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NEWSLETTER

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Proudly displaying the PMR award are, standing from left, Bruce Rist (Director), Gordon Pentecost (Director) and Craig Anderson (Director); and seated, Gaylene Banjo (Associate) and Jadyne Devnarain (Associate).

PMR AWARD 2012

LLI was delighted to be acknowledged as one of South Africa's top-performing law firms for the third consecutive year at Professional Management Review Africa's awards ceremony in Johannesburg.

The award recognises the high regard in which the firm is held by respondents, made up of a random sample of 250 people comprising in-house advisors, MDs, CEOs, Financial Directors, Company Secretaries, and senior management. LLI was ranked in the top four firms in the country in its category; firms with a turnover of less than R50 million per annum.

Among the factors considered by the respondents were accessibility of partners; added value; caring about clients; the range of services offered; technical expertise; commitment to transformation and the firm's BEE policy; turnaround time; competence; and cost-effectiveness of the legal process.

The survey had a strong focus on customer service and satisfaction.

Managing director, Douglas Tatham, attended the ceremony and accepted the award on behalf of LLI.

Surrogacy under the spotlight

As in many other countries, South African law makes provision for surrogate motherhood, although such arrangements are strictly regulated by the provisions of the Children's Act. While surrogacy has been an option in South Africa for some time, very few matters have come before our Courts, largely owing to the close relationship that usually exists between the parties who are involved in the surrogacy agreement.

In terms of the Children's Act, a surrogate motherhood agreement is a contract between a surrogate mother and a commissioning parent in which it is agreed that the surrogate mother will be artificially fertilized for the purpose of bearing a child for the commissioning parent.

The surrogate mother undertakes to hand over the child to the commissioning parent upon its birth or within a reasonable time thereafter, with the intention that the child concerned becomes the legitimate child of the commissioning parent.

A distinction is drawn between full surrogacy and partial surrogacy. Full surrogacy is when the surrogate mother is not genetically linked to the child, whereas partial surrogacy refers to when the surrogate mother's ovum is fertilized by the sperm of a commissioning man.

A valid surrogate motherhood agreement must be in writing and confirmed by the High Court. This requirement is designed to minimize the risks inherent in surrogate motherhood and to ensure that the arrangement is in the best interests of all concerned, particularly those of the child. The Court may not confirm the agreement unless

- the husband, wife, or partner of the commissioning parent has given written consent to the agreement;
- the husband or partner (where a permanent relationship exists) of the surrogate mother has given his or her consent to the agreement.

Marriage is broadly defined to include heterosexual as well as same-sex civil marriages, customary marriages, and religious law marriages not yet formally recognized in South Africa. The Act also extends to a partner in a permanent relationship.

- the conception of the child is to be effected by the use of gametes from both commissioning parents or, if that is not possible for biological, medical, or other valid reasons, the gamete of at least one commissioning parent.

This is to give effect to the general purpose of surrogacy, which is to give a childless couple a child that is genetically related to at least one of them.

A Court may further not confirm a surrogate motherhood agreement unless

- the commissioning parent/s (who must be domiciled within the Republic) are permanently unable to give birth to a child;
- the commissioning parent/s are competent to enter into the agreement, are suitable to accept parenthood of the child, and understand and accept the legal consequences of the agreement, the Act, and their rights and obligations;
- the surrogate mother is competent to enter into the agreement and understands and accepts the consequences of the agreement, the Act, and her rights and obligations;
- the surrogate mother is not using surrogacy as a source of income, having entered into the agreement for altruistic reasons and not for commercial purposes, and has a history of at least one pregnancy and viable delivery and has a living child of her own.

This does not exclude payment of expenses related directly to the artificial insemination, pregnancy, birth of the child, loss of earnings by the surrogate mother, and insurance costs to cover medical complications.

The effect of a valid agreement is that

- the child is, for all purposes, the child of the commissioning parent/s from birth;
- the surrogate mother is obliged to hand the child over to the commissioning parent/s as soon as possible after birth;
- the surrogate mother and her husband, partner or relative has no right of parenthood or care of the child, no right of contact with the child, and no responsibility for maintenance.

The effect of this is that the commissioning parent/s acquire full parental responsibility.

It must be noted, however, that a partial surrogate mother who is genetically related to the child may, without incurring any liability to the commissioning parent/s, terminate and withdraw from a fully enforceable surrogate motherhood agreement up to 60 days after the birth of the child by filing written notice with the Court. The effect of the termination is that any rights vested in the commissioning parent/s are vested in the surrogate mother and the child has no claim for maintenance or of succession against the commissioning parent/s.

"Surrogate motherhood offers childless couples who long for a child a chance of realising their dream," comments Russell Argue, a director in LLI's family law department. "However, given the potential for problems arising from this procedure, it should be considered a last resort," he cautions.

Companies Act 2008: Memorandum of Association

One of the consequences of the new Companies Act, which was introduced in May 2011, is that the previous constitutional documents of a company, the Memorandum and Articles of Association, are replaced by a single Memorandum of Incorporation (the MOI).

The Act specifies certain provisions which must always apply, and others which may be altered at the election of the shareholders ('the alterable provisions').

For a period of two years from the commencement of the Act, most of the provisions of the old Memorandum and Articles and shareholders agreements will continue to apply. However, after the expiry of this two-year transitional period (May 2013), the provisions of the Act will automatically take precedence and certain provisions will then apply even if these are contrary to the provisions of the old Memorandum and Articles or of a shareholders agreement.

The company will therefore have to refer to multiple sources to determine which rules of governance apply in which circumstances. It is advisable for all companies to go through the exercise before the transitional period expires to determine which of the alterable provisions should be changed, and in the process to adopt a new MOI which will accurately record the new governance provisions of the company.

Some examples would be:

1) whether to vary the number of votes required for special and ordinary resolutions. Previously, approval of more than 50% of the voting rights was required to pass an ordinary resolution and 75% for a special resolution. These remain as default percentages under the new Act but a company may elect to alter these percentages provided that a differential of at least 10% is retained;

2) whether the company should still be required to have an audit done each year. Under the old regime, all companies were required to be audited annually. The new Act requires all public companies to be audited and to comply with the provisions of Chapter 3 of the Act. A private company is not required to be audited except to the extent that it meets the criteria set out in the Regulations, or to the extent that the MOI requires this. Companies can therefore take the opportunity of ensuring that the correct audit requirements apply, particularly if the company is an enterprise in which the shareholders and directors are the same parties and there are limited external persons with an interest in the company, such as employees. Each company should check its existing Memorandum and Articles to verify the current audit obligations.

3) whether the directors of the company should have the power to impose rules for the management of the company. Unless limited specifically, directors of a company are empowered to make rules relating to the governance of a company in respect of matters not addressed by the Act or the MOI. Any intention to limit this power should be recorded in the new MOI.

Directors of companies are advised to give consideration to these issues and may consult with Lance Coubrough of LLI's commercial department in order to establish whether a new MOI is necessary and, if so, which options best suit the requirements of the company.

Debt review and sequestration

The National Credit Act (NCA) allows for over-indebted consumers to apply to be placed under debt review. In order to qualify for debt review, the debtor must show that he cannot within his financial means meet his repayment obligations under existing credit agreements. Thereafter a debt counsellor or magistrate can rearrange his debt by recalculating the obligations set by the creditor in order to provide for reduced monthly payments over an extended period.

On the other hand, the Insolvency Act allows a creditor to apply for a sequestration order declaring the debtor to be insolvent if the debtor commits an 'act of insolvency'. An act of insolvency includes any action by the debtor evidencing an inability to pay his debts.

In the case of Firstrand Bank Ltd v Evans the Court held that, in terms of the Insolvency Act, a debt rearrangement order is considered to be evidence of a debtor's inability to pay a debt and constitutes an 'act of insolvency', regardless of the debtor's willingness to pay in a reorganised fashion.

Once a creditor has been informed of the debt review process, the creditor can elect to institute insolvency proceedings to have the debtor declared insolvent and claim a share of the debtor's insolvent estate.

We extend a warm welcome to:

Associate is Gaylene Sharon Banjo.

GAYLENE BANJO – Associate in the litigation department
After graduating with an LLB from UNISA, Gaylene served articles of clerkship with LLI. In addition to her passion for the law, she enjoys reading and creative writing.

Candidate attorneys, from left, Kyle Bailey, Nelisha Mahadeo and Ndumiso Dlamini.

NELISHA MAHADEO
Candidate Attorney
Nelisha joined LLI in August 2011 after completing an LLB as well as an LLM in Business Law at the University of KwaZulu-Natal. In her spare time Nelisha enjoys reading and is actively involved in community service.

NDUMISO DLAMINI
Candidate Attorney
Ndumiso obtained a Diploma in Civil Law Administration and an LLB degree from UNISA before joining LLI in March 2012. Out of the office, Ndumiso enjoys playing and watching sport.

KYLE BAILEY
Candidate Attorney
Kyle joined LLI in January 2012 having graduated with a B SocSci (Political Science) and an LLB degree from the University of KwaZulu-Natal. He then obtained a Master of Laws degree (Global Environment and Climate Change law) from the University of Edinburgh, Scotland. Kyle enjoys the outdoors and is passionate about sustainable development and rugby.

Get advice before amending trust deed

Many trusts are set up as the alter ego of the founder and founding trustees, who believe that the provisions of the trust deed can be amended at will. In a recent SCA decision, Potgieter v Potgieter, it was held that the alteration of a trust deed by agreement between the founder and trustees was invalid without the consent of the beneficiaries who had previously received benefits in terms of the original trust deed. The effect of the decision was that the trust deed remained enforceable in its unamended form.

"The consent of the beneficiaries is required even when the trust deed does not call for it," cautions Lance Coubrough, a director in LLI's commercial department. "It would be wise to seek advice before any amendments are made to a trust deed," he concludes.

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