



LEGAL FIRST AID KIT FOR BUSINESS

The kit is designed to provide any professional, entrepreneur or business person with the basic tools and guidelines required so as to ensure that he/she is exposed as little as possible to the prospect of costly and time-consuming legal dispute in both the establishment and conduct of a business enterprise.

There can be little doubt that, if the guidelines laid out in the kit are adhered to, the prospect of any disputes or litigation arising will be dramatically reduced. As cliched as it may sound, “forewarned is forearmed”, and the time and cost involved in ensuring that your business affairs are in order can be (and very often is!) time and cost well spent.

Essentially, there are four areas of business relationship which will demand your attention; they are:

1. Your relationship with your own partners, co-members, trustees or shareholders;
2. Your relationship with your employees and agents;
3. Your relationship with your clients / customers; and
4. Your relationship with your creditors.

The proper regulation of each of these relationships is vitally important, and will be dealt with separately.

1. YOUR RELATIONSHIP WITH YOUR OWN PARTNERS, CO-MEMBERS, TRUSTEES OR SHAREHOLDERS

The first thing to know is that there is no such thing as a “gentleman’s agreement”. A new relationship with a business partner should be treated with a great deal of circumspection. Whilst one does not want to enter into a business relationship by creating a climate of mistrust or suspicion, it is nonetheless advisable, and sound business practice, to satisfy yourself concerning all relevant aspects of the person/s with whom you intend conducting business. Be unobtrusive, but be sure that you have satisfied yourself fully concerning the honesty, integrity and ability of such person/s. Like a marriage relationship, a business relationship, once established, can become extremely costly, traumatic and time-consuming to dissolve.

A contract regulating your relationship with other partners must be considered mandatory, irrespective of any pre-existing levels of trust between you and the other party. Whether an association agreement, shareholders agreement or basic partnership agreement, the agreement need not be lengthy, but must contain clauses which deal with, for example:

- Speedy and cost-effective dispute resolution mechanisms
- What happens to the share of a retiring partner
- What happens to the share of a partner in the event of death
- The mechanism by which a partner's share is, or will be, valued
- The responsibilities (and authority) of each partner in the business
- Confidentiality regarding the affairs of the business
- A restraint of trade clause, if appropriate
- Partnership insurance, or a "buy and sell" agreement.

It is also important that the agreement contain certain "standard" or "usual" clauses, the absence of which can similarly create disputes which, unless resolved between the parties themselves, will require the intervention of an arbitrator, or a court. (Eg. A "so-called "sole memorial" clause and a "domicilium" clause.)

The bottom line is that, should a dispute arise between partners in the absence of a clear agreement between them, and should the partners be incapable of amicably resolving the dispute between them, the only remaining dispute resolution mechanism is through arbitration (and then only by agreement), or through the courts.

The cost of having a good quality agreement drafted clearly regulating the relationship between the parties will always be significantly less than the cost of even the lowest-level Magistrate's Court litigation.

2. YOUR RELATIONSHIP WITH YOUR EMPLOYEES, REPRESENTATIVES OR AGENTS

It is as important to contractually regulate your relationship with your employees as it is to regulate your relationship with your partners, but for generally different reasons.

Whilst many of the same principles apply to each, the "master/servant" nature of the relationship between you and your employee makes the situation somewhat different. Labour legislation is a minefield and labour disputes are best avoided by very clearly defining, in an employment contract, the nature and extent of the job description of the employee, as well as details concerning, for example, medical aid, salary expectation and policy concerning increases, bonuses and the like.

Remember that the Basic Conditions of Employment Act also requires that certain minimum conditions of employment are met. These include annual leave, sick leave, hours of work, payment for overtime etc. These conditions should be clearly defined in your contract of employment.

Similarly, the Labour Relations Act sets out the requirements which should be complied with when staff are dismissed for misconduct, poor performance or operational requirements (retrenchment). It is a good idea to set these out in a disciplinary code and procedure so that there are no misunderstandings.

It is vitally important to consider whether the nature of the employment of the employee makes it desirable that the employee be required to sign a confidentiality (secrecy) agreement and/or a restraint of trade. Business in S.A. is conducted on the basis of "free enterprise" and it is therefore open to an employee who has terminated his/her employment with you to, in the absence of a restraint agreement, literally set themselves up next door to you, and in direct competition with you. The potential consequences of such a step to your business need hardly be explained.

It is not possible to lay down exhaustively in what circumstances a restraint would be appropriate or otherwise, since each employment relationship has its own specific and unique circumstances. As a general rule, if you think you have an interest worth protecting in the context of the work performed by your employee, then play it safe and request that he/she sign an appropriate agreement with you. Where such an employee is already in employment with you, the situation is, or can be, somewhat different, since it can be said that the employee has been placed in an unequal bargaining position.

3. YOUR RELATIONSHIP WITH YOUR CUSTOMERS/CLIENTS

Whilst your relationship with your customers does not demand that you enter into a bilateral written contract with them per se, it is nonetheless crucial that you take all reasonable steps to create a contractual relationship between you.

This is not generally appropriate where, for example, you are involved in a "cash over the counter"-type business, since the contract is normally concluded by the exchange of goods for cash, but it becomes important particularly where goods are supplied on credit. Thus a delivery note, once signed by the recipient, constitutes a contract between the parties. In these circumstances, it is advisable that the delivery note contains terms and conditions which will protect you.

Examples of such terms would include:

- The obligation to pay interest on overdue accounts
- The obligation to pay attorney and client charges in respect of any proceedings instituted
- A “domicilium” clause
- Any appropriate warranties
- Ownership of the goods vesting in you until the goods are fully paid for.

Always be sure to clearly establish the identity of the party with whom you are dealing. It is always preferable to deal with natural persons, since they are self-evidently liable to discharge any debt they may incur. Always be cautious when dealing with so-called legal entities (such as close corporation, companies and trusts) and, whenever and wherever possible, try to secure the personal surety of one or more of the owners of such an entity. Many suppliers are reluctant to take this step, fearing that they may lose potential business, but one should have reason to question the bona fides of a customer should they refuse to bind themselves personally.

4. YOUR RELATIONSHIP WITH YOUR CREDITORS

Whilst the decision concerning the contractual relationship your creditor requires will be for your creditor to decide, always ensure that when you are receiving goods and services in the private sector, you insist on appropriate warranties covering the goods or services.

Whilst you should always strive to secure personal suretyships from your own customers, always do your best to avoid having to sign them yourself! As an aside, and on a more serious note, please always be aware of the consequences of guaranteeing the obligations of others. Whilst to do so may occasion no immediate cost to you, you must remember that you are creating a contingent liability in your estate, thereby affecting your own creditworthiness, and you are exposing yourself (and anyone who depends on you) to grave risk and your potential insolvency in the event that the principal debtor defaults on his/her obligation in some way.

GET YOURSELF CONTRACTUALLY PROTECTED!

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