GLOBAL **BUSINESS** SOLUTIONS

GIVING **YOU** THE **EDGE**

Welcome to the first revamped edition of this newsletter. Previously we had only discussed developments in the Consumer Protection arena. Unfortunately, to date, things have moved slowly on this front, so in an attempt to remain cutting edge, Global have changed this to a corporate newsflash.

In this edition we cover three matters : The groundbreaking Ambrosini bill, the first ever delinquency case and finally, on the CPA front…. the European horsemeat scandal.

The Ambrosini Bill

The introduction of a private member's bill-the draft national credit amendment bill- was formally adopted for discussion in the National Assembly after being introduced in the committee by Oriani-Ambrosini.

The Inkatha Freedom Party MP's amendments included extending to five years the period a consumer under debt review has to repay debt, and suspension of the accrual of interest on that debt for the same period.

Trade and industry department (DTI) officials rejected the amendment, and said it would undermine the entire process of debt review.

Oriani-Ambrosini landed himself in hot water with Fubbs and fellow MPs when he arrived an hour late for what is believed to be a precedent setting process.

It was the first time an individual MP had tabled a bill in the Assembly, following his victory in the Constitutional Court last year.

The court declared unconstitutional rules stating that MPs had to get permission from a majority of the House before tabling a bill.

Delinquent directors under the Companies Act 71 of 2008

While the Companies Act 71 of 2008 (the Act) has increased the powers of company directors, it has, at the same time, increased their liabilities.

A significant innovation under the Act is that it provides for a court application to declare a director delinquent or to have him placed under an order of probation.

The Act confers locus standi on a broad range of persons to apply to court for such an order and such applications can have far-reaching implications for directors. Also of significance is that a court may impose various restrictive conditions when granting such an order.

In the recent case of Kukama v Lobelo and Others (GSJ) (unreported case no 38587/2011, 12-4-2012) (Tshabalala J) the South Gauteng High Court granted the first order of delinquency against a director under the Act. This judgment indicates that courts will not shy away from placing directors under delinquency (or probation) should the circumstances warrant this.

Court's decision

The court declared Lobelo a delinquent director, however it did not specify the duration of the declaration. In terms of s 162(6)(b) of the Act, however, a declaration of delinquency in terms of s 162(5)(c) to (f) subsists for seven years from the date of the order or a longer period determined by the court.

The court in addition granted Kukama leave to institute legal proceedings in the name of Peolwane against Diphuka or against Lobelo in his personal capacity for recovery of the R 22 million.

The court further held that, in view of the effect of an order of delinquency, it was not necessary to also order the removal of Lobelo as a director of the company due to the 'automatic inherent effect of such a declaration' (para 21).

Conclusion

Section 162 of the Act is a new remedy available to shareholders and certain stakeholders to hold directors (including non-executive directors) accountable (see the 'Memorandum on the objects of the Companies Bill', 2008 at para 8). The rationale of this remedy is that a director who is guilty of serious abuse of his position and infringements of his fiduciary duties should not be allowed to continue to hold a directorship or should only be allowed to continue to do so under strict conditions imposed by a court.

Section 162 sets out to raise the standards of good behaviour and integrity expected of directors and makes them accountable not only to the company, shareholders and fellow directors but also to the employees of the company.

It is important, however, to guard against abuse by those with locus standi to bring such applications, since such persons may well abuse this mechanism to lodge vexatious claims, which could result in damage to the reputation of directors (Cassim et al (op cit) at 436).

Indeed, even if a director were successful in having the order of delinquency or probation suspended or set aside, the reputational damage and stigma caused by such an order is likely to be significant and may last for a long time. The Kukama case illustrates that the courts will not hesitate to grant orders of delinquency where the circumstances warrant this. It remains to be seen whether Lobelo will apply to have his order of delinquency suspended after three years.

Extracted from de Rebus , Jan/Feb edition , Rehana Cassim

Inquiry ordered after food official says he raised alarm in 2011

Europe has recently been hit by a horsemeat scandal. Traces of the meat have been found in dishes like lasagne,etc which are TV dinners.

It has been reported that the British Agriculture minister was told that meat passport scheme was not working.

The Government is urgently investigating allegations that ministers were alerted as long ago as 2011 that illegal horsemeat was entering the food chain.

John Young, a former manager at the Meat Hygiene Service, which is now part of the Food Standards Agency (FSA), said he helped draft a warning letter to the former agriculture minister Sir Jim Paice. In it, the minister was told that the Government's passport scheme – designed to prevent horse meat containing harmful drugs entering the food chain – was not working.

But the head of the supermarket chain Iceland blamed the scandal on cost cutting by Government and local authorities, who he claimed were set on spending as little as possible on meat for schools, hospitals and prisons.

"Supermarkets are visible because they are on the high street but British supermarkets shouldn't be blamed," said Malcolm Walker.

"If we are going to blame somebody, let's start with local authorities because there is a whole side to this industry that is invisible, that is the catering industry; it is massive business for cheap food and local authorities award contracts based purely on one thing: price.

"If you're looking to blame somebody who is driving down food quality: it's schools, it's hospitals, it's prisons, it's local authorities."

Mr Walker said he would personally not eat value meals but defended the supermarkets for not doing more testing for horsemeat themselves, saying: "Why would we? We don't test for hedgehog either."

Meanwhile Mark Price, the managing director of Waitrose, said the rising costs of rearing animals could have encouraged meat suppliers to "cheat", either for their own "personal greed or to keep a company afloat".

Courtesy of The Independent, Oliver Wright

Whilst there has been no current report in South Africa of horsemeat being used, we hope the powers that be are being vigilante in ensuring that this problem does not enter our market place.