EXECUTIVE SUMMARY

In this month's issue, we discuss the Protection of Personal Information Act's role in addressing cybercrime, a matter in which a business rescue case was protected from all legal proceedings and the increasing validity of company notices in electronic form.

While we have shared the salient points in this eFile, more detailed versions of each of these articles can be found on our Web site.

ADDRESSING CYBERCRIME WITH THE PROTECTION OF PERSONAL INFORMATION ACT

Cybercrime is no longer a rare occurrence. Between 70% and 80% of South African adults have been victims of cybercrime, and it is estimated that cybercrime cost the South African economy approximately R5.8 billion in 2014. This ever-escalating cost to individuals and businesses requires clear legislation, which begins with protecting private information that may be vulnerable.

The Protection of Personal Information (POPI) Act constitutes a critical step forward for South African legislation, as it is the first piece of legislation to have the protection of personal information as its core concern.

Signed into law in November 2013, it introduces minimum requirements to protect personal information by regulating how such information is processed, stored, secured, and ultimately destroyed. These minimum requirements are currently not mandatory, but this is set to change. A failure to comply with the POPI Act could expose businesses to fines from the regulator of up to R10 million or, in certain instances of non-compliance, a court sanctioned fine and/or a period of imprisonment of up to 10 years.

If you would like to learn more about the steps you should take to prepare for the full implementation of the POPI Act, visit our Web site or get in touch with us.

BUSINESS RESCUE PROTECTED FROM ALL LEGAL PROCEEDINGS

If a company is undergoing business rescue, the Companies Act states that it is immune to the commencement of any 'legal proceeding,' without the written consent of the business rescue practitioner. However, the phrase 'legal proceeding' is not defined by the Act.

The Supreme Court of Appeal (SCA) was required to scrutinise two critical questions in the recent judgment of *Chetty v Hart*, namely: (i) does arbitration fall within the definition of 'legal proceeding' for purposes of the above; and (ii) if so, are arbitration proceedings (leading to a subsequent arbitration award) conducted without the consent of the business rescue practitioner null and void?

In this particular case, the SCA considered the purpose of business rescue proceedings and stated that, "It gives the company breathing space so that its affairs may be assessed and restructured in a manner that allows its return to financial viability." In addition to this, the requirement of consent from the business rescue practitioner allows them to assess the impact of the claim against the business' financial health.

The SCA held that a general moratorium on the rights of creditors is crucial in order to achieve the above objective. Given the ubiquitous use of arbitrations to resolve commercial disputes, excluding these proceedings (which can be both costly and lengthy) from the moratorium created by s. 133(1)(a) would significantly hinder the realisation of a business rescue's objectives. Accordingly, the definition of 'legal proceedings' in this context was held to include arbitrations.

It is, therefore, submitted that the SCA was correct in its interpretation of s. 133(1)(a) and that the effect of the lower court's ruling would have drastically impaired the business rescue practitioner's abilities to attempt to rehabilitate companies in business rescue, as arbitrations can be lengthy, costly and often involve a diversion of the company's resources which may impede the effectiveness of the business rescue proceedings.

COMPANY NOTICES IN ELECTRONIC FORM

While we are accustomed to declaring a contract valid based on its physical existence, our increasing shift to online communication and documentation requires us to review our definition of a document's 'validity.'

The United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 2007) establishes the general principle that communications are not to be denied legal validity solely because they were made in electronic form. Currently, there are only six parties to the Convention, namely the Congo, Dominican Republic, Honduras, Montenegro, the Russian Federation and Singapore. The Convention further clarifies that a proposal to conclude a contract made through electronic means and not addressed to specific parties amounts to an invitation to deal, rather than an offer in which acceptance binds the offering party.

While the Convention does not have a great number of parties who have acceded to it, other jurisdictions have enacted laws with similar principles. These include the Electronic Transactions Act 1999 in Australia; The New Zealand's Electronic Transactions Act 2002 and Electronic Transactions Regulations 2003 (SR 2003/288) and the South African Companies Act 71 of 2008.

The South African Companies Act states that if, in terms of that Act, a document, record or statement, is to be published, provided or delivered, it is sufficient if an electronic original or reproduction of that document, record or statement is published, provided or delivered by electronic communication via electronic mail or as the High Court may otherwise authorise. This means that communications and contracts through social media, as another form of electronic media, should not and cannot be denied legal validity on the basis that they were devised in electronic form. However, while legislation may evolve over time, it is safe to say that whether an electronic document is binding is something that should be left for each jurisdiction to determine independently.