

September 2013

A man without money need no more fear a crowd of lawyers than a crowd of pickpockets - R. Rinkle

## COMPANY LAW: AMENDMENTS IN RESPECT OF STANDARD FORM MOI'S

The Companies and Intellectual Property Commission (CIPC) have recently published amended Companies Regulations which are aimed at rectifying the deficiencies in the standard CIPC forms in respect of the Memorandum of Incorporation (MOI). These amendments will apply retrospectively.

Amendments that were made include:

- \* Numerous inconsistent, incomplete and unsound cross-referencing and drafting errors have been corrected;
- \* The standard MOI for Personal Liability Companies now refers to the previously omitted directors' liability; and
- \* The short form MOI for Private Companies has been corrected in that "more than 50%" is needed for an ordinary resolution, not "at least 50%" as previously recorded.

It is also a requirement that Private Company MOI's must prohibit the offering of securities to the public and restrict the transferability of company securities. The standard MOI's for Private Companies did not contain such restrictions. In addition, the short form MOI did not contain the transfer restriction, whilst the long form MOI for Profit Companies omitted both requirements in respect of Private Companies. A restriction on transferability has now included in the short form MOI, but it only addresses the transferability of shares (and not all securities). This is problematic if the company happens to authorise any securities other than shares.

In respect of the long form MOI for Profit Companies (specifically Private Companies), a prohibition on offering securities to the public is now included, allowing the incorporator to insert restrictions on transferability in the annexures to the long form MOI. Therefore, if the long form MOI is used, the relevant part of the annexure must be completed or else a Public Company may be inadvertently created. The Profit Company's long form also now allows the selecting of a State-owned Company, which was omitted in the original form.

A point of concern that will no doubt lead to some debate in future is the retrospective application of the new forms, especially for companies who have taken action on the basis of the original form of the standard MOI's.

### *Law & Laughter*

ATTORNEY: "What was the first thing your husband said to you that morning?"

WITNESS: "He said, 'Where am I, Cathy?'"

ATTORNEY: "And why did that upset you?"

WITNESS: "My name is Susan!"

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# TRANSPARENCY IN TENDER ADJUDICATION: SANRAL V THE TOLL COLLECT CONSORTIUM (“TOLL COLLECT”)

Toll Collect was an unsuccessful tenderer for the operation of the N2 South Coast Toll Plaza and one of four entities which submitted tenders. The tender was structured in such a way that a preliminary technical evaluation of the tenders was done, with a minimum of 75 points required before the bid would be considered. Toll Collect fell short of the mark and was not considered further. After Toll Collect instituted a successful review in the KwaZulu Natal High Court, SANRAL appealed to the Supreme Court of Appeal.

Apart from certain technical issues, the appeal hinged around what constitutes objectivity and transparency in the evaluation of tenders. Toll Collect argued that the process was not transparent, as it could not ascertain what value would be given to the various items in the tender specification that it had to comply with. The technical portion of the tender was divided into three sub categories with points assigned to each, but the individual items under the categories not. It was reasoned that those tenderers which has rendered the relevant service before would have an advantage, as they would reasonably know the value of each individual item in the eyes of SANRAL. As such, Toll Collect argued that the process was neither transparent nor objective.

The SCA rejected these arguments based on the meaning of transparency and objectivity as defined in the Constitution. Transparency means that the process needs to take place in an environment where the tender is open to public scrutiny. The tender must be advertised publicly and its terms available for inspection. The tender must be evaluated impartially and the results made known publicly. Accordingly, if the tender is challenged; a record of the evaluation of the tender must be available.

Objectivity in turn means that the procurement process must be fair and the evaluation of the tender must be by means that are explicable and free of bias or outside intrusion. It does not mean that the process must be purely mechanical and without the exercise of judgment.

The appeal was accordingly granted and the order of the KZN High Court set aside. alleged bad service delivery.

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