

1. Introduction

This report is a reflection of the discussions the consultant had with the stakeholders. The consultant held discussions with various stakeholders in the legal profession (practising lawyers), government ministries such as the Registrar General's Office, Master of the High Court and the Ministry of Trade and Industry and some members of the business community.

The report contains views and comments about the issues to be addressed in the proposed Companies Act. Some of the views will be incorporated in the final draft of the said Companies Act. The analysis by the consultant will provide reasons why some suggestions and comments should not be incorporated in the law.

The consultant preferred to have meetings with the various stakeholders instead of questionnaires because the latter method restricts elicitation of information to the desired answers through pre-designed questions. In these meetings people expressed different views and came to a consensus and when there was no consensus the consultant took the views of the majority. The views of the minority were taken into account when they were compelling. Here subjectivity founds its way quite easily.

In addition to using meetings as a method of information gathering the consultant set out issues to be discussed in advance. The advantage of this strategy was to ensure that the discussions would address one issue at a time and a conclusion reached on that issue as to what should be incorporated in the proposed legislation. In this regard the following points formed the basis for discussion with the relevant groups.

2. Annual Returns by Companies

The main issue which was to be addressed was whether the Registrar of Companies should issue annual returns in the prescribed form to the company in case the company fails to file the annual return in terms of the law. The role of the company should be to make additions of information, which they believe is missing from the submitted form. The required information should be information contemplated by the provisions of the proposed law together with the schedules thereto. If there is no new information to add or fill in then the company should state clearly so.

This point was prompted by the provisions of sections 165 to 169 of the proposed Companies Act which, place an obligation on officers of the company to file the annual returns. These sections set out clearly the information that should be contained in an annual return. The issue is: what should happen if the

company fails to file the annual return for a variety of reasons such as ignorance on the part of the officers? Should there not be a mechanism put in place to address the situation besides the sanctions stipulated under sections 165 and 169?

The Registrar of Companies' staff members told consultant that the current practice is that many companies do not file annual returns when the law requires this to be done. They indicated that it is not easy to monitor this in practice because their system is manual. It means if they have to confirm if each and every company has complied with its obligations under the Companies Act of 1967 they would have to go through each and every file in the Companies Registry. This exercise would be costly in terms of time and available manpower resources.

They were agreed that if the Registry had a computerized system they would be able to drag down not only companies that do not comply with the law by failing to file annual returns but also those companies that are defunct. Their view was that the proposed provisions as set out in sections 165 to 169 do not differ much from the current legal framework and the obtaining practices

The office of Registrar of Companies holds the view that some people simply register companies for the sake of it or for ulterior motives. Mention was made of some people who incorporate companies with the objectives of perpetrating

criminal offences in other countries using companies as *alter egos*. These kinds of companies do not normally comply with the mandatory legal requirements such as filing the annual return in terms of the provisions of the current Companies Act. It was mentioned that some people have their companies registered by lawyers and they do not know that they have certain obligations in terms of the law. In other words they are ignorant about their legal obligations in terms of the current Companies Act.

It is therefore agreed by all that it is imperative that the proposed law should have a provision obliging the Registrar of Companies to issue an annual return form to be filled by the officers of the company, if necessary. This form should contain information that has been supplied to the Companies Registry and contain blank spaces where information is missing, which must be submitted in terms of the law. If the company fails to comply with this proposed provision by neglecting or deliberately refusing to complete the annual return form the Registrar of Companies should be given powers to deregister such a company within a certain defined period of time. The Registrar of Companies should only exercise this option as the last resort, when all other options have failed. In addition the law should be framed in such a manner that the annual return form contains a statement calling upon the company to fill in the form within a specified period of time failing which it must furnish the Registrar with reasons why it should not be deregistered.

Legal practitioners suggested that if the Registrar took the decision to deregister the company for failure to file the annual return she should publish a notice in the government gazette and local newspaper alerting any person who might want to object to the deregistration that the company has failed to comply with the requirements of the law. It is proposed that the law should give her powers to deregister it if it fails without good cause to file the annual return. The proposal here is that the notice should be placed in the government gazette and local newspaper for 14 days. The rationale behind this proposition is that creditors will come forward and advise the Registrar that they have claims against the company and that if the deregistration proceeds they are likely to be prejudiced.

The issue of deregistration leads to another issue, namely protection of creditors. What should the Registrar do in order to protect the interests of the creditors? If there is a valid objection by the creditors regarding the intended deregistration, what should the Registrar do? These are important issues related to the aspect of recommending deregistration for non-compliance with the provisions of the proposed legislation. It is hoped that this issue will be settled by the time the final report is prepared as it will assist in the drafting of the proposed law.

This is one issue which the consultant considers important in light of what the Registrar said about some companies failing to comply with the legal

requirements. The feeling of all is that the annual return is a system which enables the Registrar to screen “genuine” companies that are ready to comply with the law. The consultant endorses these views and feelings and accordingly recommends that it is important to insert a new section in the proposed Companies Act reflecting what has been discussed above. The new provisions will come at the time when the Registry will be computerized.

During our visit with the international consultant we were invited to a demonstration of the software which the Registry will be using. We were informed that the system will operate in phases. Phase one was intended to be a database for all registered companies and societies. The software is web-linked and can only be accessed through usernames and passwords. It has an audit trail for deleted files, edit work and additions. It is intended that the system once fully operational will store data reflecting name of each company, directors, shareholders, share capital, shares held by each shareholder, physical address, postal address, date of incorporation and registration number (unique numbers for internal companies and external companies). There is no doubt that once phase two of the computerization project is finalized the Registrar will be able to trace companies that do not comply with the law easily particularly those that fail to file their annual returns.

3. Registry of Companies and Business Names

The consultant tabled the issue before the Registrar of Companies' staff. The issue was whether they regard it as appropriate and best practice for the Registrar of Companies to keep a register of business names given that the FIAS report recommends this.

The Registrar of Companies' officials informed the consultant that they consider this to a positive move because the current practice creates a lot of work. The current practice is that the Ministry of Trade and Industry keeps a register of business names and some of these are company names, which have been registered with the Companies Registry. They pointed out that the current practice gives problems given that business and trade names are likely to be duplicated because the system that is used within the Ministry of Trade and Industry simply considers whether an individual or company meets the criteria set out in the laws regulating trading and industrial licensing. If they meet these requirements the Ministry grants the license. The Registrar of Companies suggests that in addition to ensuring that an applicant for a license meets the prescribed licensing requirements they would also ensure that the proposed name does not infringe well-known trade marks because they have capacity to detect things such as this. The current practice in the Ministry of Trade and Industry does not extend this far as shown immediately above. Incidentally, the Department of Trade endorses the view that matters relating to trade and industrial licensing should be left to the office of the Registrar of Companies.

They suggest that the Companies' Registry should be relocated to the Ministry of Trade and Industry.

4. Minimum Share Capital Requirements and Stamp duty

The Companies Act of 1967 did not initially provide for the minimum share capital requirement as a pre-requisite for registration. The minimum share capital requirement was introduced by the Companies (Amendment) Act of 1984. Views on this issue are varied and divergent. There are those who argue that the minimum share capital requirement should be retained because it reduces the “influx” of companies, some of which are likely not to commence business operations. This will result in a lot of work on the part of the Registry and will promote bogus companies so the argument goes. In simple words, there are people who fear that the system is likely to be abused with the Registrar having to deal with dormant and bogus companies as result.

However, the majority of people are agreed that the minimum share capital requirement is unnecessary and that in any event the current Companies Act did not originally have this requirement. They argue that the stamp duty should be removed as it constitutes tax on investment. But they propose that the registration fee should be increased because this is seen as an instrument to screen “genuine companies”. The other theory is that if the registration fees are reduced that will deter the “influx” of companies because immediately the

proposed law takes effect it will be easier to register a company than it is currently the case now.

5. Incorporation of Companies

The current administrative policy of the Registrar of Companies to require persons intending to register companies to do so only through attorneys has been criticized on the grounds that it does not have legislative backing. It has been said that the Registrar refuses to register companies if the documents do not purport to have been prepared and submitted by a practising lawyer.

The Registrar of Companies' staff indicated that they are aware that the requirement that documents submitted for purposes of registering a company should be submitted by a lawyer is not sanctioned by the law. They however pointed out that the reason why they adopted this policy against the law is that they used to spend a lot of time trying to improve the quality of documents submitted by persons seeking to incorporate a company. For instance, sometimes it would take months to register a company because of repeated mistakes and failure to understand what information should be contained in the documents submitted in support of an application for registration. In their view the current arrangement allows their work to be relatively efficient because lawyers know how the documents are to be compiled and what documents to submit for registration of the company.

However, they conceded that if the proposed law would incorporate simple forms in the form of schedules, which are simple and easy to understand, they would not insist on the requirement that documents must be submitted by lawyers only. In the event that this is the position their attitude is that the requirement would be superfluous given that the forms would be user-friendly.

Legal practitioners insist that this policy constitutes the best practice given that there are inadequate resources particularly human resources to deal with “poor” documents submitted for registration by lay persons. They hold the view that people should be given an option either to engage the services of a lawyer or to do it themselves. Some made mention of the South Africa system of close corporation, namely that people are not able to comply with the requirements of the system even though it is one of the simplest systems. These lawyers argue that most business people in South Africa prefer to engage the services of a lawyer. The consultant’s own observations are that lawyers are aware that the removal of the policy currently practised by the Registrar of Companies stands to reduce their income particularly those lawyers who handle registration of companies as their main business.

6. Guidance Notes and Forms

The consultant discovered that the office of the Registrar of Companies conducts outreach programmes intended to make officers of companies aware about their obligations under the Companies Act. They indicated that they have internal guidelines used to assist them in implementing the provisions of the current Companies Act. The prime issue is whether the proposed law should oblige the Registry of Companies to provide guidance notes either at defined intervals or on request.

The general consensus is that the Registrar of Companies should be given discretion to provide the notes and guidelines to company officers if the resources allow particularly because these have financial implications. The suggestion was therefore that this should be a matter of the Registrar's administrative policy. It should not be sanctioned by legislation.

7. Improper Registration under the Act and Registrar's Powers

The current proposal contained under the provisions of section 5 of the proposed legislation is that where the Registrar discovers that a company or association or any entity is registered contrary to the provisions of the Act she must launch petition proceedings in terms of which she will be applying for the liquidation of such an entity. The section gives rise to a number of issues, but of

importance is; what is the basis for requiring the Registrar to engage liquidation proceedings against such entity?

In view of the controversy surrounding this issue the consultant deemed it necessary to consult the Registrar of Companies. The position of this office is that the current proposal should be abandoned in favour of giving the Registrar powers to deregister such an entity after consultations or giving it a hearing on why it should not be removed from the Companies' Register. There was disagreement regarding the issue of what should happen in case the Registrar goes ahead with her decision and the entity is not satisfied with the decision to deregister it. Some suggested that it should have an automatic right to appeal to a superior body. But after further deliberations this suggestion was discarded in favour of the right to challenge the decision by way of review in the courts of law.

Granting the powers to the Registrar would also protect third parties who might be prejudicially affected by the operations of the entity in question. It is still controversial as to how the system of balance and checks will come into place to safeguard against possible abuse of power on the part of the Registrar. Some people are convinced that the right of review in the courts will ensure that the Registrar applies her mind objectively to each case. The entity against whom deregistration is sought should be given an opportunity to make representations before a final decision is taken to deregister it.

The provisions of section 242 specify the grounds upon which the Registrar could remove a company from the register and in the event of any of the grounds stated in this section taking place the Registrar is obliged to notify the company of her intentions to remove it from the register. In terms of section 243 she is obliged to give public notice of the factors which militate for the deregistration of the company. This section provides a mechanism through which a company is given an opportunity to make representations before a final decision to remove it from the register is taken by the Registrar. Clearly, it is our considered view that instead of requiring the Registrar to invoke the cumbersome and often time consuming legal proceedings in the High Court she could be given powers to remove such entity under the provisions of section 243.

Another critical issue which cropped up is the issue of creditors. If the Registrar is given powers to deregister the entity, then how will she safeguard and protect the rights of the creditors particularly those who might be owed some moneys? Should she not be required to make enquiries about the liabilities and assets of the company or association as the case may be before proceeding to deregister it? If the entity has liabilities would it not be proper to grant her powers to give directions on how the entity should settle the debts with sanctions meted out against its officers who fail to comply with such directions? The other option would be to appoint a liquidator to realize the assets of the entity and pay out creditors before it is deregistered. The issue is important because the proposed provisions dealing with liquidations are silent on this issue.

The South African Close Corporations Act of 1984 (as amended) safeguards the interests of third parties such as creditors by providing that in the event a close corporation is deregistered their rights still remain intact (section 26). The section makes members of a close corporation jointly and severally liable for debts of the deregistered close corporation. This section applies to cases where the Registrar holds the opinion that the close corporation in question is not conducting business or is not in operation as the case may be. It is submitted that provisions along the same lines should be considered with the objective of protecting the rights and interests of third parties that may be prejudicially affected by the deregistration.

8. Remuneration of Liquidators

The proposed legislation does not address this issue and yet this is a crucial issue as far as the law of corporate insolvency is concerned. The inception report argues that the omission of this important aspect of the liquidation process tend to give problems in practice. Many stakeholders expressed their opinion that it is “unfair” to leave the matter of remuneration to the sole discretion of the liquidator. The office of the Master of the High Court in particular indicated that most liquidators do not seem to give the interests of the whole body of creditors priority instead they try as much as possible to pay themselves exorbitant remuneration. We were advised that this is the practice notwithstanding, for instance, the fact

that there may be inadequate funds to meet the claims of all creditors or a certain “reasonable” percentage of what they are owed.

The office of the Master informed us that due to the fact that the Insolvency Proclamation of 1957 is considered to be dated they allow liquidators to decide on their remuneration and in most cases they rely on the good faith of each liquidator. The consequence of this is that it is not surprising to find two liquidators administering estates of almost the same value “charging” completely different liquidation fees. In other words, the current obtaining practice is not uniform as far as the remuneration of liquidators is concerned.

On the issue of timeframe within which the liquidation process should be finalized the common ground seems to be that each case should be looked at differently. However, there is agreement that the time limit should be set within which the liquidation process should be completed. The Master’s office indicated that in practice liquidators tend to take long time before they submit a plan of distribution together with liquidation accounts because as it was put “[the current system] gives too much to the liquidators. The longer it takes the more their fees.”

In our view the issue of time in liquidations is extremely important. If there are no clear guidelines regarding the time period within which the insolvent estate should be liquidated abuse might find its way quite easily and often to the

prejudice of the stakeholders in the estate such as shareholders and creditors. This issue must be addressed in the proposed law. Penalties should be meted out against those liquidators who do not meet the stipulated deadlines in terms of the law. This process should last for a short period in order to realize assets whilst they represent good value in monetary terms. Of course, the Master of the High Court should be given powers to extend the deadline in deserving cases.

The issues raised under this title, namely remuneration of liquidators and timeframe within which they should file their liquidation account and plan of distribution are covered by sections 63 and 92 of the Insolvency Proclamation of 1957 respectively. In terms of section 63 the liquidator is entitled to reasonable remuneration for his services subject to the requirement that this remuneration should be taxed by the master of the High Court. The provisions of this section give the Master powers either to reduce or increase the remuneration for a good cause or she may also disallow the remuneration partially or in whole on account of any failure of or delay in the discharge of the liquidator's duties or on account of any improper exercise of the duties. There is no doubt the proposed law should carry some provision to this effect.

Most practising lawyers consulted over this issue agree that the proposed law should carry a provision along these lines. Some suggested that a liquidator should be entitled to deduct a fixed percentage of the total value of the insolvent estate, for instance, five per cent as the liquidation fee. They suggest that the

Master should be given powers to increase this percentage if the circumstances warrants.

The question of keeping the records of the liquidation process for a minimum period of six years after the finalization of the liquidation process seems to be controversial. Views from the Master of the High Court are divergent. There are those who suggest that this period of time is necessary given that it may enable law enforcement agencies or creditors to institute legal proceedings if the liquidator fails to exercise his functions properly or where he has actually committed fraud. It would be difficult to deal with the matter if the records were to be destroyed by this time so the argument goes. The argument here is that the keeping of the records for this length of time would make suspected transactions traceable. In view of these concerns and reasons we consider it important that this issue should be considered and determined by the stakeholders. One option would be to retain the six years suggested in the proposed law.

9. Conclusion

The points highlighted in this report and those that may be identified in due course require further consideration. The proposed law will have to reflect all the points identified in this discussion and those that have been identified in the

inception report. The workshop should be able to resolve whether the Registrar of Companies should be given authority to deregister companies that fail to observe provisions of the proposed law such as the filing of annual returns. If the Registrar of Companies is given these powers in the law there should be mechanisms put in place to ensure that the powers set out in the proposed law are exercised properly.

The issue of registration fees should be carefully considered given differing opinion regarding its key objectives. This is a finance issue, but there is no doubt that the Registrar of Companies plays a key role in devising the fees structure and making the appropriate recommendations to the relevant finance authorities.

Individual persons should be given a choice either to register the company themselves as the proposed law provides or they should be at liberty to engage the services of a lawyer if they so wish.

It is important that the Registrar should devise a policy in terms of which she should issue out guides and notes on various matters prescribed in the proposed law. These will also educate people about their rights and obligations as set out in the proposed law.

It is recommended that section 5 should be changed to give the Registrar the necessary powers in law to deregister any entity that registers contrary to the

provisions of the law. However, mechanisms should be put in place to safeguard the rights of creditors and to ensure that the Registrar exercises her powers objectively and fairly.

Finally, it is important to reconsider and make a determination about the issue of how liquidators are to be remunerated. The current proposed provisions are inadequate on this issue. The Insolvency Proclamation of 1957 may provide guidelines about how to go about this issue.