

REPUBLIC OF SOUTH AFRICA

CLOSE CORPORATIONS AMENDMENT BILL

*(As amended by the Portfolio Committee on Trade and Industry (National Assembly))
(The English text is the official text of the Bill)*

(MINISTER OF TRADE AND INDUSTRY)

[B 6B—2005]

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Amendment of section 29 of Act 69 of 1984, as amended by section 3 of Act 64 of 1988 and section 1 of Act 17 of 1990

2. Section 29 of the principal Act is hereby amended by the substitution for subsections (1) and (1A) of the following subsections, respectively:

“(1) Subject to **[the provisions of]** subsection (1A) or (2)(b) and (c), only natural persons may be members of a corporation and no juristic person or trustee of a trust *inter vivos* in that capacity shall directly or indirectly (whether through the instrumentality of a nominee or otherwise) hold a member’s interest in a corporation. 5

(1A) **[The provisions of subsection (1) shall not apply to the membership of a corporation of a]** A natural or juristic person **[who holds that membership for the benefit]** in the capacity of a trustee of a trust *inter vivos* **[if immediately before 13 April 1987 a natural person held membership of the]** may be a member of a corporation **[for the benefit of that trust]**: Provided that— 10

- (a) no juristic person shall directly or indirectly be a beneficiary of that trust; 15
- (b) the member concerned shall, as between himself or herself and the corporation, personally have all the obligations and rights of a member; 15
- (c) the corporation shall not be obliged to observe or have any obligation in respect of any provision of or affecting the trust or any agreement between the trust and the member concerned of the corporation; and 20
- (d) if at any time the number of natural persons at that time entitled to receive any benefit from the trust shall, when added to the number of members of the corporation at that time, exceed 10, the provisions of, and exemption under, this subsection shall cease to apply and shall not again become applicable notwithstanding any diminution in the number of members or beneficiaries.”. 25

Amendment of section 60 of Act 69 of 1984, as amended by section 9 of Act 81 of 1992

3. Section 60 of the principal Act is hereby amended by the substitution for subsection (4) of the following subsection:

“(4) (a) A corporation may appoint as its accounting officer— 30

- (i) any person who is a member of a recognised profession listed in a notice referred to in subsection (2);
- (ii) a firm as defined in section 1 of the Public Accountants’ and Auditors’ Act, 1991 (Act No. 80 of 1991); **[and]**
- (iii) any other firm, **[may be appointed as an accounting officer of a corporation, provided]** if each partner in the **[latter]** firm is qualified to be so appointed; or 35
- (iv) any other corporation, if each member of such corporation is qualified to be so appointed. 40

(b) The liability of a partner in respect of debts and liabilities incurred by a firm contemplated in paragraph (a)(iii) during the partner’s period as a partner and the liability of a member in respect of debts and liabilities incurred by a corporation contemplated in paragraph (a)(iv) during the member’s period as a member may not be excluded by operation of law or in any other way. 40

(c) For the purposes of paragraph (b), “debts and liabilities incurred” means debts and liabilities incurred by the firm or corporation, as the case may be, in connection with the performance by the firm or corporation, as the case may be, of its duties in terms of section 62.”. 45

Substitution of certain words in Act 69 of 1984

4. The principal Act is hereby amended by the substitution for the words “he”, “him”, “his” and “himself”, wherever they occur except in sections 10(1)(m) and (o), 13, 14, 15(1), 72 and 76(3)(b), of the words “he or she”, “him or her”, “his or her” and “himself or herself”, respectively. 50

Short title

5. This Act is called the Close Corporations Amendment Act, 2005. 55

MEMORANDUM ON THE OBJECTS OF THE CLOSE CORPORATIONS AMENDMENT BILL, 2005

1. In terms of section 26 of the Close Corporations Act, 1984 (Act No. 69 of 1984) (“the Act”), the Registrar of Close Corporations (“the Registrar”) may deregister a close corporation under certain circumstances. Section 26(5) of the Act provides that the members of such close corporation are jointly and severally liable for any outstanding liabilities at the time of deregistration. Section 26(6) of the Act allows the Registrar to restore the registration of a deregistered close corporation under certain circumstances. In terms of section 26(7) of the Act a close corporation whose registration has been restored shall continue to exist and be deemed to have continued in existence as from the date of restoration as if it had not been deregistered.

2. In the case of *Mouton and Another v Boland Bank Ltd. 2001(3) SA 877 (SLA)* the question arose whether or not the restoration of the registration of a close corporation affects a member’s liability under section 26(5) of the Act if the liability remains undischarged at the date of restoration of the close corporation’s registration. The court found that the member’s liability is not extinguished upon the restoration of a close corporation’s registration. The court argued that there is no provision in section 26(5) of the Act “limiting its operation or making its operation subject to” section 26(7) and that there is also no provision in section 26(7) “to reverse the one-time operation” of section 26(5) in respect of a member.

3. In view of the above-mentioned judgment, it was decided to propose an amendment to section 26(7) of the Act so as to prevent members from being prejudiced under certain circumstances. If a close corporation’s registration is restored in terms of section 26(6) of the Act, a member who has incurred legal liability in terms of section 26(5) of the Act, or any other person having a material interest, may apply to a court for any one or more of the following orders:

- (a) An order that the legal liability incurred by a member in terms of subsection (5) shall cease to exist;
- (b) an order that the corporation whose registration has been restored shall become liable for any liabilities incurred by any member of the corporation in terms of subsection (5);
- (c) an order that the corporation whose registration has been restored shall compensate a member who lawfully paid a claim that arose as a consequence of the provisions of subsection (5);
- (d) any other order that the court on the basis of fairness deems appropriate.

4. The amendments to section 29(1) and (1A) of the Act seek to allow a trustee of a trust *inter vivos* to hold a member’s interest in a close corporation under certain circumstances.

5. The current provisions contained in section 60(4) of the Act, relating to persons acting as accounting officers, are inadequate. Section 60(4) provides that a firm, as defined in section 1 of the Public Accountant’s and Auditors’ Act, 1991 (Act No. 80 of 1991), and any other firm may be appointed as an accounting officer of a corporation.

6. The Standing Advisory Committee on Company Law (SAC) advised the Department of Trade and Industry that the definition of firm should be broadened so as to allow a corporation to perform the duty of an accounting officer. This is provided for in clause 3 of the Bill. It is also proposed that the partners in a firm (other than the one defined by the Public Accountants’ and Auditors’ Act, 1991) and the members of the corporation should not be exempted from any liability incurred during their tenure. This is in line with corporate governance principles.

7. FINANCIAL IMPLICATIONS FOR STATE

Publications of notices in the *Government Gazette* have financial implications and those activities are budgeted for.

8. CONSTITUTIONAL IMPLICATIONS

None.

9. CONSULTATION

The following bodies were consulted:

- Accounting professional bodies; and
- Standing Advisory Committee on Company Law.

10. PARLIAMENTARY PROCEDURE

10.1 The State Law Advisers and the Department of Trade and Industry are of the opinion that this Bill must be dealt with in accordance with the procedure established by section 75 of the Constitution, since it contains no provision to which the procedure set out in section 74 or 76 of the Constitution applies.

10.2 The State Law Advisers are of the opinion that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.

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