Commercial Department June 2021 Newsletter

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Refunds for defective goods: Motus Corporation (Pty) Ltd v Wentzel

A recent Supreme Court of Appeal ("SCA") decision provides some insight into the approach of the Court regarding consumers receiving refunds for defective goods.

In *Motus Corporation (Pty) Ltd and Another v Wentzel*, Wentzel purchased a new entry level car from a dealership. The transaction was financed by a bank. Her problems with the vehicle began whilst it was still on the showroom floor! Her complaints about alleged defects in the car were numerous. On three occasions, she took the car to the dealership's service department, which conducted repairs free of charge. However, she continued to have problems and complaints, so the dealer principal offered to take back the vehicle as a trade-in (at book value) so that she could purchase a different model car. Wentzel did not qualify financially for that arrangement.

She approached the Motor Industry Ombudsman of South Africa (MIOSA) for assistance – she requested a full refund for the car, alternatively a car which could be completely repaired. MIOSA would not assist her, so she approached the courts. She succeeded in the High Court where the dealership and its parent company were held jointly and severally liable for the total purchase price and finance charges for the vehicle and were ordered to pay Wentzel's costs on an attorney and client scale. On appeal to the SCA, the High Court order was set aside with no order as to costs. In effect, Wentzel was required to keep the car and to continue to pay it off in terms of her arrangement with the bank.

The SCA touched on three key issues regarding consumers who want refunds for defective goods:

1. *Must a consumer exhaust all the remedies referred to in Section 69 of the Consumer Protection Act 68 of 2008 ("the Act") before they may approach a civil court?*

Section 69 provides for referring a matter to the National Consumer Tribunal, an appropriate ombud, the consumer court, alternative dispute resolution, filing a complaint with the National Consumer Commission and *"approaching a court with jurisdiction over the matter, if all other remedies available to that person in terms of national legislation have been exhausted"*. The section, which is couched in permissive language and wherein remedies are couched as alternatives, does not create a clear hierarchy of remedies.

The Court did not hear full argument on the matter, so the issue was not finally resolved. However, the Court noted that section 69 of the Act should not be read lightly as excluding the right of consumers to approach the court in order to obtain redress. Section 34 of the Constitution guarantees the right of access to courts. The Court stated that, *"…there is no apparent reason why* [consumers] *should be precluded from pursuing immediately what may be their most effective remedy. Nor is there any apparent reason why the dissatisfied consumer who turns to a court having jurisdiction should find themselves enmeshed in procedural niceties having no bearing on the problems that caused them to approach the court."*.

2. *When is a consumer entitled to a refund in terms of section 56(3) of the Act?*

The Court held that a consumer is entitled to a refund in terms of section 56(3) of the Act when all of the events referred to in that section have taken place. Section 56(3) provides that, *"(i)f a supplier repairs any particular goods or any component of any such goods, and within three months after that repair, the failure, defect or unsafe feature has not been remedied, or a further failure, defect or unsafe feature is discovered, the supplier must (a) replace the goods; or (b) refund to the consumer the price paid by the consumer for the goods."*

To obtain a replacement or refund, Wentzel had to show, firstly, that the dealership had repaired the defective parts and, secondly, that within three months after the repairs the defects had not been

remedied or that a further failure was discovered. Although section 56(3) requires a further defect to be "discovered" and not "reported", the Court was of the view that a consumer is required to report further defects to the supplier which manifest themselves within three months after the repair of the vehicle as such reporting is necessary for the purposes of enforcing the warranty provisions.

Wentzel was not entitled to a refund because she did not report further defects to the dealership's service department after the repairs which had been conducted by them. Although she had discussed further defects with the dealership, this had been done in a different context and for a different purpose – when she had gone to the dealership to discuss the possibility of replacing the vehicle with another model.

3. What would be the amount of the refund?

The Court found that, even if Wentzel had been entitled to a refund from the dealership, she would not have been entitled to the amount which she had agreed to pay to the bank in terms of her agreement with the bank (which included finance charges). The maximum amount of the refund would be the amount which was paid by the bank to the dealership on her behalf. Furthermore, the dealership would have been entitled to deduct a reasonable amount for the use of the vehicle during the time that it was in her possession, a period of more than 18 months.

In conclusion, this case offers hope to consumers who want to approach a civil court for redress. It is also a stark warning that a purchaser of a new car should report any defects in the car to the service department of the dealership (and not a salesperson); preferably in writing. The amounts of any refund should be determined so as to be fair to both parties.

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TAX

Tax deduction for commercial buildings

Section 13quin of the Income Tax Act provides for an allowance on any new and unused buildings or improvements that are used by a taxpayer in the course of a trade. While the heading to section 13quin refers to "commercial buildings" that term is not used in the section itself and is just a useful description for buildings that are used in the course of trade, and could include office buildings, retail stores, warehouses, etc.

To qualify for the allowance the building or improvement must be:

- constructed on or after 1 April 2007;
- new and unused;
- owned by the taxpayer; and
- wholly or mainly used by the taxpayer during the year of assessment for purposes of producing income in the course of the taxpayer's trade, other than the provision of residential accommodation.

All of these requirements must be met to qualify for the deduction.

Not only new and unused buildings qualify but also improvements to any building. For an improvement to qualify it will have to be physically attached, connected or structurally integrated with the building. The building or improvement must be new which means it must be recently built. It must also be unused. If an allowance is claimed on only an improvement, only that improvement needs to be new and unused.

The taxpayer claiming the allowance must also be an owner of the land on which the building or improvement is constructed. In the case of sectional title, the taxpayer must own a unit in the sectional title scheme.

The building or improvement must be "wholly or mainly used" in producing income in the course of trade. Reference to the word "mainly" means used more than 50% during the year of assessment for the purpose of producing income.

Having met all the requirements, a taxpayer is entitled to an allowance calculated at 5% a year of the cost of the building or improvement. The "cost" is the actual cost to the taxpayer or the arm's length direct cost, whichever is less. It does not include the land cost on which the building is erected.

Naturally the aggregate deductions allowed under section 13quin cannot exceed the cost, and nor can a deduction for a cost be claimed if that cost qualified for a deduction of expenditure under any other provision of the Income Tax Act. When a taxpayer sells the building, the allowance can no longer be claimed.

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New financial emigration rules

On 1 March 2021 new rules came into effect where the process of financial emigration through the South African Reserve Bank (SARB) was replaced by a new verification process primarily administered by the South African Revenue Service (SARS).

Under the new dispensation natural person emigrants and natural person residents are treated the same. This is not to say that emigrants can now freely transfer funds offshore. The process of controlling or blocking an emigrant's remaining assets in a special blocked account has fallen away. Authorised Dealers (e.g., banks) may, subject to tax compliance, allow the transfer of assets abroad. Transfers of up to R1 million per individual per calendar year may be transferred without a Tax Compliance Status (TCS) from SARS. A TCS is however required when an emigrant transfers amounts of between R1 million and R10 million offshore per calendar year.

Emigrants who transfer more than R10 million offshore are initially subject to a more stringent verification process by SARS and approval process by SARB. Such a transfer triggers a risk management test that includes verification of tax status and source of funds along with a risk assessment in terms of the anti-money laundering and countering terror financing requirements prescribed by the Financial Intelligence Centre Act.

A person applying for a TCS will need to be older than 18 years of age. The previous form used by SARB (Form MP 336(b)) does not have to be submitted to SARS as part of the TCS application. An emigrant will now be required to complete the SARS TCR01 form disclosing assets and liabilities.

With regard to emigrants who want to access their retirement fund benefits, they will first need to prove that they have been non-resident for tax purposes for an uninterrupted period of three years and that an applicable Tax Directive was issued to the retirement fund by SARS. Proof of non-residency may include proof of being a tax resident in another jurisdiction.

Although it is not a new rule, emigrants should be aware of the deemed disposal provisions in section 9H of the Income Tax Act, where a person is treated as having disposed of his assets at market value when he ceases to be a South African tax resident. The effect of this is that certain "departure taxes" may become payable by triggering a receipt or accrual of a capital or a revenue nature.

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TRADE MARK

Blurring the boundaries between alcoholic and non-alcoholic beverage classes of trade marks

The International Trade Mark Association (INTA) has reportedly filed an amicus brief, as third-party observers, in a case before the Grand Board of Appeal of the European Union Intellectual Property Office. The case concerns the issue of similarity or dissimilarity of alcoholic and non-alcoholic beverages.

While the provisions on trade mark infringement in the EU differ from the South African Act, decisions made in the EU may be taken into account by the South African courts.

Interestingly, a recent report reveals that there may be good reason to reconsider a decision on the similarity or dissimilarity of alcoholic and non-alcoholic beverages given changing market realities.

Where two parties, one selling alcoholic beverages and the other non-alcoholic beverages under similar marks may not have been held to be confusing in the past, there may be good reason for this to change. In its brief, the INTA asserted the importance of considering current market practices and habits insofar as the goods in question are concerned. All relevant factors need to be considered in assessing the similarity between goods, including the nature of the goods, their intended purpose, method of use and whether they compete with each other or are in some way complementary. It is also important to consider the channels used to distribute the goods, their usual origin, and the relevant public. It is not necessary for all criteria to be fulfilled.

The INTA asserted that it should not be relevant that the public is generally capable of distinguishing the goods – being alcoholic from non-alcoholic beverages.

Current market realities reveal that, unlike in the past, where producers of the two types of drinks remained relatively separate, there is now more of a convergence of the two. The alcoholic beverages industry is becoming more likely to sell non or low alcoholic beverages. Furthermore, soft drink manufacturers are moving towards the manufacture and sale of alcoholic variations of their soft drinks. The boundaries between the two classes of trade marked goods are becoming more blurred.

It might therefore be argued that the likelihood that the public would be able to distinguish the goods is inextricably woven into the current practices of the market.

The authors of the South African Law of Trade Marks, Webster and Page, provide that the English courts have adopted the view that the determining factor in deciding the likelihood of deception or confusion, in cases of potential infringement, is: how the potential marks can be used, provided that the manner of use is fair and normal. This is called the notional user approach and has been applied by our courts in subsequent decisions.

One of the cases that applied the notional use approach is *Danco Clothing (Pty) Ltd v Nu-Care Marketing Sales and Promotions (Pty) Ltd*. Here, the Court had to decide whether there was a likelihood of deception or confusion among a substantial number of persons, taking into account: the nature of the goods, their respective use, and the trade channels through which the goods could notionally be retailed. In this case, while the marks of the parties in question were identical, being FRENCH CONNECTION, the goods were arguably quite different, being cosmetics and clothing. The Court decided that, while there was no evidence of actual confusion or deception, and while there were no side-by-side sales of the respective commodities, making confusion arguably more likely, the established trend of

manufacturers of popular brands of clothing to also market cosmetics and perfumery under the same brand meant that they had become associated in the minds of the public. This was enough for the Court to decide that there was a likelihood of deception or confusion between the marks in question, despite the apparent differences of the goods.

On the other hand, in the case of *Mettenheimer v Zonquasdrif Vineyards CC*, a South African case concerning the registered trade mark ZONQUASDRIFT in respect of alcoholic beverages, except beer (the appellant's mark) and use of the mark ZONQUASDRIF VINEYARDS in respect of wine grapes (the respondent's mark), the Supreme Court of Appeal ("SCA") agreed, in comparing the two marks, that the marks were virtually identical. It was argued by the appellants that the public may be confused into thinking that the appellant's wine and the respondent's grapes originate from the same farm. The Court, however, distinguished between the notional purchasers of grapes and the notional purchasers of wine, highlighting that wine grapes are suitable only for winemaking and sold exclusively to wine makers and co-operatives, or using specialists. The chances of the buyers confusing the respondent's wine grapes as the source of the appellant's wine was therefore excluded. It also held that any likelihood of notional purchasers of Zonquasdrift wine believing that they originate from the same farm as the respondent's was overcome by the fact that the respondent did not market its wares in outlets or retail outlets or advertise them in the public domain.

The considerations proposed to determine the likelihood of confusion include: the uses of the respective goods; the users of the goods; the physical nature of the goods; and the respective trade channels through which the goods reach the market. This is by no means an exhaustive list.

It is this author's view that, while the public's ability (or inability) to distinguish the goods in question may remain an important consideration, the changes in current market realities (where industries extend the range of products sold and previously clear divisions between products become more blurred, like that between alcoholic and non-alcoholic beverages, or the shift online) are likely to become more relevant in decisions on the likelihood of confusion. Further, while there are common factors to be taken into account in each case, the deciding factors will likely differ from case to case.

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COMPANY

Corporate opportunities and directors' fiduciary duties

In the recent Supreme Court of Appeal (SCA") matter of *Modise v Tladi Holdings Pty Ltd*, Modise was identified by fellow businessman Sandler as a BEE Partner in his intended electrical conglomerate ("Tladi") which would seek to do business with State-owned entities and municipalities. Modise became a director and chairman of Tladi. The shareholders' agreement permitted shareholders to pursue their own interests except for four opportunities to be pursued through Tladi.

One of the Tladi opportunities was to buy a BEE stake in ARB Electrical Wholesalers (Pty) Ltd, a major supplier of electrical equipment to Sandler's company, Muvoni. When the ARB opportunity became available, Modise and his company, Batsomi Power, were offered the same deal that Sandler had identified as the ARB opportunity for Tladi. Modise accepted the offer, and did not disclose his meeting with ARB or that he had accepted the offer to Tladi. Tladi claimed that Modise had misappropriated its corporate opportunity.

The SCA examined the law in relation to director's fiduciary duties. At common law directors have an overarching and paramount fiduciary duty to exercise their powers in good faith and in the best interests

of the company, codified by section 76(3) of the Companies Act. The basic duty is of loyalty, which is 'unbending and inflexible' to ensure that it is not abused, and encompasses at least three rules, namely:

- *No-Conflict Rule*: Directors may not place themselves in positions of conflicts of interest or duty. It does not require an actual conflict to be established, only that a reasonable person would think that there was a real sensible possibility of conflict.
- *No-Profit Rule:* Directors may not make secret profits. This applies even if the company would not itself have made a profit, and even if the director has not profited at the company's expense.
- *Corporate Opportunity Rule:* Directors may not acquire economic opportunities for themselves that properly belong to the company. Profit and opportunity are not confined to assets or property only, but also to confidential information used for personal gain.

The Court referred to case law that corporate opportunities are the 'property' of the company and if acquired by directors, for personal benefit, the law will refuse to give effect to the director's intention and will treat the acquisition as having been made for the company. The director remains under a duty to disclose the opportunity's existence and information to the company, even if such opportunities would not have materialised.

From the facts, the SCA characterised the ARB opportunity as a corporate opportunity that Modise had been expressly mandated to pursue. The SCA found that once Modise was aware that Tladi was pursuing the same opportunity offered to him, he was not entitled to secure it in his own interest without disclosure to and approval by Tladi's board, due to his fiduciary relationship with Tladi.

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Setting aside a winding up in the interest of creditors

In the case of *Nyhonyha and others v Venter NO and others, Regiments Capital Pty Ltd* ("Regiments"), a company notable for its links to State Capture and the Gupta brothers, was placed under final winding up on 16 September 2020 in terms of section 354 the Companies Act, 1973. The applicants, which included the directors of Regiments, brought an urgent application in the Gauteng High Court to set aside the order for winding up in November that year. Twenty-one respondents opposed the application, including the South African Revenue Services ("SARS").

The applicants argued that Regiments was factually solvent, and the dispute between Regiments and Vantage, the creditor which sought the initial winding up order, could be resolved once the winding up was lifted. They argued that Regiments experienced a temporary liquidity difficulty which resulted in its inability to timeously satisfy the claim of Vantage. However, once the winding up was set aside, it would be able to meet the claim of Vantage and all other creditors.

Regiments contended that it had various assets residing in subsidiary companies which could be liquidated to meet all its liabilities and that it had concluded a restructuring/unbundling transaction with some of these subsidiaries holding assets which were of substantial value, to the tune of about R359,3 million. Further, certain creditors related to Regiments agreed to subordinate their claims to other creditors and, therefore, these independent creditors would be paid first before Regiments-linked creditors. Regiments also contended that should the winding up not be set aside, this would cause irreparable harm to all the creditors, as the provisional liquidators fee alone would be at least 10% of Regiments assets.

SARS, as a potential creditor, opposed the relief sought on the basis that it was still auditing the company and had as yet an undetermined liability. In addition, SARS intended to audit the unbundling transaction in its entirety. According to SARS calculations at that time, SARS contended that Regiments was factually insolvent.

The Court considered section 354 of the Companies Act, 1973 which, in summary, provides that a court may order that a winding up be set aside at any time after its commencement, on application by any liquidator, creditor or member which provides proof that all the proceedings in the winding up should be

set aside. The Court explained the wide powers of this section and that the applicant must show there are special and exceptional circumstances justifying the setting aside of the winding up order and must provide a satisfactory explanation for not having opposed the granting of the final order or having appealed against the order. Other relevant considerations include the delay in bringing the application and the extent to which winding up had progressed.

The interests of creditors weigh heavily with the courts. They are bound to scrutinise the facts very carefully and to exercise their discretion in a manner that at the very least does not disadvantage any creditor. The Court held that, despite the applicants seeking to frustrate the liquidators and SARS by withholding basic information, the fact remained that the company was asset rich but cash poor, that is, it was only commercially insolvent. Regiments had, in fact, also opposed the granting of the final winding up order.

The Court held that if all creditors could be paid in terms of the unbundling transaction, then the order should be set aside. It noted that SARS was concerned that it would lose its preferent creditor status if such order was set aside. However, the Court held that SARS itself could take certain steps to protect its claim, including seizing assets and applying for a preservation order under section 163 of the Tax Administration Act. In deciding that the winding up order should be set aside, the Court also made an order earmarking certain assets that should not be dissipated until the claim of SARS was paid in full.

In recent developments, SARS intends to head to the Supreme Court of Appeal seeking to overturn the High Court order. SARS recently issued Regiments with a tax assessment of nearly R700-million and based on its calculations, claims that Regiments will not have enough to pay up once it settles various concurrent creditors. Regiments intends to oppose.

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Liability for the fraudulent or reckless conduct of a business

Can directors and other role players be personally liable for the debts of a company where the business has been carried on recklessly or with the intention to defraud the creditors? This question was recently addressed by the Western Cape High Court in *Cooper and another NNO v Myburgh*.

The applicants were the liquidators of DPMM Transport (Pty) Ltd (“Transport”) who sought to hold the director, shareholder, related companies, and their attorney personally liable to pay the debts of Transport in liquidation. A trust established by Myburgh, was the owner of Transport. Myburgh was the sole director of Transport, which was wound-up at his instance. He was also the sole director and shareholder of the companies "Trucking" and "Hauliers". Mr Spamer, who was Transport’s attorney, the trustees and Marius Myburgh (Myburgh’s father) were also cited as parties in the matter.

In 2014 Transport found itself in a serious financial situation. Its unaudited financial statements for the 2014 financial year showed that the company was trading in insolvent circumstances. They further showed that the company had been insolvent in the 2013 financial year. At the end of its 2014 financial year the company's current liabilities exceeded its current assets by a ratio of more than 5:1. Myburgh confirmed the precarious state of Transport's financial position in his answering affidavit stating that he had been advised by the auditor that he could not allow the company to continue trading. He said that he had engaged an independent auditor on the advice of his attorney Mr Spamer. Transport's 2015 financial statements carried an adverse opinion from this auditor, noting that the company had been trading in insolvent circumstances and that its financial statements, which had been prepared on a going concern basis, did not fairly represent the company's situation. In the Director's Report in the financial statements Myburgh stated that:

> "*The director has reviewed the company's cash flow forecast for the year to February 2016 and in the light of the review and the current financial position he is satisfied that the company has or has access to adequate resources to continue in operational existence for the foreseeable future*."

Mr Spamer's advice was, inter alia, that the trucks, trailers and equipment of Transport be sold at a market related price as this was better than a sale in execution. Myburgh, acting on this advice, entered into various transactions, among which Transport's trucks, trailers, forklifts, tools and equipment, and office furniture were sold to Trucking. The disposal of these goods was preceded by the adoption by the company's shareholders and the trustees of the Trust, of a special resolution pursuant to section 115 of the Companies Act, 2008. Such a special resolution was required in order to enable Transport to lawfully dispose of all, or the greater part of, its assets or undertaking. The resolution was signed by all three of the trustees. It was the conduct of the trustees in resolving that Transport could dispose of its assets to Trucking that resulted in the applicants claiming a declaratory order against them in terms of section 424 in the current proceedings.

In dealing with the matter, the Court considered section 424(1) of the Companies Act, 1973 through which the applicants sought the declaratory order. Section 424(1) provides that where the business of a company has been carried on recklessly or with intent to defraud creditors of the company, or creditors of any other person, or for any fraudulent purpose, the court may, on application, declare that any person who was knowingly a party thereto, shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company.

In respect of the various parties' personal liability, the Court held that with regard to Myburgh, the set off effect engineered by the cession to Trucking of Myburgh's loan accounts in Transport very obviously exacerbated the prejudice occasioned to Transport's creditors by the alienation of the company's operational assets. It was evident from Mr Spamer's advice that Transport had creditors who were pressing for payment and threatening legal action. There was no cogent explanation as to how selling all of Transport's assets to another company controlled by Myburgh would advantage anyone other than Myburgh. The Court also considered that if the intention of the scheme put in place by Myburgh was to advantage Transport's creditors, why were the rentals payable by Hauliers to Trucking not made immediately available to them through Transport? The Court found that the measures taken were not to the advantage of Transport's creditors at all, but were instead manifestly, and very foreseeably, to their prejudice. This, the Court held, was because the obvious and inevitable effect of the transactions was to keep Transport's creditors with claims from having any prospect of recovery, remote as that might be, for several years. The Court ultimately held that a very clear case of reckless, if not fraudulent, conduct within the meaning of section 424(1) had been made out against Myburgh.

Regarding Trucking and Hauliers, the Court held that no case had been made out against these parties and that the evidence suggested that any order against those companies would, in any event, be worthless. When considering Mr Spamer's liability, the Court held that his role in giving advice to Myburgh did not amount to being party to the carrying on of the company's business, and that no relief would be granted against him.

When it came to the liability of the trustees, the Court considered whether, by adopting the section 115 special resolution to permit the disposal by Transport of its assets, the trustees could be said to have been party to the carrying on of Transport's business. The Court found that it did not follow that because the trustees exposed themselves to liability, in terms of section 424 of the Companies Act, 1973, the assets of the Trust would be available to satisfy any order against the trustees to pay the debts of Transport. The Court further held that one cannot ignore the implications of the existence of a validly established trust by treating the trust property as if it were the property of the trust's controllers. That can be done only if it is shown that the trust is in fact a sham. The Court ultimately found that since the applicants did not even attempt to prove that the trust was a sham, the claim against the trustees could not succeed.

The Court therefore declared that in terms of section 424(1) of the Companies Act, 1973, Myburgh was personally responsible, without any limitation of liability, for all of the debts or other liabilities of the company.

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SERVICES

Commercial 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
- Mining agreements
- 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
- 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
- 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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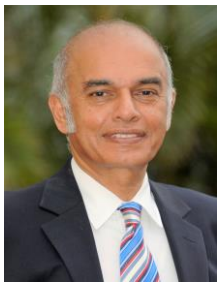

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