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WITH COMPLIMENTS

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May 2016

PROPERTY AND TRUSTS – BE CAREFUL!

"This case yet again demonstrates the need to be careful when dealing with a trust" (extract from judgment below)

For most of us, business dealings with trusts are most likely to happen when selling a property to, or buying a property from, a trust. But no matter why or how it happens, have your lawyer check that whoever signs for the trust is fully authorised to do so.

For want of authority, the case is lost

Otherwise you could be in for a major shock if you come to blows and need to ask a court for assistance. Witness the case of a bank trying to enforce a trustee's personal suretyship –

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- *Tell everyone - Being an "early bird" doesn't help*
- *How an innocent investor lost R224,000*
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1. A trust concluded instalment sale agreements with a bank
2. Owed R1m by the trust, the bank tried to enforce a personal suretyship signed by one of the trustees in which she had bound herself as surety and co-principal debtor with the trust
3. The High Court however found that the suretyship was invalid because the instalment sale agreements themselves were invalid. They had only been signed by one trustee, whereas the trust deed required a unanimous decision by two trustees.

What to look for

- **Check the letters of authority:** The Master of the High Court must authorise the trustees to act so a vital first step is to have these checked and on record.
- **Check I.D.:** Keep copies of all signing trustees' I.D.s to avoid any dispute as to identity.
- **Check the trust deed:** The trust will only be bound by what the trustees do if their appointment and actions comply strictly with the trust deed's requirements, such as -
    - Appointment of trustees: Check that the Board of Trustees has been properly constituted.
    - Capacity to contract: Whilst many trust deeds authorise trustees to enter into virtually every type of transaction you can think of, some are more restrictive so make sure the trustees have authority for your particular type of contract.
    - Minimum number of trustees: If the deed requires a minimum number of trustees to be in office, they must all be in place for the trust to have any capacity at all. In this case for example, the trust deed required there to be always between 3 and 5 trustees in place, whereas in fact there were only 2. The only exception – and this saved the bank's neck on this particular leg of the fight – other clauses in this particular trust deed provided specifically for the case of there being only 2 trustees, and empowered them to still bind the trust in this way.
    - Number of trustees required to act jointly: Unless the trust deed provides to the contrary, trustees must always act jointly. Or, as in this case, a trust deed may specify certain actions that can be carried out by one trustee acting alone, or by two trustees acting jointly, or by all trustees acting unanimously. In this case, the deed required only 2 trustees acting jointly to enter into this sort of contract.
    - Delegation of authority: Often, as in this case, trust deeds empower the trustees to authorise one or more of them to sign certain documents. In the event of a dispute, you will have to prove that such authority was validly given - something the bank in this case failed to do. Alternatively you may be able to prove ratification or inferred or "ostensible" authority (where trustees create the impression that the trustee had the necessary authority to represent them) but it's much safer to require written proof of actual authority upfront.
    - All the other little requirements and formalities: Even "template" trust deeds are usually tweaked in one way or another and the differences can be subtle but critical. **So as always, sign nothing until your lawyer has checked it!**

THE PANAMA PAPERS, SARS AND THE (PROPOSED) NEW SVDP

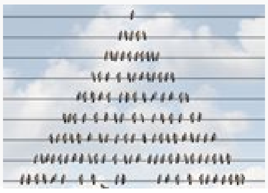
"The notion that there are any safe places to hide money is a thing of the past" (U.S. tax attorney Mark Matthews)

The Panama leaks, last year's HSBC leaks, and OECD's "Automatic Exchange of Information initiative" all suggest that SA residents with accounts and investments in foreign tax jurisdictions should ensure that they are fully compliant with all their local and international tax and exchange control obligations.

In any doubt, take advice on the proposed new Special Voluntary Disclosure Programme (SVDP) – remember that if you consult a lawyer you will benefit from attorney-client privilege. The SVDP was announced in the Budget Speech and is anticipated to run from 1 October 2016 to 31 March 2017. Penalty relief and protection from criminal prosecution will only be available if applications are submitted to SARS' VDP unit before whatever deadline is finally set – we'll keep you updated!

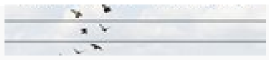
PYRAMID SCHEMES: EASY TO FALL FOR, AND EVEN EARLY BIRDS LOSE THE WORM

"If it sounds too good to be true, it probably is" (wise old adage)



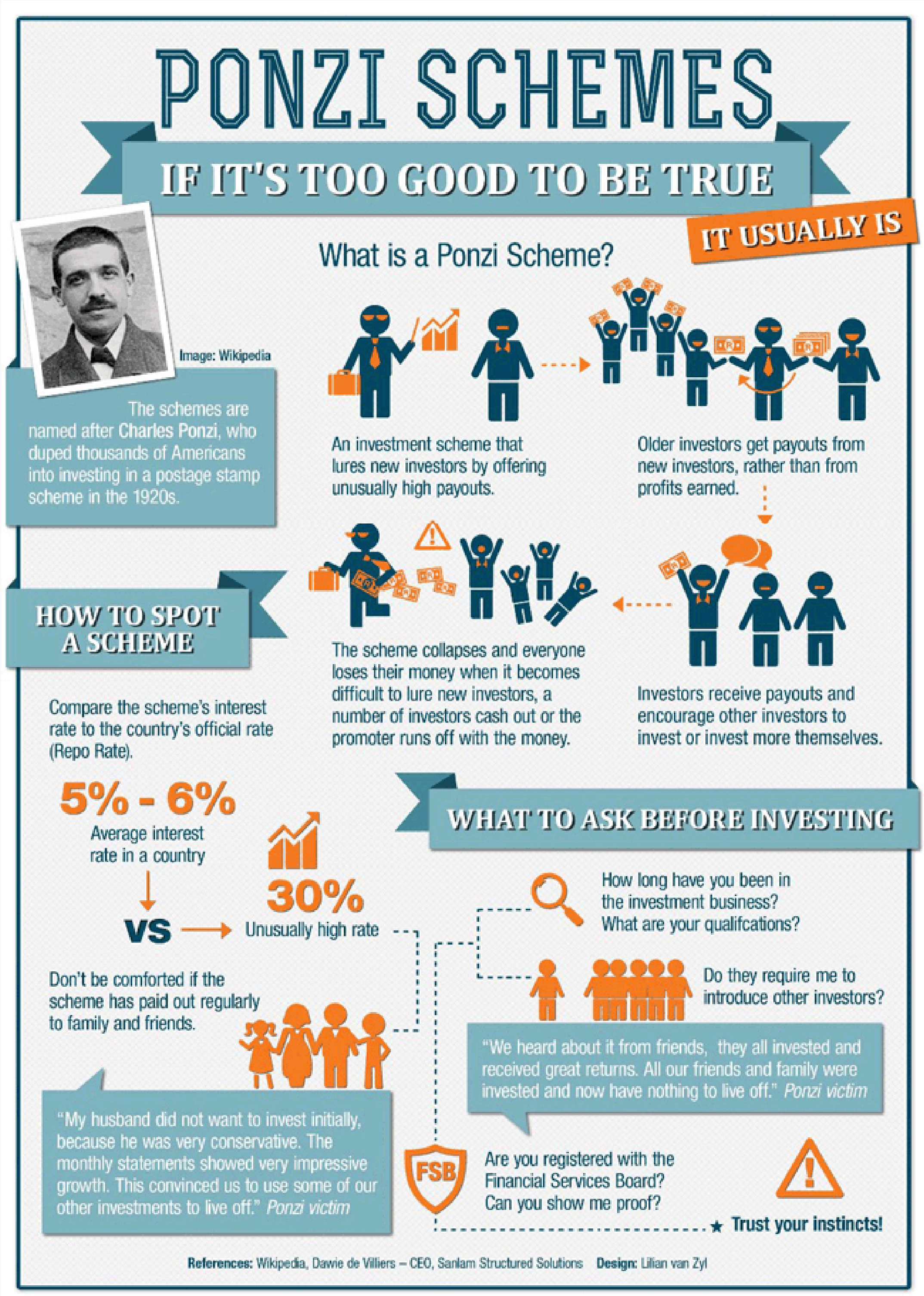
Pyramid schemes are in the news again

They are easy to fall for, with not only desperate pensioners and low-wage earners but also Captains of Industry and many otherwise-savvy investors regularly tricked into "investing" in them. The reason of course is that the con artists behind these schemes are adept at hiding their true nature, coming up like clockwork with ever more creative cover stories to lure the unwary. Very popular are "Ponzi" schemes, where the masterminds behind them promise to do everything for you – all you need do is "invest", then sit back and reap the profits.



Don't be a victim!

Workplaces are great hunting grounds for these swindlers, so if you are an employer it is worth warning your staff upfront about how to spot and avoid these schemes. See Sanlam's Infographic below for some classic warning signs -



Source: *Sanlam Employee Benefits. Reproduced with authority from http://thinkvisually.co/portfolio/ponzi-schemes-sanlam/.*

Tell everyone - Being an "early bird" doesn't help

Many pyramid schemes rely on their victims putting aside their suspicions in the perennial hope that, even if the scheme is illegal and doomed to eventual collapse, they will be one of the few (12%) "Early Birds" flying away into the sunset with all the loot whilst the latecomers (88%) are left with all the losses.

The reality is that even the "early birds" are at serious risk of losing not only their "profits" but also their original investments.

The reason is that a liquidator ("trustee" in the case of a person or a trust) can recover any monies paid out by a liquidated scheme during the 6 month period prior to liquidation, unless the recipient can prove that the disposition was made "in the ordinary course of business" and without intention to prefer one creditor above another. Note that the investor isn't safe even after 6 months, although the onus of proof then shifts to the liquidator.

A recent Supreme Court of Appeal (SCA) case illustrates -

How an innocent investor lost R224,000

- A Trust attracted investors to a pyramid scheme by fraudulently promising that the scheme was "viable, lawful, not in contravention of any statutory or regulatory provisions, not a pyramid scheme and that the deposits would be utilised by the Trust to purchase from certain estate agents their rights to commissions which had been earned but not yet paid"

- When the scheme collapsed the Trust was sequestrated and the original trustees convicted of criminal offences

- The trustees in the insolvency sued an investor for return of "undue preferences" totalling R224,000 being –

    - A first investment of R100,000 repaid after 3 months with interest of R12,000 (effectively a 42% rate of interest), and

    - A second investment of R100,000 repaid after 2 months with interest of R12,000 (effectively a 74% rate of interest)

- As the investor had been paid out less than 6 months before sequestration, the onus was on him to prove his defence that the payments were made "in the ordinary course of business"

- Unsurprisingly however the SCA held that the payments were clearly – on a factual, objective basis - not made in the ordinary course of business. No matter that the investor acted innocently (it was accepted that he had no knowledge of the true nature and illegality of the scheme), he must repay to the sequestrated Trust both the R24k interest **and his original R200k capital**, together with interest and legal costs. Of course he still has a concurrent claim against the sequestrated trust, but statistically that's likely to be worth little or nothing.

The bottom line – take advice!

Take advice before you invest in anything offering suspiciously high returns. If you decide to go ahead anyway, make sure that you can afford the risk of losing it all - because you probably will.

And if after you invest you start picking up inklings of anything irregular or illegal, get legal assistance immediately. Some of the Court's comments suggest that the investor's claim would have been a lot stronger had he become aware of the true nature of the scheme and then demanded repayment of his capital, not on the basis that the investments were due for repayment but on the basis that they were illegal and void – an important distinction that might have saved him R200,000.

EMPLOYERS: COIDA DEADLINE EXTENDED TO 31 MAY

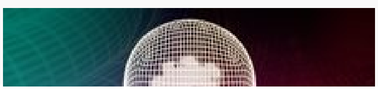
If you employ anyone (domestic workers excluded) you must be registered with the Compensation Fund in terms of COIDA (the Compensation for Occupational Injuries and Diseases Act). COIDA provides for compensation for employees injured, disabled or killed by a workplace accident or work-related disease.

Your employees can claim only from the Fund, not from you. They are covered by the Fund even if you haven't registered, but in that case you will have to pay a penalty to the Fund, probably equivalent to the full amount of your employee's claim.

You must submit a Return of Earnings form every year for assessment of contributions payable by you to the Fund. The Department of Labour has announced an extension of the 2015/2016 submission deadline to 31 May 2016. **Penalties are imposed for non-compliance so don't be late!**

YOUR MAY WEBSITES: 19 SITES TO MAKE YOU SMARTER AT WORK AND AT HOME

Are you taking full advantage of the huge reservoir of knowledge and guidance that is the Internet?



Turn your cyber-surfing into a productive tool for enhancing every aspect of your life with Business Insider's "19 Websites That Will Make You Smarter" list at http://www.businessinsider.com/websites-that-make-you-smarter-2014-6.

There's something for everyone –

- Business advice and life lessons from corporate executives
- Digital photography school
- Language skills
- Investing, markets, personal finance
- Recipes for "what's in the fridge?" nights
- Productivity and DIY tips
- Speed reading
- Ask online experts to answer your questions on any topic
- And much, much more.

Dipping into the dictionary

"Murgeon", v – To grimace at, make faces at (a person)

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