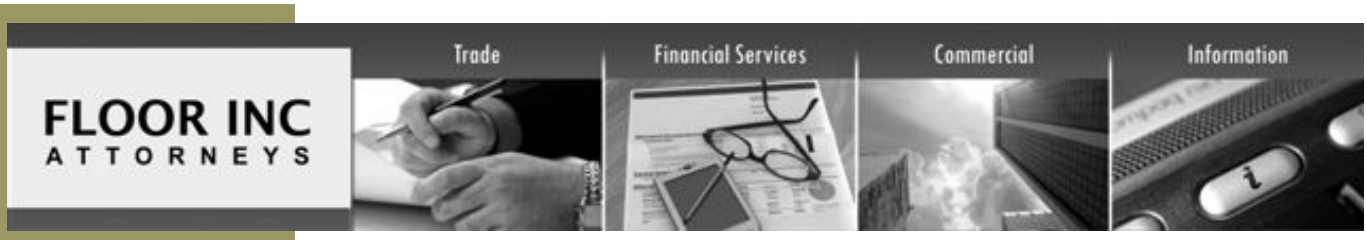

Floor Inc Newsletter

July 2007

Inside this issue:

WTO 'Corn' Dispute Revitalized

The Canadian Minister of International Trade (David Emerson) and the Minister of Agriculture, Agri-Food & the Canadian Wheat Board (Chuck Strahl), announced last Friday 8 June 2007 that Canada will now request that a WTO dispute settlement panel be established on the issue of the USA's agricultural subsidies.

After indicating their intention last month to hold off on the former maize subsidies case until December 2007, Canada made the surprise announcement that they are going to proceed with the official initiation of the subsidies case against the US now. Canada made the official request to launch the WTO panel proceedings at the relevant WTO dispute settlement meeting on 20 June 2007. This request was procedurally blocked by the USA, which they can do once.

It is likely that the lacklustre trade outcome from the G8 summit, one that is unlikely to really spur the Doha talks, and the emerging of what seems to be a 'business as usual' new US Farm Bill, influenced this decision.

The South African maize industry was very keen for the SA government to join the case in May, judging from industry press releases on the matter. It will thus be very interesting to see how South Africa proceeds at this juncture. Others with anagricultural subsidies interest like the European Union, Australia, Brazil, Argentina, Nicaragua, Guatemala, Uruguay and Thailand have already indicated their participation in the WTO case at the consultations stage in January this year.

South Africa did not join these countries at the time, but the current Canadian move now provides South Africa with a second opportunity to do likewise on 24 July 2007.

By Hilton Zunckel

Important changes to company law

As regular readers know, there is currently draft legislation out, namely the Companies Bill, which will transform the corporate landscape as we know it. On 11 April 2007 the President signed a new law, which brings about certain changes which is contemplated in the Companies Bill. This new law, the Corporate Laws Amendment Act has not yet come into effect, but it is expected that the effective date will be published soon.

As mentioned above the Corporate Laws Amendment Act introduces new provisions which the Companies Bill contemplates. For instance the Corporate Laws Amendment Act introduces the concepts of widely held and limited interest companies, which will eventually replace the existing public and private companies respectively. For more hereon please read here.

An important amendment is that the current relaxed prohibition which states that a company may not give financial assistance for the purchase of its shares will also change once the Act becomes effective. According to the new Act, a company may give financial assistance when the company's board is satisfied that after the assistance is given, the company's consolidated assets will be more than it's consolidated liabilities (thus the company must be solvent) and that for the duration of that transaction, the company will be able to pay its debts as they become due in the ordinary course of business. Lastly the members of the company need to approve the terms of the financial assistance by a special resolution (thus more than 75%).

Another important change is brought about when directors want to dispose of the whole or substantial part of the business or assets of the business. In terms of the current section 228, the directors' ability to dispose of the business or assets or a substantial part thereof is restricted by the fact that the members of the company must approve such a disposal by an ordinary resolution (thus more than 50%). The new Act will restrict the directors' powers even more in order to prevent abuse and now requires that the members of the

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Important changes to company law (Cont.)

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company must approve such a sale by a special resolution (thus more than 75%).

However the majority of the Corporate Law Amendment Act deals with the audit committee and financial reporting matters. The Act brings new changes for widely held companies, thus the old public companies, in the appointment of an audit committee and the information which must be reflected in financial statements as well as a variety of issues surrounding finances of these public companies.

Public companies are cautioned to familiarise themselves with all these changes. For further information, kindly contact Rian Geldenhuys.

Should you wish to read news updates on the Companies Bill you may click here, here or here.

Quick fix for corporate compliance?

Corporate Governance in South Africa, as in most parts of the world, relies on the principle of self-regulation in order to ensure compliance with corporate governance principles and to combat misuse of power by the managers of companies. The recent corporate scandals that have emerged in South Africa this year once again questioned the effectiveness of this method.

History has shown that the banking and financial industry is most prone to be affected by corporate mismanagement. The Department of Finance has proposed new regulations which will serve the purpose of strengthening the regulatory authorities of these two sectors. The Department of Finance has proposed that the Financial Institutions Amendment Bill, which is to be tabled in parliament later in 2007, should specifically address the issue of power of the Financial Services Board and yet again the issue of a comprehensive regulatory board has been raised by certain role players.

In the months leading up to the publication of King Code II in 2003, various government departments had speculated on the possibility of the regulation of corporate governance by means of legislation and a regulatory body. Specifically it was advocated that South Africa should follow the route of America and implement legislation similar to the Sarbanes Oxley Act and that a regulatory body, moulded after the Securities and Exchange Commission (SEC), should be formed. This led to the current view of the Department of Finance that, amongst others, the Financial Services Board should merge with the banking regulator in order to create a "super regulator" for the banking and financial industry.
Although there is a possibility that this could be the solution to the problem of corporate mismanagement, this only addresses the problem on the surface and is it doubtful whether regulation in this manner will be effective. First, it is doubtful whether South Africa has the immediate necessary workforce to regulate such a expansive industry. Furthermore, it should be borne in mind that certain aspects of the financial sector do not fall within the jurisdiction of the financial regulator, for example trusts, which fall within the jurisdiction of the Master of the High Court. Furthermore, the amount of banking institutions are incomparable with the amount of pension funds which needs to be regulated by the FSB.

By Annelene Dippenaar

Limited liability of directors still intact

When starting a new business venture in South Africa, an entrepreneur has a vast number of options as to the form of the business organisation, including close corporations, partnerships and sole proprietorships as well as trading trusts, co-operatives and companies (private and public companies).

A company is deemed to be a separate entity and exists separately from its shareholders with the result that it can enter into contracts and be sued in its own name. This can be an attractive consideration when weighing the different forms of business entities against each other.

Nevertheless, a director may be held personally liable to indemnify the company as well as stakeholders (including shareholders and creditors) against losses suffered by them in, amongst others, the circumstances where the director trades in a reckless or fraudulent manner.

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Limited liability of directors still intact (Cont.)

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Thus, even though the principle of limited liability for the directors of a company is practiced in South Africa, section 424(1) of the Companies Act 61 of 1973 makes provision for personall liability. This provides for protection of stakeholders, especially creditors, due thereto that a director or manager of a company is prohibited to hide behind his limited liability.

This provision was recently considered by the Supreme Court of Appeal in the case of *Heneways Freight Services (Pty) Ltd v Grogor.* Heneways applied for an order to declare Grogor, who is the sole director and manager of a company with limited liability, personally liable for the debts of the said company.

Various arguments were made by Heneways to support their case. Among others Heneways argued that Grogor's actions amounted to fraud and recklessness due to the fact that he settled his debts with creditors by providing them with post dated cheques and with cheques that he stopped or that were dishonoured almost immediately after the date that it became due and payable. Heneways furthermore argued that Grogor knew or should reasonable have known that there were not enough funds in the bank account of the company to satisfy the company's debt.

In order to prove fraud, it should be established that the perpetrator, at the time when the debt was incurred, had no reason to believe that the required funds were available to settle the debt when it became due and payable.

The Supreme Court of Appeal dismissed the application after it established that Heneways failed to prove that intent to defraud creditors or recklessness on the part of Grogor was present. The rationale for this decision is based thereon that, during the time when the company incurred credit, Grogor was negotiating a new business prospect with a third party who would have provided the required funds. The negotiations had also progressed to such an extent that a reasonable person in the position of Grogor would have believed that the deal would be concluded. This proposed deal led Grogor to believe that, when the debts became due and payable, he would be able to satisfy the creditor's claims and thus he did not anticipate that he would not be able to satisfy the claims.

Despite the recent calls for more onerous liabilities on company directors, the court decided that a director can only be held liable for the debts if the director acted in a fraudulent manner. Due to the fact that Grogor was in a position to reasonably believe that the company will be able to pay its debts when it became due and payable, he did not act fraudulent..

By Annelene Dippenaar

"A thorough knowledge of customs duties will show you that there are various ways to claim a refund"

Know your customs duties

Frequently we come across clients, who import and export products, who are ill informed about the importance of customs duties. Sure some view customs duties as a necessary evil which one just has to accept. However, you should only have this view once you are sure that you are applying the correct customs duty to your product, if a customs duty is at all applicable.

The difference in the applicable tax that you have to pay when importing a product under the incorrect tariff could be huge, thus costing you a lot more money than it should. Frequently businesses outsource this aspect of their business to an agent, such as a freight forwarder, who may not possess the necessary legal skills in order to classify a particular good under the correct tariff heading. Often, these determinations are wrong. This could mean that you might have saved some money if you imported the product under the correct tariff heading. You could also be taxed at a higher rate than what you were advised by your agent. In certain circumstances it could even mean that your business does not have an import history which could mean that you may no longer be allowed to import the product concerned. An example hereof was seen in the recent quotas imposed on clothing and textiles being imported from China. All of a sudden many importers could not receive a quota, because they have been importing under the incorrect tariff heading. Any such hassle may be avoided by obtaining a prior legal opinion on the matter, which cost would mostly be negligible in comparison with any loss which the business has now suffered as a result of not seeking such advise.

Customs duties are not however only about determining what tax is applicable to a product. It may even be used to strategically position your business. A thorough knowledge of customs duties will show you that there are various ways to claim a refund (also referred to a as rebate or drawback) on the

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Know your customs duties (Cont.)

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tax you pay for your imports. Such knowledge could therefore be used to position your business as an exporter for example. Such 'tax-free' imports relate to amongst other things the following:

- imports of goods used in the manufacture of other goods for local consumption;
- imports of goods used in the manufacture of other goods for export;
- imports of goods which are only temporarily in the country for adjustments, repair, etc which is then re-exported; and
- imports of goods for local consumption.

There are vast differences in the rules that apply to each of these refunds and importers will not automatically receive the refunds. Instead importers have to apply for these refunds, preferably before the goods were imported, in order to receive these refunds. The importer will also have to comply with certain legal requirements, which varies between the purposes for which the goods are imported, before such an application will be approved. It will be worthwhile to request a comprehensive review of your business' customs exposure. Such a review may save your business a great deal of money.

By Rian Geldenhuys

"importers have to apply for these refunds, preferably before the goods were imported"

Tax relief for individuals and small business alike

On 7 June 2007 the Taxation Laws Amendment Bill (18 of 2007) and the Taxation Laws Second Amendment Bill (19 of 2007), was tabled by the minister of finance, Trevor Manuel. The Bill contains measures to assist individuals with a special emphasis on savings. Manuel also made use of this opportunity and assisted small business by extending the small business tax amnesty by another month. The tax amnesty is available to all small businesses that are non-compliant with tax legislation and covers the full spectrum of small businesses (sole proprietors, unlisted companies, trust etc.) as long as the business's turnover does not exceed R10m.

The tabling of these Bills specifically drew attention to the fact that SARS had received a vast number of applications for amnesty under the provisions of the Amendment of Taxation Laws Act. Presently, the Amendment of the Taxation Laws Act provides for an application period from October 2006 until 31 May 2007. This period has however been extended to 31 June 2007 due to the vast number of applications for amnesty received by SARS. In addition SARS will allow applicants until 31 August 2007 to submit all documents supporting their amnesty application.

The main objective of the Tax Amnesty Act is to draw a greater number of small businesses into the tax net in South Africa. This goal is achieved by pardoning non-compliance with tax regulations in the past. Specifically small business who did not submit their tax information will now need to submit it for the amnesty and thus SARS will now have access to their information for future tax purposes. The Act also seeks to formalise and regulate the taxi industry before the onset of 2010 by means of the re-capitalisation program. Amongst others, provision is made for taxi owners to apply for R50 000.00 to spend towards a new vehicle.

Tax relief for the individual is addressed by the Taxation Laws Second Amendment Bill. This Bill enacts some of the main tax policy changes announced in the February 2007 budget speech – specifically by addressing the proposed objective to assist the public by promoting the saving of money. This is predominantly reflected in the changes proposed to the Income Tax Act and the amendments to the Retirement Funds Act.

Specifically the threshold for tax-free income has been changed for the better (R43 000 instead of the previous R40 000) and the 18% and 40% bracket has also been lifted to the advantage of individuals who earns salaries. The amendments to the Retirement Funds Act are also to the advantage of the public as it increases the threshold for tax-free retirement payment with the effect that provident funds and individual retirement annuities can now grow tax-free so as to maximise the savings 'nest egg' of future retirees.

By Annelene Dippenaar

G8 Summit Weak on Trade

Realistically the business of breaking the WTO's negotiating inertia is likely to be conducted at the politically orientated level, where compromises can be sanctioned from the highest levels, than at the current technical negotiation level. On the highest political front the G8 countries, representing the world's richest, met in Heiligendamm, Germany in the second week of June 2007. The G8 leaders discussed a

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G8 Summit Weak on Trade (Cont.)

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host of globally pressing issues ranging from global climate change to governance issues in developing countries. In their final communiqué trade featured as item 9 out of 9 issues addressed by the Summit. This prioritization, or lack thereof, was an early portent to a rather lacklustre one page declaration on trade which did not venture far from established rhetoric.

The trade declaration echoes the opening paragraphs of the 2001 Doha Declaration by expressing a full commitment to the development dimension of the Doha agenda, promoting progressive trade liberalisation, helping developing countries to better integrate into the multilateral trading system and providing support to the poorest countries in order to enable them to benefit from the significant opportunities of globalisation.

The G8 leaders stressed their desire for the achievement of an ambitious, balanced and comprehensive agreement on the Doha Development Agenda. They expressed their confidence in the April Ministerial Communiqué of the G6 Trade Ministers which guessed that by intensifying of negotiations, a conclusion of the Doha Round by the end of 2007 was still possible.

On the positive side, the G8 did recognise that the time had come to translate the continued commitment on political level into tangible results. They thus urged trade ministers to provide what they referred to as a 'solid platform for a multilateral negotiation' which would lead to an agreement on modalities within weeks. Short of instructing the trade ministers to proceed with the much needed compromises, they took a softer approach and called for the exercise of 'flexibility' by WTO Members, accompanied by 'all necessary efforts' by the negotiating groups in Geneva to achieve a timely breakthrough.

In tandem with other elements of the Summit, the leaders underlined what they saw as the 'crucial role' of Aid for Trade, the enhanced Integrated Framework, the role of trade related capacity building overall and the fundamental importance of increased and more effective funding. They called for increased effort to improve aid for trade elements by 2010.

The G8 Summit had the potential to go beyond carefully re-quoting existing Doha language and break new ground in issuing its closing declaration, but unfortunately stopped short of this challenge. What is significantly gained is a first world political commitment, subsequently responded to and agreed to by developing countries; that the Doha Round must end in 2007. The weight of responsibility now returns to the Geneva trade negotiators, who again have to proceed without the administration of the necessary political elixir to there now tired negotiating mandates.

By Hilton E. Zunckel

About the firm

Floor Inc Attorneys is a boutique law firm servicing local, national and international clients. Clients include banks, multinationals, listed companies and governments.

The firm's focus is on banking & financial services law, corporate & commercial law, international trade law and ICT law.

Services include advising on commercial transactions, establishing businesses, negotiating deals and drafting the necessary agreements. The firm also does commercial dispute resolution and arbitration.

A large part of the financial services practice is concerned with the regulatory impact on our clients' businesses and the subsequent compliance assistance.

The firm specialises in assisting clients to participate in international trade and to make use of the available trade remedies. The department also advises governments, the private sector and non-governmental organisations on trade policy issues. We are forerunners in practicing in information technology and data protection law.

As attorneys we value our independence and your confidentiality.

The views expressed in this newsletter do not constitute legal advice and we recommend you consult an attorney before acting on anything contained in this newsletter.

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