for any loss or damage suffered by that person as a result of that contravention."*

The shareholders argued that, in contravention of the Act, the directors had conducted the business of the holding company (African Bank Investment Limited) and its wholly-owned subsidiary (African Bank) in a reckless manner; that their conduct had caused significant loss to African Bank and had resulted in their shares in African Bank Investment Limited dropping by R27.84 per share (from R28.15 to 31c) within a year. Thus, the shareholders' contended that the directors were personally liable for their loss, being the diminution in value of their shares in African Bank Investment Limited.

The Court considered and interpreted the wording of relevant sections of the Act, including Section 218(2) as set out above, Section 77(2)(a) regarding the fiduciary duties of directors and Section 77(3)(b) regarding directors' liability for loss arising from the business of the company having been conducted recklessly. It concluded that the Act does not alter or extinguish the common law doctrine of "reflective loss".

In effect, our courts have determined that there is an insufficient causal link between harm suffered by a company as a result of a breach of a duty owed to it and any loss suffered by its shareholders in consequence of a fall in the company's share price. One of the principles which underpins the doctrine of reflective loss is that a company has a legal personality distinct from its shareholders and, accordingly, a loss to the company which causes a fall in its share price is not a loss to its shareholders.

Africa Bank, the company which suffered the loss, would have been the proper plaintiff to sue the directors. A similar conclusion was reached with regards to the shareholders' delictual claim against the companies' auditors.

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TAX

TERS payments are exempt from employees tax

Businesses registered with the Unemployment Insurance Fund (UIF) that are suffering financial distress as a direct result of the Covid-19 pandemic qualify to receive financial relief from the Temporary Employee / Employer Relief Scheme (TERS). TERS entitles businesses to receive salary benefits on behalf of its employees for a maximum period of three months, that is, for April, May and June 2020 salaries.

How are theses TERS payments treated when it comes to paying employees tax which is commonly referred to as PAYE? Usually an employer is required to deduct PAYE from an employee's remuneration paid or payable. When an employer makes TERS applications it does so for and on behalf of the affected employees. It is the employees who are entitled to the TERS payment not the employer. The employer is only distributing the benefits to the employees on behalf of the UIF. The Covid-19 Directive explains that the employer is distributing the TERS benefits because of the need for social distancing and to avoid in person individual employee applications at the Department of Labour.

The TERS payments being distributed by the employer to the employee are made in accordance with the Unemployment Insurance Act, 2001 (UIA). There is a specific exemption in section 10(1)(mB) of the Income Tax Act, 1962, from normal tax, of any benefit or allowance payable in terms of the UIA.

Payments made by employers, on behalf of the UIF, to its employees, is not remuneration. Therefore, TERS payments should not be reflected as such on employees' payslips, nor should they be included

in their PAYE. When calculating other benefits, such as retirement fund contributions, or when claiming employment tax incentives, TERS benefits should also not be considered.

TERS benefits can be paid by employers in advance and the advance payments may be set-off against the payments received by the employer from the UIF. When an advance TERS payment is made, it should be made to an employee on the explicit understanding that it is an advance on a TERS benefit and not remuneration. PAYE would not be withheld on such advance payment of benefits.

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When can SARS deduct a tax debt from your bank account?

One of the most effective tax collection weapons in the South African Revenue Service ("SARS") armoury is third party payments. Section 179 of the Tax Administration Act, 2011 ("Act") allows SARS to issue a notice to a person who holds or owes money, including a pension, salary, wage or other remuneration, for or to a taxpayer, requiring the person to pay the money to SARS in satisfaction of the taxpayer's outstanding tax debt.

An easy target for a third party payment notice is a taxpayer's bank. In *SIP Project Managers (Pty) Ltd v Commissioner for the South African Revenue Service* the taxpayer brought an application to set aside such a notice and further sought an order that SARS should refund the money paid over by its bank.

An additional assessment was issued to the taxpayer for R1.2 million on 30 September 2019. It was uploaded onto the taxpayers e-filling profile but through no fault of SARS did not come to the taxpayer's attention. The taxpayer only became aware of the additional assessment in February 2020 when SARS served a notice on Standard Bank to pay over an amount of R1.2 million held in the taxpayer's account.

Section 179 was amended in 2015 to provide that a notice may only be issued after delivery of a final demand for payment to the taxpayer, which must be delivered at least 10 business days before the issue of the notice, and which demand must set out the recovery steps that SARS may take if the tax debt is not paid, as well as the available debt relief mechanisms under the Act in respect of recovery steps which may be taken under section 179.

When the taxpayer contacted SARS, they were advised that three letters of demand were sent on 7 and 11 November 2019, and 22 January 2020 before the notice was issued to the bank. The taxpayer could not find any of these letters on its e-filing profile. SARS abandoned relying on the letters of 11 November 2019 and 22 January 2020 as one was only a payment reminder and the other was not issued at least 10 business days before the notice to Standard Bank was issued on 3 February 2020. That only left the letter of 7 November 2019 which the taxpayer denied receiving and annexed to its court papers a screenshot of its e-filing profile showing no letter of demand had been issued. The Court held that it was not enough for SARS to prove the existence of the letters, they also had to show that they had been delivered. Delivery through the e-filing system was acceptable, but SARS failed to provide any proof that there had been such delivery. The Court therefore found that there had not been compliance with section 179.

In addition to no proof of delivery, the letter of demand of 7 November 2019 was also premature. It was common cause that the date for payment reflected on the additional assessment, was 30 November 2019. The letter of 7 November 2019 was therefore issued before the due date for payment and accordingly before SARS could demand payment. Therefore, the Court declared the third party notice null and void ordering SARS to repay the R1.2 million with interest.

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PROPERTY

The Right to education versus the right to retain a sense of place

In the recent matter of *Kruger and another v Rayner and others*, the applicant, Kruger, sought to argue that a school operating on a neighbouring farm in the KwaZulu-Natal Midlands, diminished his property value, interfered with access to his own farm, and disturbed the “sense of place” of the area. He sought an interdict to have the school shut down. The KwaZulu-Natal High Court had to therefore consider the interplay between property, constitutional and planning laws.

The Rayners operated an independent school on their farm which is not registered with the KZN Department of Education. Further, the Umgeni Municipality had not granted the necessary permission for the school under the applicable planning legislation, being SPLUMA and the KZN Planning and Development Act, and no certificate of occupation, in terms of the National Building Regulations and Building Standards Act, had been obtained for the buildings which constitute the school.

The Rayners gave evidence that they had had no luck in obtaining the necessary authorisation from the Department of Education, which took the approach that since the school is a private, independent school, they did not wish to participate in the matter or even make submissions to the Court. The Court chastised the Department for failing to appreciate that the school was the only access to the fundamental right to education for the children concerned and that the Department had failed to consider their plight should the school be ordered to cease its operations.

The Court next considered previous case law holding that socioeconomic rights (like the right to a basic education) may be “negatively protected” from improper invasion. Breach of this obligation occurs directly when there is a failure to respect the right, or indirectly, when there is a failure to prevent the direct infringement of the right by another, or a failure to respect the existing protection of the right by taking measures that diminish that protection. The "negative constitutional obligation" in this particular case required, in the view of the Court, that the applicants, as the adjacent landowners to the school, minimise the potential impairment of the learners' right to a basic education.

The Court based its reasoning on the constitutional obligations of property owners as alluded to in *Port Elizabeth Municipality v Various Occupiers* where Sachs J cautioned against "privileging in an abstract and mechanical way the rights of ownership" over other fundamental rights. In the circumstances of the present matter, this called for a balancing of the competing interests of the learners to obtain an education, and that of the applicant to (inter alia) retain his "sense of place" with the operation of a school taking place approximately half a kilometre away.

Applying this to the facts of the matter, the fundamental right of the learners at the school cannot be displaced by the singular objection of the applicant to the operation of what is essentially a small school serving the needs of children in a rural setting. The competing interests of the learners is based on a foundational right in the Constitution, which in the Court’s view, trump any "interference" which may be experienced by the adjacent landowner. Further, the Court held, even if there is inference with Kruger’s use and enjoyment of his property (of which no substantive evidence has been provided), it was so minor that the applicant’s complaint was to be dismissed.

The Court also commented on argument that the school was operating illegally without the necessary authorisations. The Court held this also did not warrant for the interdict to be granted. The Court held, in determining whether or not to grant an interdict, it always has a discretion based on the facts of the matter and the interests sought to be protected from harm. In this case, the interests of the learners to be allowed to continue attending their school, should not be impeded. That being said, the Court could not exempt the Rayners from having to apply for the various required approvals, which in fact they have been attempting to do for many years without success. In the Court’s view, and in light of the interests at stake, and the prejudice which the learners would suffer resulting from a disruption of their schooling,

'the balance of convenience clearly favours that the school continue to operate while the various approvals to the Municipality and the Department of Education were being processed.

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POPI

Personal information in gated estates

The collection and use of personal information in private estates and gated communities in South Africa is common. Visitors are often required to provide personal information to security companies like full names, contact number, vehicle registration and, with the development of technology, vehicle licence and ID or driving licence details are also required.

Collecting this information makes it easier for security companies to deal with offenders where damage might be caused, or crime committed on the estate.

In a ruling by the SCA last year on enforcing lower speed limits on private roads in the Mount Edgecombe Country Club Estate (*Mount Edgecombe Country Club Estate Management Association II (RF) NPC v Singh and others*) the Court confirmed the principle that the relationship between the parties was regulated by contract. In this case, it was held that there was no conflict between the National Road Traffic Act and the private rules of the association. The contractually binding regulations were "enforceable by the parties to the contract, and against them only". It remains to be seen how this might fare under the Protection of Personal Information Act (POPI), which is yet to come into force fully.

As an estate is private property, visitors cannot claim a right to access. Instead, visitors may be required to provide personal information in order to gain entry. While the provision of personal information is not necessarily a problem in itself, there is often little certainty about what will be done with the personal information.

Incidents of cloning vehicle registration details provided to security guards at private estates and incidents of identity theft are causing concern.

In terms of POPI, personal information must not be retained for any longer than it is necessary to achieve the purpose for which it was collected. While there are exceptions, it is a subject that requires careful consideration and the implementation of a good record retention policy which is reviewed regularly. A good information retention policy should cover how the information is stored and secured, how long it is stored and with whom the information is shared.

Although persons living on private estates may have good grounds for requiring identification from visitors, it is important that the security companies are assessed and required to implement appropriate policies and procedures to protect personal information. In the event of a security breach, it may well be that the homeowners' associations would be liable for their role in failing to properly protect the personal information they process.

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COMPETITION

Excessive pricing under the Covid-19 regulations

The first consent order under new Covid-19 regulations relating to excessive pricing was entered into between the Competition Commission ("Commission") and Cilliers and Heunis CC t/a Centrum Pharmacy. The Commission investigated Centrum Pharmacy, an individual outlet in Boksburg, for allegedly engaging in excessive pricing in relation to face masks. Facial masks fall under the category of 'medical and hygiene supplies' in the Consumer Protection Regulations of 19 March 2020 under the Competition Act ("Act").

After investigation by the Commission and in terms of the consent order, approved by the Competition Tribunal, the pharmacy admitted to excessive pricing conduct. The Commission had concluded that the pharmacy was a dominant firm under the lockdown due to changed market circumstances. Under section 7 of the Competition Act, dominance is established in terms of market share of a firm. A firm is dominant in a market if it has at least 45% of that market; or if it has at least 35%, but less than 45% of that market, it is dominant unless it can show that it does not have "market power". Lastly in terms of section 7, if a firm has less than 35% of that market, it may be dominant if it has market power.

Dominance

Interestingly, in the consent order there was no consideration of the market share of the pharmacy. The Commission considered the single outlet to be dominant on the following reasons based on market power:

- States of disaster provide for conditions where temporary market power is held by entities which would not otherwise have market power outside the disaster period. The removal of constraints on these entities to having market power arises due to many reasons, which are all conceptually related to the fact that the geographical market for products has become narrower. The geographical market has become narrower because the movement of people is heavily restricted.

- Secondly, in terms of section 8(3) of the Act, the Commission also held that market power can be inferred from the economic behaviour of a firm. In this case, it concluded that the mere ability to raise prices is indicative of market power as it demonstrates a lack of constraints such that there is an ability behave independently of competitors and customers.

Excessive Pricing

In terms of the new Consumer and Customer Protection Regulations under the Competition Act, section 4 specifies that a material increase in the price of a listed product (which includes face masks) may be considered to be excessive if the price increase:

- does not correspond to, or is not equivalent to, the increase in the cost of providing those goods or services; or
- results in an increase in the net margin, or mark-up above the average margin or mark-up, for those goods or services in the three-month period prior to March 2020.

Therefore, the test for assessing excessive pricing under the Act is determining whether or not price increases have a corresponding cost justification.

The Commission found that the average mark up on face masks at Centrum Pharmacy in March 2020 was approximately 150%. This increase of price lead the Commission to conclude that Centrum Pharmacy was in breach of the excessive pricing provisions under the Act and the Consumer Protection Regulations. The Commission concluded in its investigation that Centrum Pharmacy abused its dominance by charging an excessive price for a product that Centrum Pharmacy did not sell in any

material volumes before March 2020 (section 8(1) of the Act). The Competition Tribunal confirmed these findings in the consent order.

In terms of the order, Centrum Pharmacy was to:

- immediately desist from the excessive pricing conduct;
- reduce its mark-up on facial masks to significantly below that which it levies on other non-pharmaceutical store items with immediate effect for the duration of the state of national disaster;
- donate certain essential goods amounting to a total value of R25 410.00 to two old age homes situated in Boksburg, namely:
    - 500 hand sanitizers (100ml each)
    - 320 items of 3 ply face masks

Consent orders allow firms to settle disputes without resorting to heavy litigation, a quick solution for smaller firms wishing to avoid litigation costs. While it appears that the Commission has followed the reasoning set out in this consent order in respect of investigations into other smaller firms that have since been published, we may see the approach by the Commission, the regulations, as well as concepts such as "temporary market power" being challenged by larger firms who find themselves accused of excessive pricing. In particular, in respect of an excessive price allegation against Dischem, the Commission is reported as seeking the maximum penalty under the regulations, of 10% of its annual turnover. The strength and rationale of the Commission's reasoning set out above will surely be tested with not only the possibility of the administrative penalty being levied, but also with the reputation of such firms being at stake.

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SERVICES

Ccommercial, finance and construction law department services

The department offers a full range of expert services in all aspects of corporate and commercial law. This division is involved locally, nationally and internationally with:

- Agency, distributorship, licensing and franchising structures
- Amalgamations, restructuring and unbundling
- Banking and finance, including conventional and Islamic banking and finance
- Black economic empowerment (BBBEE) structures
- Business rescue, insolvency and liquidation
- Credit, hire purchase, instalment sale and asset lease agreements
- Competition law
- Company formations, secretarial work and CIPC registrations
- Consumer protection laws
- Contracts including options, offers and memoranda of understanding
- Corporate governance, director, member and shareholder issues
- Due diligences and legal audits

- Exchange control matters
- Energy and petroleum matters
- Information and communication technology law
- Leasing and occupational rights
- Mergers and acquisitions
- Partnerships and joint ventures, including public private partnerships (PPP)
- Property development and planning schemes
- Standard trading terms, disclaimers and statutory warranties
- Structured finance, lending, preference share schemes and securities
- Tax law
- Sugar industry law
- Trusts, their structure, formation and alteration
- Takeovers, sales of businesses, offers to minorities and management buyouts
- Water law

Company secretarial services

We have in-house expertise providing comprehensive company incorporation and secretarial work and services, including the following:

- Incorporation of new companies in SA or anywhere in Africa or the rest of the world (through our Multilaw and associated networks)
- Replacement or amendment of MOI
- Purchase and tailoring of shelf companies/CCs
- Company/CC de-registrations
- Restoration of deregistered companies
- Voluntary winding up of companies and CCs
- Changes of directors and shareholders
- Changes to shareholders
- Filing of annual returns
- Filing of audited AFS and conversions to iXBRL format (through our agents)
- Company name, auditor, financial year end, MOI changes for registration
- Maintenance of share registers and minute books
- Close corporation conversions
- Submission of annual returns
- Minutes and resolutions

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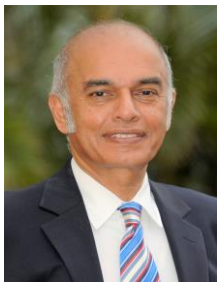

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