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Practical Wisdom – Trusted Advice

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KEEPING YOU IN TOUCH

LawDotNews

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January 2020

Before You Start a New Small Business in 2020 …

"Just do it!" (Nike)

You and your fantastic business idea can't wait to chuck up the 9 to 5 job and launch your own new venture. 2020 here we come! But is this the right time to do it?

Of course no one knows for sure whether 2020 will see our economy glide happily into recovery mode or continue bumping along in the mud at the bottom. But one of the great things about starting a new small business is that it doesn't really matter. Provided, that is, that you plan carefully and remain agile and adaptive to whatever may come our way.

Here are some thoughts on how to get that planning underway…

1. ***Line up the right professional help***

   Quite apart from all the many legal, accounting and tax-planning issues you will face, bouncing your ideas off your professional advisers is a no-brainer here. Just do it before you put too much time, effort and money into your new venture.

More on that below…

2. ***Ask yourself "Am I an entrepreneur?"***

   Not everyone is suited to the cut and thrust of running a small business. On one side of the coin you can look forward to a good dose of exhilaration and excitement, but on the other you are in for more than your fair share of work-life balance challenges, risk, fear and stress. The personal and financial rewards can be enormous, but the spectres of disruption, decline and failure will haunt you at every turn (if they ever stop haunting you, something's wrong – nothing is certain, and nothing lasts forever!).

   Bring your family in on this from the very start – they will be walking this road with you every step of the way!

3. ***Quiz yourself online***

   Spend 10 minutes answering the questions in an online quiz like the Business Development Bank of Canada's "Entrepreneurial potential self-assessment" on its website – then book appointments with your professional advisers to see if they agree (back to 1 above).

4. ***Decide on a business structure upfront***

   This is critical; the tax, financial, legal and practical issues of getting it wrong can be substantial. And whilst you can change from say sole proprietorship to a company/trust structure down the line, the consequences are best avoided. Rather get it right from the outset with professional advice (1 above again).

5. ***Figure out the financing***

   Whether you will need a lot of money upfront or not, your business idea is a non-starter without finance. First, figure out **how much** you will need – crowdfunding site Kickstarter has a useful planning checklist on its "Funding" **webpage**.

   Next think about **where** that money is coming from. Can you finance the startup yourself; and if you can, should you? Will you ask friends and family or a bank for a loan? Perhaps you can find a rich partner or an angel investor? Crowdfunding may be worth a look – apart from **Kickstarter** and many others like it, consider local platforms – Google "Crowdfunding in South Africa" for a list, and read Jumpstarter's "Crowdfunding in South Africa!" **here**. The State also comes to the party here – read "Where do I get assistance to establish a small business?" on the South African Government Information **website** for a list.

   Last but not least, specific professional advice is once again a no-brainer.

6. ***Build a strong, dynamic team***

   Your staff will be the backbone of your business so whether your team will be big or small, in-house or out-sourced, management-heavy or mostly there in a support function, put your heart and soul into choosing wisely. Recruit wherever you can from diverse backgrounds and a range of specialties for a dynamic team that is agile and adaptable, and has the creativity that flows from constant cross-pollination of ideas.

7. ***Market, market, market!***

   No matter how brilliant your product or service, it is worth absolutely nothing to you until your target market pays you for it. Which it will only do if it knows what you do and how you benefit them. As obvious as that sounds a lot of startups fail for lack of planning around how to achieve the necessary exposure.

   With all the marketing noise bombarding us all these days you have to find a way to be heard - prioritise marketing or fail.

8. ***For a company get cracking with Biz Portal's 'One-Day, One-Stop' online platform***

The CIPC (Commission for Intellectual Property Commission) has just launched its "**Biz Portal**" online business registration platform. In collaboration with SARS, UIF, the Compensation Fund, B-BBEE Commission, the .za Domain Name Authority, and banks, the platform says it will help you register your new company in just 1 day (it normally takes 40!), plus assist with tax registrations, domain names, bank account, BEE certificate and so on.

Time will tell how effectively this (very welcome!) new initiative will actually work, but remember that by its very nature it cannot give you that essential individualised input we keep mentioning. **Take professional advice as above before using this platform!**

9. ***The bottom line: Just do it!***

   To quote Richard Branson: "*Screw it - just do it!*"

Must You Pay Tax on Your Rental Income?

"Few of us ever test our powers of deduction, except when filling out an income tax form" (Laurence J. Peter of The Peter Principle)

Letting out property can give you an excellent "annuity" income, and if that concept appeals to you and a buy-to-let property comes your way at the right price put an offer in right now; before the current 'buyer's market' runs its course.

In your financial planning however remember the tax implications, because as a landlord you must add your rental income to your salary and other taxable income in your tax return every year. Not to do so is tax evasion, and that carries heavy financial penalties as well as the very real threat of criminal prosecution.

Having to pay tax on your rental income could be make-or-break when it comes to deciding on how much you should pay for a particular property, so do your homework **before** you put your offer in.

Our tax laws are complex and specialised, so professional advice on your particular circumstances is essential here. These general concepts will however help you in your initial planning –

- **You must declare all property rental income**

  You must declare your gross rental income to the taxman whatever type of accommodation you rent out – whether a whole house or apartment, just a room/garden flat or anything similar – or if you are in the guesthouse/B&B/Airbnb business.

- **You can claim some expenses, but not all**

  Your taxable income will be calculated by subtracting allowable deductions from your gross income.

  In general, only "expenses incurred in the production of that rental income can be claimed" (SARS). So you can claim things like levies, rates and taxes, bond interest, advertising, agent's fees, homeowner's insurance, garden services, electricity and water, repairs and maintenance to the leased area (which would, says SARS, "usually take place when a person attempts to restore an asset to its original condition as a result of damage or deterioration"). Beware the "beginner's mistake" of thinking that your full bond repayment instalments are deductible – not so, only the interest portion can be claimed and not the capital repayments.

In regard to VAT (per SARS): "The supply of accommodation in a dwelling is an exempt supply for VAT purposes, and consequently you may not deduct VAT incurred on expenses in respect of supplying accommodation in a dwelling."

And when it comes to renting out only a portion of a property (a room say in the house you live in) you can only claim pro-rata to total floor area. Click **here** for a practical example from SARS.

Take advice also on claiming depreciation on furniture and the like – your allowable deduction there might be worthwhile.

Not allowed are "expenses that are capital in nature or that are not in the production of rental income" (SARS). So the cost of improvements to the property - which would normally "result in the creation of a better asset" (SARS) - cannot be claimed. Improvements can however be added to the "base cost" of your property – important when you come to pay CGT (Capital Gains Tax) on eventual disposal.

- **How are you taxed, and what about "ring-fencing"?**

  Your total taxable income (i.e. including net rental income) will be taxed as per current tax tables.

  What if your letting business shows a loss? Per SARS - "should the expenses exceed the rental income, the loss should be available for set-off against other income earned by the individual, provided that the loss is not "ring-fenced" in terms of prevailing anti-avoidance provisions". In other words SARS could ring-fence your letting business losses to stop you from setting them off against your regular non-rental income. But if that happens you don't lose those losses, they are just carried forward so that when your letting business starts turning a profit the losses can then be set off against that profit.

  Keep an eye also on your obligation to register for and pay provisional tax. As an individual if you earn taxable income of R30,000 p.a. or more in "rental from letting of fixed property" you fall into the net.

- **Keep full records from Day 1!**

  Create and maintain a full spreadsheet, with a file of supporting documents, of all income and expenditure (distinguish between revenue and capital, claimable and not claimable). It's a relatively painless exercise if you update it regularly, but a real challenge if you end up trying to recreate everything only when the annual "income tax return panic" sets in, or when SARS and/or your accountants call for breakdowns and documentation.

Your Written Contract Should Cover Everything – No Oral Evidence Allowed!

Here's another warning from our courts to make sure that all your contracts are properly drawn to reflect both accurately and fully what you have agreed to.

The problem with leaving anything out –

or agreeing to something that isn't then fully recorded in your contract – is a principle in our law known as "the rule of parol evidence".

A recent SCA (Supreme Court of Appeal) decision illustrates the rule in action, and the facts will resonate with the many farmers, businesses and city dwellers facing empty dams in drought-stricken areas…

The water diviner and the "insufficiently yielding" borehole

- A fruit farm/wine estate accepted a quote from a contractor to drill a borehole.

- The contractor, having successfully used his water divining skills and over 20 years' experience to locate a good drilling spot, quoted to drill on the basis of his standard "No Water, No Pay" policy. The farm accepted the quote with a modification requiring a drill to 70m (or 100m if no water was found at 70).

- The resultant 76m deep borehole yielded some 4,000 litres of water per hour - something which, as the Court put it, "would put a smile on the face of most farmers in this country".

- Nevertheless, and despite the borehole "gaily being used by the [farm] to irrigate its orchards", the farm refused to pay the drilling contractor a cent, arguing that the water yield was insufficient to meet the contractor's agreed obligations.

- One long (and no doubt expensive) legal battle through the courts later, the fight ended up before the SCA.

- One of the farm's defences to the claim (and the one relevant to this article) was its (hotly denied) insistence that the contractor had guaranteed a minimum water supply of 10,000 litres per hour.

Oral evidence disallowed - it's the written contract that counts

- Bad defence, said the Court. A guarantee of water yield "is not what the agreement says, and to find that there was agreement on such a guarantee would breach **the rule of parol evidence which prescribes that where the parties to a contract have reduced their agreement to writing, it becomes the exclusive memorial of the transaction; and no evidence may be led to prove its terms other than the document itself, nor may the contents of the document be contradicted, altered, added to or varied by oral evidence."** (Emphasis supplied).

- On that basis "the considerable volume of evidence led by both sides in regard to their negotiations and what their intention had been was all clearly inadmissible". All that mattered was that the contract specified that payment was due if the borehole produced water and wasn't "dry" – its actual yield was irrelevant.

- The farm also tried to rely on the "partial integration rule" whereby, when a contract is partially written and partially oral, evidence can be led to prove the oral part of the agreement. But, held the Court, that rule cannot be used to "contradict or vary the written portion" of the agreement – which is exactly what the farm was trying to do.

- End of that argument, so the farm must pay its borehole bill in full, plus legal costs.

The bottom line – make sure your contracts cover <u>everything</u> both clearly and comprehensively!

January is "Divorce Month": Beware the Dangers of DIY

"What's the only thing divorce proves? Whose mother was right in the first place" (Anon)

The festivities are over, the bills are coming in and everyone is returning to reality. Couples who for most of the year only have to live with each other after work hours, have suddenly spent a whole lot more 24/7 time in each other's close company. Little irritations have magnified, habits have got on each other's nerves, in-laws visiting for the annual family bun fight have heightened tensions…

Whatever the reasons, and whether only one party was at fault or both, January's worldwide reputation as "divorce month" applies equally here in South Africa. Which means that the legal and personal risks associated with divorce are peaking now, in January.

On the legal side of things a particular risk to be aware of is the temptation for couples splitting on an "uncontested" (i.e. by mutual agreement) basis to opt for a "DIY" divorce.

Beware, that's a siren's call…

The dangers of a DIY divorce

Divorce is full of both legal and practical pitfalls, and any mistakes a divorcing couple makes now could well live with them, their children, and their extended families for life.

The hard fact is that whilst DIY divorce may seem affordable and workable, specific legal assistance and guidance is worth every cent it costs – and particularly in uncontested matters the cost of proper legal help certainly won't break the bank. Without such advice, the average couple risks the exact opposite of "affordable" in the form of a great deal more expense (not to mention stress and heartache) than had they consulted an attorney upfront.

To illustrate some of the many relevant issues the couple must take into account –

1. **Formalities:** Getting divorced means complying with a list of formalities and requirements, and appearance in either the High Court or the Divorce Court. Getting anything wrong here is a recipe for disaster.

2. **Consent paper:** A settlement agreement (often called a "deed of settlement" or "consent paper"), setting out what the couple has agreed to regarding children, maintenance, division of assets etc, should be made an order of court to give it the status of an enforceable judgment. The agreement should cover everything important, clearly and unambiguously – overlooking something vital (easy for the layperson to do) will come back to haunt everyone.

3. **Children:** The most vulnerable parties in any familial breakup, children enjoy special protections in our law, and parents need to take into account questions of parental responsibilities and rights including "care and contact" (the new terms for "custody and access"), guardianship, maintenance, formal "parenting plans", health care and the like.

4. **Maintenance:** In addition to child maintenance, one spouse may have a claim on the other for spousal maintenance, either on an interim basis or longer-term.

5. **Financial implications and division of assets**: Particularly where valuable assets are involved (a house or other property perhaps, or rights to a pension fund) the divorcing couple should agree on a split, on how property transfers will work, who will pay for what, who will assume financial obligations like home bonds etc. Which "marital regime" the couple was married under becomes important here, as does the question of whether or not there is an ANC (ante-nuptial contract) in place. A whole host of other legal and practical issues are also at stake.

A final thought on controlling costs…

If you have a particular need to control costs, be open with your attorney and ask for advice on whether you can minimise them in any way.

Your Website of the Month: Be (Cyber) Safe in 2020!

"The email of the species is deadlier than the mail" (Stephen Fry)

Cyber-attacks in South Africa increased by 22% in 2019, and our exposure to serious online security breaches increases exponentially in line with our increasing use of email.

The fact is that we are all of us under attack by cybercriminals who become cleverer by the day at identifying our email vulnerabilities and at exploiting them. **Defend your business** with the tips in "Email in the age of cybercrime" on the LexisDigest **website**.

The whole article is a goldmine (particularly the "*quick guide to email security*" section) so share it now with your colleagues and your staff, and diarise monthly reminders!

"Have a Healthy, Happy and Successful 2020!"
