

February 2016

*"Failure will never overtake me if my determination to succeed is strong enough".
Og Mandino*

AGREE TO (DIS)AGREE

An agreement to negotiate a contract or further terms of a new contract in the future that is vague, illusory or unacceptably uncertain will not be enforceable in South African Law. For example, a promise in a purchase of land contract stating that should the purchase of land not be realised, the purchaser and seller will negotiate and conclude a lease agreement in respect of the land may be too vague and uncertain. This may be despite the intention of the parties for it to be a binding legal obligation to which the parties should be held.

According to South African case law, where the parties agreed that they would enter into an agreement "to be negotiated between the parties in good faith" or where the agreement states that certain terms and conditions will be determined by a third independent party, such agreement to negotiate may be enforced by our courts. As example, in the case of Letaba Sawmills (Pty) Ltd. v Majovi (Pty) Ltd. the rental of a future lease agreement to be negotiated between the parties in good faith was to be determined by arbitrators, obliged to take into consideration the limits of market related prices for property rental payable.

Beware that should your agreement to negotiate a contract not be supported by a deadlockbreaking mechanism, such as the final decisions of an arbitrator, your agreement to negotiate may only be an agreement to disagree and not be enforceable in law.

Law & Laughter

Joke: What' the difference between a lawyer and a boxing referee?
A: A boxing referee doesn't get paid more for a longer fight.

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BEWARE OF THE HIDDEN SECRETS OF A SHARE BUY-BACK

In the event that a company wish to re-acquire its own shares the provisions of the Companies Act must not be overlooked. The Companies Act requires that, in the event of a company re-acquiring more than 5% of it's owns shares (in a transaction considered alone or together with a whole series of integrated transactions), the company must (in addition to complying with the solvency and liquidity test) obtain shareholders' approval by way of a special resolution and retain the advice of an independent expert who understands the transaction and is able to evaluate and assess the consequences thereof.

The independent expert must prepare a report to the board of directors of the company, which report must, at a minimum, state all information relevant to the value of the shares subject to the buy-back, identify every class of shareholder affected, describe the material effects on the rights and interests of the shareholders, evaluate any material adverse effects and state any material interest of any director.

For further assistance regarding share buy-backs and the required independent report, please be sure to contact our offices prior to implementation of any such proposed transaction.

Contact Van Huyssteens

T +27 12 349 2306
F +086 6151 183

Address:

De Haviland Crescent Nr. 5,
III Villaggio Nr.12, Torino Suite
Persequor Park
Pretoria, South Africa

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