

# **I would like to buy a business. Should I buy the shares of the company owning the business or rather the business itself?**

The company might sometimes have assessed losses, which would be available to you as purchaser for tax purposes. From that point of view the temptation would be to rather take over the shares in the company and not the business.

This is, however, a risky option in that the company will remain liable for all its debts. If the seller therefore, for example, fails to disclose debts of the company to you or where certain creditors only make their appearance at a later stage (for example SARS) this would leave you as purchaser with a major headache. The warranties normally contained in a contract of sale would entitle you to recover any amounts claimed by creditors from the company from the seller. The company will, however, in the meantime have to pay the debts and cannot use the seller's breach of such warranties as a defence against such creditors. It might also be that the seller has in the meantime disappeared and cannot be traced or has been declared insolvent, in which event the recovery of these amounts would obviously be difficult or even impossible.

For this reason the safest route as purchaser would normally be to rather buy the business as such and not the shares in the company owning the business. The same applies in respect of the purchaser of a property. It would always be safer for the purchaser to rather buy the property and not the company owning the property.

If the business is bought, a further precaution would be to ensure that an advertisement of the sale is placed in terms of section 34 of the Insolvency Act, 24 of 1936. If the advertisement is not done or not done properly (prescribed time period for advertisement: within a period not less than 30 days and not more than 60 days before the date of transfer) such transfer of the business shall be void against creditors for a period of six months after such transfer and also void against the trustee of his estate for a period of six months after such transfer,

where the seller is sequestrated.

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