

REPUBLIC OF SOUTH AFRICA

**CLOSE CORPORATIONS
AMENDMENT BILL**

(As introduced)

(MINISTER OF TRADE AND INDUSTRY)

[B 23—97]

REPUBLIEK VAN SUID-AFRIKA

**WYSIGINGSWETSONTWERP OP
BESLOTE KORPORASIES**

(Soos ingedien)

(MINISTER VAN HANDEL EN NYWERHEID)

[W 23—97]

ISBN 0 621 27163 2

GENERAL EXPLANATORY NOTE:

[] Words in bold type in square brackets indicate omissions from existing enactments.

_____ Words underlined with a solid line indicate insertions in existing enactments.

BILL

To amend the Close Corporations Act, 1984, so as to substitute the definition of “Court” and to regulate the definition of “name”, in relation to a corporation, anew; to clarify the jurisdiction of courts in respect of corporations; to provide for a literal translation of a corporation’s name into any one other official language; to provide for the reservation of a name for a corporation; to compel a corporation to subjoin the statement “In Voluntary Liquidation” to its name in appropriate circumstances; to further regulate the use and publication of the name of a corporation; to further determine the nature of a member’s interest in a corporation; to provide for the attachment and sale in execution of a member’s interest; to further regulate participation in the management of a corporation; to provide for the adjournment of and subsequent quorum for a meeting of members of a corporation at which a quorum is not present; to further determine the powers of members to bind a corporation; to provide for a longer period within which a vacancy in the office of accounting officer shall be filled; to further prescribe the duties of an accounting officer who has resigned or has been removed; to clarify the liability for the debts of a corporation by a member who fails to deliver the member’s contribution; to exclude the application of the provisions of the Companies Act in respect of compromises and arrangements in so far as they relate to the liquidation of a corporation; to provide for an offer of composition to be made in the winding-up of a corporation; and to prescribe a penalty for a further offence; and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

Amendment of section 1 of Act 69 of 1984, as amended by section 1 of Act 38 of 1986

1. Section 1 of the Close Corporations Act, 1984 (hereinafter referred to as the principal Act), is hereby amended—

(a) by the substitution for the definition of “Court” of the following definition:

“ ‘Court, in relation to—

(a) any corporation, means any court having jurisdiction in terms of section 7; and

(b) any offence under this Act, means any court having jurisdiction in respect of that offence;” and

(b) by the insertion after the definition of “Minister” of the following definition:
 “ ‘name’, in relation to a corporation, means the full registered name of that corporation, or a registered literal translation of that name into any one other official language of the Republic, or a registered shortened form of that name or any such translation thereof, referred to in section 12(a);”.

Substitution of section 7 of Act 69 of 1984, as substituted by section 1 of Act 64 of 1988

2. The following section is hereby substituted for section 7 of the principal Act:

“Courts having jurisdiction in respect of corporations

7. For the purposes of this Act any High Court and any magistrate’s court, within whose area of jurisdiction the registered office or the main place of business of the corporation is situate, shall have jurisdiction.”.

Amendment of section 12 of Act 69 of 1984, as amended by section 1 of Act 81 of 1992

3. Section 12 of the principal Act is hereby amended by the substitution for paragraph (a) of the following paragraph:

“(a) The full name of the corporation: Provided that a literal translation of that name into **[the] any one** other official language of the Republic, or a shortened form of that name or such translation thereof, may in addition be given;”.

Repeal of section 18 of Act 69 of 1984

4. Section 18 of the principal Act is hereby repealed.

Substitution of section 19 of Act 69 of 1984

5. The following section is hereby substituted for section 19 of the principal Act:

“Undesirable names and reservation of names

19. (1) No founding statement containing a name for a corporation to be incorporated and no amended founding statement containing a new name for a corporation shall be registered if the name is in the opinion of the Registrar undesirable.

(2) Any person who intends to form a corporation or any corporation which intends to change its name shall, on the prescribed form and on payment of the prescribed fee, apply to the Registrar for the reservation of a name: Provided that a company being converted into a corporation in terms of this Act shall not be required to so reserve its name if the name remains identical.

(3) A reservation contemplated in subsection (2) shall be valid from the date of approval by the Registrar for a period not exceeding two months.”.

Amendment of section 22 of Act 69 of 1984

6. Section 22 of the principal Act is hereby amended—

(a) by the substitution for subsection (1) of the following subsection:

“(1) The abbreviation CC or BK, in capital letters, shall be subjoined to the **[English or Afrikaans]** name **[, as the case may be, of]** used by a corporation **[which it uses]**.”;

(b) by the substitution for subsection (3) of the following subsection:

- “(3) If a corporation is being wound up, the statement “In Liquidation” or “In Voluntary Liquidation“, as the case may be, shall for the duration of such winding-up be subjoined to the name [of] used by the corporation [which it uses].”; and
- (c) by the insertion after subsection (3) of the following subsection: 5
 “(4) Any corporation which fails to comply with the provisions of subsection (3) shall be guilty of an offence.”.

Amendment of section 23 of Act 69 of 1984, as amended by section 5 of Act 81 of 1992

7. Section 23 of the principal Act is hereby amended— 10
- (a) by the substitution for paragraph (a) of subsection (1) of the following paragraph:
 “(a) shall display its registered full name (or a registered literal translation thereof into [the] any one other official language of the Republic) and registration number in a conspicuous position and in characters easily legible on the outside of its registered office and every office or place in which its business is carried on;” and 15
- (b) by the substitution for paragraph (b) of subsection (2) of the following paragraph:
 “(b) issues or authorises the issue of any such letter, [advertisement,] delivery note, invoice, receipt or letter of credit of the corporation,”. 20

Amendment of section 30 of Act 69 of 1984

8. Section 30 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection: 25
 “(1) The interest of any member in a corporation shall be a single interest expressed as a percentage and shall be moveable property which shall be transferable in the manner provided by this Act.”.

Insertion of section 34A in Act 69 of 1984

9. The following section is hereby inserted in the principal Act after section 34: 30

“Attachment and sale in execution of member’s interest

34A. The provisions of section 34 shall apply *mutatis mutandis* to any attachment and sale in execution of a member’s interest in a corporation.”.

Amendment of section 47 of Act 69 of 1984

10. Section 47 of the principal Act is hereby amended— 35
- (a) by the substitution for the heading to the section of the following heading:
 “**Disqualified persons regarding management of corporation**”;
- (b) by the substitution in subsection (1) for the words preceeding paragraph (a) of the following words:
 “Notwithstanding any other provision of this Act or in any association agreement or any other agreement [**between members**] to the contrary, the following persons shall [, **if they are members,**] be disqualified from taking part in the management [**of the business**] of a corporation.”; and 40
- (c) by the substitution for subsection (2) of the following subsection:
 “(2) Any person disqualified under the provisions of subsection (1)(b) or (c) who directly or indirectly takes part in or is concerned with the management [**of the business**] of any corporation, shall be guilty of an offence.”. 45

Amendment of section 48 of Act 69 of 1984, as amended by section 9 of Act 38 of 1986

11. Section 48 of the principal Act is hereby amended by the insertion after subsection (2) of the following subsections:

- “(2A) Unless an association agreement provides otherwise, a meeting at which a quorum is not present within half an hour after the time appointed for the meeting, shall be adjourned to a day not earlier than seven days and not later than 21 days after the date of that meeting, and if at such adjourned meeting a quorum is not present within half an hour after the time appointed for the meeting, the members present in person shall constitute a quorum. 5
- (2B) Where a meeting has been adjourned as contemplated in subsection (2A), the member who adjourned the meeting shall, upon a date not more than three days after the adjournment, send a written notice to each member of the corporation stating— 10
- (a) the date, time and place to which the meeting has been adjourned; 15
- (b) the matters before the meeting when it was adjourned; and
- (c) the grounds for the adjournment.”.

Substitution of section 54 of Act 69 of 1984, as amended by section 10 of Act 38 of 1986

12. The following section is hereby substituted for section 54 of the principal Act: 20

“Power of members to bind corporation

- 54.** (1) Subject to the provisions of this section, any member of a corporation shall in relation to a person who is not a member and is dealing with the corporation, be an agent of the corporation. 25
- (2) Any act of a member shall bind a corporation whether or not such act is performed for the carrying on of the business of the corporation unless the member so acting has in fact no power to act for the corporation in the particular matter and the person with whom the member deals has, or ought reasonably to have, knowledge of the fact that the member has no such power.”. 30

Amendment of section 59 of Act 69 of 1984, as amended by section 8 of Act 81 of 1992

13. Section 59 of the principal Act is hereby amended—

- (a) by the substitution in subsection (3) for the words preceding the proviso of the following words: 35
- “If a vacancy occurs in the office of an accounting officer, whether as a result of a removal, resignation or otherwise, the corporation shall within [14] 28 days appoint another accounting officer and comply with the provisions of subsection (2) of section 15.”; and
- (b) by the substitution for subparagraph (iv) of paragraph (a) of subsection (5) of the following subparagraph: 40
- “(iv) [that as] whether, at the time of [his] the resignation or removal from office of the accounting officer, [he] that officer was [not] aware of any matters in the financial affairs of the corporation which are in contravention of the provisions of this Act: Provided that an accounting officer who was aware of any such matter shall submit the full particulars thereof in writing to the Registrar.” 45

Amendment of section 63 of Act 69 of 1984, as amended by section 5 of Act 64 of 1988

14. Section 63 of the principal Act is hereby amended— 50

- (a) by the substitution for paragraph (b) of the following paragraph:

“(b) where any member fails to pay money or to deliver or transfer property to the corporation as required by section 24(4), [he] that member shall be so liable for every debt of the corporation incurred from [its] the date of registration of the founding statement in which particulars of the contribution concerned are stated to the date of the actual payment, delivery or transfer of such money or property;”;

and
(b) by the deletion of paragraph (c).

Amendment of section 66 of Act 69 of 1984

15. Section 66 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection: 10

“(1) The provisions of the Companies Act which relate to the winding-up of a company, including the regulations made thereunder, (except sections 311, 312, 313, 337, 338, 344, 345, 346(2), 347(3), 349, 364, 365(2), 367 to 370, inclusive, 377, 387, 389, 390, 395 to 399, inclusive, 400(1)(b), 401, 402, 417, 418, 419(4), 421, 423 and 424), shall apply *mutatis mutandis* and in so far as they can be applied to the liquidation of a corporation in respect of any matter not specifically provided for in this Part or in any other provision of this Act.”. 15

Substitution of section 72 of Act 69 of 1984

16. The following section is hereby substituted for section 72 of the principal Act: 20

“Composition

72. (1) Any person, in this section referred to as “the offeror”, may at any time after the commencement of the liquidation of a corporation which is unable to pay its debts, submit to the liquidator a written offer of composition. 25

(2) If the liquidator is of the opinion that the creditors will probably accept the offer of composition, he shall send by registered post or deliver to every known creditor as well as the Master, a copy of the offer referred to in subsection (1) with his report thereon, and an explanation of the effect of the composition. 30

(3) If the liquidator is of the opinion that there is no likelihood that the creditors will accept the composition or that he has insufficient information at his disposal to make a recommendation, he shall inform the offeror in writing that the offer is unacceptable and that he does not propose to send a copy thereof to the creditors and the Master. 35

(4) The offeror may, within 30 days from the date on which the liquidator advised him of the rejection of his offer, submit representations in writing to the Master who, after having allowed the liquidator 14 days to comment in writing, shall consider the representations and comment and may thereafter direct the liquidator to send by registered post or deliver a copy of the offer to every known creditor of the corporation together with his report thereon, and an explanation of the effect of the composition. 40

(5) Whenever the liquidator posts or delivers to the creditors and the Master an offer of composition in terms of the provisions of this section, he shall simultaneously give notice to the creditors of the meeting at which the offer and any other matter mentioned in the notice, are to be considered. 45

(6) An offer of composition may be considered at a general meeting of creditors of the corporation in terms of this Act, provided that notice was given to creditors and the Master not less than 10 days and not more than 28 days before the date of such a meeting. 50

(7) An offer of composition which has been accepted by creditors whose votes amount to not less than two-thirds in value and two-thirds in number, calculated in accordance with the provisions of section 52 of the Insolvency

Act, 1936 (Act No. 24 of 1936), of the votes of all the creditors who proved claims against the corporation, shall be binding upon every person who had notice of and was entitled to vote at that meeting, whether or not that person was present or represented at the meeting, as if that person were a party to the composition: Provided that—

- (a) no offer may be so accepted if it contains any condition whereby any creditor would obtain any benefit to which he would not have been entitled upon the distribution of the estate in the ordinary way;
- (b) payment under the composition has been made or security for such payment has been given as specified in the offer of composition; and
- (c) the right of any secured or preferent creditor shall not be prejudiced thereby, except insofar as he has expressly and in writing waived his preference.

(8) A composition shall not affect the liability of a surety of the corporation.

(9) Any money to be paid and anything to be done for the benefit of creditors in pursuance of a composition shall be paid and done through the liquidator: Provided that any creditor who has failed to prove a claim before the liquidator has made a final distribution amongst those creditors who have proved their claims, shall be entitled to prove a claim and share in such final distribution up to the amount to which he may have been entitled to under the composition: Provided further, that no claim shall be proved against the corporation after the expiration of six months as from the date of the meeting at which the composition was accepted, except with leave of the Court or Master and on payment of such sum to cover the costs or any part thereof, occasioned by the late proof of the claim, as the Court or Master may direct.

(10) When a composition has been entered into between a corporation and its creditors, the liquidator shall, in terms of this Act, frame an account and plan of distribution of all the assets which are or will become available for creditors under the composition.

(11) If an accepted offer of composition so provides, the offeror may apply to the Court for the setting aside of the winding-up of the corporation and the Court may make such an order provided that the offeror has, not less than three weeks before making the application, given notice by advertisement in the *Gazette*, of his intention to make the application and has served a copy of the application on the Master, the Registrar and the liquidator.

(12) The application for the setting aside of the liquidation of the corporation may be opposed by any creditor or other interested person on the following grounds:

- (a) That the composition approved under this section unfairly prejudices the interests of a creditor of the corporation;
- (b) that there has been some material irregularity at or in the relation to the meetings held for the consideration of the composition;
- (c) that insufficient or materially inaccurate information on the composition was disclosed; or
- (d) any other grounds that the Court may deem sufficient.”.

Amendment of section 82 of Act 69 of 1984, as amended by section 10 of Act 81 of 1992

17. Section 82 of the principal Act is hereby amended by the substitution for paragraph (c) of subsection (1) of the following paragraph:

“(c) in section 20, 22, 22A, 23 or 47, to a fine not exceeding R500 or imprisonment for a period not exceeding six months, or to both such fine and such imprisonment; and”.

Short title

18. This Act shall be called the Close Corporations Amendment Act, 1997.

**MEMORANDUM ON THE OBJECTS OF THE CLOSE
CORPORATIONS AMENDMENT BILL, 1997**

The amendments to the Close Corporations Act, 1984 (Act No. 69 of 1984), hereinafter referred to as the “principal Act”, were proposed by the Standing Advisory Committee on Company Law, which in terms of section 11 of the Principal Act has the duty to make recommendations to the relevant Minister in regard to any amendments to the Principal Act. The amendments are mainly of a technical and procedural nature and fall in essence within the following categories:

- (a) **Amendments to clarify uncertainty over the jurisdiction of the courts concerned.** The jurisdiction of the magistrates’ courts in respect of close corporations has for many years been uncertain. Section 29(fA) of the Magistrates’ Courts Act, 1944 (Act No. 32 of 1944), now provides expressly that the magistrates’ courts have jurisdiction in respect of liquidation of close corporations. The amendments to the principal Act are aimed to make it clear that the cheaper procedures of the magistrates’ court are available for most of the other court actions stemming from the provisions of the principal Act.
- (b) **Amendments to better regulate the use of names of close corporations.** This includes a new provision in respect of the definition of the word “name”. In the public interest the use of the registered name is restricted to only two official languages. The purpose of the restriction is to avoid confusion and to enhance consumer and creditor protection. Provision is also made for compulsory reservation of names. The purpose of the reservation is to avoid duplication and to eliminate other undesirable uses of names which could lead to confusion in the commercial community and could be detrimental to consumer and creditor protection. No individual has a registered name in all the official languages and it is in the public interest that juristic persons should not be allowed to do business under a multitude of names.
- (c) **Amendments to clearly prescribe the nature of a member’s interest in a close corporation and a member’s power to bind a close corporation.** The existing provisions are highly complex and have in various court cases proven to be inadequate. It is made clear that a member’s interest in a close corporation is movable property, subject to attachment and may be sold in execution. In the interest of persons who are dealing with a close corporation it is further made clear that any act of any member of a close corporation binds the close corporation unless the member concerned has no power to act in the particular matter and the person with whom he or she deals has, or ought to have, knowledge that such member has no such power. The outside party, or consumer, will enjoy enhanced protection for the reason that a member binds a corporation whether or not such an act is performed for the carrying on of the business of the corporation.
- (d) **Amendments making it clear that in certain circumstances not only members are disqualified to participate directly or indirectly in the management of the close corporation, but also any other person who would thus be disqualified.**
- (e) **Amendments to provide for situations where members’ meetings are to be held but a quorum is not present.** An association agreement may have provisions in this regard, but in the absence thereof no relief is provided for in the principal Act. In practice members holding either a minority or majority of the member’s interest in a close corporation often hold the others at ransom by not attending members’ meetings, with the result that no valid resolutions can be passed.
- (f) **Amendments in connection with the appointment and duties of accounting officers.** The period within which a new accounting officer must be appointed is, for practical reasons, extended from 14 to 28 days. When an accounting officer resigns or is removed from office, he or she shall in future be obliged to inform the Registrar of Close Corporations of any particular in respect of the close corporation, of which he or she is aware, which is in contravention of the principal Act.

- (g) **Amendments relating to the liability of members for the debts of a close corporation.** The liability of a member of a close corporation for debts of the close corporation is made more realistic in that the liability of a member who did not pay or deliver his or her member's contribution is limited only to debts incurred during the period in which he or she was in default of such payment or deliverance.
- (h) **Amendments to substitute the present ineffective provisions in respect of a close corporation in liquidation and in financial difficulties,** for provisions providing for an offer of composition or any other arrangement between the corporation and its creditors. This is a proven method of saving the on-going business of a juristic person.

In the opinion of the Department of Trade and Industry and the State Law Advisers this Bill should be dealt with in terms of section 75 of the Constitution of the Republic of South Africa, 1996.