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The rising threat of trade secrets theft

Johannesburg, 11 March 2013 - Writing in *JD SUPRA Law NEWS,* Michael Vollkov writes that one of the drawbacks of a global economy is the rise in trade secret theft. In the absence of a seamless global enforcement infrastructure foreign actors have had little fear of being caught and suffering any consequences. When competition gets tough, some bad actors – foreign governments or company employees – like to steal trade secrets in an attempt to catch up in the market place.

He continues that the FBI in the United States has now listed economic espionage and trade thefts as its second law enforcement priority just below terrorism. This is quite the statement when you think about the increasing amount of white collar fraud and other economic crimes.

Given the draconian provisions of the new Companies Act in South Africa and the provisions of the *King Report and Code* which applies on an *apply or explain* basis, South African directors, prescribed officers and committee members should play careful heed to the issue of trade secrets theft.

Companies and industry associations, and in fact all entities, should develop and adopt voluntary best practices to protect themselves against trade secrets theft. In her excellent article dealing with this issue Lauren M. Papenhausen of McDermott Will and Emery says that the best solution is to prevent a trade secret theft from ever occurring. Even if that is not possible, having taken strong measures to protect trade secrets will aid success both in any civil litigation against the perpetrator and in any criminal action the government may bring. Entities should consider at least the following types of protective measures:

- Research and development compartmentalization, i.e., keeping information on a “need to know” basis, particularly where outside contractors are involved in any aspect of the process

- Information security policies, e.g., requiring multiple passwords or multi-factor authentication measures and providing for data encryption
- Physical security policies, e.g., using controlled access cards and an alarm system
- Human resources policies, e.g., using employee non-disclosure agreements, conducting employee training on the protection of trade secrets and performing exit interviews.

It also will be important in any future litigation that a company has clearly designated as confidential any materials it may wish to assert are trade secrets.

It is recommended that each and every South African business entity should carefully and urgently review its employment contracts and ensure that in regard to trade secrets, its policy framework and best practices are best of breed. Failure to do so can have disastrous consequences.

Prepared by Michael Judin