

## Developments regarding Close Corporations

### Close Corporations and the New Companies Act

Upon implementation of the new Companies Act No 71 of 2008 ("new Act") later this year (anticipated July 2010), it will no longer be possible to incorporate Close Corporations and existing Companies will not be permitted to convert to Close Corporations. Existing Close Corporations will continue to exist indefinitely though, unless they are deregistered or dissolved under the Close Corporations Act or converted to a Company under the new Act.

The existing Close Corporations Act No 69 of 1984 and the new Act will co-exist and Close Corporations existing at the time of implementation of the new Act (and beyond) will be required to comply with the applicable provisions of both. A major provision will be that Close Corporations would need to adhere to more stringent accounting and reporting policies and procedures, similar to those imposed on Private Companies at present.

A suitable alternative to Close Corporations, under the new Act, is a Private Company. A Private Company needs only one shareholder and one director. Offering of a Private Company's shares to the public shall remain prohibited and restrictions regarding the transferability of shares will also be applicable. There shall however not be any limitation on the maximum number of shareholders permitted (the maximum is 50 at present).

### Trusts as members of Close Corporations

The Close Corporations Act has been amended by the Close Corporations Amendment Act No 25 of 1984 so as to provide therefore that *inter vivos* ("living") trusts could be members of Close Corporations, subject to the provisos that the trustees and beneficiaries are all natural persons (i.e. not Companies) and the combined number of Close Corporation members and Trust beneficiaries do not exceed 10. What this means is, if a Close Corporation has five members and one of those five members holds that position in the capacity of trustee of a trust, that trust may not have more than five beneficiaries, so as to comply with the proviso aforementioned.

### QUOTABLE QUOTE

"A multitude of laws in a country is like a great number of physicians, a sign of weakness and malady." - Francois Voltaire

### LAW & LAUGHTER

"A gang of robbers broke into a lawyer's club by mistake. The old legal lions gave them a fight for their life and their money. The gang was very happy to escape. "It ain't so bad," one crook noted. "We got \$25 between us." The boss screamed: "I warned you to stay clear of lawyers — we had \$100 when we broke in!"

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## **Does affirmative action influence the retrenchment process?**

For more than a decade, affirmative action has been a consideration in the appointment, promotion, training and development of employees. Due to the impact of South Africa's recent recession more businesses have to consider retrenchments. Therefore we need to consider whether affirmative action should be taken into account when retrenchment takes place. Affirmative action is a principle introduced by the Employment Equity Act (EEA). The EEA provides that measures must be designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equally represented in all occupational categories and levels in the workforce of a designated employer.

In *Thekiso v IBM South Africa (Pty) Ltd*, Mrs. Thekiso argued that, when selecting employees for retrenchment, the employer's obligations in terms of the EEA must be taken into consideration. If the employer had done this she, as a black lady, would not have been retrenched. The Labour Court rejected this argument and stated in return that employers have no obligation to give preference to suitably qualified employees from a designated group when a dismissal is made.

In *Robinson and others v Pricewaterhouse Coopers* retrenchments took place as a result of restructuring. It was alleged that the retrenchment of a certain applicant would be beneficial to the affirmative action policy of Pricewaterhouse Coopers. The court held that affirmative action could never be used as an excuse for retrenchment.

Employers are obliged to enforce specific selection criteria assigned to the retrenchment by law. They must also make sure that no fundamental rights are infringed by it. As examples unfairly discriminating criteria would be selection on the basis of pregnancy or a specific race group. Generally accepted selection criteria are length of service, skills and qualifications. When using the LIFO-principle (Last In First Out) it is most likely that the process will be fair. It is therefore not necessary to consider affirmative action when considering retrenchment.

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