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“ Our greatest weakness lies in giving up. The most certain way to succeed is always to try just one more time.” Thomas A Edison

CONTRACT LAW: THE IMPORTANCE OF STANDARD 'BOILERPLATE' CLAUSES IN AGREEMENTS

Most present day agreements contain certain standard clauses – commonly referred to as “Boilerplate Clauses” – found in the latter part of commercial agreements. The main purpose of these standard clauses is:

- i) to deal with the administration of the agreement;
- ii) to highlight enforceability; and
- iii) to create a legally sound agreement between the parties.

The importance of these Boilerplate Clauses are mostly overlooked during negotiation, and way too often one party will be stuck with his hands in his hair, having not considered the outcome of the provisions he agreed to on signature of the agreement.

A few examples of such standard clauses that parties should be aware of are listed below:

- **“Entire Agreement”**: This clause provides that the agreement constitutes the total understanding between the parties. By including this clause, the agreement will supersede any previous understandings. Therefore, agreements made prior to the execution of the final written agreement will not be interpreted as being part of the agreement.
- **“Non-Variation”**: Should a party wish to amend a provision, such amendment should be agreed upon between the parties, be reduced to writing, and signed by both parties.. If not adhered to such amendment may not be recognised, and be deemed unenforceable.
- **“Domicilium and Notices”**: Provides for the method in which notice should be given should any party default in terms of the agreement. If process is served at an outdated domicilium, left

It is thus of the utmost importance that both contracting parties study the provisions of the agreement to become well acquainted therewith. The parties should familiarise themselves with every possible outcome in the event that either party has to rely on a specific clause.

Law & Laughter

*Q: What's the difference between a female lawyer and a pitbull?
A: Lipstick.*

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COMPANY LAW: A DIRECTOR'S CIVIL LIABILITY TOWARDS CREDITORS FOR LOSS AND DAMAGE

A company itself has a claim for loss / damage caused to such company by one of its directors. Although the Companies Act 71 of 2008 (the “**Act**”) does not specifically provide a basis on which a creditor can claim for loss against a unscrupulous director, certain provisions appear to pave the way for such claims to be allowed.

Section 218 (2) of the **Act** provides that:

- any person who contravenes any provision of the **Act**;
- is liable to any other person;
- for loss / damage suffered as a result of such a contravention.

It has been argued that herein lies a creditor's remedy should he / she wish to pursue a claim against any one director as a director acting in breach of his fiduciary duties will inevitably be acting in contravention of the **Act**.

The provisions of this section would seemingly allow any creditor to institute a claim against the company as well as its directors (or any other person in actual fact) whose actions in contravention of the **Act** resulted in loss / damage to the creditor. This would specifically apply to the liability imposed on a director by Sections 76 and 77 of the **Act**, however it is not clear whether a breach of common law duties (those not codified in the **Act**) would similarly result in a remedy to a creditor.

The implication of the abovementioned **Section 218 (2)** is therefore twofold.

- On the one hand, creditors should be aware of all possible remedies for the recovery of damages suffered by them as a result of the actions of a company's “decision makers”.
- On the other, directors should in turn also keep in mind the far reaching implications their actions can have, not only for the company but also for themselves in their private capacity, and at all times ensure that they act with the requisite degree of care, skill and diligence required from someone in such a position of authority.

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