



With Compliments

Upper Ground Level
8 Arnold Road
Rosebank
2196

Tel: 011 880 3300
Fax: 011 880 9128
Email: dunn@hfattorneys.co.za
Website: www.hirschowitz-flionis.co.za

[Forward email](#)

[Online Printable Version](#)



*Hirschowitz Flionis
Attorneys & Conveyancers*

In this Issue

What is an Occupancy Certificate? Why Do You Need It?

- *Why bother to comply?*
- *How does the Certificate protect you?*
- *Who must obtain it?*

Dagga – Arrest Risk Remains

Will Your ANC Protect Trust Assets on Divorce?

- *A multi-million Rand fight over trust assets*
- *The outcome, the law, and the lessons to be learned*

Starting a Business? The Business Trust Option

- *What is a business trust?*
- *5 advantages of business trusts ...*
- *... and 3 disadvantages*
- *The tax angle*

June 2017

WHAT IS AN OCCUPANCY CERTIFICATE? WHY DO YOU NEED IT?

“Cheops’ Law: Nothing ever gets built on schedule or within budget” (Robert A. Heinlein)

Hopefully you won't have to wait 20 years for your new dream home to be built - that's how long Cheops (ancient Egyptian pharaoh) had to hang around twiddling his thumbs whilst his Great Pyramid of Giza was going up - but you will no doubt be keen to move in as soon as you can.



But before you do so you must obtain a “Certificate of Occupancy” from your local municipality. This applies whether you are moving in yourself or putting in a tenant. It also applies both to building from scratch and to carrying out any “alteration, conversion, extension, rebuilding, re-erection, subdivision of or addition to, or repair of any part of the structural system of, any building”.

Why bother to comply?

1. Firstly, if you don't comply, you will have problems with your bank if your

Subscribe

home is mortgaged, and – perhaps more critically – you could find yourself without insurance cover.

2. Secondly, you won't be able to arrange water and electricity accounts and connections from the municipality.
3. Thirdly, it is a criminal offence to occupy or use (or permit occupation or use) of the building without authority (or to the extent that "it is essential for the erection of such building").

A couple of notes here –

- In necessity you may be able to get temporary, conditional permission to use a building before the Certificate is issued.
- If the building later falls into disrepair or is deemed unsafe, the municipality may revoke the Certificate.
- If you are moving into a new/renovated building as a tenant, ask for a copy of the Certificate from the landlord to ensure that your occupancy is lawful.

How does the Certificate protect you?

The municipality will only issue the Certificate once satisfied that your building is fully completed in accordance with the approved building plans, that all conditions of approval and other municipal requirements have been met, and that all necessary compliance certificates (structural completion, electrical, plumbing, gas and so on) have been issued.

The end result – assuming of course that the municipality has done its job properly - is confirmation that your builder has complied with all regulations and requirements. For both safety and financial reasons that's an important protection for both you and your family, and for any tenants or other occupiers.

Who must obtain it?

In practice your builder or project manager should obtain the Certificate for you after final municipal inspections have confirmed compliance as above, but make sure you get it before you take occupation. Then file it away somewhere safe in case of future problems or queries.

Ask for help if you run into any problems here.

DAGGA – ARREST RISK REMAINS

There's still a lot of confusion as to whether dagga (cannabis) remains an illegal drug in South Africa, fuelled in part by conflicting media reports.

Here's where we stand –

1. **It remains in general illegal** to cultivate, possess, supply or use cannabis "without the necessary authorisation from the Department of Health" (see below).
2. **"Medicinal" cannabis**
 - o Individual patients needing to use cannabis products for medicinal purposes can apply for special permits (3 of them are required) to do so.



- o The Medicines Control Council (MCC) has to date approved only one medicine containing synthetic cannabinoids (Dronabinol) under Schedule 6 - i.e. it is available only on prescription.
- o Cultivation of “medicinal” dagga remains generally illegal, but the MCC is “working towards implementing a detailed regulatory framework to enable applications for licences and permits for the cultivation, production and manufacture of medicinal cannabis products.” No growing permits will be issued until the necessary legislative amendments have been passed by Parliament, and the MCC’s current draft guidelines for growers contain very strict requirements and controls which are likely to limit the number of farmers able to comply.

3. What about the new “at home” defence?

The recent high-profile Western Cape High Court judgment did not, despite the impression to the contrary created by some media reports, “legalise dagga”. What it did do, on grounds of unconstitutionality of the legislation in question, is to provisionally provide a deemed “right of privacy” defence to anyone charged with a dagga-related offence where “the use, possession, purchase or cultivation of cannabis in a private dwelling is for the personal consumption of the adult accused”.

The Court was at pains to state that its findings “should not be construed as meaning that this court wishes, in any way, to understate the importance of curbing drug trafficking and the pernicious and socially destructive activities of drug dealers ... this case is only concerned with acts / conduct of individuals performed in the confines of their own homes”, nor did it in any way extend to children.

In other words, the defence - **if it is currently available at all (see below)** - is only available to adults growing or using dagga in the privacy of their own homes for their own personal use. Any other cultivation, possession, supply or usage will fall outside that deemed defence and remains a fully prosecutable offence.

It’s now over to the Constitutional Court to confirm or overturn the declaration of unconstitutionality (which is suspended for 2 years accordingly) and thereafter Parliament will need to amend the relevant legislation as necessary. It remains to be seen whether or not that process will eventually result in full decriminalisation.

4. Even “at home” offenders still risk arrest

SAPS have indicated strongly that, with an appeal having been lodged against the High Court order, pending a Constitutional Court decision on the matter, and pending any necessary amendments to legislation, the police will continue to arrest offenders even for contraventions in their own homes.

Although there is at date of writing no clarity on how the NPA will handle resulting prosecutions, **the best advice for now to anyone thinking of “at home” dagga cultivation or use is to be cautious and to be aware that the risk of arrest and prosecution remains a real one.**

5. And what about the workplace?

As cannabis remains in law an illegal drug in South Africa, and as the new “deemed defence” to any criminal charges applies – if it applies at all - only to own-home possession and usage, workplace restrictions against drug use and abuse remain unaffected. Your employees cannot turn up for work with a joint and claim to be acting lawfully – they aren’t.

WILL YOUR ANC PROTECT TRUST ASSETS ON DIVORCE?

A recent Supreme Court of Appeal (SCA) decision illustrates once again how essential it is, before getting married, to have your lawyer structure your antenuptial contract (ANC) correctly, and with as much detail as is needed for certainty.



A multi-million Rand fight over trust assets

- A divorcing couple had married and divorced three times.
- They had in respect of the latest divorce been married out of community of property with the accrual system, so each was in principle entitled to 50% of all “accrual” (growth) in their estates after marriage, except as specifically excluded from accrual by their ANC.
- The husband had, on the advice of his accountant, created a new legal entity for each of his new timeshare business ventures, in order to ensure that if one business failed, the others would not be affected.
- In their ANC the couple had specified which of the husband’s assets (including interests in business entities such as trusts, CCs and companies) were excluded from the accrual.
- On divorce, the wife asked the High Court to declare the assets of three trusts to be assets of her husband for the purpose of accrual on two grounds –
 - That on the facts and on interpretation of the ANC they were not excluded from the accrual, alternatively
 - That the trusts were simply the husband’s “alter ego” so that the assets of the trusts were in reality her husband’s assets.

The outcome, the law, and the lessons to be learned

The SCA held that none of the trusts’ assets were to be taken into account in determining accrual in the husband’s estate –

1. In respect of two of the trusts, on the particular facts of this case they weren’t covered by the exclusion clause which provided that exclusion was to extend to “any other asset acquired by such party by virtue of the possession or former possession of such asset”. The Court rejected the husband’s argument that this should be read widely to exclude “any asset acquired as a result of his activities in the timeshare industry” – it only covered “the particular asset, its proceeds, and assets which replace the excluded asset or are acquired with its proceeds”.

Lesson 1 therefore is this – if you want a wide exclusion of a particular class of assets from the accrual process, say so clearly in your ANC.

2. However, the wife also had to convince the Court that the trusts were the “alter ego” of the husband.

She was able to convince the Court that he had “administered the trusts with very little regard for his fiduciary duties as a trustee and without proper

regard for the essential dichotomy of control and enjoyment essential to the nature of a trust and ... such conduct may have justified his removal as a trustee, or the appointment by the Master of an independent co-trustee..."

What she had failed to prove was any "abuse of the trust form" nor that "the trust form [was] used in a dishonest or unconscionable manner to evade a liability, or avoid an obligation."

Firstly, the husband's use of separate trusts for each new business venture was a "legitimate business activity" given his "overall business strategy".

Secondly, there was no proof that the husband "transferred personal assets to these trusts and dealt with them as if they were assets of these trusts, with the fraudulent or dishonest purpose of avoiding his obligation to properly account to the respondent for the accrual of his estate. In addition it was not established that the transfer of assets to these trusts by the appellant was simulated with the object of cloaking them with the form and appearance of assets of the trusts, whilst in reality retaining ownership."

Lesson 2 therefore is that if you want to attack your spouse's use of trusts to hold assets you will need to prove more than just misconduct in the administration of the trusts. You will also have to prove a fraudulent or dishonest attempt to avoid the consequences of accrual.

STARTING A BUSINESS? THE BUSINESS TRUST OPTION

"The secret of getting ahead is getting started" (Mark Twain)

That's great advice from Mark Twain, so if you are sure that you are cut out for the exciting, hurly-burly life of an entrepreneur, and if you have a viable business concept, take advice now on how to get started.



In our previous article in the series "Choosing the right legal entity for your business" we looked at the private company option. In our final article in this series we consider the plusses and minuses of trading in a business trust.

What is a business trust?

In summary, a trust is a contractual arrangement that allows trustees to hold assets (without owning them) for the benefit of the trust beneficiaries.

Most trusts are not "business trusts" – they are just used to hold assets. In the case of "living" trusts (the type of trust most likely to be encountered in this context) assets are initially provided by a "founder", "settlor" or "donor", and then owned, controlled and managed by trustees in their capacities as such (not in their personal capacities), for the benefit of beneficiaries. The trustees can, and usually do, acquire more assets for the trust thereafter, again just to hold/control/manage.

With a business trust the trustees go one step further – they trade for profit, again for the benefit of the beneficiaries.

Strictly speaking, trusts aren't separate legal entities like partnerships and companies, but in practice they are often treated as though they were, and some

legislation (tax in particular) specifically defines them as such.

5 advantages of business trusts ...

1. Trusts, like companies, have “perpetual succession”, so they survive the death/incapacity/insolvency/removal of trustees, with all the practical benefits that entails. For example, the business can continue to operate normally after the death of the founder or trustees, rather than be tied up in the process of winding up the deceased estate. And trusts that are properly created and administered can protect assets from creditors in the event of insolvency, divorce etc of the founder/trustees/beneficiaries.
2. The trading risks of the business lie with the trust i.e. the trust’s assets are at risk from trading liabilities, not the personal assets of the parties to the trust. Trustees, unless of course they have signed personal suretyship for any trust debts, generally risk personal liability only if they fail to comply with the provisions of the trust deed and other legal requirements. In particular they have very strong fiduciary duties towards beneficiaries, and must always act in their interests. They must also observe the fundamental requirement that trust assets be treated as such, and not as their personal assets.
3. As is the case with companies, you may find it easier to raise funding for a trust than for a sole tradership or partnership.
4. Tax: Possibly an advantage ... see below.
5. Savings on death: Trusts have in the past often been used to freeze the value of growth assets as part of an estate planning exercise to reduce estate duty, capital gains tax and executor’s fees. These savings can be substantial, but be aware of factors such as the high tax rates applicable to trusts (see below) and of the various recommended changes to our tax and estate duty laws (such as the Davis Tax Committee proposals) which could – if they are ever implemented - reduce the attractiveness of trusts for this purpose.

.... and 3 disadvantages

1. Formation: Like companies, trusts require formal procedures for formation in the form of drawing up and registration of a trust deed, and appointment of trustees by the Master of the High Court. Factor the resulting delays and costs into your plans. Don’t take shortcuts here! An incorrectly worded trust deed for example will cause you all sorts of unnecessary pain.
2. Costs of administration will generally be higher than with sole proprietorships although typically lower than with companies. But check upfront with your advisors what you will be in for.
3. Tax: Possibly a disadvantage ... see below.

The tax angle

As with all the other possible trading entities you can choose from, it is impossible to give general advice here. But as an overall comment, trusts have lost a lot of favour in recent years as a result of various government “attacks” on trusts, and they are now highly taxed compared to individuals, partnerships and companies. Apart from generally being subject to higher rates of tax, they are also denied the various tax exemptions and rebates available to individuals.

There are a host of factors to be considered here, and you need to seek advice tailored to your particular circumstances. For instance, it may or may not affect your business trust that the primary residence CGT exemption isn’t available to trusts.

Moreover government has given out strong signals that this “hostile” trend will continue. In 2017 already, interest-free and low-interest loans to trusts have become subject to the risk of being taxed as donations. Now the “conduit principle”, whereby income can be taxed at personal rates in the hands of beneficiaries rather than in the trust at a flat rate of 45%, is reportedly under threat.

Even more so than with other types of trading entity, it is essential to get specific guidance on whether a business trust is the most tax-efficient entity for your particular situation.

The bottom line is this - take full professional advice on both the legal and the tax implications of using each type of entity (or any combination of entities) before you start trading.

This is the fifth and final article in our series “Choosing the right legal entity for your business”. We hope you have found these articles a useful introduction to a most important subject.

And if you ever wonder why your business is so important to you, read “Entrepreneurs love their companies like parents love their children: study” on [MedicalXpress](#).

YOUR JUNE WEBSITES: FIGHTING THE FLU WITH FOOD

***“Let food be thy medicine,
and medicine be thy food.”
(‘Father of Modern Medicine’
Hippocrates in about 400
BC)***

Don’t let colds and the flu knock you for a six this winter. Particularly if you run your own small business, every day in a sick bed is a day of opportunity lost forever!



“The 15 Best Foods to Eat When You’re Sick” from [AuthorityNutrition](#) sets out some of the science behind Hippocrates’ sage and ancient advice.

You may also be able to boost the “good food” effect with some medical help. See “Zinc acetate lozenges may increase the recovery rate from the common cold by three-fold” on [ScienceDaily](#).

Dipping into the OED

“Parkinson’s Law”, n. “The notion or law, proposed by Parkinson, that work expands to fill the time available for its completion.”

Note: Copyright in this publication and its contents vests in DotNews - see copyright notice below.



A Client Connection Service by DotNews

© DotNews, 2005-2018 LawDotNews is a division of DotNews, proprietor Stanhope Trustees SA (Pty) Ltd, Reg. No. 1999/017337/07
Copyright notice: no part of this newsletter may be used, redistributed, copied, imitated or reproduced without prior written permission of the owner.

Disclaimer

This Newsletter is a general information sheet and should not be used or relied on as legal or other professional advice. No liability can be accepted for any errors or omissions nor for any loss or damage arising from reliance upon any information herein. Always contact your legal adviser for specific and detailed advice.
