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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 Corporation Act 69 of 1984

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2015-02-09
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'became a company of a group other than the particular group in question'. For example, if the corporation changed its membership configuration from that given in permutation number 92 in Table 4.5 to that given in permutation number 66 in Table 4.4,[12] it would not become a disqualified company and its holding of the property would not transgress s 14. Moreover, as the groupless corporation is not a 'company of any group', s 14(2) will not apply. This subsection provides that no company of any group which at or after the commencement of the Group Areas Act 77 of 1957 acquires immovable property in the controlled area, shall, if it ceases to be a company of any group or becomes a company of another group, hold that property except under the authority of a permit. These subsections can only apply to companies having a particular group characteristic.

5.10. Curiously, subsections 1(b) and (2) of s 14 only appear to contemplate a situation in which a company having a group character ceases to be a company of that group (thereby becoming a company of no group) or changes over to membership of another group. In an apparent oversight, they do not deal with the possible situation in which a company of no group is transformed into a company having a specific group character. It is submitted that in this situation s 14 would not apply to the acquisition of group character and the company would be entitled to continue to hold its property without a permit.

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12 See tables following 4.9

5.11. The possible changes that would not fall foul of s 14 are:

(a) a groupless corporation acquiring immovable property in the controlled area from another groupless corporation;

(b) a groupless corporation acquiring immovable property in the controlled area from a company of a particular group;

(c) a groupless corporation transforming itself into a company of a particular group, but continuing to hold the immovable property.

5.12. Perhaps the most significant effect of transferring immovable property in the controlled area to a groupless corporation, or of a company or corporation with a specific group character transforming itself into a groupless corporation, is that the property cannot be said to be acquired or held in contravention of any provision of the Act. The drastic provisions of s 41 of the Act will therefore not apply to such a transfer or transformation, (i e the Minister cannot cause the property to be sold).

5.13. The penalties of a fine not exceeding R400,00, imprisonment for a period not exceeding two years, or both such fine and imprisonment which can be imposed for

contravention of s 14 would also not apply to the type of transfer or transformation under consideration.[13]

5.14. Finally, as a corporation is not a private company, the provisions of s 36 will not apply to the transfers and transformations involving groupless corporations referred to in 5.11 above.[14]

Occupation

5.15. In terms of s 20(1) no disqualified person may occupy and no person may allow any disqualified person to occupy any land or premises in the controlled area, except under authority of a permit. In terms of the definition, a disqualified person in relation to property in the controlled area owned by a company is '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'.[15]

5.16. It has been mentioned that the question of whether or not a company can occupy land or premises is unclear.[16] It is proposed, ex abundantia cautela, to proceed on the assumption that companies can indeed occupy.[17]

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13 See s 46(1)(a)

14 See 6.4-6.5

15 See 3.40. See also generally Dison & Mohamed, p 47 et seq

16 See 2.23

17 Cf 5.25-5.26. See also Van Reenen E.6.17-19, pp 179-180

5.17. Therefore, no groupless corporation occupying land or premises in the controlled area can be considered to be a disqualified person or disqualified company. Similarly, no natural person occupying land or premises in the controlled area owned by a groupless corporation can be a disqualified person or, if that person is itself a company of any sort, a disqualified company.

5.18. Van Reenen's statement that only persons belonging to the same group as the owner may occupy land or premises in the controlled area[18] therefore does not hold where a groupless corporation is owner. Persons belonging to different groups from that of the owner may occupy the land or premises in the controlled area without the necessity for a permit if that owner is a groupless corporation.

5.19. As the occupation characteristic of land and premises in the controlled area is derived from the group to which the owner belongs, it is quite possible, by means of the groupless corporation, to change the occupation characteristic of such property. For example, if a company in which all controlling interests were held by whites owned land in the controlled area, the land could only be occupied by whites. If, however, a groupless corporation acquired this property from the white owner-company (as, it is submitted, it will be entitled to do)[19] a natural person of any group would be able to occupy that land after that because only persons belonging to a group

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18 Van Reenen E.7.46, p 191

19 See 5.3

different from that of a controlling interest holder in the owner company would be disqualified from occupation. As there are no controlling interest holders in a groupless corporation the concepts of disqualified person and disqualified company cannot apply and any person would be entitled to occupy the land and premises in the controlled area in accordance with common law principles.[20] In this regard the property in the controlled area could be said to be 'groupless property' for occupation purposes. A coloured person, for example, could legitimately occupy the property from then on. If a second coloured person were to acquire the property from the groupless corporation the property would acquire a specific coloured group character and only the first coloured person or another coloured person could occupy the property thereafter. A further change in the group occupation character of the land and premises could only be achieved by means of a further intermediate acquisition by a groupless corporation. Land and premises in the controlled area can also be said to have a chameleonic character as far as occupation is concerned.[21]

5.20. Van Reenen states,

> In the case where land is owned by a heterogeneous company the property may not be occupied by members of any group, since all persons are disqualified. Thus, in the controlled area, only land or premises

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20 See the definition of 'disqualified company' and 'disqualified person' at 3.39-3.40. See also 3.65-3.66

21 Cf 5.3, 5.6 and 5.7

owned by a homogeneous company can be occupied without a permit.[22]

It is submitted that, by the term 'heterogeneous company', Van Reenen means a company in which 'there are at least two different groups represented in the control of (the) company'.[23] His term 'homogeneous company' refers to 'a company in which all possible controlling interests are held by persons belonging to the same group.'[24] It has been seen that there is not even one controlling interest in a groupless corporation, so no person can be disqualified in respect of immovable property owned by a groupless corporation.[25] It is therefore submitted that land or premises owned by a groupless corporation in the controlled area can be occupied by any person of any race without a permit.

5.21. Section 26(4) of the Act provides that any provision in the title deed of immovable property in any group area prohibiting or restricting the occupation or use of the property by persons who are members of the group for which the group area has been established shall lapse as from the date of proclamation of the group area. There is no similar provision concerning occupation in the controlled area, so it appears that effect will be given to the terms of a restriction contained in a title deed.[26] The effect of the title deed restriction will depend upon its terms, but if it relies on the language of the

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22 Van Reenen E.7.48, p 192

23 Ibid; see also his cross-reference in note 38 to E.3.7, p 135

24 Van Reenen E.3.7, p 135

25 See 3.60-3.67

26 See Van Reenen E.7.49, p 192

Act or expressly invokes the Act for purposes of interpretation, it might well happen that the title deed restriction will not prevent a change in occupation character by means of intermediate acquisition by a groupless corporation for the same reasons that the provisions of the Act discussed above will not prevent such a change.

5.22. Occupation of land in contravention of the provisions of s 20(1) and allowing such occupation is an offence punishable by a fine not exceeding R400,00, imprisonment for a period not exceeding two years, or both such fine and imprisonment.[27]

5.23. A groupless corporation occupying land or premises in the controlled area, owned by a natural person or a company having a specific group character, will not be a disqualified company in relation to the said land or premises, but it will remain an offence for other disqualified persons to occupy the said land or premises. For example, if a groupless corporation hired an hotel owned by an Indian in the controlled area for the purposes of conducting an hotel business, the white manager of that hotel would not be able to occupy the manager's flat in the hotel unless he either had a permit or unless the State President had by proclamation in the Gazette declared the provisions of s 20(2)(h) to apply.[28] If, however, a groupless

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27 s 46(1)(a)

28 This subsection empowers the State President, inter alia, to declare by proclamation in the Gazette that the provisions of s 20(1) shall not render it unlawful for any disqualified

corporation is itself the owner of the land or premises it will not be an offence for any person, irrespective of their group, to occupy the land or premises. Thus, if a company controlled only by whites hired hotel premises owned by a groupless corporation in the controlled area, its Indian manager would be able to occupy the manager's flat in the hotel premises without a permit and without a special declaration by the State President that the provisions of s 20(2)(h) were to apply and the provisions of s 20(1) would not prohibit his occupation in those circumstances.

5.24. Section 46(2) of the Act applies to contravention of s 20(1), so that a court convicting any person on a charge of occupying land or premises in contravention of s 20(1) may, in addition to any penalty imposed:

(a) order the ejectment of such person and any person of the same group proved to be living with him from such land or premises;

(b) make such orders, give such instructions and confer such authority as it considers reasonably necessary to give effect to the order of ejectment and for the removal from such land or premises of the possessions of any ejected person.

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person to occupy any land or premises as the bona fide employee (other than a domestic servant) of any person who is lawfully occupying such land or premises.

This fate will not be visited upon a person who occupies land or premises in a controlled area owned by a groupless corporation, nor upon a groupless corporation occupying land or premises owned by a member of a particular group. It may, however, be visited upon a disqualified person who is permitted to occupy land or premises in the controlled area by a groupless corporation.[29] For example, the white manager occupying the manager's flat referred to in the first example in 5.23 above, could be ejected. It is worthwhile to note that it is not obligatory for a court to make such an order and it should not do so unless specifically requested. Considerations relevant to the exercise of the court's discretion include the nature of the area concerned, the attitude of the neighbours, the policy and views of interested departments of State, the attitude of the landlord, the prospects of a permit being issued for continued lawful occupation, the personal hardship which an ejectment order may cause and the availability of alternative accommodation.[30]

Use

5.25. Section 35 provides that any company which uses land or premises for any purpose other than the letting thereof in relation to which it is a disqualified company is guilty of

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29 Cf 5.25-5.26

30 S v Govender 1986 (3) SA 969 (T) This was a case concerning contravention of s 26(1) and not s 20(1), but s 46(2) is of equal application to both

an offence and liable on conviction to the penalties[31] prescribed in respect of unlawful occupation of land or premises by a disqualified person.[32] Moreover, any person who occupies any land or premises for any purpose connected with such use by a disqualified company is also deemed to be a disqualified person in relation to such land or premises for the purposes of ss 17(1), 20(1) and 26(1).[33] A disqualified company therefore cannot put a person in occupation of the land or premises in order to circumvent the company's disqualification. Section 35 appears to be aimed at eliminating the practice whereby persons, not being disqualified persons, occupy land or premises on behalf of persons or companies who would be disqualified from occupation.[34]

5.26. It has been seen that if the land or premises in the controlled area is or are owned by a groupless corporation no other person can be disqualified in relation to that land or those premises.[35] Accordingly, such other person would be able to use the land or premises for any purpose and not only for purposes of letting. Of course, the groupless corporation could itself use the land or premises for any purpose as well. Moreover, a groupless corporation, not being the owner of the property, could use it for purposes other than

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31 A fine not exceeding four hundred Rand, or imprisonment for a period not exceeding two years, or both such fine and imprisonment. See s 46(1)(a)

32 See 6.2-6.3 for a transcription and discussion of s 35

33 See s 35

34 See Van Reenen E.4.34-44, pp 150-152 and the examples in 5.23

35 See 5.7 and 5.17

merely letting because the provisions of s 35 would not apply to it. If the owner belonged to a particular group, any person other than the groupless corporation (e g a natural person being a partner of a groupless corporation trading on the premises) could nevertheless be a disqualified person. If a groupless corporation occupied the land or premises for a purpose connected with use (other than for letting purposes) by a disqualified person or company it would be deemed to be a disqualified person in relation to that land or premises. This notwithstanding the fact that no controlling interest in the corporation is held by a member of any group.[36] Thus, for example, if a groupless corporation conducted the business of a clothing store in white-owned premises on behalf of an Indian, that groupless corporation would be deemed to be a disqualified company in relation to that land or premises irrespective of whether or not the employees running the shop were whites.

The Specified Area

General Comment

5.27. In terms of s 16 of the Act the State President may by proclamation declare that the provisions of ss 17 and 18 shall apply in any portion of the controlled area ('the specified area') from a date specified in the proclamation ('the specified date').[37] The provisions of ss 17 and 18 apply to the

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36 See s 35

37 s 16(1)

specified area irrespective of any special or other statutory provision relating to the occupation of land or premises in that area (but title deed restrictions remain operative).[38] The provisions of s 20 concerning the occupation of land and premises in the controlled area are suspended in the specified area from the specified date.[39] The State President's proclamation issued or deemed to have been issued under s 16 shall cease to have effect upon the establishment of any group area (other than a group area for ownership only) in respect of so much of the specified area as may be comprised by or included in that group area.[40]

5.28. Sections 17 and 18 only affect occupation in a specified area, and the area remains part of the controlled area with respect to ownership.[41] Reference can therefore be made to 5.2-5.14 above concerning the acquisition and holding of immovable property by groupless corporations in the specified area. A lease or sublease of immovable property and certain mineral and other rights are not included in the definition of immovable property in the specified area.[42]

5.29. The effect of s 17 is that from the specified date no person who was a member of any group shall occupy and no

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38 See Van Reenen E.8.2, p 212

39 s 16(2)

40 s 16(3)

41 Van Reenen E.8.3, p 212

42 See the definition of 'immovable property' in s 1 and Van Reenen E.5.1-5, pp 153-154

specified area irrespective of any special or other statutory provision relating to the occupation of land or premises in that area (but title deed restrictions remain operative).[38] The provisions of s 20 concerning the occupation of land and premises in the controlled area are suspended in the specified area from the specified date.[39] The State President's proclamation issued or deemed to have been issued under s 16 shall cease to have effect upon the establishment of any group area (other than a group area for ownership only) in respect of so much of the specified area as may be comprised by or included in that group area.[40]

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41 Van Reenen E.8.3, p 212

42 See the definition of 'immovable property' in s 1 and Van Reenen E.5.1-5, pp 153-154

person shall allow any such person to occupy land or premises in a specified area which was not lawfully occupied (nor deemed under s 18 to have been occupied) at the said date by a person of the same group, except under authority of a permit. The occupation character of land in the specified area is therefore determined by the group of the occupant of the property at this specified date, not by the group of the owner (as with property in the controlled area).[43]

Occupation

5.30. Section 17 makes no reference to disqualified persons or companies and the notion of disqualification is not applicable to occupation in the specified area. This is because the restrictions on occupation imposed by s 20 are suspended in the specified area and persons who would otherwise be disqualified from occupation may be lawfully permitted to occupy land or premises in the specified area, while a qualified person may not be so entitled.[44] Section 17 refers to a 'person who is a member of any group' and a 'person who is a member of the same group' and it has been shown that groupless corporations are not members of any group.[45]

5.31. On a strict interpretation, s 17(1) presupposes that both the occupant at the specified date and the subsequent

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43 Van Reenen E.8.5, p 213. See generally Dison & Mohamed, p 31 et seq

44 Van Reenen E.8.15, p 215

45 See 3.60-3.66

occupant will be members of a group. Three situations involving groupless corporations can arise:

(a) both the occupant at the specified date and the subsequent occupant are groupless corporations;

(b) the occupant at the specified date is a member of a group and the subsequent occupant is a groupless corporation;

(c) the occupant at the specified date is a groupless corporation and the subsequent occupant is a member of a group.

5.32. In 5.31(a) and (b) above the subsequent occupant, a groupless corporation, will be entitled to occupy because it is not a person who is a member of any group. On this interpretation it is not necessary for the subsequent occupant to belong to the same group as the occupant at the specified date because the subsequent occupant does not fall within the class of persons who are members of any group. In paragraph (c), however, the subsequent occupant is a member of a group and will therefore not be entitled to occupy because the occupant at the specified date, the groupless corporation, is not a 'person who is a member of the same group' as the subsequent occupant. There is cold comfort for a would-be avoider of s 17(1) because occupation of land or premises in the specified area is only meaningful if natural persons are entitled to occupy the land or premises; unfortunately, no person may allow any person who is

a member of any group (and to all intents and purposes every natural person is a member of a group) to occupy land or premises in a specified area which was not lawfully occupied at the specified date by a person who is a member of the same group.

5.33. It is perhaps more likely that, under a more realistic interpretation, s 17(1) only allows land or premises in the specified area to be occupied by persons or companies who are members of the same group as the lawful occupant or deemed occupant at the specified date. If this is so, groupless corporations would not be lawfully entitled to occupy land or premises in the specified area.

5.34. The exemptions to s 17(1) provided for in s 17(2) will still remain effective.[46]

5.35. If the land is or premises are occupied and such occupation is lawful at the specified date, the group of the lawful occupant determines the occupation character of the land or premises. If the land is or premises are unoccupied or not lawfully occupied at the specified date and:

(a) if a person other than a company or statutory body is the owner, that owner is deemed to have occupied the property at that date and the property will have the occupation character of that owner;[47]

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46 See Van Reenen E.8.45-59, pp 222-225

47 s 18(1)(a)

(b) if a company or statutory body is the owner, the Minister shall, on written application of the owner, determine the group which is deemed to have occupied the property at the specified date.[48]

If a groupless corporation was the owner of the property at the specified date and the property was unoccupied or not lawfully occupied at that date, the Minister would have to determine the group by which the property was deemed to have been occupied. It is not easy to predict what determination the Minister would make in this situation, especially if the groupless corporation in question was a strictly groupless corporation.[49] If there was a majority in number of members of the close corporation belonging to one group, the Minister might be justified in determining that the group to which that majority belonged was deemed to have occupied the property at the specified date.[50]

5.36. If, however, any building on the land has been changed after the specified date by:

(a) the erection of a new building on land vacant at the specified date; or

(b) the completion of a building which was being built at the specified date;

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48 s 18(1)(b)

49 See 4.4

50 Cf 3.49

and a company or statutory body was the owner on that date, the Minister would, on the written application of the owner, have to determine the group by a member of which the building, land or premises was deemed to have been occupied at the specified date.[51] It is not clear what will happen if the owner does not make an application for such a determination or if no determination is made, but van Reenen submits[52] that the position is the same as under ss 18(2) and (3)(c), (i e *the building in question is deemed to have been unoccupi* In terms of s 17(1), therefore, the building cannot be occupied at all.

5.37. Where any building on the land has been changed after the specified date by:

(a) the demolition of a building existing at that date and the erection of another in its place; or

(b) the extension of a building existing at that date,

before which they were lawfully occupied by persons belonging to the same group, the new building or extended building is deemed to have been occupied at the specified date by members of the group of the last lawful occupant. If they were occupied by persons belonging to different groups the Minister has to determine the group which is deemed to have occupied the

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51 See Van Reenen E.8.33-34, p 219

52 Ibid

building at the specified date.[53] Until the determination is made the building is deemed to have been unoccupied at the specified date, again meaning that no one may occupy it until a determination is made.

5.38. In terms of s 21(3) the Minister may take into consideration the relative needs of any group concerned in regard to housing, the amenities of life and educational and recreational facilities, trading and industrial undertakings, the situation of the immovable property, land or premises in relation to other property, land or premises owned or occupied by members of any group, and any other matters which in his opinion are relevant to the question whether or not any such permit should be issued or an amendment of the condition thereof should be made or how any such determination should be made.[54] It should be noted that there is no duty on the Minister to take any or all of these factors into account.

5.39. It appears that a determination made by the Minister in terms of s 18(1)(b) will deprive a groupless corporation of its groupless nature and will, by administrative fiat, relegate the corporation to membership of a particular group for the purposes of occupation in the specified area.[55]

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53 Van Reenen E.8.37, p 220

54 s 21(3)

55 See Van Reenen E.8.65-77, pp 227-229

Use

5.40. Section 35 applies the notion of disqualified company once again.[56] There is an apparent conflict between the provisions of ss 17 and 35 because, it is submitted, use is a wider concept than that of occupation and the latter is a subset of the former (i e there can be use without occupation, but not vice versa).[57] Section 16(2) only suspends the provisions of s 20 in the specified area and not those of s 35. As a result occupation in the specified area is governed by s 17 (in which the identity of the occupant or deemed occupant at the specified date is relevant) and use is governed by s 35 (in which use is governed by the notion of disqualification). It is not clear whether occupation stricto sensu should be governed by ss 16, 17 and 18 while the residual content of use (i e use without occupation) should be governed by s 35, or whether the provisions of ss 15, 17 and 18 should override those of s 35. Anomalous positions could arise.

5.41. For example, if a workshop owned by an Indian in the controlled area was lawfully occupied by coloured artisans at the specified date the workshop would only be able to be occupied by coloureds from that date in accordance with s 17(1). If, however, the coloured artisans were employees of a white controlled company at the said date, they and the company would not be disqualified as occupants in respect of the workshop under s 17(1), but they and the company would be

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56 See too 5.25-5.26

57 See Van Reenen E.4.38, p 151

deemed to be disqualified persons in relation to use of the workshop under s 35 (i e they will be occupying the workshop for a purpose connected with the use of that workshop by a disqualified company).

The Defined Area

5.42. In terms of s 18(3)(a) the State President may by proclamation in the Gazette define any area in a specified area for the purposes of subsection 3(b). 'An area has therefore first to be a specified area before it can be defined; this is because to a large extent the control in the defined area is the same as that in a specified, and these controls are not repeated with respect to the defined area.'[58]

5.43. The Minister shall, on written application of the owner of any building which has been completed, erected (whether or not in the stead of a demolished building) or extended, or is about to be completed, erected or extended, in an area defined in any such proclamation, after the date of publication thereof, or of any land or premises in any such area which are or were unoccupied or not lawfully occupied on the said date, determine the group by a member of which such building, land or premises shall, for the purposes of s 17, be deemed to have been occupied at the specified date.[59]

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58 Van Reenen E.9.3, p 231

59 s 18(3)(b)

5.44. A deeming would have to be done in the following circumstances:

(a) if any change had been made in the buildings on the land;

(b) if no change had been made in the buildings, but the land or premises were not occupied at the date of defining the area; or

(c) if there was occupation, but that occupation was not legal.[60]

5.45. In each case the deeming is made by determination by the Minister on the written application of the owner and the only real change from the specified area is that in the defined area the group of the owner of the property can never serve to attach a deemed occupation character to land or premises.[61] Therefore, if a person other than a company or a statutory body was the owner at the specified date, the building in question will not be deemed to have been occupied by the owner at that date. If the buildings on the land have been changed by the demolition of a building or buildings existing at the specified date and erection of one or more buildings instead, or the extension of the buildings existing at that date, and the building or buildings as they existed before demolition or extension were lawfully occupied or are deemed to have been so

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60 See Van Reenen E.9.9, p 232

61 See Van Reenen E.9.11-12, p 232

occupied by persons belonging to the same group, the new building or buildings or the extended building is not deemed to have been occupied at the specified date by the group to which the last lawful occupant belonged.[62] Instead, a determination of deemed occupation must be made by the Minister.[63] Finally, if the land or premises was either unoccupied or not lawfully occupied at the specified date and a person other than a company or a statutory body was the owner, that owner is not deemed to have occupied and his group as at the specified date will not determine the occupation character of the land or premises in question. Instead, the Minister will have to do a deeming.[64]

5.46. The defining of an area only affects occupation in that area and the area remains part of the controlled area regarding ownership. Reference can be made to 5.2-5.14 above concerning the acquisition and holding of immovable property by groupless corporations in the defined area. Save as aforesaid, the comments made concerning occupation and use in the specified area in 5.30-5.41 above are equally applicable to occupation and use in the defined area.

Free Trading Areas

5.47. The State President may, after consultation with the Administrator of the province concerned, by proclamation

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62 See Van Reenen E.9.14, p 233 read with E.8.35, p 219

63 Ibid read with E.8.29 and 36-37, pp 218-220

64 Ibid read with E.8.40, p 220

declare that from a date mentioned in the proclamation the provisions of certain sections of the Act will not apply in respect of any building, land or premises in the area defined in the proclamation, subject to the condition that such building, land or premises may only be occupied or used for trading, commercial, professional or religious and educational purposes in terms of a town planning scheme in operation in the area. The sections which can be declared not to apply are ss 13, 14, 15, 17, 18, 20, 26(1), 27, 35, 37 and 40.[65]

5.48. These provisions were substituted by s 1 of the Group Areas Amendment Act 101 of 1984 for the previous s 19. 'The effect of the amendment is to allow the State President to create free trading areas where the traders involved will not be subject to the racially restrictive provisions of the (Act). It is significant that the racially restrictive provisions regarding residence are not included within the ambit of the relaxation'.[66]

5.49. This new s 19 may affect the removal of:

(a) restrictions on the acquisition of immovable property in the controlled area by disqualified persons and companies (s 13);

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65 s 19(1)

66 H G Rudolph 'Constitutional Law' (1984) Annual Survey, pp 25-26

(b) restrictions on the holding of immovable property in the controlled area by companies of a particular group (s 14);

(c) restrictions on the holding and disposal of immovable property in the controlled area on change of group by a natural person (s 15);

(d) restrictions on the occupation of land or premises in the specified area (s 17);

(e) the deeming provisions concerning buildings erected or completed after the specified date and buildings, land or premises unoccupied at that date (s 18);

(f) restrictions on the occupation of land in the controlled area (s 20);

(g) limitations on the right of occupation of disqualified persons and companies in group areas (s 26(1));

(h) the prohibition against the acquisition of immovable property in group areas by disqualified persons and companies (s 27);

(i) limitations on the entitlement to use land or

premises by disqualified companies or persons (s 35);

(j) limitations on the rights of companies which have issued shares or share warrants or debentures to acquire or hold immovable property (s 37); and/or

(k) the prohibition against the acquisition or holding of immovable property on behalf or in the interests of any other person who would not otherwise lawfully be able to acquire or hold property (s 40).

Groupless corporations can be used to bypass certain of the restrictions in paragraphs (a),[67] (b),[68] (f),[69] (h),[70] (i)[71] and (j),[72] irrespective of whether or not the State President has declared them not to be applicable.

5.50. Nevertheless, the State President's declaration in terms of s 19 will not always be redundant where a groupless corporation is involved and even a groupless corporation may benefit from the removal of certain restrictions. For example, a declaration that the provisions of s 26(1) will not apply in a group area for occupation would mean that any of the groupless

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67 See 5.3

68 See 5.9

69 See 5.17 and 5.19

70 See 5.58 and 5.61

71 See 5.25-5.26

72 See 6.6-6.9

corporation's employees who were previously disqualified from occupation would no longer be disqualified.[73]

5.51. There are two qualifications to this relaxation. If the free trading area is situated within a group area for occupation and ownership, the provisions of s 27 concerning restrictions on the acquisition of immovable property remain applicable in respect of any building, land or premises occupied or used exclusively or partially for residential purposes.[74] If the free trading area is situated in the controlled area or a defined area the State President may simultaneously determine the group which may occupy any building, land or premises situated in that area for residential purposes.[75]

The Group Area

Group Areas for Ownership

5.52. A '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 interests of a person who is a disqualified person in relation to such property, land or premises.[76] A 'disqualified person' in relation to immovable property, land or

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73 Cf 5.61

74 s 19(2)

75 s 19(3)

76 See the definition in s 1

premises in any group area means a person who is not a member of the group specified in the relevant proclamation under s 23.[77]

5.53. No disqualified person, disqualified company and no administrator of a deceased estate in which a disqualified person has a testamentary interest, may acquire any immovable property within a group area for ownership, except under a permit.[78]

5.54. A disqualified natural person who holds immovable property in a group area may retain it, but may only dispose of it, before or after his death, to a person who is not disqualified. If a company which is a disqualified company at the date of proclamation of the group area holds immovable property in that area, it may only continue to do so for a period of ten years from the date of that proclamation, except under authority of a permit.[79] If a company only becomes disqualified or again becomes disqualified after the date of proclamation of the group area, it shall not hold any immovable property within that area which it acquired after the said date otherwise than in pursuance of a permit, except under authority of a permit.[80]

5.55. Any provision in the title deed of immovable property situated in the area prohibiting or restricting the

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77 Ibid

78 s 27(1)(a)

79 s 27(1)(b)

80 s 27(1)(c)

acquisition, alienation or hypothecation of such property by, to or in favour of persons who are members of the group for which that area has been established as a group area, shall lapse as from the date of proclamation of the group area and no such provision shall thereafter be inserted in the title deed of any immovable property situated in that area.[81]

5.56. The penalty for contravention of ss 27(1)(a), (b) and (c) is a fine not exceeding R400,00, imprisonment for a period not exceeding two years, or both such fine and imprisonment.[82]

5.57. The provisions of s 27(1) override anything contained in any special or other statutory provision relating to the acquisition or holding of immovable property.[83] An exception is made for companies engaged in mining operations or in operations carried on in a factory as defined in the Factories, Machinery and Building Work Act 22 of 1941, in which machinery acquired at a price of not less than R10 000,00 had already been installed at the date the company became disqualified, such company being allowed to hold any immovable property used by it in connection with such operations.[84]

5.58. As before, the use of the concepts of disqualified person and disqualified company in s 27 limits the common law

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81 s 27(1)(d)

82 s 46(1)(a)

83 s 27(2)

84 Ibid

rights of natural persons and companies having a group character. Because the groupless corporation does not have a group character, the limitations on acquisition of immovable property in a group area imposed by s 27 will not apply to it.[85] A groupless corporation would therefore be able to:

(a) acquire immovable property situated in any group area for ownership;

(b) continue to hold such property upon such area being de-proclaimed and proclaimed an area for ownership by another group; and

(c) hold such immovable property notwithstanding changes within the corporation's membership, provided always that the corporation remained a groupless corporation.

A groupless corporation would not be able to transfer the property to a disqualified person, only to another groupless corporation or a person who was not disqualified. Provisions in the title deeds of the immovable property situated in that area could, depending on the wording of their terms, nevertheless prohibit or restrict the acquisition, alienation or hypothecation of the property by, to or in favour of a groupless corporation. For example, the title deeds might prohibit acquisition by any person who is not a member of the white group, or by any company in which all of the controlling

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85 See 3.60-3.67

interests are held by persons who are members of the white group.

Group Areas for Occupation

5.59. In terms of s 23(1)(a) the State President may, by proclamation in the Gazette, declare that as from a date specified in the proclamation ('the proclaimed date') the area defined in the proclamation shall be an area for occupation by members of the group so specified. No disqualified person[86] shall occupy, and no person shall allow a disqualified person to occupy, any land or premises in a group area for occupation as from the date specified in a proclamation under s 23(1)(a), except under authority of a permit.[87] Section 46(2) provides that a court convicting any person on a charge of occupying land or premises in contravention of s 26(1) may, in addition to any penalty imposed:

(a) order the ejectment of such person and any person of the same group proved to be living with him on such land or premises;

(b) make such orders, give such instructions and confer such authority as it considers reasonably necessary to give effect to the order of ejectment and for the removal from such land or premises of the possessions of any ejected person.

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86 See 3.40

87 s 26(1). See Dison & Mohamed, pp 44-45

The comments made in 5.24 above about the decision in S v Govender are also applicable here.

5.60. In terms of s 23(2) the Minister can apply the provisions of s 26 from an operative date, being at least twelve months from the date of proclamation, to any land or premises in a group area for occupation by giving twelve months notice of the operative date in the case of business occupation and three months notice in the case of any other occupation, where land or premises are lawfully occupied by a disqualified person immediately prior to the proclaimed date.

5.61. As no controlling interest in a groupless corporation is held or deemed to be held by or on behalf or in the interest of a person who is not a member of the group specified in the relevant proclamation under s 23 (i e because no controlling interests at all are held or deemed to be held in a groupless corporation), a groupless corporation is not a disqualified person as far as occupation in a group area for occupation is concerned.[88] Although a groupless corporation might therefore be entitled to occupy immovable property, land or premises in a group area for occupation, natural persons who were members, employees or agents of the groupless corporation would only be so entitled if they were themselves not disqualified persons. Thus, a white member and branch manager of a groupless corporation conducting a liquor retailing

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88 See the definitions of 'disqualified company' and 'disqualified person' in s 1

business in a group area for occupation by Blacks would be a disqualified person even though the corporation of which he was a member would not be. He would commit an offence under s 26(1). The exemptions provided in s 26(2) would nevertheless assist natural persons in certain circumstances.[89] A groupless corporation would be able to transfer immovable property to any person of any group in a group area for occupation as the area would be part of the controlled area for ownership purposes.[90] It would also be able to take transfer of such property from any person.

Group Areas for Ownership and Occupation

5.62. If the area in question is a group area for both ownership and occupation it is subject to the controls of both s 26 and s 27.[91] Reference should therefore be made to the discussion in 5.52-5.58 and 5.59-5.61 above for the effect that groupless corporations will have on ownership and occupation in such areas.

The Future Group Area

5.63. The State President may, whenever it is deemed expedient, by proclamation in the Gazette define an area and declare

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89 See Van Reenen E.11.66-77, pp 249-251 for a discussion of the exemptions

90 See the definition of 'controlled area' in s 1 at 5.1

91 s 23(5)

that it shall be an area for future occupation by members of a particular group, future ownership by members of a particular group or both future ownership and future occupation by members of particular groups.[92] A future group area is part of the controlled area and is controlled as far as ownership and occupation are concerned in the same way as the rest of the controlled area.[93]

5.64. A groupless corporation would, therefore, be able to acquire any immovable property situated in the controlled area irrespective of the identity of the owner of that property and irrespective of the fact that such property falls within a future group area.[94] Moreover, if a groupless corporation acquired immovable property in a future group area both it and any natural person of any group would be able to occupy the property.[95]

5.65. Certain provisions are, however, introduced by s 24(4) which provide that no owner (other than a statutory body) of any land in a future group area shall, until the area in which his land is situated has been proclaimed a group area for occupation:

(a) sub-divide the land;

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92 S 24(1)

93 See the definition of 'controlled area' in s 1

94 See 5.2-5.3

95 See 5.17 et seq

(b) use the surface of the land for any purpose for which it was not being used on the date it was proclaimed as a future group area or, if a permit has been issued in respect of that land, for any purpose not authorised by the permit;

(c) enter into any agreement whereby he purports to grant to any person the right to use land in contravention of the provisions of (b).

For the purposes of these limitations land does not include any building or other structure erected on the land (i e occupation of the buildings and structures is governed by the provisions concerning the controlled area).[96]

5.66. Section 24 makes no reference to disqualified persons. Thus, even a groupless corporation owning any land situated in an area proclaimed as a future group area may not, except under authority of a permit, do any of the acts mentioned in 5.65(a), (b) and (c) above. A groupless corporation's common law rights of sub-division and use of the surface in future group areas are therefore considerably curtailed.

The Border Strip

5.67. In terms of s 25(1) the State President may by proclamation in the Gazette define any area which is

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96 s 24(4)(b). See generally Dison & Mohamed, pp 21 and 45-46

contiguous to the whole or any portion of the perimeter of any group area or future group area and declare that such area:

(a) shall from a date specified in the proclamation, which shall be a date not less than one year after proclamation, be a border strip; or

(b) is destined to be declared as a border strip (a 'future border strip').

These border strips may only be declared if the Group Areas Board has reported that there are no natural or other barriers upon or near the perimeter of the group area which would have substantially the same effect as a border strip.[97]

5.68. As from the date that the area becomes a border strip[98] no person shall, except under authority of a permit:

(a) sell or otherwise dispose of any land or premises in the border strip except to the State, South African Transport Services, provincial administration or any statutory body;

(b) occupy or allow any person to occupy any land or premises in such border strip; or

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97 Proviso to s 25(1)

98 In terms of s 25(1)(a). See 5.67(a)

(c) use any land or premises in such border strip for a purpose not authorised by such a permit.[99]

These provisions apply notwithstanding anything contained in any special or other statutory provision relating to ownership, occupation or use of land or premises.[100]

5.69. The use of land for the purpose of prospecting or mining for minerals is not curtailed by . 25.[101]

5.70. Van Reenen states that 'this prohibition serves to freeze or sterilize the land situated in a border strip and its control is completely different, both as regards ownership and occupation, from that of the controlled area'.[102]

5.71. Contravention of ss 25(3)(b) or (c)[103] is an offence and upon conviction a person is liable to a fine not exceeding R400,00, imprisonment for a period not exceeding two years, or to both such fine and imprisonment.[104] The court convicting any person on a charge of occupying any land or premises in contravention of s 25(3) may, in addition to any penalty imposed, make an order for the ejectment at State expense of that person and any other person of the same group

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99 s 25(3)

100 Ibid

101 s 25(5). See generally Dison & Mohamed, pp 21 and 46

102 Op cit E.13.11, p 265

103 See 5.68(b) and (c)

104 s 46(1)(a)

proved to be living with him and may make such orders, give such instructions and confer such authority as it may deem reasonably necessary to give effect to the said order of ejectment and for the removal from such land or premises of the possessions of any person to be ejected.[105]

5.72. As the provisions of s 25(3) do not hinge in any way upon the concept of disqualified person or disqualified company, they are of equal application to groupless corporations as they are to any other company. The provisions therefore constitute a major limitation of the common law ownership and occupation rights of groupless corporations in border strips and future border strips.

5.73. No owner of land or premises in a future border strip[106] for ownership shall, except under authority of a permit:

(a) sub-divide any such land;

(b) use any such premises or the surface of any such land for any purpose for which it was not being used on the date of such proclamation or, in the case of land or premises in respect of which any such permit has been issued, for any purpose not authorised by the permit; or

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105 s 46(2)(a) and (b), but see comment at 5.24

106 i e defined by proclamation issued under s 25(1)(b). See 5.67(b)

(c) enter into any agreement whereby he purports to grant to any person the right to use such land or premises in contravention of the provisions of paragraph (b).[107]

Contravention of these provisions is an offence punishable by a fine not exceeding R400,00, imprisonment not exceeding two years, or both such fine and imprisonment.[108] Again, the surface may continue to be used for prospecting and mining for minerals.[109]

5.74. The future border strip is almost the same as a future group area and the discussion in 5.63-5.66 above will also apply to the future border strip. Moreover, as the future border strip falls within the controlled area for all other purposes, reference should also be made to 5.2-5.26 above.

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107 s 25(4)

108 s 46(1)(a)

109 s 25(5)

CHAPTER 6

SPECIAL PROVISIONS

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Introduction

6.1. Sections 35, 36, 37 and 38 of the Act specifically pertain to companies (and therefore to groupless corporations as well)[1] and so it is desirable to examine how these sections will affect the groupless corporation model. It has been shown in chapter 5 that groupless corporations may freely and legally acquire ownership of and hold immovable property in certain areas which other types of companies would not be able to do.[2] It remains to be seen whether or not title to such property can be registered in a deeds registry without contravening s 42.

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1 See 3.37 above

2 See 5.2-5.14, 5.28, 5.46, 5.49, 5.52-5.58, 5.64 and 5.74

Use of Land or Premises

6.2. Section 35 of the Act provides:

> Any person who uses any land or premises in relation to which he is a disqualified person for any purpose other than the letting thereof, or company which so uses any land or premises in relation to which it is a disqualified company, except under the authority of a permit, shall be guilty of an offence and liable on conviction to the penalties prescribed by this Act in respect of the unlawful occupation of land or premises by a disqualified person, and any person who occupies any land or premises for any purpose connected with such use thereof by such a disqualified person or disqualified company otherwise than under the authority of a permit, shall for the purposes of sections 17(1), 20(1) and 26(1) be deemed to be a disqualified person in relation to such land or premises.

6.3. Not being a 'disqualified person',[3] a groupless corporation may use any land or premises for any purpose and not merely for the purpose of letting such land or premises, without a permit and will not thereby be guilty of an offence. Furthermore, no person who occupies land or premises for any purpose connected with such use by a groupless corporation could be deemed to be a disqualified person in relation to such land or premises. He could also not be found guilty in these circumstances of contravening s 35, nor suffer the penalties provided for in s 46(1)(a).

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3 See 3.65-3.67. See 5.25-5.26 and 5.40-5.41 for further analysis of s 35

Debentures of Close Corporations

6.4. Whenever a private company holds any immovable property, any share in or debenture of that company held by or pledged to a person who, or a company which, is a disqualified person or a disqualified company in relation to that property (other than a banking institution as defined in the Banks Act 23 of 1965), or by or to any person on behalf or in the interests of such a person or a company, may after not less than three months' notice in writing to the person or company concerned, be declared by the Minister to be forfeited to the State.[4]

6.5. It is certain that this section is intended only to apply to private companies incorporated under s 20 of the Companies Act 61 of 1973 (or equivalent provision of previous legislation) and there is no provision in the Act whereby debentures of a close corporation held by or pledged to a disqualified person, company or nominee for such person or company can be declared forfeit to the State. A creditor of an ordinary close corporation or groupless corporation (and be that creditor a disqualified natural person, a disqualified company or a disqualified close corporation) could safely take a debenture as security for the debtor corporation's debt without fear of forfeiture to the State. It should be remembered that a close corporation may not issue a debenture, secured or unsecured, to any person without the express previously obtained consent in writing of all the members of

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4 s 36(1). Cf 2.10 and see generally Dison & Mohamed, pp 18-19

that close corporation if that debenture is provided in connection with any obligation of:

(a) any of its members;

(b) any other corporation in which one or more of its members together hold more than a fifty per cent interest; or

(c) any company or other juristic person (except a corporation) controlled by one or more members of the corporation.[5]

Close Corporations with Bearer Debentures

6.6. Section 37(1) of the Act reads:

> No company which has issued any shares or share warrants or debentures entitling the bearer thereof to any rights in regard thereto, and no company wherein a controlling interest is held by or on behalf or in the interests of any such company, shall acquire or hold any immovable property, situated in the controlled area or in any group area, except under the authority of a permit: Provided that the Minister may by notice in the Gazette exempt, subject to such conditions as may be specified in the notice, any company or any class of companies specified in the notice from any of the provisions of this sub-section.[6]

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5 ss 52(1) and (2) of the Close Corporations Act 69 of 1984

6 'Company' includes close corporation

6.7. Close corporations have no share capital and so this section will only apply to close corporations (including groupless corporations) which have issued bearer debentures. Such close corporations will be referred to as section 37 corporations. A section 37 corporation may only acquire or hold immovable property which is situated in the controlled area or in any group area if:

(a) it is authorised to do so under a permit;

(b) it is exempted under the proviso; or

(c) the State President has in terms of s 19(1) by proclamation in the Gazette declared that the provisions of s 37 shall not be applicable to any building, land or premises in the area defined in his proclamation.[7]

A company wherein a controlling interest is held by a section 37 corporation or its nominee is also prohibited from acquiring or holding such property pari passu.[8]

6.8. If any section 37 corporation holds any immovable property in the controlled area or in any group area the Minister may by notice in the Gazette declare the section 37 corporation to be a company wherein a controlling interest shall, for the purposes of s 13 (concerning the acquisition of immovable property in the controlled area), s 20 (concerning the

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7 See ss 19 & 37 and 5.49(j)

8 Ibid

occupation of land or premises in the controlled area) and s 27 (concerning the acquisition of immovable property in a group area) be deemed to be held by a member of a group specified in the notice. Thereupon the section 37 corporation shall for the said purposes be deemed to be such a company and it shall be deemed that no controlling interest in the company is held by or on behalf or in the interests of any member of any other group for the purposes of the said sections.[9] The Minister may only give notice in the Gazette after not less than three months notice in writing to the section 37 corporation.

6.9. Any section 37 corporation, nominee for a section 37 corporation or other person contravening the provisions of s 37(1) commits an offence and is liable on conviction to a fine not exceeding R400,00, imprisonment for a period not exceeding 2 years, or both such fine and imprisonment.[10]

Declaration as to Controlling interest in corporations

6.10. If it appears to the Minister that there is reason to presume that a controlling interest in any company is held by or on behalf or in the interests of any member of any group, he may by notice in writing call upon that company to furnish him, within a period specified in the notice, with such particulars in regard to the control of that company as may be

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9 s 37(2). Van Reenen points out that the effects of deeming under ss 37(2) and 38 are the same. See Van Reenen E.4.8-10, p 145. See also Dison & Mohamed, p 19

10 s 46(1)(a)

so specified.[11] As before, 'company' must be interpreted to include close corporations.[12]

6.11. If the company fails to comply with any such notice within the said period or such further period allowed by the Minister, or if the said notice has been complied with and the Minister is satisfied that a controlling interest in the company was at the date of his s 38(1) notice held by or on behalf or in the interests of any member of any group, he may by notice in the Gazette declare ('the declaration') that it shall be a company wherein a controlling interest is held by or on behalf or in the interests of a member of that group.[13] Thereupon it is deemed that the company is a company in which a controlling interest is held by a member of that group or his nominee and, moreover, that no controlling interest in the company is held by a member of any other group or his nominee.[14]

6.12. The company in question has to be notified of the declaration and informed of the date before which it may apply to the Supreme Court for an order setting aside the declaration if the company can prove that no controlling interest was, either at the date of the notice under s 38(1) or at the date of the declaration, held by a member of the group in

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11 s 38(1)

12 See 3.37

13 s 38(2)

14 Ibid

question or his nominee.[15] The operation of the declaration is suspended in respect of immovable property, shares or debentures held by or pledged to the company at the date of the declaration until the said date before which the company is permitted to apply to court to have the declaration set aside or, if such an application is made, until it has been disposed of.[16]

6.13. It appears that the delay in the operation of the declaration is intended to afford the members an opportunity of changing the control of the company and thereby to avoid the consequences of being disqualified, (i e forfeiture of shares or debentures to the State).[17] If the company in question is a groupless corporation the provisions of s 38(2) will not apply.[18] Although members and creditors need not therefore fear any forfeiture of their respective members interests or debentures it would be prudent for the corporation to furnish the Minister with the particulars requested in regard to the control of that corporation. It is submitted that the Minister would not validly be able to argue that he was 'satisfied that a controlling interest in the company was at the date of such notice held by or on behalf or in the interests of any member of any group'.[19] The furnishing of these particulars should forestall the declaration as to controlling interest and

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15 s 38(3)

16 s 38(4)

17 See Van Reenen E.3.36-42, pp 142-143

18 See 3.65-3.68

19 See s 38(2)

consequent perpetual deeming of group character. In the event of the Minister nevertheless making his declaration, the corporation would be advised to apply to the Supreme Court for an order setting aside the Minister's declaration.

Ownership

6.14. The Act defines 'owner' in relation to immovable property as including, in the case of immovable property registered in the name of a trustee or trustees for a company, such company.[20] The beneficial owner is therefore the owner for the purposes of the Act and not his nominee or trustee.

6.15. In terms of s 40 no person shall acquire or hold on behalf or in the interests of any other person any immovable property which such other person may not lawfully acquire or hold in terms of the Act. In terms of s 19(1) the State President may declare that provisions of s 40 shall not be applicable in respect of any building, land or premises in an area defined in his proclamation in the Gazette. Such a declaration could operate to validate an illegal nominee ownership.

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20 See the definition in s 1

Registration of Immovable Property

6.16. The officer in charge of any Deeds Registry will not register any transfer of immovable property situated in the controlled area or in any group area unless the requirements prescribed in regulations made by the State President under s 47(1)(c) have been complied with. The transferee must furthermore submit to the officer in charge such further proof as the latter may require that the transferee may lawfully acquire and hold such immovable property or that the transferor may lawfully dispose thereof to the transferee in terms of the Act.[21] In terms of s 47(1)(c) the State President may make regulations prescribing requirements to be complied with in connection with the registration of immovable property for the purpose of ensuring compliance with the provisions of the Act.

6.17. The requirements prescribed in terms of s 47(1)(c) are contained in Government Notice No 819 of 1963.[22] Although these regulations were made under ss 43 and 29 of the Group Areas Act 77 of 1957 they are deemed to have been made under s 47(1)(c) of the present Act.[23]

6.18. Every deed lodged for registration in the deeds registry by which immovable property is sought to be acquired shall expressly set out:

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21 s 42(1)

22 See Government Gazette No 519 of 7 June 1963

23 See s 49(2)

(a) the group of which a natural person being a party to such deed is a member; or

(b) the group of which every person who holds or is deemed to hold a controlling interest in a company being a party to the deed is a member.[24]

'Party' means the transferor and the transferee, but where a transferor or transferee for or on behalf of another person or the estate of another person owns or acquires it means that other person.[25]

6.19. If a party to a deed by which immovable property is sought to be acquired is a natural person, the group of which he is a member shall be proved by an affidavit by the person concerned or a sheriff, deputy sheriff, messenger of the court, trustee, executor, liquidator, curator or administrator. It may also be proved by a certificate signed by a magistrate, attorney of the Supreme Court or a conveyancer stating that from personal knowledge or from enquiries made by him he is satisfied that the person to whom the certificate relates is a member of the group mentioned in the certificate.[26]

6.20. If the said party is a company, the group of which every person who holds or is deemed to hold a controlling

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24 Reg 2

25 Reg 1(b)

26 Reg 3(a)

interest in that company is a member, shall be proved by an affidavit made by an officer of the company.[27]

6.21. In terms of reg 4 such setting out and proof of group membership shall not apply:

(a) where the State or a statutory body, other than a local authority as transferor, is a party to the deed, provided that where a local authority is the transferor the group of only the transferee need be stated and proved;

(b) where the immovable property is situated in the controlled area and the acquisition thereof is controlled by the Development Trust and Land Act 18 of 1936 or the Black (Urban Areas) Consolidation Act 25 of 1945;[28]

(c) where the immovable property is acquired under the authority of a permit wherein the name of the transferee is specifically mentioned;

(d) to the transferor where the immovable property is situated in a group area for ownership; and

(e) to the transferor where the immovable property is acquired under the authority of a permit wherein

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27 Reg 3(b)

28 The latter Act has largely been repealed

only the group and not the name of the transferee is mentioned.

6.22. Van Reenen cites reg 4 as authority for the assertion that where it cannot be determined to what group a person belongs, the provisions contained in 6.19 and 6.20 above do not apply, but that in such a case transfer can only take place on authority of a permit and then the transfer can only be to:

(a) a person who is a member of the group specified in the permit; or

(b) a company in which all controlling interests are held by persons belonging to the group specified in the permit.[29]

It is respectfully submitted that his view is not supported by a close reading of reg 4, nor of any other regulation.

6.23 He continues by saying:

> If this regulation is given its literal meaning, property can be transferred from a 'groupless' person but never to a 'groupless' person. Such a 'groupless' person can thus never acquire immovable property in the controlled area or a group area. This position can hardly arise in practice since it should always be possible to determine the group to which a living person belongs. Thus the regulation has its purpose in the case of a transferor who has died or disappeared and whose grouping is in

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29 Van Reenen para 7 of E.5.34, p 161

doubt. This has no reference to racially neutral persons for which see E.3.4 et seq.[30]

It appears than Van Reenen is referring here to natural 'groupless' persons whose group membership is indeterminable, not to juristic groupless persons such as groupless corporations. There is nothing in the regulations to prevent transfer to a groupless corporation.

6.24. Whenever a section 37 corporation[31] is a party to such a deed, there shall, subject to the provisions of regs 2 and 3, be lodged in the deeds registry concerned proof that the said corporation has, in respect of the property sought to be acquired by the said deed:

(a) been exempted from the provisions of s 37(1); or

(b) been granted a permit issued in terms of s 37(1).[32]

6.25. In registering a right whereby a person is entitled to occupy land or premises in an area specified in terms of s 16 of the Act, the officer in charge of a deeds registry shall not be required to satisfy himself that the said person is entitled in terms of s 15 of the Act to occupy such property,

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30 Loc cit

31 See 6.6 and 6.7

32 Reg 5 read with s 49(2)

and the registration of such rights shall not be evidence that the said person is so entitled.[33]

6.26. Any person who in any affidavit or certificate referred to in 6.19 or 6.20, or in any proof referred to in 6.24 above, knowingly makes any statement which is false in any material particular, shall be guilty of an offence and liable on conviction to a fine not exceeding R100,00 or to imprisonment for a period not exceeding six months.[34]

6.27. If any immovable property is registered in the name of any person who may not lawfully acquire or hold such property in terms of the Act, the registration shall, subject to any penalty which may be incurred under the Act or to disposal in terms of s 41, not be invalid by reason of the provisions of the Act.[35] This is a considerable relaxation of the position which applied under previous Asiatic legislation whereby property automatically vested in the State.[36]

6.28. It is submitted that there is nothing in the regulations made under s 47(1)(c) that will bar a groupless corporation from being a party to a deed by which immovable property is sought to be acquired. As a groupless corporation is a company for the purposes of the Act, the group of which every person who holds or is deemed to hold a controlling

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33 Reg 6 read with s 49(2)

34 Reg 11

35 s 42(2)

36 See 2.9

interest in that groupless corporation is a member has to be proved by an affidavit made by an officer of the company.[37] As no person holds and cannot be deemed to hold a controlling interest in a groupless corporation, an affidavit to that effect made by an officer of the company should suffice for compliance with the requirements of reg 3(b) prescribed under s 47(1)(c). The officer in charge of the deeds registry would then presumably call upon the transferee to submit to him such further proof as he might require that the transferee might lawfully acquire and hold such immovable property or that the transferor might lawfully dispose thereof to the transferee in terms of the Act.[38] Such proof could be given by furnishing the officer in charge of the deeds registry with copies of the founding statement, association agreement (if any) and an affidavit as to the internal structure of that corporation. It is submitted that any subsequent refusal by the officer in charge of the deeds registry to register the transfer would be reviewable.

6.29. It has already been shown that if the groupless corporation is the transferor it may transfer the immovable property to any person of any group in a controlled,[39] specified,[40] defined[41] or free trading area,[42] or

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37 Reg 3(b)

38 This he is entitled to do under s 42(1)

39 See 5.6-5.7

40 See 5.28

41 See 5.46

42 See 5.49-5.50

in a group area for occupation.[43] In a group area for ownership the groupless corporation could only transfer immovable property in that area to members of the group specified in the State President's proclamation under s 23(1)(b), or to another groupless corporation.[44]

6.30. It has also been shown that a groupless corporation may take transfer of immovable property from any person of any group in the controlled,[45] specified,[46] defined[47] and free trading areas,[48] as well as both group areas for ownership[49] and group areas for occupation.[50]

Presumptions

6.31. Section 45(4) provides, inter alia, that whenever in any proceedings arising out of the operation of any provisions of the Act or any law repealed by it, or the Group Areas Act 41 of 1950, or any law repealed by that Act, whether civil or criminal, it is alleged by or on behalf of the Minister or any officer in charge of a Deeds Registry or in any indictment or charge:

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43 See 5.61

44 See 5.58

45 See 5.7

46 See 5.28

47 See 5.46

48 See 5.49-5.50

49 See 5.58

50 See 5.61

...

(b) that a company was at any time a company wherein a controlling interest was held by or on behalf or in the interests of an Asiatic in terms of any law repealed by the Group Areas Act, 1950; or

...

(d) that a company is or at any time was a company wherein a controlling interest is or was held by or on behalf or in the interests of a member of any group; or

(e) that any person or company has at any time held immovable property on behalf or in the interests of an Asiatic or an Asiatic company or any other person in contravention of the Act, the Group Areas Act, 1957, the Group Areas Act, 1950, or any law repealed by the last-mentioned Act,

the allegation shall be presumed to be correct unless the contrary is proved.

6.32. Thus, if such an allegation is made in any proceedings in respect of a groupless corporation, the onus of rebutting the presumption will rest upon any person wishing to refute the allegation. A groupless corporation would be able to rebut the presumption by handing in copies of its founding statement, association agreement (if any) and further evidence about the internal structure of the company.

CHAPTER 7

CONCLUSION

7.1. It is submitted that this enquiry has shown that close corporations structured in certain ways as to membership by natural persons belonging to different racial groups and as to their internal management are not and cannot be deemed to be 'disqualified companies' or 'disqualified persons' in terms of the Act.[1] A model structure of such a corporation has been posited[2] and certain precautions have been taken and refinements made in order to counter criticisms that may be made of a model corporation, which is called a 'groupless corporation'.[3]

7.2. The groupless corporation can have a major impact on ownership, occupation and use of land. This is because the Act frequently prohibits other persons from enjoying these rights in certain areas, but does not apply to groupless corporations in many circumstances.[4] As the Act was not amended to prevent ownership, occupation and use of land and premises by close corporations structured on the groupless corporation model, the legislature must be presumed to have intended that

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1 See chapter 3, especially 3.60-3.71

2 See 3.65

3 See 3.49, 3.57, 3.67 and 4.3-4.4

4 See generally chapter 5

groupless corporations are not to be limited in the same way as natural persons and other forms of 'company'.

7.3. There are circumstances, however, which would jeopardise the groupless corporation in the enjoyment of common law ownership, occupation and use of property. For example, if a member of a groupless corporation became insolvent, the trustee of that member's insolvent estate could sell his member's interest to the close corporation, to the members other than that insolvent member in proportion to their member's interests or as they might otherwise agree upon, or to any other person qualifying for membership.[5] If, furthermore, that corporation had been a strictly groupless corporation comprising three Indians, one white, one coloured and one Black (Cf permutation No 68 in Table 4.4),[6] the white member had become insolvent and the trustee of his insolvent estate had sold his 47 per cent member's interest to one of the Indian members who already had a five per cent interest in the corporation (the other members agreeing to this), that corporation would no longer be a groupless corporation. This would be because the Indian member in question would have a 52 per cent interest in the corporation, which would then no longer comply with the definition in 3.65. Similar changes in the status of the corporation could occur upon the death of a member[7] or if application were made to a court for an order that

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5 See 3.10

6 See tables following 4.9

7 See 3.11

any member should cease to be a member of the close corporation.[8]

7.4. Of particular benefit to the groupless corporation is s 40 of the Close Corporations Act.[9] This section allows a close corporation to give financial assistance for the purpose of any acquisition of a member's interest in that corporation, subject to certain precautions. Thus, a groupless corporation owning immovable property could mortgage its property to secure a loan given, for example, by a financial institution to a member so that that member could acquire a member's interest in the corporation. This could not be done by a company as it would contravene s 38 of the Companies Act 61 of 1973.

7.5. If a court, in terms of s 65 of the Close Corporations Act, declared that a groupless corporation was to be deemed not to be a juristic person in respect of its ownership rights in certain immovable property, the members of the groupless corporation would, it is submitted, be deemed to be an association of persons or a partnership. If this happened, a controlling interest in that association of persons or partnership would be deemed to be held by a person of the same group as the majority of the members thereof.[10] If the corporation in question had been a formally groupless corporation (e g a corporation based on permutation No 37 in

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8 See 3.12

9 See 3.16

10 In terms of the proviso to the definition of 'controlling interest'. See 3.49

Table 4.3)[11] a controlling interest would be deemed to be held by a person belonging to the same group as the majority three members. This would mean that the corporation would no longer be 'groupless', nor would it be qualified. The provisions of s 65 of the Close Corporations Act therefore give an added impetus to the use of strictly groupless corporations.

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11 See tables following 4.9

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Name of thesis Close corporations as qualified companies under the group areas act 1988

PUBLISHER:
University of the Witwatersrand, Johannesburg
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