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CLOSE CORPORATIONS AS QUALIFIED COMPANIES UNDER THE GROUP AREAS ACT

An examination of aspects of the
GROUP AREAS ACT 36 of 1966
and the
CLOSE CORPORATIONS ACT 69 of 1984

Research report presented for the approval of the Senate in fulfilment of part of the requirements for the degree of Master of Laws by course work, of which the other part consists of the completion of a program of courses.

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1988

DECLARATION

I declare that this research report for the approval of the Senate in fulfilment of part of the requirements for the degree of Master of Laws by course work, of which the other part consists of the completion of a program of courses, is my own unaided work. It is being submitted for the degree of Master of Laws in the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in any other university.

JEREMY JAMES GARDINER CLARK

July 1988

PREFACE

This work is an analysis of the Group Areas Act 36 of 1966 in the light of the Close Corporations Act 69 of 1984.

At the time of writing a trio of new Bills have been published which, if passed by Parliament, will affect some of the premises upon which this work is based. I have not attempted to anticipate the effect of the proposed legislation as it has not yet been enacted and the Bills may be amended considerably before they are passed. Consequently, this enquiry concerns itself only with the law as it was until 30 June 1988.

I would like to thank the partners and staff of Bell Dewar & Hall, attorneys of Johannesburg, for their indulgence towards me in the preparation of this work. In particular, I would like to thank Carrie Douglas and Trish Davies for their generous assistance in the typing and preparation of the text and Jennifer Greening for her help in gathering the research materials.

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J J G CLARK
Johannesburg
July 1988

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CHAPTER 1

INTRODUCTION

1.1. The principle underlying the Group Areas Act 36 of 1966 ('the Act') is the apportionment of land among various racial groups.[1] In terms of s 23 of the Act the State President may by proclamation in the Gazette declare that as from a date specified in the proclamation the area defined in the proclamation shall be an area for occupation, ownership or both occupation and ownership by members of a specific racial group. Persons not belonging to that group are then disqualified in respect of that area and may be prevented from owning, occupying or both owning and occupying immovable property, land or premises in the area.[2] In areas other than group areas disqualified persons are persons not belonging to the same racial group as the owner.[3]

1.2. Section 12(1) of the Act provides that there shall be three racial groups, namely:

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1 See T H van Reenen Land, Its Ownership and Occupation in South Africa (1962; most recent update 1981) E.1.1, p 113

2 See ss 23, 26 and 27

3 See the definition of 'disqualified person' in s 1

(a) a white group;

(b) a Black group; and

(c) a coloured group.

Furthermore, the State President may by proclamation in the Gazette define any ethnic, linguistic, cultural or other group of persons who are members either of the Black group or of the coloured group and declare the group so defined to be a group for the purposes of the Act or sections thereof.[4]

1.3. The coloured group has been divided into the following sub-groups :

(a) an Indian group;

(b) a Chinese group; and

(c) a Malay group.[5]

Some of these sub-groups have only been defined for certain provinces or part thereof, but the details of the variations are not relevant for the purposes of this enquiry.[6]

1.4. D'Oliveira observes that from 'a conspectus of the definitions of the three main groups it appears that

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4 See s 12(2)

5 See Proclamation 28 of 1961 in Government Gazette No 6620 of 3 February 1961

6 Van Reenen E.2.33-43, pp 126-128

membership of a group does not - except in the case of aboriginal Blacks - depend on blood or descent, but rather on habits and mode of life, or acceptance'.[7] Concerning the groups Schoombee remarks:

> It should be noted that the Act has its own system of classification, and does not follow or incorporate the classification of the Population Registration Act 1950, which is the most widely applied race classification statute in South Africa.
>
> In terms of the Act, membership of the white group is based, primarily, on appearance or general acceptance - the white group includes "any person who in appearance obviously is or who is generally accepted as a white person". In the case of Blacks, it is based on descent or general acceptance - the Black group includes "any person who in fact is or who is generally accepted as a member of an aboriginal race or tribe of Africa". The coloured group is thereupon defined negatively, as including "any person who is not a member of the white group or of the Black group". In conjunction with this basic scheme of classification, there operates a so-called "rule of attraction": where a man and a woman belonging to different racial groups marry or cohabit, the one inevitably attracts the classification of the other. Generally the woman attracts the classification of the man, except in the case of a white man, who attracts the classification of his "non-white" spouse or cohabitant. "White" thus appears to be the "protected"

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7 J A van S d'Oliveira 'Group Areas and Community Development' W A Joubert (ed) 10 Law of South Africa (1980) paras 478-600, pp 329-460 at para 498, p 351

class - this is also the case in other race classification legislation.[8]

1.5. Ordinarily, companies, associations of persons and other corporate bodies cannot be said to have a racial character. When the Companies Act 31 of 1909 (T) introduced the concept of a private company with as few as two members to the Transvaal, Asiatics, who were then prohibited from acquiring ownership of fixed property by Law No 3, 1885, began to form private companies and use them to take transfer of fixed property. After the case of Reynolds V Oosthuizen [9] acquisition of fixed property by means of companies became popular with Asiatics until subsequent legislation introduced the concept of 'controlling interest' and sought to put an end to this practice.[10] Now, where a controlling interest in a company is held or deemed to be held by or on behalf or in the interests of a member of a particular racial group, the company is deemed to be a member of that group.[11]

1.6. The distinction between different types of area is as important under the Act as that between the different racial groups. Although the aim of group areas legislation is the establishment of separate group areas for the different

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8 J T Schoombee 'Group Areas Legislation - The Political Control of Ownership and Occupation of Land' (1985) Acta Juridica, p 77 at pp 78-79

9 1916 WLD 103. See also 2.5

10 See chapter 2 for a brief history of this legislative program

11 See definitions of 'company', 'controlling interest' and 'disqualified company' in s 1 of the Act and 3.36, 3.44 and 3.39

racial groups, this objective could not be achieved overnight. The whole area of South Africa[12] became the controlled area at the inception of group areas legislation in 1950. This legislation pegged ownership and occupation rights in respect of land by attributing the owner's racial character to that land. Save for certain exemptions, any person belonging to a different racial group from the owner of the land in the controlled area (i e a disqualified person) cannot occupy or own that land.[13] Specified areas are areas excised out of the controlled area and to which certain specific occupation controls apply. They remain part of the controlled area for ownership. The significance of specified areas is that the occupation character is determined by the racial group to which the occupant at the relevant date belonged.[14] Defined areas may be defined within a specified area by proclamation. The effect of the proclamation is to give a racial occupation character to land or premises which were unoccupied or not lawfully occupied at the date of publication of the proclamation.[15] Free trading areas may be proclaimed in which certain provisions of the Act shall not apply in respect of buildings, land or premises in the free trading area.[16] The establishment of group areas is the ultimate object of the Act and these are created by proclamation

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12 It is not necessary for the purposes of this enquiry to isolate those areas to which the Act does not apply, but see for example D'Oliveira para 493, pp 339-340

13 See ss 13, 14, 15 and 20. See also 5.1

14 See ss 16, 17 and 18. See also 5.27-5.29

15 See s 18(3) and 5.42 et seq

16 See s 19 and 5.47 et seq

by the State President whenever it is deemed expedient. Group areas may be proclaimed for occupation by members of one group, for ownership by members of one group or for both occupation and ownership by members of one group. Where an area is proclaimed a group area for occupation it remains part of the controlled area for ownership and vice versa. No disqualified person may acquire any immovable property situated within an ownership controlled group area and if a disqualified company already owns it at the date of proclamation it must dispose of it within a period of ten years. Moreover, subject to certain exceptions, no disqualified person shall occupy and no person shall allow a disqualified person to occupy any land or premises in an occupation controlled group area.[17] The State President may also proclaim future group areas and declare that such areas shall be areas for future occupation and/or ownership by members of a particular group.[18] Border strips and future border strips may also be proclaimed over areas contiguous to group areas and future group areas. Such a proclamation can drastically limit the ordinary rights to sell or otherwise dispose of, occupy or allow any person to occupy and to use land or premises in such areas.[19]

1.7. The Close Corporations Act 69 of 1984 for the first time created a new legal person having certain of the characteristics of limited liability companies and certain of the characteristics of partnerships. The purpose of this

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17 See ss 23, 26 and 27. See also 5.52-5.54 and 5.59-5.60

18 See s 24 and 5.63 et seq

19 See s 25 and 5.67 et seq

enquiry is to examine whether or not the new close corporation can be used as a vehicle for the circumvention of the Act so that persons of any racial group may enjoy common law ownership and occupation rights without being fettered in that enjoyment by the provisions of the Act.

1.8. Schoombee states that the Act 'contains complex provisions aimed at propping up (the) "racial" character of companies and sealing off possible loopholes which present themselves by reason of the flexible commercial potential of the modern company, and by reason of the fact that human ingenuity excels itself when it comes to evading restrictive legal provisions.'[20] It is for these reasons and in this spirit that this research is undertaken and, more particularly, because the writer associates himself with the following views of Van der Vyver:

> Of all (the) manifestations of distorted governmental powers, the institutionalization of racial discrimination probably deserves the highest ranking on the scale of moral debasement; and in the context of the laws and legal institutions founded upon racial bias, the profound hardships caused by the implementation of group-areas policies represent perhaps the ultimate in legally sanctioned suffering.[21]

This research is undertaken in the hope that some of its findings may legally alleviate this suffering.

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20 Op cit p 79

21 J D van der Vyver 'Qu'ils Mangent de la Brioche!' (1981) 96 SALJ p 135 at p 136

1.9. Chapter 2 contains a brief history of how companies have been used in order to circumvent the Group Areas Act and its predecessors as a prelude to the main enquiry in chapters 3 to 6. Chapter 3 contains an analysis of the control of close corporations, chapter 4 posits a model for a 'groupless corporation' and chapter 5 considers the impact that 'groupless corporations' have on the acquisition of immovable property and occupation of land and premises. Certain provisions in the Act having a special bearing on companies and 'groupless corporations' are examined in chapter 6.

CHAPTER 2

A BRIEF HISTORY OF RACIAL LEGISLATION AFFECTING PROPERTY RIGHTS OF COMPANIES

2.1 For as long as the legislature has sought to curtail the common law rights that persons of certain races would ordinarily have had to acquire and hold immovable property and occupy land and premises, such persons have tried to evade those curtailments. The history of this resistance is long and complex and it is not necessary for the purposes of this work to retrace it in great detail.[1] It is desirable, however, to consider how companies have been used as a means of evading restrictive legislation before examining whether or not close corporations can be used similarly.

2.2 The passing of the Group Areas Act 41 of 1950 by no means introduced the concept of the geographical separation of races. Schoombee says that 'it has even been suggested that group areas measures can be traced back to Jan Van Riebeeck's directive in 1660 that a bitter almond hedge be planted to mark the dividing line between the "Hottentots" (Khoi) and the free burghers.'[2] Van Reenen states :

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1 For a detailed history see Van Reenen, especially B.1.1-B.3.36, pp 5-84 and D'Oliveira, paras 479-491, pp 329-338

2 Schoombee p 84, quoting para 13.5 of the Strydom Commission Report

The idea of white supremacy and the principle that the coloured races of South Africa - and other countries - could not be treated on an equal footing with Whites seems to have been introduced into this country by the very first white persons who settled here. There can be no doubt that when the first settlers moved out of the Cape into the northern areas, later to become the two Boer Republics, this idea and principle had already been well established and ingrained and was part and parcel of the way of life of those settlers.

We find this principle enunciated in the very first "constitution" drafted by the new inhabitants of the Transvaal; the so-called "Drie-en-dertig Artiekelen", drafted at Potchefstroom on 9th April, 1844, and finally approved and adopted at Derdepoort on 23rd May, 1849, and from then on it guided the racial policy of the South African Republic.

The Grondwet laid down as a principle the broad proposition that there could be no equality between White and non-White and left it to the Legislature to give effect to the principle from time to time in such direction and to such extent as it thought expedient and right.

The aim of that policy, as we see it expressed in the various "Grondwetten", "Volksraadbesluiten" and other enactments was to achieve separation between White and non-White and to do so by concentration on four aspects:

1. That no coloured person should receive any citizenship rights;

2. That no coloured person should become a member of any legislative body;

3. That no coloured person should obtain ownership rights to fixed property; and

4. That coloured persons should not live in close proximity to white persons.[3]

He adds:

> The unwillingness tn grant coloured persons ownership rights to fixed property arose from the fear that, once they were allowed to become owners of land, the coloured persons, who outnumbered the Whites, would eventually come to control the country and the State.'[4]

2.3 At the time of the annexation of the Transvaal by Sir Theophilus Shepstone in 1877 coloured persons (ie those who were not white) could not own landed property and they were segregated as far as occupation was concerned. Tribal Blacks were settled in reserves in rural areas and urban Blacks were housed near the towns and villages in locations. Up to this stage there were no Asiatics (the earlier term for members of the Indian group) in the Transvaal, but there is no doubt that if there had been they would have fallen within the term 'coloured person' and have been similarly treated. The annexation hostilities were ended by the Pretoria Convention of 1881 and the London convention of 1884. The most important section of the London Convention is Art 14, which allowed all persons, not being 'Natives', who subjected themselves to the laws of the Republic:

(a) to enter freely, to travel and to reside in the Republic with their families;

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3 Van Reenen B.1.1-4, p 5

4 Van Reenen B.1.8, p 6

(b) to hire or possess houses, factories, stores and shops;

(c) to trade either personally or through such agents as they saw fit to appoint;

nor were they to be subjected, either as to their persons or belongings, to taxes to which citizens of the Republic were not subjected. The immediate effect of this provision was an influx of Asiatics into the Transvaal, especially from Natal. Shortly after the signing of the Convention the first Indian traders settled in Pretoria. This caused an outcry and the Volksraad was specially requested to prevent the influx of Asiatics into the Republic and to restrict the occupation of land by Asiatics to their own locations, completely separated from the white population. As a result of this agitation, the Volksraad passed Law No 3, 1885, which was approved and settled by Volksraadsbesluit, Art 255 of 1st June, 1885.[5]

2.4 Law No 3, 1885 regulated the position concerning Asiatics as distinct from other coloureds. Article 2(b) originally provided that Asiatics could not be owners of fixed property in the Republic and Art 2(d) gave the Government the right to assign certain streets, wards and locations for their residence. In 1887 Art 2(b) was amended to allow Asiatics to

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5 For the fuller text from which this summary is taken, see Van Reenen B.1.12-25, pp 7-9. See also L R Dison and I Mohamed Group Areas and Their Development (1961; 1962 supplement by L R Dison), pp 4-5 and 9 on the definition of 'Asiatic' and generally p 10 et seq

obtain ownership of fixed property in the localities assigned to them by the Government. Law No 3, 1885 did not prohibit the occupation of land by Asiatic and contained no sanction or machinery to compel Asiatics to live in the areas which might be set aside for their residence. At that stage they could thus, subject to the restrictions imposed by the so-called Gold Laws, freely occupy land in the Transvaal.[6] There then ensued a protracted period of struggle in which Asiatics sought to protect their ownership rights and, where these rights were eroded, to circumvent the provisions of Law No 3, 1885 and its successors.[7] The use of nominees and companies are two important devices which were used for the circumvention of discriminatory legislation.

2.5 The Companies Act 31 of 1909 (T) introduced the concept of a private company into the Transvaal and made allowance for as few as two members. Asiatics in the Transvaal began registering private companies in order to acquire land. An important stage was reached in 1916 with the decision of Ward J in Reynolds v Oosthuizen,[8] the effect of which was that it was no contravention of Law No 3, 1885 for an Asiatic company[9] to be the registered owner of fixed property. Ward J stated:

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6 D'Oliveira para 482, p 331. See also Dison & Mohamed, p 24

7 See Van Reenen B.1.26, p 9 et seq

8 1916 WLD 103

9 A company consisting of Asiatic shareholders

> It seems to me the whole point I have to decide is whether Law 3 of 1885 forbids the transfer of land to a corporation formed under the Companies Act, whose members are Asiatics. The law forbids a Chinaman from becoming the registered owner of fixed property. Under the law, as I understand it, this limited liability company, though it is a private company and all its shares are held by Chinese, is not a Chinaman.... Nor does its registration as owner of the lease make its shareholders the owners of fixed property....[10]

After this decision the number of registrations of Asiatic companies increased markedly and the prohibition against ownership of land by Asiatics was freely and legally circumvented by means of such companies.[11]

2.6 With the coming into force of the Asiatics (Land and Trading) Amendment Act 37 of 1919 ('the 1919 Act') the provisions in Law No 3, 1885, which prohibited Asiatics from being the owners of fixed property in the Transvaal, had also to be construed as prohibiting:

(a) the ownership of fixed property in the Transvaal by any company or corporate body wherein one or more Asiatics had a controlling interest; and

(b) the registration of mortgage bonds, subject to certain

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10 Loc cit, pp 109-110

11 See in general Van Reenen B.1. 109-112, pp 28-29. See also D'Oliveira para 485, p 333

> exceptions, in favour of such company or corporate body.[12]

The effect was that Asiatic companies could be neither the direct nor indirect owners of fixed property. This Act contained no definition of 'controlling interest', and numerous subterfuges were resorted to in order to evade the prohibition.[13] For example, company A in which 51 per cent of the shares were held by whites and 49 per cent by Asiatics could acquire fixed property. A second company B, in which the shares were likewise divided between white and Asiatic shareholders in the ratio of 51 to 49, could then acquire the shares held by the white shareholders in company A. Thus a non-Asiatic company held the majority of shares in company A, which was consequently also non-Asiatic, but on analysis the Asiatics hold a 73,99 per cent interest in the fixed property.[14]

2.7 The Transvaal Asiatic Land Tenure Act 35 of 1932 ('the 1932 Act') amended the 1919 Act by providing that an Asiatic company was any company in which an Asiatic held a controlling interest. It defined a controlling interest[15] as:

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12 s 2 of the 1919 Act

13 Van Reenen B.1.204, p 48. See also Dison & Mohamed, p 25

14 See Van Reenen B.1.204, p 48

15 In s 11 of the 1919 Act as added by s 7 of the 1932 Act. It will be seen that this definition is similar in many respects to the definition of 'controlling interest' in the present Act. Cf 3.44

(a) a majority of shares;[16] or

(b) shares representing more than half the share capital;[17] or

(c) shares of a value in excess of half the aggregate value of all the shares in the company;[18] or

(d) shares entitling the holders thereof to a majority or preponderance of votes;[19] or

(e) debentures for an amount in excess of half the share capital of the company;[20] or

(f) the power to exercise any control whatsoever over the activities of the company.[21]

Although a nominee was not prevented from holding the shares for or on behalf of an Asiatic, an Asiatic would in such a case have a controlling interest by having the power to exercise some control over the activities of the company.[22]

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16 Cf para (a) of the present definition of 'controlling interest' in s 1, reproduced in 3.44

17 Ibid, cf para (b)

18 Ibid, cf para (c)

19 Ibid, cf para (e)

20 Ibid, cf para (f)

21 Ibid, cf para (g)

22 Van Reenen B.1.211, p 50. See also D'Oliveira loc cit

2.8 The 1932 Act also inserted a provision into the 1919 Act providing that whenever it was proved in any proceedings, whether criminal or civil, that an Asiatic held any share in or debenture of any company or any other person held any shares in or debentures of any company on behalf of or in the interest of any Asiatic, that company was deemed to be an Asiatic company unless the contrary was proved.[23]

2.9 The 1932 Act introduced the innovation into the 1919 Act that any property registered in any deeds registry in favour of an Asiatic or Asiatic company which that Asiatic or Asiatic company was debarred from holding by virtue of the provisions of Law No 3, 1885 or of the 1932 Act, by mere act of registration became the property of the State.[24] This forfeiture only operated on the actual registration of the property in the name of the Asiatic.[25] [26]

2.10 Moreover, the 1932 Act inserted a new s 3 into the 1919 Act in terms of which, whenever any private company held any fixed property, any share in or debenture of that private company that was held by or pledged to an Asiatic or Asiatic company or any nominee for an Asiatic or Asiatic company would

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23 s 6 of the 1919 Act as inserted by the 1932 Act

24 s 2(5) of the 1919 Act

25 See R v Hanid Ltd 1950 (2) SA 587 (T) and Minister of the Interior v Estate Roos 1956 (2) SA 266 (A)

26 See generally Van Reenen B.1.205-214, pp 48-50 and Dison & Mohamed, p 72

automatically be forfeited to the State.[27] This provision has been retained in similar form in the present Group Areas Act, but whereas s 3 of the 1919 Act made a share or debenture automatically forfeit, the current Act only makes it liable to forfeiture.[28]

2.11 Amendments introduced by the 1932 Act went further by attempting to stop the practice of floating companies outside the Union and acquiring property through such companies. Section 7 of the 1919 Act, as inserted by the 1932 Act, provided that a foreign company could not acquire any fixed property, nor be capable of holding any fixed property acquired after 1 May 1930, unless it had a place of business in the Union and had complied with the requirements of s 201 of the Companies Act 46 of 1926.[29]

2.12 The Asiatic Land Tenure and Indian Representation Act 28 of 1946 ('the 1946 Act') further refined the restrictions concerning Asiatic companies.[30] Firstly, a company in which a controlling interest was held on behalf of or in the interests of an Asiatic was also included in the definition of Asiatic company.[31] Secondly, the definition of 'controlling interest' was extended by adding the following two items:[32]

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27 See Van Reenen B.1.215, p 50

28 See s 36(1) and 6.4-6.5

29 See Van Reenen B.1.222, p 52

30 See D'Oliveira para 491, pp 336-337

31 s 31 of the 1946 Act

32 s 31(1)(c) of the 1946 Act

(a) shares entitling the holders thereof to more than half its profits or assets;[33] and

(b) any claim arising from a loan, for an amount in excess of half its share capital, or debentures for such an amount.[34]

2.13 Thirdly, the last item of the definition[35] was changed to provide that the power to exercise, directly or indirectly, control over the activities or assets of the company:

(a) by holding any interest, whether or not of the nature referred to in the other items, in any company; or

(b) in any other way whatsoever,

was to constitute a controlling interest in that company.[36]

2.14 Fourthly, two further provisions were added by which a company could be deemed to be an Asiatic company. Whenever it was proved in any proceedings that:

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33 Cf para (d) of the present definition of 'controlling interest', reproduced in 3.44

34 Ibid, cf para (f)

35 See para (f) of 2.7

36 Cf para (g) of the present definition of 'controlling interest', reproduced in 3.44

(a) an Asiatic or Asiatic company had a claim arising from a loan against any company; and

(b) any person had such a claim on behalf of or in the interest of an Asiatic or an Asiatic company,

the company was deemed to be an Asiatic company, unless the contrary was proved.[37]

2.15 The Asiatic Land Tenure Amendment Act 53 of 1949 went further by providing that if it was alleged in any proceedings that any company was an Asiatic company that company was deemed to be such until the contrary was proved.[38]

2.16 Section 28 of the 1946 Act took the limitations on foreign companies holding fixed property in the Transvaal a step further by prohibiting any company in which a foreign company had a controlling interest from so holding fixed property unless that foreign company satisfied the requirements of s 201 of the Companies Act 46 of 1926 and had a place of business in the Union. The Asiatic Land Tenure Amendment Act 53 of 1949 alleviated this by providing that the Minister could consent to the holding of fixed property by such company subject to such conditions as he might in his discretion determine.[39]

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37 s 27 of the 1946 Act. Cf present ss 45(4)(b) and (d)

38 s 3 of Act 53 of 1949. Cf present ss 45(4)(b) and (d)

39 s 4 of Act 53 of 1949

2.17 Section 1 of the Asiatic Land Tenure Amendment Act 15 of 1950 withdrew the prohibition against the holding of fixed property by foreign companies and provided that whenever the Minister of the Interior had reason to suspect that a foreign company or any company in which a foreign company had a controlling interest was an Asiatic company, he could by notice in writing call upon that company to furnish him within a specified period with particulars regarding that foreign company. The Minister could then, whether or not the particulars requested had been supplied, after consideration of the necessary report and if he was not satisfied that the company was not an Asiatic company, declare the company in the Gazette to be an Asiatic company for the purposes of the 1919 Act. The company concerned had to be notified of the Minister's declaration and could apply to the Supreme Court to have the declaration set aside. The court could set aside the Minister's declaration if the company could prove that it was not an Asiatic company, either at the date when the Minister sent his first notice calling for particulars or at the date of his declaration in the Gazette of the company as an Asiatic company.[40] The old provisions in s 7 of the 1919 Act that foreign companies had to have a place of business in the Union and comply with s 201 of the Companies Act 46 of 1926 were dropped in respect of banking or insurance companies in 1950.[41]

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40 Cf s 38 of the Act and see 6.10-6.13

41 s 1 of Asiatic Land Tenure Amendment Act 15 of 1950. See Van Reenen B.1.311-317, pp 69-70

2.18 The position just prior to the enactment of the first Group Areas Act 41 of 1950, as far as evasion by means of companies is concerned, can be summarised as follows:

(a) no Asiatic company could own land which was not situated in an assigned area;

(b) nominee holdings on behalf of the Asiatic companies were prohibited;

(c) elaborate provisions existed for determining whether a company was an Asiatic company or not (a set of presumptions assisted in this determination);

(d) and special provisions were made with regard to foreign companies.[42]

2.19 The most important innovation introduced by the Group Areas Act 41 of 1950 ('the original Act') was that it sought to control the acquisition and occupation of fixed property on a comprehensive, nation-wide basis in respect of all racial groups and not merely whites and Asiatics.[43] The original Act repealed almost all of the restrictive legislation considered above, but re-enacted similar provisions. It was amended many times in order to eliminate difficulties and was then consolidated in the Group Areas Act 77 of 1957. There were a number of further amendments after that which are now

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42 See Van Reenen B.1.323, pp 71-72

43 See Schoombee p 77

consolidated in the current Group Areas Act 36 of 1966. The important definitions of 'controlling interest',[44] 'disqualified company',[45] 'disqualified person',[46] 'company'[47] and 'person',[48] as well as the deeming provision concerning controlling interests in associations of persons,[49] have remained the same for all relevant purposes of this enquiry. Section 1(2) has not changed since it was amended into its present form by s 1(f) of Act 57 of 1957.[50]

2.20 A new presumption, now contained in the present s 45(4)(*d*), was created to the effect that whenever in any proceedings arising out of the operation of any provision of the Act or any Act repealed by the Act, or of the original Act or any Act repealed by that Act, whether civil or criminal, it is alleged:

(i) by or on behalf of the Minister; or

(ii) by or on behalf of any officer in charge of a deeds registry; or

(iii) in any indictment or charge

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44 See 3.44

45 See 3.39

46 See 3.40

47 See 3.36

48 See 3.35

49 See 3.49

50 See 3.50 and Dison & Mohamed, pp 16-17

that a company is or at any relevant time was a company in which a controlling interest is or was held by or on behalf or in the interests of a member of any group, that allegation is deemed to be correct until the contrary is proved.[51]

2.21 Another amendment in 1961 introduced the further presumption that if it is similarly alleged in any proceedings that any person or company has at any time held immovable property on behalf or in the interest of

(i) an Asiatic; or
(ii) an Asiatic company; or
(iii) any other person

in contravention of the Group Areas Act 77 of 1957, the Group Areas Act 41 of 1950, or any law repealed by the latter Act, the allegation shall be presumed to be correct unless the contrary is proved.[52]

2.22 The Act retains the procedure whereby the Minister, having reason to presume that the company is controlled by a member of any group, may by notice in writing call upon the company to furnish him with such particulars regarding the control of the company as he may specify in the notice before

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51 Cf 2.15 for an earlier presumption

52 Now contained in s 45(4)(e), introduced by s 26 of Act 23 of 1961

declaring that the company is so controlled for the purposes of the Act.[53]

2.23 In Lenz Township Co Ltd v Lorentz NO[54] the Appellate Division decided that a company cannot belong to a racial group and that there were no provisions in the 1957 Act restricting the occupation of land or premises by a disqualified company. Van Reenen states:

> The effect of that judgment then was that the provisions regarding disqualified companies were only operative as far as -
>
> (i) the ownership of land; and
>
> (ii) the allowing of occupation by disqualified persons;
>
> were concerned. As far as occupation was concerned, companies were, no matter who held any controlling interest, free to occupy premises, subject to the restrictions imposed by the then section 31.[55]

That case did not decide that a company could not occupy land or premises, but merely that the Act did not prohibit occupation by a disqualified company.[56] It was in response to the decision in the Lenz Township case that the legislature enacted a provision

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53 See s 38 and 6.10-6.13

54 1961 (2) SA 450 (A)

55 Van Reenen E.4.40, p 151

56 Van Reenen E.6.18, p 180

equivalent to the present s 35[57] which renders that decision nugatory as far as occupation is concerned as no person can now effectively occupy the premises on behalf of the company and '(t)he vexed question whether a company can occupy or not, now becomes, as far as the Group Areas Act is concerned, purely academic.... Section 35 as it now reads makes it impossible for a disqualified company effectively to use any land or premises and thus it matters little whether it can occupy land or premises or not.'[58] It will be seen later that the advent of the close corporation revives the relevance of the Lenz Township decision.[59]

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57 See 6.2

58 Van Reenen E.4.41-42, p 151

59 See 5.16 et seq

CHAPTER 3

THE CLOSE CORPORATION AND THE DISQUALIFIED COMPANY

Introduction	3.1 -3.5
The Close Corporation	3.6 -3.33
Disqualification	3.34-3.43
Controlling Interest	3.44-3.58
Control of Close Corporations	3.59-3.71

Introduction

3.1. In terms of the Close Corporations Act 69 of 1984 any one person, or more persons not exceeding ten, who qualify for membership of a close corporation (or 'corporation') in terms of that Act may form a corporation and secure its incorporation by complying with the requirements of that Act.[1] A close corporation formed in accordance with the provisions of the Close Corporations Act is on registration in terms of those provisions a juristic person and continues, subject to the provisions of that Act, to exist as a juristic person notwithstanding changes in its membership until it is, in terms of that Act, de-registered or dissolved.[2] Subject to the provisions of the Close Corporations Act, the members of a close

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1 s 2(1). All references to sections in paras 3.1-3.33 are references to sections of the Close Corporations Act 69 of 1984. Cf note 60 to 3.35

2 s 2(2)

corporation are not merely by reason of their membership liable for the liabilities or obligations of the corporation.[3] A close corporation has the capacity and powers of a natural person of full capacity insofar as a juristic person is capable of having such capacity or of exercising such powers.[4]

3.2. Naude says that the purpose of creating close corporations is 'to provide a simpler and less expensive legal form for the single entrepreneur or few participants, designed with a view to his or their needs and without burdening him or them with legal requirements that are not meaningful in his or their circumstances'.[5] He also points out that although the promotion of small business is the policy consideration behind the close corporation, the new dispensation has a flexibility which enhances its usefulness and in particular he mentions:

(a) there is no need to place any restriction on the size of a close corporation's business or undertaking;

(b) the close corporation is equally suitable for the unsophisticated and highly sophisticated business man;

(c) there is no requirement, as in partnership law, that there must be an object of making profits. Hence a

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3 s 2(3)

4 s 2(4)

5 S J Naude 'The South African Close Corporation' (1984) 9 Tydskrif vir Regsweterskap p 117 at 118

close corporation may be used for a purpose not for gain.[6]

3.3. The introduction of the close corporation has no effect on the availability of the company or partnership. Hence the entrepreneur has an additional legal form to choose from.[7] Viljoen argues that a close corporation is neither the same as the partnership, nor the same as the company and says:

> Die gevolgtrekking wat reeds gemaak kan word, is dat die beslote korporasie dus 'n eiesoortige ondernemingsvorm is, maar ook kenmerke van die vennootskap en die maatskappy vertoon.[8]

3.4. The close corporation is therefore an incorporated juristic person. The liabilities of its members are, for the most part, limited and the corporation has perpetual succession. Naude cites the departure from the traditional 'maintenance of capital rule' associated with companies as being probably the most significant innovation of close corporations.[9] Whereas a company has to maintain its share capital for the satisfaction of creditors' claims there is no such obligation upon a close corporation. The close corporation need only ensure that, after it acquires a member's interest,

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6 Op cit 119

7 Loc cit

8 D J Viljoen 'Die Interne Verhouding tussen die Lede inter se en tussen die Lede en die Beslote Korporasie' (1984) 9 Tydskrif vir Regswetenskap, p 142 at 145-146

9 Op cit 127

gives financial assistance in connection with any acquisition of a member's interest in it or pays dividends, it remains solvent and liquid.[10]

3.5. The salient features of the Close Corporations Act are to be dealt with[11] before the full impact of the Close Corporations Act upon the Group Areas Act can be assessed.[12]

The Close Corporation

3.6. Only natural persons may be members of a close corporation and no juristic person shall directly or indirectly (whether through the instrumentality of a nominee or otherwise) hold a member's interest in a corporation.[13] Only the following persons qualify for membership of a corporation:

(a) any natural person entitled to a member's interest;

(b) a natural or juristic person, nomine officii, who is a trustee of a testamentary trust entitled to a member's interest, provided that -

(i) no juristic person is a beneficiary of such trust; and

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10 ss 39 and 40

11 See 3.6-3.33

12 See 3.59-3.71 and chapter 5

13 s 29(1), subject to ss 29(2)(b) and (c)

(ii) if the trustee is a juristic person, such juristic person is not directly or indirectly controlled by any beneficiary of the trust; and

(c) a natural or juristic person, nomine officii, who, in the case of a member who is insolvent, deceased, mentally disordered or otherwise incapable or incompetent to manage his affairs, is a trustee of his insolvent estate or an administrator, executor or curator in respect of such member or is otherwise a person who is his duly appointed or authorised legal representative.[14]

3.7. Two or more persons shall not be joint holders of the same member's interest in a close corporation, thereby excluding partnerships and associations of persons from holding member's interests.[15]

3.8. A 'member's interest' or 'interest' in relation to a member of a close corporation means the interest of the member in the corporation, the size of which is expressed in accordance with s 12(e) as a percentage in the founding

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14 s 29(2)

15 s 30(2)

statement of the corporation.[16] This member's interest in a corporation is a 'single interest'.[17]

3.9. A person becoming a member of a registered close corporation acquires his member's interest required for membership -

(a) from one or more of the existing members or his or their deceased or insolvent estates; or

(b) pursuant to a contribution made by him to the corporation, in which case the percentage of his member's interest is determined by agreement between him and the existing members and the percentages of the interests of the existing members in the corporation are reduced proportionally or as they may otherwise agree.[18]

The contribution made by a person becoming a member may consist of an amount of money, or of any property (whether corporeal or incorporeal) of a value agreed upon by the person concerned and the existing members.[19]

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16 See definition of 'member's interest' in s 1

17 s 30(2)

18 ss 33(1) and 38(b)

19 s 33(2)

3.10. Notwithstanding any provision to the contrary in any association agreement or other agreement between members, a trustee of the insolvent estate of a member may, in the discharge of his duties, sell that member's interest:

(a) to the close corporation, if there are one or more members other than the insolvent member;

(b) to the members other than that insolvent member in proportion to their member's interests or as they may otherwise agree upon; or

(c) to any other person qualifying for membership of a corporation.[20]

In the last instance the other members of the corporation, if any, have a right of pre-emption before the sale to the third party becomes effective and is implemented.[21] Insolvency of a member of a corporation containing two or more members can have an important bearing on the control and group character of the corporation.[22]

3.11. In the performance of his duties the executor of the estate of a deceased member shall, subject to any other arrangement in an association agreement:

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20 s 34(1)

21 s 34(2)

22 See s 34 and 7.3

(a) cause the deceased member's interest in the close corporation to be transferred to a person who qualifies for membership of a corporation and is entitled thereto as legatee or heir or under a redistribution agreement, if the remaining member or members of the corporation (if any) consent to the transfer of the member's interest to such person; or

(b) if any consent referred to in paragraph (a) is not given within 28 days after it was requested by the executor, sell the deceased member's interest -

(i) to the corporation if there is any other member or members than the deceased member;

(ii) to any other remaining member or members in proportion to their member's interests or as they may otherwise agree upon; or

(iii) to any other person who qualifies for membership of a corporation, in which case the other members, if any, have a right of pre-emption as is the case in paragraph 3.10(c) above.[23]

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23 s 35

As with insolvency, the death of a member can have an important bearing on the control and group character of the corporation.[24]

3.12. On application by any member a court may order that any member shall cease to be a member of the close corporation on any of the following grounds:

(a) subject to the provisions of the association agreement (if any), that the member is permanently incapable, because of unsound mind or any other reason, of performing his part in the carrying on of the business of the corporation;

(b) that the member has been guilty of such conduct as, taking into account the nature of the corporation's business, is likely to have a prejudicial effect on the carrying on of the business;

(c) that the member so conducts himself in matters relating to the corporation's business that it is not reasonably practicable for the other member or members to carry on the business of the corporation with him; or

(d) that circumstances have arisen which render it just and equitable that such member should cease to be a member of the corporation:

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24 See 7.3

Provided that such application to a court on any ground mentioned in paragraph (a) or (d) may also be made by a member in respect of whom the order shall apply.[25]

3.13. On granting such an order a court may make such further orders as it deems fit in regard to:

(a) the acquisition of the member's interest concerned by the corporation or by members other than the member concerned; or

(b) the amounts (if any) to be paid in respect of the member's interest concerned or the claims against the corporation of that member, the manner and times of such payment and the persons to whom they shall be made; or

(c) any other matter regarding the cessation of membership which the court deems fit.[26]

3.14. Any other disposition by a member of his interest, or a portion thereof, whether to the close corporation, any other member or any other person qualifying for membership, shall either be done in accordance with the association agreement (if any) or with the consent of every other member of

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25 s 36(1). See also 7.3

26 s 36(2)

the corporation, provided that no member's interest shall be acquired by the corporation unless it has one or more other members,[27]

3.15. The aggregate of the members' interests in a close corporation expressed as a percentage shall at all times be one hundred per cent.[28] Accordingly:

(a) any transfer of the whole, or a portion, of a member's interest is effected by the cancellation or the reduction, as the case may be, of the interest of the member concerned and the allocation in the name of the transferee, if not already a member, of a member's interest of the percentage concerned, or the addition to the interest of an existing member of the percentage concerned;[29]

(b) when a person becomes a member of a registered corporation pursuant to a contribution made by him to the corporation, the percentage of his member's interest shall be agreed upon by him and the existing members and the percentages of the interests of the existing members shall be reduced proportionally or as they may otherwise agree;[30] and

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27 s 37

28 s 38

29 s 38(a)

30 s 38(b)

(c) any member's interest acquired by the corporation shall be added to the respective interests of the other members in proportion to their existing interests or as they may otherwise agree.[31]

3.16. A close corporation may give financial assistance (whether directly or indirectly and whether by means of a loan, guarantee, the provision of security or otherwise) for the purpose of, or in connection with, any acquisition of a member's interest in that corporation by any person, only:

(a) with the previously obtained written consent of every member for the specific assistance;

(b) if, after such assistance is given, the corporation's assets, fairly valued, exceed all its liabilities;

(c) if the corporation is able to pay its debts as they become due in the ordinary course of its business; and

(d) if such assistance will in the particular circumstances not in fact render the corporation unable

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31 s 28(c)

> to pay its debts as they become due in the ordinary course of its business.[32]

This section differs markedly from s 38 of the Companies Act 61 of 1973, which prohibits the giving of such assistance. The concession in the Close Corporations Act is of particular importance to any corporation holding immovable property because that property can be mortgaged to secure any loan given to a person for the purposes of acquiring a member's interest in the corporation.

3.17. Each member of a close corporation stands in a fiduciary relationship to the corporation.[33] This implies, inter alia, that a member:

> (a) shall in relation to the corporation act honestly and in good faith, and in particular -
>
> (i) shall exercise such powers as he may have to manage or represent the corporation in the interest and for the benefit of the corporation; and
>
> (ii) shall not act without or exceed the powers aforesaid; and

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32 s 10

33 s 42(1)

(b) shall avoid any material conflict between his own interests and those of the corporation, and in particular:

(i) shall not derive any personal economic benefit to which he is not entitled by reason of his membership of or service to the corporation, from the corporation or from any other person in circumstances where that benefit is obtained in conflict with the interests of that corporation;

(ii) shall notify every other member, at the earliest opportunity practicable in the circumstances, of the nature and extent of any direct or indirect material interest which he may have in any contract of the corporation; and

(iii) shall not compete in any way with the corporation in its business activities.[34]

3.18. A member whose act or omission has breached any duty arising from his fiduciary relationship is liable to the corporation for:

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34 s 42(2)

(a) any loss suffered as a result thereof by the corporation; or

(b) any economic benefit derived by the member by reason thereof.[35]

Except as regards his duty referred to in paragraph 3.17(a)(i) above, any particular conduct of a member shall not constitute a breach of a duty arising from his fiduciary relationship to the corporation if such conduct was preceded or followed by the written approval of all the members where such members were or are cognisant of all the material facts.[36]

3.19. The members of a close corporation having two or more members may at any time enter into a written association agreement to regulate any matter which, in terms of the Close Corporations Act, may be set out or agreed upon in such an association agreement and any other matter relating to the internal relationship between the members, or the members and the corporation, in a manner not inconsistent with that Act.[37] Any other agreement between all the members on any matter that may be regulated by an association agreement shall be valid provided that it is not inconsistent with any provision of an association agreement, does not affect any person other than the corporation or a member who is a party to it and ceases to have

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35 s 42(3)

36 s 42(4)

37 s 44(1)

any effect when any party to it ceases to be a member of the corporation.[38] An association agreement or other agreement on any matter that may be regulated by an association agreement binds the corporation to every member in his capacity as a member of that corporation and every member in such capacity to the corporation and to every other member.[39] A new member of a corporation is bound by an existing association agreement between the other members as if he has signed it as a party thereto.[40]

3.20. Section 46 of the Close Corporations Act reads:

> 46 Variable Rules Regarding Internal Relations
> The following rules in respect of internal relations in a corporation shall apply insofar as this Act or an association agreement in respect of the corporation does not provide otherwise:
>
> (a) every member shall be entitled to participate in the carrying on of the business of the corporation;
>
> (b) subject to the provision of section 47, members shall have equal rights in regard to the management of the business of the corporation and in regard to the power to represent the corporation in the carrying on of its business: Provided that the consent in writing of a member holding a member's interest of at least 75 per cent, or of members holding together at least that percentage of the

38 s 44(3)

39 s 44(4)

40 s 44(5)

members' interests, in the corporation, shall be required for -

(i) a change in the principal business carried on by the corporation;

(ii) a disposal of the whole, or substantially the whole, undertaking of the corporation;

(iii) a disposal of all, or the greater portion of, the assets of the corporation; and

(iv) any acquisition or disposal of immovable property by the corporation;

(c) differences between members as to matters connected with a corporation's business shall be decided by majority vote at a meeting of members of the corporation;

(d) at any meeting of members of a corporation each member shall have the number of votes that corresponds with the percentage of his interest in the corporation;

(e) a corporation shall indemnify every member in respect of expenditure incurred or to be incurred by him -

(i) in the ordinary and proper conduct of the business of the corporation; and

(ii) in regard to anything done or to be done for the preservation of the business or property of the corporation; and

(f) payments by a corporation to its members by reason only of their membership in terms of section 51(1)

shall be of such amounts and be effected at such times as the members may from time to time agree upon, and such payments shall be made to members in proportion to their respective interests in the corporation.

3.21. Any member or class of members (e g members who belong to a particular racial 'group' as defined in the Group Areas Act 36 of 1966) can be excluded from participating in the carrying on of the business of the close corporation if an association agreement so provides. Such exclusion from participation in the carrying on of the business need not necessarily imply that such member or class of members ipso facto loses control or loses a 'controlling interest' in the corporation if he or they nevertheless retain the power to exercise some control over the activities or assets of the corporation.[41]

3.22. For as long as the provisions of s 46(b) concerning equal rights in the management of the business of the close corporation are not varied by an association or other members' agreement, it is possible that a corporation can be so structured with regard to the composition of its members that no one natural person and/or no class of natural persons belonging to a particular group can be said to have a controlling interest in the corporation as this term is defined in the Group Areas Act.[42]

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41 See 3.46-3.48

42 See 3.44 and 3.59-3.68

3.23. By varying the provisions of s 46(c) in an association agreement, a particular member or class of members can be given a preponderant or entire power to decide upon differences between members.[43]

3.24. Similarly, an association agreement can provide that each member shall be allocated votes on a basis other than that a member's vote shall correspond with the percentage of his interest in the corporation. A particular member or class of members could, therefore, be allocated a majority or preponderance of votes or a casting vote at meetings of members.[44]

3.25. As in 3.23 and 3.24 above, the provisions of s 46(f) can be varied so that 'payments by a corporation to its members by reason only of their membership in terms of s 51(1)' shall be made to members on some basis other than in proportion to their respective percentage interests in the corporation.[45]

3.26. Members are afforded some protection against unfairly prejudicial, unjust or inequitable treatment by s 49 of the Close Corporations Act. Any member who alleges that any particular act or omission of the close corporation or of one or more other members is unfairly prejudicial, unjust or

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43 Cf 3.65

44 Ibid

45 Ibid

inequitable to him, or to some members including him, or that the affairs of the corporation are being conducted in a manner so as to have such an effect, may apply to a court for relief.[46] If it appears to the court that the particular act or omission is unfairly prejudicial, unjust or inequitable or that the corporation's affairs are being conducted as so contemplated, and if the court concerns it just and equitable, the court may with a view to settling the dispute make such order at it thinks fit, whether for regulating the future conduct of the affairs of the corporation or for the purchase of the interest of any member of the corporation by other members or by the corporation.[47] Any alteration or addition to the founding statement or association agreement or replacement of any association agreement ordered by the court shall have effect as if it were duly made by agreement of the members concerned.[48]

3.27. Any payment by a close corporation to any member by reason only of his membership may be made only:

(a) if, after such payment is made, the corporation's assets, fairly valued, exceed all its liabilities;

(b) if the corporation is able to pay its debts as they become due in the ordinary course of its business; and

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46 s 49(1)

47 s 49(2)

48 s 49(3)

(c) if such payment will in the particular circumstances not in fact render the corporation unable to pay its debts as they become due in the ordinary course of its business.[49]

The capital maintenance rule associated with companies does not apply to close corporations, which need only ensure that they remain solvent and liquid after distributing profits in the proportions and at such times as the members agree upon.

3.28. As is the case with companies, any contract in writing entered into by a person professing to act as an agent or a trustee for a close corporation not yet formed, may be ratified or adopted by the corporation after its incorporation as if the corporation had been duly incorporated at the time the contract was entered into.[50] It is therefore competent for a corporation to ratify or adopt an agreement in terms of which it acquires property or a right to property (such as a lease) when such agreement was entered into by one of its potential members or an agent or trustee before incorporation and registration.

3.29. If the relationship between any company and any close corporation is such that the corporation, if it were a company, would be a holding company of such company, the provisions of s 37 of the Companies Act 61 of 1973 regarding:

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49 s 51(1)

50 s 53(1)

(a) the employment of funds of a company in a loan to, or

(b) the provision of any security by a company to another person in connection with an obligation of,

its holding company, or a company which is a subsidiary of that holding company but is not a subsidiary of itself, shall mutatis mutandis apply in relation to any such employment of funds or provision of security by any such company in respect of any such corporation and in respect of any company which would be a subsidiary of the corporation were it a company, but which is not a subsidiary of the first-mentioned company.[51]

3.30. In such a case the provisions of s 226 of the Companies Act 61 of 1973 regarding the making by a company of any loan to or the provision of security by a company to another person in connection with any obligation of:

(a) any director or manager of the company's holding company or of another company which is a subsidiary of its holding company; or

(b) another company controlled by one or more directors

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51 s 55(1)

or managers of the company's holding company or of a company which is a subsidiary of its holding company

shall mutatis mutandis apply in relation to any such loan or provision of security by any such company in respect of -

(i) any member or officer of any such corporation, or any director or officer of another company which would be a subsidiary of any such corporation were the corporation a company; and

(ii) another company controlled by one or more members of any such corporation or by one or more directors or managers of a company which would be a subsidiary of the corporation were it a company.[52]

References to directors or officers in the relevant provisions of the Companies Act shall be construed as a reference to any member or officer of a corporation, as the case may be.[53]

3.31. Whenever a court on application by an interested person, or in any proceedings in which a close corporation is involved, finds that the incorporation of, or any act by or on behalf of, or any use of, a corporation constitutes a gross abuse of the juristic personality of the corporation as a separate entity, the court may declare that the corporation is

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52 s 55(3)

53 ss 55(2) and (4)

to be deemed not to be a juristic person in respect of such rights, obligations or liabilities of the corporation, or of such member or members thereof, or of such other person or persons as are specified in the declaration and the court may give such further order or orders as it may deem fit in order to give effect to such declaration.[54]

3.32. The close corporation, then, is a juristic person with no fixed capital base, having perpetual succession and offering limited liability to its members. In any corporation having more than one member[55] certain principles of partnership have been grafted onto the Close Corporations Act insofar as its internal management is concerned.

3.33. The fact that a member's interest in a close corporation is a 'single interest expressed as a percentage' makes the interest comparable to a partner's interest in a partnership. The size of the interest and its correlative rights depend on the number of members and the agreements they reach as to their respective rights of participation in the carrying on of the business and management of the business, voting powers, size of profit shares etc. Geach and Schoeman say that 'the use of the word "single" merely indicates that a member can only have one interest in a corporation to which a

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54 s 65. See also 7.5

55 As close corporations with single members have the same group character as that of their single members, this enquiry will concern itself only with corporations having more than one member. In this regard see 3.59 and 4.5(a)

number of different rights may nevertheless attach. A member cannot however have more than one interest with different rights attaching to each interest'.[56] A member may therefore not have two discrete interests in the way that a shareholder of a company can own two or more discrete shares. Geach and Schoeman further distinguish the rights of company shareholders and corporation members as to the admission of new members to the respective juristic persons.[57] In a company a minority shareholder is not able to dictate who will and who will not be permitted to join the company, but in a corporation a member has a right to refuse to allow a person to join the corporation regardless of the wishes of the other members or the preponderance of their interests in the corporation.[58]

Disqualification

3.34. Commenting on the general scheme of the Group Areas Act 36 of 1966 ("the Act") Van Reenen says:

> The principle underlying this Act is the apportionment of land (either the whole or portion of South Africa) among various groups. There are thus two main elements to be considered, which will be referred to as 'Groups' and 'Areas'. Consideration must, then, be given to the various

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56 W D Geach and T Schoeman Guide to the Close Corporations Act and Regulations (1984), p 534

57 Op cit p 537

58 See ss 34(2), 35(b)(iii), 36(2) and 37

> groups envisaged by the Act and to various areas which are to be allocated to such groups.[59]

The third main element is that of the respective rights that members of a 'group' (whether they are natural or juristic persons) have in respect of the ownership of immovable property and occupation and use of land and premises in the different areas. Central to this enquiry is the notion of 'disqualification' as used in the Act.

3.35. Section 1(1) of the Act provides that 'person':

> shall not be limited in its meaning by reason of any special reference to a disqualified person, a disqualified company, a private company, a company referred to in section 37 or a statutory body.

In other words, the word 'person' has its ordinary legal meaning and includes juristic as well as natural persons and a company is therefore a person for the purposes of the Act.[60]

3.36. Section 1(1) of the Act provides that the word 'company':

> includes any private company, any company referred to in section 37, any foreign company as defined in section 229 of the Companies Act, 1926 (Act No 46 of 1926), any corporate or unincorporated association

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59 Van Reenen E.1.1, p 113

60 Van Reenen E.3.1, p 134. Note that, with the exception of paras 3.1-3.33, all references to sections are references to sections of the Group Areas Act 36 of 1966. Cf note 1 to 3.1

> of persons, and any registered or unregistered corporate body other than a statutory body.

3.37. It has been established[61] that a close corporation is a registered corporate body other than a statutory body. A close corporation must therefore be a 'company' for the purposes of the Act and any reference to 'company' in the Act must be deemed to refer also to a close corporation. Accordingly, from this point all references to co ies in the text of this enquiry shall also refer to cl rporations, unless the context indicates otherwise.

3.38. The Act does not, in its language, expressly entitle 'qualified' persons to own immovable property and occupy and use land and premises. These are common law rights which the Act disentitles 'disqualified' persons from enjoying.[62] It is therefore necessary to enquire into how a natural person or company may be or become disqualified.

3.39. Section 1(1) of the Act provides that 'disqualified company':

> in relation to immovable property, land or premises, means a company wherein a controlling interest is held or deemed to be held by or on behalf or in the interest of a person who is a disqualified person in relation to such property, land or premises.

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61 See 3.1

62 See, for example, ss 13(1), 20(1), 26(1), 27(1)(a), (b) and (c) and 35

An examination of the concepts of disqualified person and controlling interest is therefore required.

3.40. 'Disqualified person' is defined in s 1(1) of the Act as meaning:

(a) in relation to immovable property, land or premises in any group area:

> a person who is not a member of the group specified in the relevant proclamation under section 23, and

(b) in relation to any immovable property, land or premises in the controlled area:

> a person who is not a member of the same group as the owner of such property, land or premises (or if the owner is a statutory body other than a municipality or division in the province of the Cape of Good Hope, in the same group as the majority of the members of such body, or in the case of such municipality or division, of the same group as the majority of the members of the council thereof)

or if the owner is a company:

a person of any group if a controlling interest in that company is held or deemed to be held by or on behalf or in the interest of a person who is a member of another group.

3.41. As to disqualification in respect of immovable property, land or premises in any group area, a person not belonging to the group specified in the proclamation under s 23 is simply disqualified. This is relatively easy when the person in question is a natural person, but a consideration of the controlling interest will have to be taken into account when the person in question is a company.[63]

3.42. In the controlled area disqualification occurs when a person does not belong to the group to which the owner belongs. Four possibilities arise:

(a) the owner is a natural person, the other person is a natural person;

(b) the owner is a natural person, the other person is a company;

(c) the owner is a company, the other person is a natural person; and

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63 See 3.44 et seq

(d) the owner is a company, the other person is a company.

Re (a): it is necessary to establish the group to which the owner and other person each belong, and, if the two groups match, the other person will not be disqualified in respect of the owner's property. This enquiry is not concerned with such a situation, being concerned with those situations involving close corporations.

Re (b): it is necessary to examine the controlling interests in the company (the other person) in order to determine whether or not this company is disqualified in relation to the owner's property. The company will be a disqualified company if any controlling interest is held or deemed to be held by or on behalf or in the interest of a person, whether natural or juristic, who is a disqualified person in relation to such property, land or premises (i e is not a member of the same group as the owner).

Re (c): it is necessary to establish the group to which each controlling interest holder of the owner company belongs to see if the other person belongs to a different group from the group to which any controlling interest holder belongs. If he does, he will be disqualified.

Re (d): it is necessary to establish the group to which each controlling interest holder of the owner company belongs, the

group to which each controlling interest holder of the other company belongs and then to see if they correspond. If they do not correspond in every way, the non-owning company will be disqualified.

3.43. It is therefore clear that a company's qualification or disqualification in a group area and in the controlled area depends on the group to which the holder or deemed holder of any controlling interest in the company belongs.

Controlling Interest

3.44. In terms of the definition in the Act, 'controlling interest' in relation to any company means:

(a) a majority of its shares; or

(b) shares representing more than half its share capital; or

(c) shares of a value in excess of half the aggregate value of all its shares; or

(d) shares entitling the holders thereof to more than half its profits or assets; or

(e) shares entitling the holders thereof to a majority or preponderance of votes; or

(f) any interest acquired by virtue of the grant of loans for an amount exceeding in the aggregate half its share capital, or debentures for such an amount; or

(g) the power to exercise, directly or indirectly, by holding any interest, whether or not of the nature referred to in paragraphs (a) to and including (f), in any other company, or otherwise, any control whatsoever over the activities or assets of the company:

Provided that in the case of an association of persons a controlling interest therein shall be deemed to be held by a person of the same group as the majority of the members thereof.

3.45. It is submitted that paragraphs (a)-(f) of the definition of controlling interest only contemplate companies having a share capital and incorporated under the Companies Act 61 of 1973, or preceding companies legislation.[64] Associations not for gain incorporated under s 21 of the Companies Act are companies limited by guarantee and which do not have a share capital.[65] These paragraphs also do not apply to corporate or unincorporated associations of persons (e g partnerships),[66] nor to any registered or unregistered corporate body other than a statutory body not having a share capital.

3.46. Van Reenen states:

> In the final analysis, controlling interest is a question of fact, and it would seem therefore that

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64 See s 19(1)(a) of Act 61 of 1973

65 See ss 19(1)(b) and 21(1) of Act 61 of 1973

66 See the proviso to the definition of 'controlling interest'

> all the factors enumerated in the definition of controlling interest, except the last, are superfluous, as they do not really assist in determining what the controlling interest is. It would perhaps be better to have defined controlling interest as being the power to exercise control, directly or indirectly, in any way whatsoever, over the activities or assets of the company. The remaining factors merely serve as illustrations or examples of what in appropriate cases would constitute the power to exercise control.[67]

3.47. Certainly, the controlling interest in a close corporation can only be determined, in the first instance, by applying the provisions of paragraph (g) to the respective interests of the members of the corporation. This is because close corporations do not have share capital.[68]

3.48. If paragraphs (a)-(f) of the definition of controlling interest are excluded from this analysis, the definition of controlling interest can be confined to meaning:

(i) the power to exercise,

(ii) by holding any interest,

(iii) any control whatsoever over the activities or assets of the company.

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67 Van Reenen E.3.21, p 139

68 See 3.4 and 3.32

The words 'directly or indirectly' merely qualify the exercise of control. Furthermore, the words 'whether or not of the nature referred to in paragraphs (a) to and including (f)' indicate that the contents of paragraphs (a)-(f) are merely an illustrative, but not exhaustive, list of the interests contemplated by paragraph (g). The fact that paragraphs (a)-(f) contemplate interests which can only apply to companies having a share capital does not so limit the interests contemplated by paragraph (g) of the definition. The fact that the interest may either be held directly in the company in question itself or indirectly by holding an interest in any other company which has the power to exercise any control over the company in question does not limit the nature of the interest.

3.49. It is submitted that the proviso[69] to the definition of controlling interest has no application in the case of a close corporation because a corporation is not an association of persons, but is rather a registered corporate body, a juristic person continuing to exist as such notwithstanding changes in its membership.[70] Nevertheless, because certain principles of partnership have been grafted on to the close corporation as far as its internal management is concerned,[71] it is advisable ex abundantia cautela to proceed with the analysis of controlling interest in the close corporation on a dual basis. The first

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69 See 3.44

70 See 3.1 and 3.32

71 See 3.3 and 3.20

approach will assume that the proviso to the definition of controlling interest has no application in the case of a close corporation,[72] while the second approach will assume that the proviso does apply to the close corporation.[73]

3.50. Section 1(2) of the Act states:

> A controlling interest in a company wherein a controlling interest is not held or deemed under any other provision of this Act to be held by or on behalf or in the interest of any person, shall for the purposes of this Act be deemed to be held by any person who holds any shares in that company or who has any interest in that company arising out of the grant by him of a loan to or debentures issued by that company.

Dison and Mohamed state:

> This deeming provision has hit also at ... the company the controlling interest in which is held by the members of no group. Public companies were formed after the 1932 restrictions were enacted, and the shareholdings were arranged in such a way that no group had a controlling interest in the company and there was nothing to prevent such a company from holding fixed property. The usual arrangement was something of this kind: a European would hold 100 shares, an Indian 100 shares, and a Coloured man would have 100 shares, but the deeming provision in Section 1(2) of the Act will now result in such a

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72 See 4.3

73 See 4.4 and 7.5

company being deemed to be one the controlling interest in which is held by members of the Indian group (the Coloured group and the White group).[74]

3.51. The intention of this subsection is that where there is no other way of determining who holds a controlling interest then such interest is deemed to be held by:

(a) any shareholder in the company; or

(b) any person who has any interest in that company, either -

(i) because he has granted a loan to the company; or

(ii) because he holds debentures issued by that company.[75]

3.52. It is submitted that the provisions contained in 3.51(a) above cannot be satisfied because no member of the close corporation 'holds any shares' in the corporation within the meaning of the word 'shares' as used in the Act. As the legislature has not amended the Act to provide that a controlling interest shall also be deemed to be held by any member of a corporation, it must be presumed not to have

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74 Op cit, pp 16-17

75 Van Reenen E.3.23, p 140

intended such a deeming. The only two remaining possibilities are contained in 3.51(b)(i) and (ii) above.

3.53. According to s 1(2), when a controlling interest in a company is not held or deemed to be held by or on behalf or in the interest of any person, any person who has an interest in the company because he has granted a loan to the company or because the company has issued him with debentures will be deemed to hold a controlling interest in the company. It is significant to note that:

(a) the person in question must have an interest in the company; and

(b) that interest must arise out of his loan to the company or the issue to him by the company of debentures.

It is submitted that there are two possible interpretations of the word 'interest'. On a strict interpretation the grantor of a loan ipso facto has an interest by virtue of his pecuniary stake in the company or close corporation. In return for the loan the grantor acquires a personal creditor's right to claim back the capital amount and interest, if any. Yet this creditor's right does not entitle the grantor of the loan to any say in the conduct of the affairs of the company or corporation. Still less does it entitle him to influence the company or corporation's conduct and fate. For example, a man

who monthly deposits a sum of R30 into a savings account with a bank or other deposit-taking institution has no influence over the management or business of that bank or institution. It would be ridiculous to deem that he had a controlling interest in the borrowing bank. It is submitted that s 1(2) is not intended to render such a result.

3.54. Instead, it is submitted that s 1(2) is intended only to deem that a controlling interest shall be held by any grantor of a loan who, by virtue of that loan, has an interest in the company or close corporation in the sense that he is able to influence the borrower's conduct and fate. This ability to influence the borrower's conduct and fate is a question of fact. Thus, a member having a ten per cent member's interest in and a loan account with a close corporation could be deemed to have a controlling interest in it depending on whether or not he thereby had a prevalent say in the conduct and fate of the corporation vis-à-vis the other members.

3.55. A debenture is a formal acknowledgement of debt by a company. It may be secured or unsecured.[76] An unsecured debenture differs only in minor respects from an ordinary loan[77] and the unsecured debenture holder, like the grantor of a loan, has only a personal creditor's right against the debtor. For the same reasons as given in 3.53 and 3.54, above it is

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76 H R Hahlo South African Company Law Through the Cases 4 ed (1984), pp 206-208

77 For example, it may be notarially executed which will assist in its proof

submitted that 'interest' in s 1(2) should not be interpreted strictly and that the debenture holder should only be deemed to have a controlling interest if the holding of that unsecured debenture confers on him the ability to influence the conduct and fate of the company or corporation issuing the debenture. This will depend upon the terms of the debenture. Nor is it likely that the position would be very different if the debenture in question was secured by the binding of movable or immovable property. This would merely confer on the holder a 'floating charge' over notarially bonded movable property or a specific charge over mortgaged immovable property. The creditor would be entitled respectively to a preferential right in the 'free residue' or to rank as a secured creditor if the company or corporation issuing the secured debenture went insolvent. The secured debenture would no more confer the ability to influence the conduct and fate of the company or corporation than would an unsecured debenture, unless the terms of the debenture specifically conferred such an ability. Again, this is a question of fact.

3.56. Van Reenen's view is that the holding of a mortgage by a disqualified person over property belonging to a company does not give the mortgagee a controlling interest in that company.[78] This is because:

> ...in the normal run of business affairs the holder of the mortgage has no interest in the conduct of the

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78 Van Reenen E.3.43, p 143

> affairs of the company and can in no way influence such affairs. It is clear that section 1(1)(vii)(f) refers only to such advances to the company which would entail the lender's having an interest in the conduct of the affairs of the company.[79]

It is submitted that this view, which hinges upon the interpretation of 'interest', is correct. If a mortgage bond held as security for a loan for an amount exceeding in the aggregate half of the share capital of the company, or debentures for such an amount,[80] does not constitute a controlling interest it is very much less likely that 'any interest in that company arising out of the grant ... of a loan to or debentures issued by that company'[81] will constitute a controlling interest.

3.57. Alternatively, and should the submissions in 3.53-3.54 above be incorrect, a controlling interest could not, in terms of s 1(2), be deemed to be held by any person in a close corporation :

(a) which accepted no loans from any person; and/or

(b) which issued no debentures.

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79 Ibid

80 See para (f) of the definition of controlling interest

81 See s 1(2)

3.58. It is therefore submitted that the question of controlling interest in respect of the close corporation is a question of fact and that the provisions of s 1(2) cannot be invoked in order to deem a controlling interest where one does not exist in fact. The only remaining provision whereby a controlling interest can be deemed to be held by or on behalf or in the interests of any member of any group is s 38. The effect of s 38 is discussed at 6.10-6.13 below where it is argued that a controlling interest cannot be deemed to be held in such a way in respect of certain model close corporations, called 'groupless corporations'.

Control of Close Corporations

3.59. If a controlling interest is 'the power to exercise control, directly or indirectly, in any way whatsoever, over the activities or assets of the company'[82] and if this is a question of fact, it becomes necessary to analyse how corporations may be controlled. It is clear that if a single person has the power to exercise the control in question he will have a controlling interest in the corporation. Indeed, he will have the only controlling interest in the corporation. Thus, whenever a close corporation has one member, that member can be said to have the power to exercise the control in question and thereby to have a controlling interest in the corporation. As a single-member corporation will have the racial character of its single member, this enquiry is not concerned with

82 See 3.46

corporations having only one member.[83] Instead, means of factual control of corporations having more than one member will be examined.

3.60. As a point of departure a simple close corporation having two members will be considered. If the size of each member's interest was the same and if the members decided not to conclude an association agreement, but simply to let the Close Corporations Act govern internal relations of the corporation:

(a) each member would be entitled to participate in the carrying on of the business of the corporation;[84]

(b) as long as neither member became disqualified in terms of s 47 of the Close Corporations Act, each member would have equal rights in regard to the management of the business of the corporation and in regard to the power to represent the corporation in the carrying on of its business.[85] The consent in writing of members holding together 75 per cent of the members interests in the corporation (i e both members) would be required for -

(i) a change in the principal business carried on by the corporation;[86]

(ii) a disposal of the whole, or substantially

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83 See note 55 to 3.32 and 4.5(a)

84 See 3.20 for s 46(a) of Act 69 of 1984

85 Ibid and s 46(b)

86 Ibid and s 46(b)(i)

the whole, undertaking of the corporation;[87]

(iii) a disposal of all, or the greater portion of, the assets of the corporation;[88] and

(iv) any acquisition or disposal of immovable property by the corporation;[89]

(c) differences between the members concerning the corporation's business would have to be decided by majority vote at a meeting of members of the corporation (i e unanimously if there were two members).[90]

(d) at any meeting of the members of the corporation each would have the number of votes that corresponded with his percentage interest (i e 50 per cent each, so any decision would have to be reached unanimously if there were two members);[91]

(e) the members would have to agree when dividends would be paid and how much would be paid on each occasion. In the absence of any other agreement each would receive equal shares of these dividends (i e 50 per cent each if there were two members).[92]

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87 Ibid and s 46(b)(ii)

88 Ibid and s 46(b)(iii)

89 Ibid and s 46(b)(vi)

90 Ibid and s 46(c)

91 Ibid and s 46(d)

92 Ibid and s 46(f)

3.61. It therefore appears that neither of the members would be able to direct or command that the corporation should engage in any particular activity. Nor could either determine that any of the assets of the corporation should be subjected to a particular fate. Neither member could therefore be said to have the power to exercise any positive control over the activities or assets of the corporation because that member could be thwarted by the other's refusal to agree on the said activity or fate of the assets. Therefore a member could only be said to exercise a negative control over the activities or assets of the corporation in that he had a right of veto.

3.62. In a corporation identical to that considered in 3.60 above save for having three members, no single member alone could veto an activity of the corporation or a decision which would affect its assets because he could be outvoted by the other two members. No single member could therefore be said to have the power to exercise even a negative control over the activities or assets of the corporation. The only qualification to this rule is that all three would have to consent in writing for a change in the principal business, disposal of the whole or substantially the whole undertaking or assets of the corporation and any acquisition or disposal of immovable property by the corporation (i e one member could veto any of these acts).[93]

3.63. Still less could a corporation identical to that considered in 3.60 above save for having four members be

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93 See 3.20, s 46(b)

said to be controlled by any one member. No single member could exercise any positive or negative control over the activities or assets of the corporation, nor even any veto on those activities and acts affecting assets for which special rules have been provided in s 46(b) of the Close Corporations Act.[94] In such a corporation a single member's dissent could be overridden by the votes of the other three members, none of whom could individually be said to have a controlling interest merely because two other members voted similarly on the same issue.

3.64. For the same reasons, a similar corporation save for having five or more members (up to a maximum of ten members)[95] could not be said to be controlled by any single member.

3.65. No member can therefore be said to have a controlling interest, within the meaning of paragraph (g) of the definition of controlling interest in the Act, in a close corporation ('a model corporation'):

(a) having more than one member;

(b) in which no member has -

(i) a member's interest of more than fifty per cent;

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94 Ibid

95 See 3.1

(ii) a member's interest entitling him to more than half of the profits or assets of the corporation; and/or

(iii) a member's interest entitling him to a majority or preponderance of votes in the corporation;

(c) in respect of which no association agreement varies the rules contained in paragraphs (a),(b),(c),(d) and (f) of s 46 of the Close Corporations Act 69 of 1984; and

(d) which has not issued any debentures entitling the bearer thereof to any rights in regard to it.[96]

3.66. The important consequence of the fact that no member of such a model corporation can be said to have a controlling interest is that the said corporation cannot be regarded as a disqualified company for the purposes of the Act. One might say that such a corporation is a 'qualified company'. A company is disqualified in relation to immovable property, land or premises if a controlling interest in that company is held or deemed to be held by or on behalf of or in the interest of a person who is a disqualified person in relation to such

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96 See 6.6-6.7. It is not considered necessary to include the safeguard mentioned in 3.57 in this model

property, land or premises.[97] Thus, whenever the Act refers to a disqualified company[98] it cannot be interpreted to refer to a model corporation of the type considered in 3.65 above. It is possible that the model corporation's common law rights to own, occupy and use immovable property, land and premises will therefore not be curtailed in the same way as those of disqualified companies.[99]

3.67. It is submitted that this conclusion also applies to model corporations having two or three members, but it is possible that the 'veto power' of members in these instances could be held to amount to a controlling interest or could be deemed to amount to a controlling interest. It is therefore advisable to bear this possibility in mind when further analysing the structure of these model corporations.[100]

3.68. Model corporations of the sort described in this chapter do not acquire any racial group character and will therefore be referred to as 'groupless corporations' for ease of reference.

3.69. Van Reenen's view[101] is that, in a company in which controlling interests are held by more than one person

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97 See 3.39

98 See, for example, ss 13(1), 27(1)(a), (b) and (c), 35

99 See chapter 5 for a detailed discussion

100 See 4.3 and 4.4

101 Op cit E.3.7, p 135 and E.3.18-20, pp 138-139

belonging to at least two different groups,

> ... the scales will be weighed down by the 'power to control'. If, after full analysis, the power is equally balanced in the hands of two or more persons, a company must be deemed to be of a dual (or multiple) character and it will be disqualified in each of its characters. Thus, a company could be disqualified because it is Indian and also because it is white, if a white and an Indian equally hold the power to exercise control. Such a position was no doubt contemplated by the legislature.[102]

3.70. It is submitted that van Reenen's remarks pertain only to companies in which there are two or more controlling interests. There are no controlling interests in groupless corporations. In the example he cites at E.3.19 van Reenen is dealing with shareholders whose interests comply with the terms of paragraphs (a)-(f) of the definition of controlling interest. Their interests are therefore ipso facto controlling interests. In the case of groupless corporations under discussion the requirements of paragraphs (a)-(f) of the definition are not capable of satisfaction. A controlling interest can only be found to exist in terms of paragraph (g) of the definition if a member can be said to have the power to exercise control, in any way whatsoever, over the activities or assets of the corporation.[103] This is a question of fact and,

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102 Op cit E.3.20, p 139

103 See 3.44-3.48

it is submitted, it has been shown that there is not even one controlling interest in a groupless corporation.[104]

3.71. It is submitted that, emerging from this chapter, close corporations structured in certain ways are not and cannot be deemed to be 'disqualified companies' or 'disqualified persons' in terms of the Act. Instead, they could be called qualified companies. This will be seen to have important consequences in regard to the ownership, occupation and use of immovable property, land and premises governed by the Act. Chapter 4 will consider the ways in which such corporations, referred to as groupless corporations, can be structured. The implications of groupless corporations in regard to the ownership, occupation and use of immovable property, land and premises under the Act will be considered in chapter 5.

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104 See 3.60-3.68. The groupless corporation's position would be the same as that of the company in Dison & Mohamed's example cited in 3.50, before the enactment of s 1(2)

CHAPTER 4

THE CLOSE CORPORATION:

FORMALLY AND STRICTLY GROUPLESS CORPORATIONS

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- Formally groupless corporations 4.3
- Strictly groupless corporations 4.4

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- Membership permutations in groupless corporations comprising persons belonging to:
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  - Formally groupless corporations Table 4.7
  - Strictly groupless corporations Table 4.8

Structure

4.1. The enquiry in chapter 3 showed that corporations structured and organized in certain ways as to their membership and internal relations will:

(a) be 'companies';

(b) in respect of which no member can be said to have a 'controlling interest';

(c) and which cannot be branded as 'disqualified companies' or 'disqualified persons';

in the sense that each of these terms is defined in the Act.[1] Corporations of this sort will be referred to as 'groupless corporations'.

4.2. Given the fact that there are six groups[2] for the purposes of the Act and that no corporation may have more than ten members,[3] there will be a finite set of groupless corporations. Before tabulating the possible permutations between any given number of groups and any given number of members in a groupless corporation it is desirable further to distinguish two varieties of groupless corporation.

Formally Groupless Corporations

4.3. The first variety is made up of those corporations which, in the structure of their membership and in their internal organization, formally comply with the definition of groupless corporation.[4] In this category certain groupless corporations may have a majority of members who belong to a single group, though none of them can be said to have a controlling interest in the corporation. A corporation in this

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1 See 3.36, 3.44, 3.39 and 3.40

2 See 4.5(b)

3 See 3.1

4 See 3.65 and 3.68

category will be referred to as a 'formally groupless corporation' because of its formal compliance with the definition.

Strictly Groupless Corporations

4.4. The second variety of groupless corporation, a subset of the first, comprises those corporations which formally comply with the definition of a groupless corporation, consist of more than three members,[5] and in which no majority of members in number belongs to one particular group.[6] A corporation in this category will be referred to as a 'strictly groupless corporation' because, even if the proviso to the definition of controlling interest is held to be applicable to close corporations, there is no majority of members in number belonging to one group and, therefore, no member who can be deemed hold a controlling interest.[7]

4.5. Certain limiting factors will have to be borne in mind before attempting to tabulate the finite set of groupless corporations, both formal and strict. These are:

(a) There can be no groupless corporations with a single member. It is obvious that the sole member of any one-member corporation will have a controlling

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5 See 3.67

6 See 3.49

7 See 3.49

interest in the corporation, indeed the only controlling interest in it. For as long as this sole member belongs to any of the groups the corporation will be disqualified in relation to any immovable property, land or premises in relation to which the sole member is disqualified.

(b) The minimum number of groups represented in a formally groupless corporation is one and in a strictly groupless corporation the minimum is two. The maximum possible number of groups in a corporation is six. The groups are:

(i) the white group;

(ii) the Black group;

(iii) the coloured group;

(iv) the Indian group;

(v) the Chinese group; and

(vi) the Malay group.[8]

(c) The maximum number of members in a corporation is ten.[9]

(d) The number of members in a corporation can never be less than the number of groups represented in that

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8 See s 12(1) and Proclamation 28 of 1961 in Government Gazette No 6620 of 3 February 1961, deemed to have been made under s 12(2)

9 See 3.1

corporation (for example, no corporation in which four groups are represented can have fewer than four members). The converse is not necessarily true because there can be fewer groups represented in a corporation than the number of its members (for example, the seven members of a corporation may belong to only two groups). The limiting factor is therefore the number of groups represented in the corporation.

4.6. Taking the above limitations into account, the possible permutations between any given number of groups and any given number of members in a groupless corporation are tabulated in Tables 4.1-4.6. The letters A-F allocated to the representation of groups in a corporation do not respectively bear any relationship to any group as defined in the Act, but are merely used for illustrative purposes.

4.7. The number of possible permutations between any given number of groups and number of members in a formally groupless corporation is summarised in Table 4.7. There is a total of 122 possible permutations of formally groupless corporations.

4.8. The number of possible permutations between any given number of groups and number of members in a strictly groupless corporation is summarised in Table 4.8. There is a

total of 69 possible permutations of strictly groupless corporations.

4.9. An enquiry into the practical application of the concept of groupless corporations to the acquisition of immovable property and occupation and use of land and premises will be made in chapter 5.

Tables

No of Members	Permu-tation Number	Group A	B	C	D	E	F	Strictly Groupless Corp (*)
1	N/A**							
2	1	2 A						
3	2	3 A						
4	3	4 A						
5	4	5 A						
6	5	6 A						
7	6	7 A						
8	7	8 A						
9	8	9 A						
10	9	10 A						

Table 4.1: The permutations of membership of a groupless corporation comprising persons belonging to a single group.

** Group Character.

No of Members	Permu-tation Number	Group A	B	C	D	E	F	Strictly Groupless Corp (*)
1	N/A							
2	10	1 A	1 B					
3	11	2 A	1 B					
4	12 13	3 A 2 A	1 B 2 B					*
5	14 15	4 A 3 A	1 B 2 B					
6	16 17 18	5 A 4 A 3 A	1 B 2 B 3 B					*
7	19 20 21	6 A 5 A 4 A	1 B 2 B 3 B					
8	22 23 24 25	7 A 6 A 5 A 4 A	1 B 2 B 3 B 4 B					*
9	26 27 28 29	8 A 7 A 6 A 5 A	1 B 2 B 3 B 4 B					
10	30 31 32 33 34	9 A 8 A 7 A 6 A 5 A	1 B 2 B 3 B 4 B 5 B					*

Table 4.2: The permutations of membership of a groupless corporation comprising persons belonging to two groups.

No of Members	Permutation Number	Group A	B	C	D	E	F	Strictly Groupless Corp (*)
1	N/A							
2	N/A							
3	35	1 A	1 B	1 C				
4	36	2 A	1 B	1 C				*
5	37	3 A	1 B	1 C				
	38	2 A	2 B	1 C				*
6	39	4 A	1 B	1 C				
	40	3 A	2 B	1 C				*
	41	2 A	2 B	2 C				*
7	42	5 A	1 B	1 C				
	43	4 A	2 B	1 C				
	44	3 A	3 B	1 C				*
	45	3 A	2 B	2 C				*
8	46	6 A	1 B	1 C				
	47	5 A	2 B	1 C				
	48	4 A	3 B	1 C				*
	49	4 A	2 B	2 C				*
	50	3 A	3 B	2 C				*
9	51	7 A	1 B	1 C				
	52	6 A	2 B	1 C				
	53	5 A	3 B	1 C				
	54	5 A	2 B	2 C				
	55	4 A	4 B	1 C				*
	56	4 A	3 B	2 C				*
	57	3 A	3 B	3 C				*
10	58	8 A	1 B	1 C				
	59	7 A	2 B	1 C				
	60	6 A	3 B	1 C				
	61	6 A	2 B	2 C				
	62	5 A	4 B	1 C				*
	63	5 A	3 B	2 C				*
	64	4 A	4 B	2 C				*
	65	4 A	3 B	3 C				*

Table 4.3: The permutations of membership of a groupless corporation comprising persons belonging to three groups.

No of Members	Permu-tation Number	Group A	B	C	D	E	F	Strictly Groupless Corp (*)
1	N/A							
2	N/A							
3	N/A							
4	66	1 A	1 B	1 C	1 D			*
5	67	2 A	1 B	1 C	1 D			*
6	68	3 A	1 B	1 C	1 D			*
	69	2 A	2 B	1 C	1 D			*
7	70	4 A	1 B	1 C	1 D			
	71	3 A	2 B	1 C	1 D			*
	72	2 A	2 B	2 C	1 D			*
8	73	5 A	1 B	1 C	1 D			
	74	4 A	2 B	1 C	1 D			*
	75	3 A	3 B	1 C	1 D			*
	76	3 A	2 B	2 C	1 D			*
	77	2 A	2 B	2 C	2 D			*
9	78	6 A	1 B	1 C	1 D			
	79	5 A	2 B	1 C	1 D			
	80	4 A	3 B	1 C	1 D			*
	81	4 A	2 B	2 C	1 D			*
	82	3 A	3 B	2 C	1 D			*
	83	3 A	2 B	2 C	2 D			*
10	84	7 A	1 B	1 C	1 D			
	85	6 A	2 B	1 C	1 D			
	86	5 A	3 B	1 C	1 D			*
	87	5 A	2 B	2 C	1 D			*
	88	4 A	3 B	2 C	1 D			*
	89	4 A	2 B	2 C	2 D			*
	90	3 A	3 B	3 C	1 D			*
	91	3 A	3 B	2 C	2 D			*

Table 4.4: The permutations of membership of a groupless corporation comprising persons belonging to four groups.

No of Members	Permu-tation Number	Group A	B	C	D	E	F	Strictly Groupless Corp (*)
1	N/A							
2	N/A							
3	N/A							
4	N/A							
5	92	1 A	1 B	1 C	1 D	1 E		*
6	93	2 A	1 B	1 C	1 D	1 E		*
7	94	3 A	1 B	1 C	1 D	1 E		*
	95	2 A	2 B	1 C	1 D	1 E		*
8	96	4 A	1 B	1 C	1 D	1 E		*
	97	3 A	2 B	1 C	1 D	1 E		*
	98	2 A	2 B	2 C	1 D	1 E		*
9	99	5 A	1 B	1 C	1 D	1 E		
	100	4 A	2 B	1 C	1 D	1 E		*
	101	3 A	3 B	1 C	1 D	1 E		*
	102	3 A	2 B	2 C	1 D	1 E		*
	103	2 A	2 B	2 C	2 D	1 E		*
10	104	6 A	1 B	1 C	1 D	1 E		
	105	5 A	2 B	1 C	1 D	1 E		*
	106	4 A	3 B	1 C	1 D	1 E		*
	107	4 A	2 B	2 C	1 D	1 E		*
	108	3 A	3 B	2 C	1 D	1 E		*
	109	3 A	2 B	2 C	2 D	1 E		*
	110	2 A	2 B	2 C	2 D	2 E		*

Table 4.5: The permutations of membership of a groupless corporation comprising persons belonging to five groups.

No of Members	Permu-tation Number	Group A	B	C	D	E	F	Strictly Groupless Corp (*)
1	N/A							
2	N/A							
3	N/A							
4	N/A							
5	N/A							
6	111	1 A	1 B	1 C	1 D	1 E	1 F	*
7	112	2 A	1 B	1 C	1 D	1 E	1 F	*
8	113	3 A	1 B	1 C	1 D	1 E	1 F	*
	114	2 A	2 B	1 C	1 D	1 E	1 F	*
9	115	4 A	1 B	1 C	1 D	1 E	1 F	*
	116	3 A	2 B	1 C	1 D	1 E	1 F	*
	117	2 A	2 B	2 C	1 D	1 E	1 F	*
10	118	5 A	1 B	1 C	1 D	1 E	1 F	*
	119	4 A	2 B	1 C	1 D	1 E	1 F	*
	120	3 A	3 B	1 C	1 D	1 E	1 F	*
	121	3 A	2 B	2 C	1 D	1 E	1 F	*
	122	2 A	2 B	2 C	2 D	1 E	1 F	*

Table 4.6: The permutations of membership of a groupless corporation comprising persons belonging to six groups.

NO OF GROUPS	NO OF MEMBERS 1	2	3	4	5	6	7	8	9	10	TOTAL
6	N/A	N/A	N/A	N/A	N/A	1	1	2	3	5	12
5	N/A	N/A	N/A	N/A	1	1	2	3	5	7	19
4	N/A	N/A	N/A	1	1	2	3	5	6	8	26
3	N/A	N/A	1	1	2	3	4	5	7	8	31
2	N/A	1	1	2	2	3	3	4	4	5	25
1	N/A	1	1	1	1	1	1	1	1	1	9
TOTAL	0	2	3	5	7	11	14	20	26	34	122

Table 4.7: The number of possible permutations between any given number of groups and any given number of members in a formally groupless close corporation.

NO OF GROUPS	NO OF MEMBERS 1	2	3	4	5	6	7	8	9	10	TOTAL
6	N/A	N/A	N/A	N/A	N/A	1	1	2	3	5	12
5	N/A	N/A	N/A	N/A	1	1	2	3	4	6	17
4	N/A	N/A	N/A	1	1	2	2	4	4	6	20
3	N/A	N/A	0	1	1	2	2	3	3	4	16
2	N/A	0	0	1	0	1	0	1	0	1	4
1	N/A	0	0	0	0	0	0	0	0	0	0
TOTAL	0	0	0	3	3	7	7	13	14	22	69

Table 4.8: The number of possible permutations between any given number of groups and any given number of members in a strictly groupless close corporation.

CHAPTER 5

THE IMPACT OF GROUPLESS CORPORATIONS ON THE ACQUISITION OF IMMOVABLE PROPERTY AND THE OCCUPATION OF LAND AND PREMISES

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The Controlled Area

5.1. The Act defines tne controlled area as any area which is not:

(a) a -

(i) group area; or

(ii) scheduled Black area; or

(iii) Black residential area; or

(iv) coloured persons settlement; or

(v) incorporated area; or

(vi) mission station or communal reserve referred to in s 23(6)(c); or

(vii) any land vested in the South African Development Trust;

and include :

(b) except for the purposes of s 20, any specified area referred to in s 16.[1]

In terms of the proviso to the definition of controlled area, any group area which is not in terms of a proclamation under s 23(1)(a) a group area for occupation, shall form part of the controlled area for the purposes of occupation of land or premises in the controlled area, and any group area which is not in terms of such a proclamation a group area for ownership, shall form part of the controlled area for the purposes of the Act relating to the acquisition of immovable property in the controlled area. Van Reenen points out that to all intents and

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1 s 1, but see also Van Reenen E.1.11, E.7.3 and E.7.4 at pp 116 and 184

purposes there are ownership-controlled areas and occupation-controlled areas within the notion of controlled area.[2]

Ownership

5.2. In terms of s 13(1) of the Act, no disqualified person and no disqualified company may acquire any immovable property[3] in the controlled area, except under authority of a permit. In other words, as far as companies are concerned, no company in which a controlling interest is held by a person who is a member of a group different from that of the owner of such property may acquire the property in question. If the owner of the property in question is itself a company, no company in which a controlling interest is held by a person belonging to a group different from the group to which a controlling interest holder of the owner company belongs, may acquire the property. This refers to 'any' interest holder and not 'the' interest holder. In terms of the Act acquisition means becoming the owner of such property in any manner whatsoever, which would include acquisition pursuant to an agreement, under a testament, by intestate succession, prescription, accession, marriage in community of property, etc.[4]

5.3. Subject to what is said in chapter 6 about the formalities concerning acquisition of property,[5] s 13(1)

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2 Van Reenen E.7.1-7, pp 183-184, especially E.7.2

3 See the definition of 'immovable property' in s 1

4 Van Reenen E.7.16, p 186

5 See 6.16-6.30

presents no bar to the acquisition of immovable property by a groupless corporation. As the section reads it only interferes with the ordinary common law rights of disqualified persons and disqualified companies to acquire immovable property situated in the controlled area. The groupless corporation, not being a disqualified company, must remain able at common law to acquire any immovable property situated in the controlled area, irrespective of the identity of the owner of that property. Thus, for example, a groupless corporation with one coloured, two Black and two Indian members (Cf permutation No 38 in Table 4.3)[6] could freely and legally acquire an erf or a farm from a white owner in the controlled area without the need to obtain a permit.

5.4. In terms of s 13(3) a testamentary disposition or intestate succession by which any person would acquire or hold immovable property in contravention of s 13(1) shall, unless the beneficiary is authorised to acquire or hold such property under permit, be deemed to be a testamentary disposition of or succession in respect of the nett proceeds of such property. Any testamentary disposition or intestate succession by which a groupless corporation acquired or held immovable property could not be deemed to be a testamentary disposition of or succession in respect of 'the nett proceeds of such property'. The provisions of s 13(3) would not impinge upon the ordinary interpretation of any will by which a groupless corporation succeeded to property in the controlled area.

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6 See tables following 4.9

5.5. In terms of s 46(1)(a) of the Act, contravention of s 13(1) is made an offence punishable on conviction by a fine not exceeding R400,00, or a period of imprisonment for a period not exceeding two years, or both such fine and imprisonment. It should be noted, however, that it is only the acquisition of immovable property by a disqualified person or disqualified company that is punishable. The disposition of such property is not made punishable at all. No groupless corporation acquiring immovable property in the controlled area could be found to have contravened s 13(1) and so these penalties would not apply to it.

5.6. Van Reenen states that the effect of s 13 is that in the controlled area the ownership of property is 'pegged' to remain within a particular group (unless it moves outside that group under authority of a permit).[7] Yet a groupless corporation could dispose of immovable property situated in the controlled area to another groupless corporation without the latter contravening s 13(1). The second groupless corporation could, in turn, dispose of the property to another groupless corporation and so on ad infinitum.

5.7. Whether or not a natural person or a company with a specific group character could acquire immovable property in the controlled area, in respect of which they would otherwise be disqualified, from a groupless corporation without a permit is a moot point. In terms of the definition a

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7 Van Reenen E.7.20, p 186A

disqualified person in relation to immovable property, land or premises in the controlled area, where the owner is a company, (including a close corporation)[8] means a person of any group if a controlling interest in that company is held by or on behalf or in the interest of a person who is a member of another group. As no controlling interest is held by any person in a groupless corporation, no controlling interest in the corporation either would or could be deemed to be held by or on behalf or in the interest of a person who was a member of a group different from that of the aspirant acquirer (i e the aspirant acquirer would not be a disqualified person). Strictly speaking, any natural person or company having a specific group character should be able to acquire such property from a groupless corporation without falling foul of s 13(1). From then on only persons belonging to the same group as the person who bought the property from the groupless corporation could acquire the property in turn. The group character of the property in question could therefore change from one group to another by means of the intermediate acquisition by a groupless corporation. Section 13(1) need not always, therefore, peg the ownership characteristic of property in the controlled area within the domain of a particular group. Such property can be said to have an almost chameleonic character as far as ownership is concerned.

5.8. Section 14(1) of the Act, insofar as it relates to corporations, provides that where a company of any

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8 See 3.37

particular group has acquired immovable property in the controlled area after the commencement of the Group Areas Act 41 of 1950,[9] it shall not continue to hold that property (except under the authority of a permit) if it ceases to be a company of any group or becomes a company of a different group. This also applies to the situation in which a company having a multiple character[10] loses one or more of its group characteristics (though retaining another), thereby becoming disqualified from holding the property. If a member of another group acquired a controlling interest in a company, it would thereby also become a company of that person's group (though it need not necessarily lose its membership of the groups of other controlling interest holders). It would then be disqualified and prohibited from holding the property. Section 14(3) provides that, for the purposes of s 14, a company shall be deemed to be a company of a group if a controlling interest in that company is held or deemed to be held by or on behalf or in the interests of a member of that group.[11] It seems that the similarly worded s 15 must therefore only apply to natural persons.

5.9. As no controlling interests are held in the groupless corporation (i e it is not 'a company of any particular group') the fact that it changed from a groupless corporation of one particular membership configuration to that of another would not mean that it 'ceased to be a company of any group' or

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9 The position prior to this is not relevant as close corporations were only introduced in 1984 with effect from 1 January 1985

10 Van Reenen E.3.18-20, pp 138-139

11 Cf 2.23

Author Clark J J G
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