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WITH COMPLIMENTS

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PROPERTY BUYERS: MUST YOU PAY THE PREVIOUS OWNER’S OLD DEBTS?

Imagine this. You buy your dream house. You take transfer. You book a date for your move with Fred’s Furniture Removals. But when you apply for electricity and water accounts so you can actually move in, your local municipality refuses until you settle an old (and substantial) municipal debt which the original owner still owes. “Pay up” says the municipality, “or we’ll sue. You could lose the house.



Can that possibly be correct? A recent Supreme Court of Appeal (SCA) judgement says that indeed it can.

The case of the innocent buyer down R100k

- A property was sold in execution, and the buyer paid all municipal debts for the preceding 2 years (in order to obtain a municipal clearance certificate, which you need to take transfer), thinking that that was the end of the matter.
- The new owner on-sold the property to another buyer, who was refused municipal services until she paid a “historical debt” (over 2 years old and therefore not part of the clearance certificate) of R106,219-75.
- The no-doubt horrified new buyer understandably declined to either pay a cent to the municipality or to take transfer until a court ruled on whether she could really be held liable for someone else’s old debts like that.
- Initially the High Court found in her favour that old municipal debt cannot survive a sale in execution. The SCA disagreed, holding that – per existing legislation and regardless of whether the sale was an execution sale or a normal private sale - the municipality’s claims for rates, taxes and services remained “a charge on the property”. **These old debts survived the change in ownership.** Provided that it followed its own bye-laws (in this case requiring it to first try recovery from the original debtor, and disallowing action against an occupied property), the municipality could obtain court authority to “perfect its security” and sell the property.

Buyers: Protect yourself!

There is talk of a constitutional challenge to this legislation, but in the meantime take legal advice immediately if you are ever on the receiving end of such a demand. “Prescribed” (expired) debt cannot be claimed from you (prescription is 3 years for service accounts but 30 years for “rates and taxes”, which our courts have held includes sewer and refuse charges), and your lawyer will check whether all local bye-laws have been complied with.

Even more importantly, before signing the sale agreement ask your lawyer to check that it protects you as fully as possible. For example the seller should prove payment of all municipal debts, old as well as new, and you should be indemnified against any other hidden claims crawling out of the woodwork after transfer.

Sellers: This is for you

Ensure a quick, clean transfer - ask your attorney (remember you choose the transferring attorney) to double-check that the municipality isn’t going to hassle you down the line for some old “forgotten” claim.

NOTE FOR ATTORNEYS: The judgment in *City of Tshwane Metropolitan Municipality v PJ Mitchell (38/2015) [2016] ZASCA 1* is on [Saflii](#).

STARTING A BUSINESS? THE “FLYING SOLO” OPTION

“A lot of people have ideas, but there are few who decide to do something about them now. Not tomorrow. Not next week. But today. The true entrepreneur is a doer, not a dreamer” (Nolan Bushnell, founder of Atari)



Step 3 in starting your own business is, you will recall from last month's article, picking the correct trading vehicle upfront.

Let's start off our analysis of the various choices open to you with the **sole proprietorship** (or “sole trader”) option – could it be the best fit for your particular needs and those of your new business?

What exactly is a sole proprietorship?

In a nutshell, you are the business. You are the only proprietor, owner and operator; you run the business at your own personal risk and for your own personal profit. Although sole proprietorship is a legitimate trading vehicle it is not a separate legal entity, nor is any trading name you may use in the business – so for example “Joe Bloggs trading as Joe's Perfect Plumbers” has no existence separate to Joe, everything is done in Joe's own name, Joe must pay all taxes personally and all business income is included in his own personal income tax return.

Like all your options, this one has both advantages and disadvantages. Let's explore some of them -

4 advantages

1. It's simple – of all your options this is the easiest to set up, operate and close down. There's no need for company or trust registration, your administrative burden is low, and you make all management decisions independently.
2. It's quick – you can start trading immediately.
3. Profits are yours and yours alone.
4. You are taxed at personal rates, which can sometimes (but not always – see below) be to your advantage.

..... and 4 disadvantages

1. Risk – you are 100% personally liable for all the debts and obligations of the business. All sales and contracts are in your name. Remember that your potential liabilities extend far beyond your regular trade creditors – think for example of product/service liability, labour law compensation claims, and your landlord. Creditors of your business can (and will if you run into financial difficulty) attach all your assets, both “business”

and “personal”. Sleepless nights await you if any important assets (like your house) are in your name.

2. Access to funding can be problematic for a sole trader, and not only is starting off with insufficient capital a common cause of business failure, but down the line it can stop you from expanding the business to its true potential. For example, you can't as an individual sell shares in your business to raise new venture capital. As a rule of thumb therefore, sole proprietorship is a poor choice if you plan to grow your business significantly.
3. Tax and estate planning – as mentioned above, being taxed at your personal income tax rate may be a plus in some cases, but in others you will benefit far more from a tax-efficient structure incorporating one or more corporate entities or trusts as well.
4. It's lonely! Confirmed lone wolves will always be happiest on their own but for most of us having a partner or two not only both brings new skills to the business, it also eases the stresses and strains of management and decision-making.

Remember to take full professional advice on the legal and tax implications of using each type of entity before choosing.

This is the second article in our series “Choosing the right legal entity for your business”. Next time we'll look in more depth at the partnership option.

NOTE FOR ATTORNEYS: [SMEToolkit South Africa](#) has a host of resources you can refer your SME clients to, but older articles should be treated with caution, particularly those written before the new Companies Act came into effect.

[For more on the tax aspects see SARS' “Small Business” pages.](#)

CONTRACTING WITH A COMPANY: CHECK FOR DIRECTOR AUTHORITY!

A recent High Court judgement reminds us once again of how important it is, when dealing with a company, to check that whichever director/s you are dealing with is/are fully authorised to bind the company.



R3.8m in claims attacked

- A liquidation application was launched against a property developing company with 3 directors,
- The applicant creditor was owed some R3.8m in loan and suretyship claims,
- Its problem was that the suretyship and loan agreements had been signed by only one of the directors of the property company, with the knowledge and approval of the second director but not of the third,
- The third director (acting as trustee of a creditor trust) opposed the liquidation application on the grounds that the first and second directors had acted without authority. He argued that the creditor had no claim against the company, and therefore had no standing to liquidate it,

- The Court found on the facts that the creditor had failed to prove that the first and second directors had acted with authority. Nor had it proved that they were held out as being persons authorised to manage the company's affairs. Thus it could not enforce any claim, and the liquidation order was refused.

So, how do you prove authority?

You must firstly show that you were dealing with someone who had either actual or apparent (often called "ostensible") authority to contract with you. **You can't enforce your claim if you can't prove authority!**

Assumptions, assumptions

As a rule you are allowed to assume that the board of directors and any managing director have the necessary authority. The same doesn't generally apply to any ordinary director or employee, except perhaps to the extent that they hold an executive position (financial director or branch manager perhaps) which suggests that they have authority "usual to that type of position". Of course you can't make any assumptions at all if you *actually knew*, or *should have known or suspected*, that the director or employee was acting outside his/her powers and authority.

No wriggle room

To complicate matters (sorry, but this is important and to your advantage) what happens if a company tries to wriggle out of its contract with you on the basis that, unknown to you, the director had breached some internal company procedure? Since usually only insiders will know about a company's internal policies, it would be highly unfair to you if that were allowed.

To protect you, our law says that, once you have proved actual or apparent authority as above, *you can then assume that all the company's internal rules and policies have been complied with*. Out of interest, if you ever hear lawyers earnestly and learnedly debating "The Turquand Rule", this is what they are talking about.

Beware – our law on this is both complex and fraught with grey areas, and the notes above are just a summary of some general legal principles. Insist on directors you contract with producing written proof of authority (a formal company resolution to start with) and **take legal advice on your particular circumstances!**

NOTE FOR ATTORNEYS: The judgment in *One Stop Financial Services (Pty) Ltd v Neffensaan Ontwikkelings (Pty) Ltd and Another (20028/14) [2015] ZAWCHC 89*, which analyses in depth the interplay between actual authority, ostensible authority, constructive notice of company articles to third parties, and the Turquand rule, is on [Saflii](#).

LOSING YOUR LICENCE WITH AARTO DEMERITS – ARE WE THERE YET?

"Are we there yet?" (Donkey, in Shrek 2)

Both businesses and individuals need to start preparing for the much-delayed nationwide rollout of the demerit system in terms of AARTO (the



Administrative Adjudication of Road Traffic Offences Act).

Although a launch date of 1 April was announced last year, changes to the legislation are afoot (the extended closing date for comments is reportedly 10 March) and it seems very likely that we are actually looking at a launch date later in 2016.

Whilst we law-abiding motorists will welcome the crackdown on serial traffic offenders, we also need to manage the risks. Every motorist, every professional driver and every transport operator will be at serious risk of losing their licences/operator permits.

Even businesses outside the transport sector will need to manage this – what happens if your sales people are grounded or your office staff can't drive to work?

We'll give you full details of the system once the legislative changes are in place and a definite start date is announced. **Watch this space!**

NOTE FOR ATTORNEYS: Amendments to both AARTO and the Regulations are in the pipeline and we will provide links to the finalised legislation when available.

THE MARCH WEBSITE: BOOST YOUR BUSINESS!

“Employees are a company's greatest asset - they're your competitive advantage” (Former Xerox Chairperson and CEO Anne M. Mulcahy)



Entrepreneurs and managers: Give your business a boost. Keep your team smiling and producing with “7 Ways to Keep Your Employees Happy (And Working Really Hard)” on the [Forbes Magazine website](#).

A Professor of management and organisational development shares tips on how to inspire your employees and help them grow – it's a win-win outcome for everyone!

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