



LAW LETTER

Supplement

April 2008



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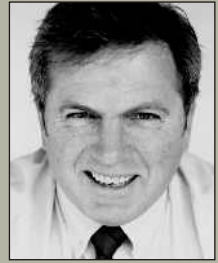
why litigate when you can liquidate?

If a close corporation or company ("corporation") owes you money, liquidation can be a very effective debt recovery tool. In most cases, the debtor will settle your claim in order to avoid being wound-up.

One of the grounds for liquidating is a corporation's inability to pay its debts. If you go this route, the basic requirement is that you must have an undisputed claim for an agreed amount of money, whether based on an invoice, a cheque or otherwise. The amount must be due and payable at the time liquidation proceedings are launched.

The procedure is usually kicked off by sending a statutory letter of demand to the corporation demanding payment within 21 days. If payment is not received, there is a presumption that the corporation is unable to pay its debts and the liquidation application may be launched. The critical thing, though, is that the debt must be undisputed and due and payable. A Durban company recently learnt the hard way about the importance of fulfilling this requirement.

In the case of Alton Coach Africa CC vs



by Anthony Grant
Debt Recoveries
Division

Datcentre Motors (Pty) Ltd, Alton Coach had ordered 30 bus chassis from Datcentre, which in turn placed an order with the manufacturer. Alton Coach subsequently cancelled the deal on receipt of the first 6 chassis, claiming that the chassis were of inferior quality. Datcentre argued that the chassis were fine and claimed damages from Alton Coach in the form of its lost profit margin on each chassis. Datcentre took the first steps towards bringing a liquidation application against Alton Coach by serving the statutory letter of demand.

Alton Coach responded by obtaining a temporary interdict, which prevented any further liquidation proceedings until a court had ruled on whether or not the claim for lost profits was disputed and whether the claim was due and payable. Alton Coach pointed out that the claim for damages still had to be proven in court before it became due and payable.



*On receiving a telegram from his bankers,
who had become alarmed at his expensive student lifestyle:
Any further letters and I shall remove my overdraft.*

Bobby Corbett



When the matter came before the court again, the court held that liquidation proceedings are only appropriate in respect of a claim for an agreed amount or an amount that is based on a document that clearly shows the amount claimed, such as an invoice or a cheque. As Datcentre's claim was disputed, and had yet to be proven, the money was not due and payable and Datcentre was not entitled to follow the procedure it had adopted.

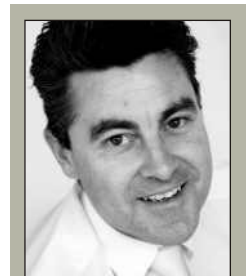
The court found that Datcentre had used the procedure as a tactical device to obtain payment of an alleged debt and that this constituted an abuse of the process. The court gave Alton Coach a permanent interdict and ordered Datcentre to pay all of Alton Coach's legal costs. Liquidation applications are useful, but applicants need to be sure that they have the necessary requirements before pressing the "launch" button.

when your company's cheque book **may as well be your own**

Close corporations and companies ("corporations") are required to print their full registered names and numbers on a range of documents. These documents include cheques, letters, invoices, delivery notes, receipts, notices and official publications.

Only certain abbreviations are permitted when stating a corporation's name, including "Ltd" for a public company, "(Pty) Ltd" for a private company and "cc" for a close corporation. What's more, a corporation may only use a shortened form of its name if the shortened form is used in conjunction with its full name.

These requirements are intended to ensure



by Leith Cawcutt
Debt Recoveries
Division

that people doing business with a corporation are made aware of the corporation's separate and distinct legal status. This is important because generally only the corporation, and not the person signing on behalf of the corporation, may be sued if, for example, the corporation's cheques bounce.


The consequences of not complying with these requirements are severe. A director, officer or member of a corporation who



*You must learn from the mistakes of others.
You can't possibly live long enough to make them all yourself.*

Samuel Levenson





issues or authorises the use of a non-compliant document commits a criminal offence and may be held personally liable for payment on, for example, a dishonoured corporation cheque.

In the case of *Constantaras v BCE Foodservice Equipment (Pty) Ltd*, Constantaras, a member of Cater-Mart cc, was sued for two non-compliant corporation cheques that he had issued in favour of BCE Foodservice Equipment. The corporation had previously converted from a company to a close corporation, but the cheque books had not yet been updated with the corporation's new name and registration number. The words "for and on behalf of" were also missing.

BCE Foodservice Equipment sued Constantaras in his personal capacity, but Constantaras argued that he had signed the cheques as a representative of Cater-Mart cc and was not personally liable. Alternatively, he claimed that as both parties

intended that he sign the cheques in a representative capacity, the signing of the non-compliant cheques was a mistake common to both parties and the cheques should be deemed to have read "for and on behalf of Cater-Mart cc".

BCE objected to Constantaras's defence arguing that if Constantaras was allowed the amendment it would defeat the purpose of the legislation. The Court agreed with BCE and held Constantaras personally liable for the dishonoured cheques.

Constantaras appealed to the Supreme Court of Appeal, but the appeal court confirmed that Constantaras was in fact personally liable. The court found that personal liability arose as soon as a defective document was issued or authorised, and it was irrelevant if BCE was aware of the true facts relating to the corporation. This liability was separate and independent from any contractual relationship between the parties.

an honour **indeed**

We recently attended a very special school assembly at St Francis College in Mariannhill, a leading independent Catholic boarding school for boys and girls. The College draws learners from throughout KwaZulu-Natal and the Eastern Cape and has an impressive academic record.

Our delegation was met by vibrant singing from the school hall, a row of smiling prefects and the College's long-standing principal, Mr J Nzama. We were visiting the historic school campus for the official

unveiling of three honour boards donated by Venn Nemeth and Hart to the College.

Venn Nemeth and Hart is proud to have an ongoing association with St Francis College. Its 100% matric pass rate speaks of the dedication of the staff, while the very notable alumni of the College - including Steve Biko; Dr. B.W. Vilakazi, the linguist and Zulu poet and Dr Ben Ngubane, South Africa's ambassador to Japan - speak for themselves.



The assembly was followed by a presentation to the Grade 11 and 12 learners on how to become an attorney, the career opportunities available in law and what day-to-day life as an attorney is like.

The College was heart-warmingly grateful for the donation of the honour boards and for the presentation. But, as we thoughtfully made our way back to Pietermaritzburg, we realised that the honour was, in fact, ours.



St Francis College Management Team including Principal J Nzama and the Venn Nemeth & Hart delegation

law professions day



On hearing that a Hollywood agent had swum safely in shark-infested waters: I think that's what they call professional courtesy.

Herman J. Mankiewicz.



February 2008

Venn Nemeth and Hart participated in the University of KwaZulu-Natal's second Law Professions Day in February 2008. Law firms from across the country use the opportunity to promote their firms to students. Students, on the other hand, get a chance to interact personally with practicing attorneys and to ask questions about the profession.

Hannah Szudrawski, Nosipo Mgojo and Marcel Sandells (our Marketing Manager) represented Venn Nemeth and Hart at the university's Pietermaritzburg and Durban

campuses. Knowing that some might be inclined towards extending Mr Mankiewicz's sentiments about Hollywood agents to attorneys, we use the opportunity to recruit quality candidate attorneys for the ensuing year.



Left to right: Hannah Szudrawski, Nosipo Mgojo and Marcel Sandells

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