

*J Henning & S du Toit*

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# Financial markets in the Southern African development community: the harmonisation and approximation of commercial laws\*

## Summary

The free flow of capital has been identified as a critical factor in the process of reducing poverty in the SADC region, along with the lowering of trade barriers. While the trade protocols have been adopted and much has been made of the harmonisation of stock exchange listing requirements and central banking regulation, it is an effort at harmonising corporate law that is noticeably absent. This article focuses on the harmonisation of business law including the supporting financial markets and the process of corporate law reform in South Africa, Botswana and Zimbabwe.

## Finansiële markte in die Suider Afrikaanse Ontwikkelingsgemeenskapsmark

Die SAOG is nie huiwerig om kennis te neem van harmoniseringsmodelle in ander streke nie. Dit is reeds voorgestel dat die SAOG die benadering of kombinasie van benaderings volg wat die streek die beste sal pas. Die vrye beweging van kapitaal tesame met die vermindering van handelsbeperkings is geïdentifiseer as 'n kritieke faktor in die verligting van armoede in die streek. Terwyl handelsprotokolle aanvaar is en klem gelê word op die harmonisering van effektebeursnoteringsvereistes en die regulering van sentrale banke, ontbreek die harmonisering van korporatiewe reg. Hierdie artikel fokus op die harmonisering van kommersiële reg insluitend ondersteunende finansiële markte en die proses van korporatiewe regshervorming in Suid-Afrika, Botswana en Zimbabwe.

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*J Henning, Unit for Economic Crime Studies, University of the Free State, Bloemfontein.*

*S du Toit, Department of Mercantile Law, Faculty of Law, University of the Free State, Bloemfontein, and Director, Roodt Inc, Johannesburg.*

## 1. Introduction

The Governor of the South African Reserve Bank inadvertently summarised the topic of this contribution well, when he made the following comments in Harare last year:

There is a worldwide trend towards an integration of financial markets. This process of globalisation is no longer restricted to the industrial countries of the world, but emerging markets, countries in transformation and the developing countries of the world are all being drawn into this process.

The smaller countries of the world can easily be marginalised in this process of global financial integration, unless they form part of some regional cooperation arrangement to guide them into the highly competitive global system of integrated financial markets. The Southern African Development Community (SADC) provides the opportunities for the countries of Southern Africa to approach the process of global financial integration through first combining forces in a regional cooperation arrangement that will, in a second phase, facilitate the real worldwide integration process.<sup>1</sup>

The Southern African Development Coordination Conference, the SADCC, was founded in 1980<sup>2</sup> as an organisation, which had as its main aim, the pursuit of economic cooperation in Southern Africa<sup>3</sup>. More specifically, the stated aim of the organisation included:

- a) decreasing economic dependency, especially on South Africa;
- b) creating regional integration;
- c) mobilising local resources; and
- d) ensuring international cooperation.<sup>4</sup>

In 1992, the SADCC was replaced by the Southern African Developmental Community, or SADC.<sup>5</sup> The member states of SADC are: Angola, Botswana, Lesotho, Malawi, Mauritius, Mozambique, Namibia, South Africa, Swaziland, Tanzania, Zambia, and Zimbabwe.

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1 Stals 1999:1.

2 Some authors date the founding of the SADCC to July 1979. See Mbendi 1998:5. Others date it to 1 April 1980. See Southern African Development Community 2000: Corporate profile; Balule 1998:1; Rogers 1997:26; Thomas 1993:2; Soontiens 1992:1.

3 Balule 1998:1; Soontiens 1992:1. Though this was the stated main aim of the SADCC, it must be noted that there are some authors who maintain that the reason for the formation of the organisation was as much political as economic. See, for example, the declaration by the heads of state or government of Southern African states issued in Windhoek in 1992, in which it is stated: 'In South Africa, the process is underway to end the inhuman system of apartheid, and to bring about a constitutional dispensation acceptable to the people of South Africa as a whole. It is, therefore, only a matter of time before a new South Africa is welcome to join the family of free and majority-rules states in the region.' See also Rogers 1997:26.

4 Grimmett 1999:209; Balule 1998:1; Pakote 1997:19; Soontiens 1992:26-28.

5 Ng'ong'ola 1999:2; Pakote 1997:23; Soontiens 1992:1.

The SADC region has a population of nearly 200 million people and a GDP of over \$ 175 bn. Despite this, the SADC countries suffer from relative under-investment. Most of Africa has been bypassed by globalisation and has been marginalised in the process.<sup>6</sup> The SADC region has the capacity to combat this. It is already home to more than half of the stock exchanges in Africa and there is no doubt that it is an important financial market.<sup>7</sup>

SADC presents the most important instrument for the promotion of economic cooperation in Southern Africa. It is vital that SADC realises the potential of the region to globalisation and that the region does not become isolated from international trends.<sup>8</sup> In the declaration by the heads of state or government of Southern African states, styled: *Towards the Southern African Development Community* the countries of Southern Africa committed to work out and adopt a framework of cooperation which provides for, *inter alia*, deeper economic cooperation and integration, on the basis of balance, equity and mutual benefit, providing for cross-border investment and trade, and freer movement of factors of production, goods and services across national borders.<sup>9</sup>

Focusing more pertinently on the finance, investment and trade sector, it was deemed evident that the countries in Southern Africa would need to harmonise their economic policies and plans and pay special attention to factors that impinge on intra-regional investment and trade flows, such as monetary and financial relations.<sup>10</sup>

Against this background intention, the objectives of SADC include:

- a) achieving economic growth and development through regional integration; and
- b) achieving complementarity between national and regional strategies and programmes.<sup>11</sup>

To this end, SADC shall, *inter alia*, develop policies aimed at the progressive elimination of obstacles to the free movement of capital and labour, goods and services, and of the peoples of the region generally,<sup>12</sup> among member states.<sup>13</sup> The treaty places an obligation on member states to adopt adequate measures to promote the achievement of these objectives and to refrain from taking any measure likely to jeopardise the sustenance of its principles or the achievement of its objectives.<sup>14</sup>

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6 Soontjens 1998:12.

7 Ramano 1999:1-2.

8 Brown 1998:1. See also Grimett 1999:210.

9 Southern African Development Community 1993:5.

10 Southern African Development Community 1993:8-9.

11 SADC Treaty: article 5(1)(a) and (e). See also Stals 1998:1.

12 For a critique of this objective of the former SADCC on which SADC was founded, see the discussion of Baloro 1991:7-21.

13 SADC Treaty: article 5(2)(d).

14 SADC Treaty: article 6(1).

Though it has been remarked that the treaty appears to be more of a declaration of intent than an agreement embodying firm obligations, it is recognised that the treaty aims to give effect to these obligations through a series of protocols.<sup>15</sup>

SADC functions, in part on a system of sectoral responsibilities, whereby each member state assumes responsibility for the promotion and attainment of goals in that sector. South Africa has been assigned finance and investment.<sup>16</sup>

This is the newest sector to be operationalised under the auspices of SADC and its *Finance and Investment Sector Coordinating Unit* (FISCU) and has the biggest potential to lead the way to creating an integrated approach to economic development. This is, however, also the sector in which the thorniest issues are to be found:

- a) macro-economic harmonisation;
- b) resource orientated investment;
- c) liberalised capital flows; and
- d) monetary cooperation.<sup>17</sup>

From these stated goals, principles and from the sectoral divisions that have been made, no explicit reference is made to the role of corporate law at any level. Neither is mention made of financial markets and their regulation. This does, however, not, by far, imply that the harmonisation and approximation of commercial laws is irrelevant.

Indeed, from such objectives as the promotion of the free flow of capital and the obligations of member states not only to refrain from adding impediments to this objective, but indeed to promote it — also in national laws, an imperative to investigate the role of the corporate law can be deduced. Corporate entities can play a significant role in this process by facilitating cross-border investment and trade.<sup>18</sup>

In addition, the SADC treaty makes provision for the progressive elimination of obstacles to the free movement of capital — a clear indication that the parties indeed envisaged a gradual harmonisation process.

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15 Blumberg 1994:15.

16 Stals 1997:3; Rogers 1997:26.

17 It may at this stage be noted that trade and industry as a sector has been assigned to Tanzania with the mandate to:

- a) facilitate the removal of non-tariff barriers to regional trade;
- b) ensuring the implementation of the recently signed SADC trade protocol;
- c) establishing an information resource center on regional trade and industry; and
- d) the creation of effective links with the regional business community in order to facilitate industrial development and trade. The overlap between this sector and that of finance and industry has indeed been questioned and amalgamation with that sector, seems to be part of the logical course of action.

18 Balule 1998:1.

## 2. Business law as a harmonisation priority

The focus of this contribution is on financial markets and the need for the harmonisation of business laws in the SADC to support those markets — especially in view of the strong focus on cross-border investment and the promotion of investment in general.<sup>19</sup> It is therefore necessary to examine the need for harmonisation and the role that harmonised laws have to play in supporting and protecting financial markets.

### 2.1 Harmonisation

The International Monetary Fund has recognised globalisation as a potential source of economic growth and structural change. Opportunities that result from this globalisation process are typically in the form of increased trade and cross-border investment.<sup>20</sup>

Most authors on the topic of globalisation will define it as a significant increase in international transactions founded in economic exchanges such as an increase in trade, finance and investment.<sup>21</sup> In addition, it has been described as the compactation of interactions in a specific area of life, by means of the mutual interpenetration of actors and events across traditional boundaries and the resulting world-wide homogenisation of behaviors, norms and values.<sup>22</sup> It has consequently been identified with the harmonisation of standards, the greatly increased mobility of capital and deregulation as well as the massive spread of financial markets.<sup>23</sup>

Harmonisation can be understood as making regulatory requirements of national laws of different countries more similar. This can be achieved through the adoption of hard law sources in the form of multi-lateral agreements such as the founding SADC treaty or soft law sources, including model laws, standard contracts, general statements of principles, or standard minimum rules. The legal status of these norm will depend on their source and upon the intention of the participants.<sup>24</sup>

Approximation, in turn, may be defined as replacing national rules with uniform SADC provisions when this is required for furthering the objectives of the community.<sup>25</sup>

The harmonisation of corporate law is, however, by any means not to be merely carried out for the sake of harmonisation. It should only be carried out in a manner linked to the objectives of the SADC treaty as discussed

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19 See in general Anonymous 1997:47. There is a great focus in Southern Africa on luring foreign investment. Some states have embarked on extensive and aggressive privatisation programmes to attract foreign investment and most countries boast impressive inflation rates and solid growth.

20 Soontiëns 1998:12.

21 Biersteker 1998:15.

22 Pakote 1997:1.

23 Biersteker 1998:15.

24 Cutler 1999:25.

25 Mathijssen 1995:262.

above. Company law harmonisation should contribute to the realisation of freedom of establishment. It is necessary to prevent distortions in the market, which may ultimately result from the fact that states with well-developed company law regimes are put at a disadvantage. Unless a minimum level of harmonisation is achieved, there could indeed be a tendency to establish companies preferably in those states which have a liberal company law.<sup>26</sup>

## 2.2 Supporting financial markets

In the philosophy of law and economics, it is frequently asked whether or not it is in the first instance the responsibility of the state to regulate and support financial markets. Within the SADC context, it has been argued that there is little use in attempting to separate state and market — especially where the task of the state is so dependant on achieving economic growth:

It would be a serious mistake if states in the SADC region were simply to confine their role to the provision of infrastructure and a stable regulatory framework for private capital. ... [T]he role of the state in regional integration should ... include distributive functions such as land reform, human resource development as well as market-enhancing forms of developmental planning which minimises risk for private capital...<sup>27</sup>

### 2.2.1 Central Banks

One of the primary instruments aimed at establishing a sound financial sector in the SADC is the *Finance and Investment Protocol*. For this purpose, there is a Council of Ministers of Finance, which has formed two subcommittees:

- a) the Committee of Treasury Officials; and
- b) the Committee of Governors of Central Banks.

The Committee of Governors has embarked on a program with, *inter alia*, the objectives of:

- a) examining the role of central banks in the establishment, regulation and supervision of banking institutions in the region with a view to promoting harmonisation and cooperation;
- b) defining the role banks should play in the development and operation of money and capital markets;
- c) co-ordinating the development of national clearing, payment and settlement arrangements, with a view to facilitate financial transactions among SADC members; and
- d) co-ordinating ways and means to combat money laundering and other cross-border banking currency frauds.<sup>28</sup>

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26 Wachter *et al* 1989:12.

27 Tsie 1996:97.

28 Stals 1998:3.

To this end the Subcommittee has built on the work done by the *Eastern and Southern African Banking Supervisors Group* (ESAF). It encourages harmonisation on such banking policies as licensing, minimum prudential requirements, regular auditing of banking institutions and internal risk management.<sup>29</sup>

The Committee of Governors has embarked on a 'bottom-up' approach which is based on first laying an appropriate foundation in the form of an effective institutional framework for the financial system in each country. It placed more ambitious projects such as the harmonisation of macro-economic policy at a later stage in its programme.<sup>30</sup>

This programme, which has been particularly active, has spawned a number of initiatives, among which the formation of a subcommittee of Stock Exchanges in SADC countries.

### 2.2.2 Stock Exchanges

The Subcommittee on Stock Exchanges has delivered a number of important inputs on such issues as the standardisation and harmonisation of listing requirements on the various stock exchanges operating in the SADC region, dual listings and central depositories. This programme will ultimately lead to the facilitation of cross-border investments in the region.

In April of 1998, agreement was reached by top-ranking officials from the stock exchanges in the region that the listing requirements in the region should meet international standards and that at least one stock exchange in each of the SADC member states should offer trading in equities, bonds and money market instruments such as treasury bills.<sup>31</sup>

The Committee released a press statement on the 8th of October 1999, announcing that the listing requirements of stock exchanges in the following countries has been harmonised: Botswana, South Africa, Malawi, Namibia, Zambia, and Zimbabwe.

The exchanges utilised the 13 principles set out in the listing requirements of the Johannesburg Stock Exchange.

At a transnational level, the regulatory authorities can ensure openness, and most notably, the communication of comprehensive, regular and credible financial information about the business.<sup>32</sup>

All SADC stock exchanges agreed that there was a need for connectivity between markets.<sup>33</sup>

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29 Stals 1998:4-5.

30 Stals 1997:3.

31 Anonymous 1998:1.

32 Ramano 1999:3.

33 Anonymous 2000:11-12; Anonymous 1999:1.

The cooperation intended, however, extends beyond the mere harmonisation of standards. It extends to an inter-connected electronic clearing and settlement system for all the stock exchanges in the region. To this end, for instance, the Namibian Stock Exchange has recently hooked up to JET, the electronic trading system of the Johannesburg Stock Exchange.<sup>34</sup>

Despite this, there is still a measure of difference between the Stock Exchanges in Southern Africa. In addition, Swaziland, for instance, will commence the first transactions on their stock exchange this month.<sup>35</sup>

### 2.2.3 Corporate Law Harmonisation?

Virtually by definition, commercial legislation is focused on regulating business activities within a given country. When that type of legislation varies to some degrees from one country to another within a region, it generally ensues that relationships may become more complex for enterprises doing business in more than one country. This is why it would be beneficial to create a business law model with the objective, through a harmonisation process, of facilitating compliance with legal requirements throughout the region and thus promote and facilitate trade and investment in the region, both regionally and internationally.<sup>36</sup>

The SADC Programme for the Regional Harmonisation of the Accountancy Profession included the harmonisation of Business Law as a significant aspect of their 1998 Business Plan. The mandate given to the team was that it review, propose and supervise implementation of measures designed to harmonise the provisions of the *Companies Act* and its equivalent in other SADC countries in the member countries.

Pursuant to the identification of business law as a necessary project within the broader programme, the Coordinating Research Institute for Corporate Law — a subcommittee of the Standing Advisory Committee on Company Law — held a workshop on the 28th of August 1998 on the harmonisation of commercial laws in Southern Africa.<sup>37</sup>

The result of the submissions made there and the subsequent discussions was a recommendation to the South African Standing Advisory Committee on Company Law that it release a press statement regarding the SADC objectives on Coordination and harmonisation, especially as far as company laws are concerned. An interim committee was also elected to actively support this objective.

Since that meeting was held, the term of office of the members of the SAC has expired and though new members have been appointed, the activities of neither the SAC nor CRIC have resumed.

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34 Anonymous 1999:1.

35 Jacobs 2000:2.

36 Laliberte 1999:33.

37 Brown 1998:5.



## 2.3 The harmonisation process

A three-tiered harmonisation process can be adopted in order to facilitate the aims of SADC in the process of the harmonisation of corporate laws. It would, firstly be possible, to provide for the mutual recognition of forms of business enterprise on a footing more substantial than mere reciprocity.

The next step would be the careful harmonisation of the basic tenets of company law.

Ultimately, it would be possible to focus on the creation of some transnational forms of business enterprise, similar to the *societas europaea*.

### 2.3.1 Harmonisation focus

The issues that need to be addressed in relation to the harmonisation of company law may include:

- a) the nature of shares that will be issued by companies, especially as regards the rights attaching to these shares;
- b) the maintenance of share capital of these companies;
- c) prescribed minimum share capital for companies or for certain types of companies;
- d) the transferability of shares;
- e) internal management arrangements, especially minimum requirements for shareholder's meetings;
- f) the protection of minority shareholders;
- g) the duties and responsibilities of the management board or board of directors of companies;<sup>38</sup>
- h) liability for mismanagement and liability in bankruptcy;
- i) workers' participation in the management of the company;
- j) the structuring of company groups;
- k) annual financial statements;
- l) dissolution;
- m) takeovers and mergers.

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38 See especially the comments of King 1998:1-2, that corporate governance in Southern Africa should, in addition to the commonly held principles, encompass three elements: the effective sharing of information with the workforce for them to form a better understanding of the corporation, effective consultation with the workforce in regard to decisions that will affect the workforce, and a speedy identification on conflict and effective prompt resolution thereof.

### 2.3.2 The transnational form of business enterprise

It has always been wise not to learn only from one's own mistakes but also from the mistakes and successes of others. To the end of proposing a uniform Southern African form of business enterprise it would therefore be wise to take some lessons from the foremost agents of unification in the world when viewing our own situation.

The founders of the European Economic Community were thoroughly aware of the fact that sufficient unification for the creation of a European Common Market could only be achieved through the extensive harmonisation of the company law systems of the member states. Their initial strategy was, accordingly, threefold in nature:

In terms of the *Convention on the Mutual Recognition of Companies and Legal Persons* of 1972, a company formed in one of the member states would be recognised by all the other member states — even when it did not comply with all the prerequisites set by the host state involved;

The European Economic Community then proceeded to issue a number of directives aimed at diminishing the differences between the company law systems of the member states — at present these directives cover almost the entire field of company law with the expected final effect of extensive company law reform in the whole of Europe;

Finally the EC aimed at the establishment of a single set of European forms of business enterprise, of which one should be singled out for purposes of this discussion on harmonisation in Southern African context: the *Societas Europaea*.<sup>39</sup>

#### **The *Societas Europaea* and The European Company Statute**

Pursuant to several failed proposals in 1970 and 1975 for a European Company, the European Commission published a directive for a European Company. This first concept is known as the draft European Company Statute and creates a supra-national form of business enterprise, aptly named the *Societas Europaea*. This directive sought to establish an optional legal entity for certain entrepreneurs within the European Union and to create a new mechanism for cooperation between companies registered within the various EU member states. The ultimate goal was to create bigger and more competitive trans-national business entities.<sup>40</sup>

The process of setting up such an undertaking is a simple one: a European Company, known as an SE (abbreviated from the term *Societas Europaea*) may be set up by existing national companies through:

- merging,
- setting up a joint holding company, or
- creating a joint subsidiary.<sup>41</sup>

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39 Henning 1996:158.

40 Brand 1997:53.

41 Anonymous 1998:24.

The additional requirements include that at least two of the companies should have their main administrative offices in two separate countries, that the initial capital should comprise at least 100 000 ECU and that capital should always be measured and reflected in ECU.<sup>42</sup>

The European Company Statute provides a governance structure comprising a general meeting of shareholders and a choice between a two-tiered management system, consisting of a supervisory board and a managing board, or a Board of Directors.<sup>43</sup>

From its introduction until now the realisation of this form of business enterprise has been hampered by a number of problems stemming, mainly, from the differences in company law between the various EU member states.<sup>44</sup> One of the biggest problems the *SE* faced was the extent and framework of worker participation in the business entity — this seems to have been resolved in the recent labour and social affairs Council held in April of this year.<sup>45</sup> Some authors have made an argument against the necessity of such a form of business enterprise in view of the freedom of movement so predominant within the European Union, and the options offered by the Third, Sixth and Tenth Directives, offering member states greater opportunities towards transnational competitiveness.<sup>46</sup>

### **The Close Corporation and Southern African Harmonisation**

In the same manner as the European Economic Community recognised the necessity of company law harmonisation through, *inter alia*, the establishment of a *Societas Europaea*, the need for a Southern African form of business enterprise in order to achieve the ideal of greater economic cooperation, must be recognised. It is submitted that there is, however little need for the formulation of an entirely new form of business enterprise.

When the Standing Advisory Committee on Company Law became convinced of the need for a new form of business enterprise, the close corporation was introduced in South African Law as a form of business offering

- greater freedom of choice in an incorporated business entity;
- deregulation;
- the promotion of more effective competition between small businesses;
- and certain tax advantages.

It proved less cumbersome than the highly complex and inappropriate company law regime and infinitely more accessible.<sup>47</sup> At present, in addition to South Africa, Namibia offers entrepreneurs the option of incorporating a

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42 Brand 1997:53.

43 Brand 1997:53-54.

44 Anonymous 1998:24.

45 Anonymous 1998:24.

46 Brand 1997:54.

47 Naudé 1995:2-8.

Close Corporation under the *Close Corporations Act* 26 of 1998, and Zimbabwe under the *Private Business Corporations Act* 15 of 1993.

When one takes into consideration the fact that the Close Corporation developed as a uniquely South African export, the application of the following objectives to a Southern African context seems fitting:

Company law has become increasingly complex due to the fact that the *Companies Act* and its complicated mechanisms were designed for the regulation of large public companies — the system of administration of companies, however, has compelled application to all companies, however large or small;

The alternative of building further exemptions for small companies into the *Companies Act* was viewed as unacceptable. The complexity of the act would only be exasperated and the burden on small companies would become too exacting.

Small business, the lifeblood of many South Africans, were in need of a form of business enterprise which afforded them with some sort of limited personal liability, without exposing them to the inaccessible South African mass of common law.<sup>48</sup>

Accordingly the stated aim of the *Close Corporation Act* of 1984 is to provide:

A simpler and less expensive 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.<sup>49</sup>

These objectives are by now familiar to every scholar of company law, but they echo the needs of the Southern African Developmental Community for an African *Societas Europaea* to complement its *African Renaissance*. The same objectives guiding the South African legislature can now guide the Southern African legislature because the needs do not differ between entrepreneurs from here to the borders of Egypt: simplicity, accessibility and limited liability.

The following distinctive features of the Close Corporation can serve the whole of Africa well:

- juristic personality;
- the capacity and powers of a natural person insofar as these are appropriate;
- a minimum of formalities in formation, administration and operation;
- the fact that a single person may form a close corporation, and that it need not be a undertaking for gain;
- no shares or issued share capital;

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48 Cilliers *et al* 1992:569-570.

49 Naudé 1984:118.

- the ability to utilise its own capital;
- flexibility in management and internal relations;
- equal participation in management by all the members of the corporation;
- decriminalisation — as discussed below, and
- less extensive accounting and disclosure regulation coupled with tax advantages suitable to the small business.<sup>50</sup>

In conclusion, one of the most important aspects of the close corporation is the extent to which the criminal sanction has been avoided. Whilst the Nel Commission of enquiry into the affairs of the Masterbond Scheme has highlighted in no uncertain words the inefficiency of the South African Criminal Justice Administration to effectively police companies, it makes a lot of sense to avoid the institution of criminal law sanctions from the start.<sup>51</sup>

The close corporation offers an example of effective and premeditated non-criminalisation of the variety that is necessary in the region. Supple application of personal liability serves as a commendable precedent for other African countries in the regulation of small business enterprises.

There is no need to reinvent the wheel in either the shape of harmonisation or business entities. The *Societas Europaea* has set the precedent in Europe, which the close corporation may follow in Southern Africa.

### 2.3.3 Corporate Law Reform in South Africa

In the two and a half decades since the introduction of the present *Companies Act* 61 of 1973, many fundamental changes and developments have occurred. As has been aptly pointed out<sup>52</sup>, these include significant changes to corporate structures, international trade and foreign investment in a world without borders, corporate failures in various jurisdictions manifesting serious defects in regulatory provisions and resulting in investors suffering extensive losses, South Africa's emergence from decades of isolation, extensive developments in corporate law reform in many jurisdictions, developments worldwide in the financial services industry and the financial services markets, changes in the nature of financial instruments and methods of investment, the mobility of international capital with the consequent necessity for domestic laws to be investor friendly and competitive with international trends, the explosion of information technology with significant consequences including virtual shareholding, cross-border voting, the establishment of

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50 Cilliers *et al* 1992:571-572.

51 The first Report of the Commission of Inquiry into the Affairs of the Masterbond Group and Investor Protection in South Africa.

52 For a comprehensive discussion, see Katz 'Developments in Corporate Law' 1997 *Journal for Juridical Science* 28-42; *id* 'Programme for Corporate Law Reform' paper read at the *Coordinating Research Institute for Corporate Law Conference on the Reform of Corporate law in Southern Africa*, Johannesburg, 28 August 1998.

trading blocks such as the European Union and NAFTA resulting in the harmonisation of laws, and, finally, the growth of unemployment leading to the formation of many smaller and more informal enterprises with the concomitant need for simpler, more user friendly and more accessible legislation.

South Africa now lags considerably behind other jurisdictions with British company law derivative systems. The following examples are sufficient for present purposes: the capital maintenance rule, including principles relating to purchase of own shares (share buy backs); the interaction between company law and labour law; investor protection and offers by companies of their securities to the public; corporate combinations, including mergers and acquisitions; corporate insolvency legislation, business rescue schemes and other aspects of creditor protection; accounting principles relevant to company and close corporations law; the participation of foreign corporations in South Africa's economy; unincorporated vehicles for the conduct of business activities such as partnerships, limited partnerships, limited liability partnerships and business trusts; the administration and enforcement of company law; the complexity of the *Companies Act*; the failure to harmonise company law developments within the SADC region; the extent to which modern concepts of corporate governance should be incorporated in company legislation; and procedures relating to general meetings of shareholders.

With the foregoing in mind, it should be clear that it is time for structured and urgent corporate law reform in South Africa. The same holds true for corporate law reform in Southern Africa.

#### 2.3.4.1 Matters previously identified

*The Standing Advisory Committee on Company Law (SAC)* issued a major policy statement on the future development of company law in 1985, with the purpose of informing the commercial world of the Committee's main objectives for company law reform and of utilizing available expertise in company law; the overriding aims are to simplify the *Companies Act* and to keep abreast of developments in the European Community and in Anglo-American law. Various problem areas were identified in order of importance and urgency.

*Category A:* introduction of a take-over panel; abolition of the distinction between public and private companies; sanctions for ensuring compliance with the provisions of the Act; *inter vivos* trusts not subject to established principles as provided by the Act.

*Category B:* Capacity and powers of the company, bringing these nearer to that of the close corporation; insider-trading; provision of a separate simpler Act to cater for associations not for gain and possible abolition of guarantee companies; minimum capital and insider loans; redemption of redeemable preference shares and potentially undesirable practices associated therewith; introduction of solvency and liquidity as a criterion as in the case of close corporations; tables A and B; simplification of procedure relating to company names; effectiveness of sections relating to disqualification of directors; disclosure of directors' interest in contracts; abuse of the company form.

*Category C:* development and introduction of a sophisticated and modern dispensation in regard to company groups; viability of no par value shares; need for special provisions to deal with multinational companies; valuation of doctrine of constructive notice which was expressly kept out of close corporation law; and institution of a logically structured *Bankruptcy Act* replacing Insolvency Act and winding-up provisions of the *Companies Act*.

A further statement on future development was issued by the SAC during 1989. While the general objectives of the previous programme did not change, developments, and in particular the phenomenal success of the close corporation, necessitated a revision of priorities.

The main items are as follows in their approximate order of priority: The establishment of the Securities Regulation Panel and to regulate take-overs and mergers and to control insider trading; the implementation of class actions for parties who have suffered loss through insider trading; the abolition of the distinction between private and public companies; various amendments to the *Close Corporations Act*, for instance to ensure effective application of the prohibition on loans and the provision of security in a group context, the effective enforcement of sanctions regarding the maximum number of members and participation by non-qualified persons in management; modernisation of the law of partnership; eliminating present abuses concerning trading trusts; uniform legislation on winding-up and sequestration; suitable amendment of the *Companies Act* to permit purchase by a company of its own shares; duties of non-executive directors and possibly the codification of director's duties in general; review of the *Sectional Titles Act*, 1986 and the *Share Blocks Control Act*, 1980; revision of associations incorporated under section 21 of the *Companies Act*; decriminalisation of the *Companies Act* and the imposition of personal liability as an additional penalty; ensuring meaningful disclosure requirements in the Third and Fourth Schedules; effective regulation of the group system; an independent statutory bureau replacing the Companies Registration Office; recognition of external close corporations; elimination of confusion and inadequacies regarding compromises and schemes of arrangement in terms of section 311 of the *Companies Act*; review of the effectiveness of provisions relating to the disqualification of directors.

The lists are comprehensive indeed. However, it should serve South African corporate law reformers well to be sensitive to the altered priorities consequent upon the comprehensive constitutional, economical, political and social changes wrought since the democratic elections in 1994. Practical examples of issues with enhanced priority for effective reform is workers' participation in the managing organs of corporations (for instance the board of directors) facilitating the introduction of ESOPS (employee share ownership plans), effecting a seamless match between corporate, bankruptcy and labour law, enhancing the protection of creditors as well as reviewing take-over legislation that may impinge upon the enhancement of economic participation by previously disadvantaged communities. A case in point is the compulsory offer to minorities in affected transactions provided

for in rule 8.1 of the Securities Regulation Code. This formed the subject of a critical press release by the SAC last year.

#### 2.3.4.2 Five-act approach

In 1997, pursuant to a meeting between the Minister of Trade and Industry and members of the SAC, the SAC issued a press statement through the Department of Trade and Industry on the development of the law of business enterprises in South Africa. A strategic framework of five principle statutes is envisaged within which, to some extent, greater provision is made for the empowerment of the victims of economic crime, and also for their protection:

Firstly, a redrafted *Companies Act* which will not include provisions to be contained in the proposed new *Securities Act* or *Bankruptcy Act*, mentioned below. The proposed new *Companies Act* will deal essentially with the formation of companies; the administration of companies; the major organs of a company, being the board of directors and the shareholders in general meeting; the relationship between the shareholders and directors; certain aspects of the relationship between a company and its creditors, including revised capital maintenance rules as well as the capacity of a company to purchase its own shares.

Secondly, a new *Securities Act* which will deal essentially with the raising of new capital by companies, including the obligation to register and issue prospectuses. This concerns essentially the primary markets; activities in the secondary markets, including take-overs, mergers, acquisitions, schemes of arrangement. This will also include the regulation of insider trading. The greater emphasis on the protection of investors emanates, partly, from the findings on the Nel Commission of enquiry into the affairs of the Masterbond Scheme. This Commission highlighted a number of aspects of investor protection for urgent attention.

Thirdly, the *Close Corporations Act* 69 of 1984 in its present form, that is as amended in 1997. Since the *Close Corporations Act* in its current form is more than adequate for the purposes which it is designed to regulate, it is not envisaged that significant changes will be effected to it.

Fourthly, a new *Bankruptcy Act* which will deal, in a single statute, with all of the provisions relating to insolvencies of individuals, companies, banks, pension funds, building societies, medical aid funds, insurance companies and cooperative societies. It will also include compromises and judicial management or similar legislation. This will drastically change the current position where provisions for the winding up of, for instance, a close corporation are contained in three separate acts. The South African Law Commission and the SAC are currently engaged in the preparation of the *Bankruptcy Act*.

Lastly, a new *Business Enterprises Act*, which will regulate unincorporated forms of business enterprise. This Act will focus, *inter alia*, on the law of partnership and the law of business trusts. Complex and often inaccessible sources of the *ius commune* presently typify the outdated South African law of partnership, which in addition is still based on the aggregate theory of partnership while the application of the entity view is limited to a few exceptional



cases. This contrasts sharply with the position in, for instance, the USA where the *Revised Uniform Partnership Act* of 1994 is based on the principle that a partnership forms an entity separate from the individual partners. Principles of both English law and Roman-Dutch law have been applied by our courts to constitute the bulk of the South African law of business trusts. These do not always enhance legal certainty or form a seamless match.<sup>53</sup>

#### 2.3.4.3 Interim measures

The five-Act approach enjoys priority in the drafting and promulgation of new legislation. However, in its 1997 press statement, released by the Department of Trade and Industry on its behalf, the SAC emphasised that, until the new legislation has been drafted, existing statutes will have to be amended and supplemented as the need arises. It is in some of these interim amendments that the current position of the victims of economic crime is improved significantly. Especially changes in the regulation of offers of shares to the public and insider trading that victims are afforded better protection and better prospects of recovering losses.

#### **Companies**

For this reason various areas were identified for urgent remedial legislation. These include the following:

- Legal backing for accounting standards and the creation of an Accounting Review Panel. Upon finalisation of negotiations between the Department of Trade and Industry and SAICA, the necessary legislation will be drafted and published for public comment.
- The amendment of Section 247 on the *Companies Act* to allow companies, at their cost, to insure themselves against negligence, default, neglect of duty or breach of trust by any of their directors or officers.
- The amendment of Section 228 of the *Companies Act* to provide that the disposal of the undertaking of the greater part of the assets of a company will be an “affected transaction” and subject therefore to the jurisdiction of the Securities Regulation Panel.
- The amendment of Section 144 of the Act to clearly stipulate when an offer of shares will be a public offer and to effectively prevent the making of offers by the so-called “private placement” route.

The SAC has given priority to amending legislation relating to the disclosure of the beneficial holding of shares in public companies by nominee companies, the purchase by companies of their own shares, and the disclosure of annual remuneration of directors in annual financial statements. At a meeting of the SAC held on 14 February 1997 it was resolved that beneficial holding of shares in listed companies by nominee companies be disclosed. It was also resolved to recommend that: public companies be

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53 Press statement released by the Department of Trade and Industry on behalf of the Chairman of the Standing Advisory Committee on Company Law, the Honorable Mr Justice Richard J Goldstone.

required to establish an appropriately constituted remuneration committee, the split between emoluments of executive directors and non-executive directors be disclosed; the performance versus non-performance elements of the directors' emoluments be disclosed; enhanced disclosure of share options and participation in share incentive scheme required, other prerequisites be disclosed; and that disclosure of individual directors' emoluments or emoluments in "bands" not be required.

The SAC also recommended to the Minister of Trade and Industry that the SAC should operate under its own statute and that its mandate should be extended to cover the areas of law covered by the five-Act approach. It was agreed that in order to promote efficiency and avoid fragmentation of corporate law, these statutes (with the possible exception of the proposed single *Bankruptcy Act*), should remain within the ambit of the activities of the Department of Trade and Industry and be administered by the offices of the Registrar of Companies and Close Corporations.

A further topic discussed with the Minister of Trade and Industry was whether the SAC could play a role in the Southern African region with regard to rationalising corporate law and so facilitating trade between the members of the SADC.

The Minister of Trade and Industry requested the SAC to consider and advise on the rationalisation of the many governmental bodies and authorities which are presently involved with the monitoring and enforcement of commercial law in many areas. Specific consideration should be given to the need for transparency, an equitable process and governance, preference, wherever appropriate, to self-regulation, ensuring full and prompt compliance with the law, and in the case of transgression, efficient prosecution and appropriate penalties.

An important objective in issuing this particular statement was to inform the general public of the work programme of the SAC, and more particularly the priorities which the SAC regard to be important as well as matters which are currently on the SAC's work agenda. The aim was to facilitate productive interaction between the general public, stakeholders and the SAC. Members of the public and other stakeholders who wish to make submissions to the SAC will now then be aware of the priorities established by the SAC.<sup>54</sup>

### **Securities Regulation**

Some of the proposed amendments were effected by the *Companies Amendment Act* of 35 of 1998, the *Second Companies Amendment Act* 60 of 1998 and the *Companies Third Amendment Act* 125 of 1998.

Section 144 was amended to prohibit so-called private placement of shares in attempts to bypass the required issuing of a prospectus in an offer of shares to the public. The amended section now clearly outlines offers that

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54 For this purpose the SAC can be contacted through the secretary: Standing Advisory Committee on Company Law, Registrar of Companies, PO Box 429, Pretoria, 0001. Tel: (021) 310 8724.

need not be accompanied by a prospectus in order to stop the private placements that are effectively offers to the public and the Securities Regulations Panel is now enabled to more effectively protect the interests of minority shareholders in that the disposal of a substantial part of a company's assets (previously approved by ordinary resolution) is classified as an affected transaction;

Draft legislation dealing with other issues, such as the purchase by a company of its own shares, was published for comment in the *Government Gazette* during 1998.<sup>55</sup> This press statement of the SAC has also been published in Volume 3 "Reform of South African Corporate law: Purchase by a Company of its Own Shares" of the *Corporate Law Development Series* of the Coordinating Research Institute of Corporate Law of the SAC.

### Insider Trading

The *Insider Trading Act* 135 of 1998 following on the recommendations of the King Task Group (as approved by the SAC) should also be mentioned. The prohibition on insider trading in terms of the *Companies Act* 61 of 1973 could never be effectively enforced and never resulted in any prosecutions.<sup>56</sup> *Inter alia* this Act provides for a derivative action against wrongdoers that may be instituted by the Financial Services Board, which as the new regulating body is given significantly enhanced enforcement powers.

The *Insider Trading Act* 135 of 1998 replaces section 440 F in the *Companies Act* 61 of 1973.<sup>57</sup> The prohibition on insider trading is framed in much broader terms in this act and is aimed at making the crime easier to police.<sup>58</sup> Furthermore, the act makes provision for both criminal and civil law penalties for insider dealing, while maintaining the common law actions which a victim of insider trading may have.

Civil liability in these terms entails that the perpetrator is liable to pay the Financial Services Board an amount of damages of up to three times the amount involved.<sup>59</sup> After the deduction of the costs of the Financial Services Board in recovering these damages,<sup>60</sup> the remainder of the funds is to be deposited in trust and ultimately utilised to compensate claimants who were affected by the avenged dealings.<sup>61</sup>

This act is the first to introduce punitive damages into South African Law.<sup>62</sup> It is submitted that this represents a significant step towards combating

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55 See Notice 724 of 1998 in GG 18868 of 8 May 1998.

56 Wandrag MS 'The Insider Trading Act 135 of 1998' 1999 Unpublished paper delivered at the Annual Conference of the Society of Law Teachers of South Africa. Section 17.

58 Wandrag MS "The Insider Trading Act 135 of 1998" 1999: Unpublished paper presented at the Annual Conference of the Society of Law Teachers of South Africa.

59 Section 6(3).

60 Section 6(5)(a).

61 Section 6(6).

62 *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC).

the abuse of price sensitive information and empowering the victims of economic crime through the administration of a trust fund from which damages may be compensated.

### **Close Corporations**

The SAC is responsible to make recommendations from time to time for the amendment of the *Close Corporations Act* 69 of 1985 and to assist the Minister on matters he refers to it. A Standing Sub-committee on Close Corporations (SSCC) is appointed by the SAC in terms of the Act for advice on all matters referred to it by the SAC. In this way provision is made for the observation of the operation and development of the *Close Corporations Act* and for shaping suggestions for reform.

A three year reform and development program of the SSCC on the following aspects was approved by the SAC: Replacing the section 72 composition; eliminating anomalies in group context; regulation of debentures and prohibition of offers to the public; jurisdiction in liquidation; membership by disqualified persons; effective enforcement of maximum membership; liability for the delay of subsequent members' contributions; use of the name, abbreviations and explanations with the name of a corporation; participation of disqualified persons other than members in the management of the corporation; period of reprieve for filling a vacancy for the office of accounting officer; duties of accounting officer and sanctions for non-compliance; abuse of separate legal personality of corporation; power of a member to bind the corporation; close corporations not for gain.

The following further aspects were also being researched by the Standing Sub-Committee in 1993: Practical problems concerning the attachment and transfer of members' interests; liability of members on deregistration of a close corporation; extending the jurisdiction of the Small Claims Court to cover internal disputes between the members of close corporations.

A comprehensive draft *Close Corporations Amendment Bill* was approved by the SAC and recommended for enactment in late 1994. This draft (with minor amendments effected during the committee stage concerning the use of abbreviation of the term "close corporation" in the ten other official languages) was eventually enacted as the *Close Corporations Amendment Act* 26 of 1997.<sup>63</sup>

### **Agency and representation**

Section 54 of the *Close Corporations Act* has significantly been amended to better the position of the bona fide third party in a transaction to which the close corporation is a party. At the inception of the act representation had been identified as a problematic provision in this act. The idea or perhaps the effect was that of an incorporated partnership, with two or more members, minority members' rights and representation. To effect these principles the

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63 See Henning (ed) 'Close Corporations' in *The Law of South Africa* (First Re-Issue 1996) Volume 4.3 paragraph 501.

provisions for representation were to an extent copied from the old English Partnership Act. This made the situation extremely complicated and difficult to comprehend without a sound knowledge of the English law of Partnership. The experience with the close corporation in South Africa has shown that approximately 75% of all close corporations are one man corporations, and this has compelled the Standing Advisory Committee to reconsider representation.

Where a member of a close corporation could bind that corporation contractually on either the actual business of the close corporation, or its main business as stated in the founding statement. An act by a member on behalf of the corporation could also be expressly authorised in advance or ratified retrospectively. The doctrine of estoppel as it applies in company law could also be used to hold the corporation to the acts of a member. The unfortunate effect was that the close corporation was protected at the cost of the innocent third party.

The amended section 54 provides, in essence, that a contract is binding on the close corporation if the third party contracted in good faith. Was he aware of the lack of authority of the member to inter into a particular transaction, or should he reasonably have been aware of the same, section 54 will afford him no protection.

It should be clear that this amendment enhances the protection of innocent third parties in their dealings with close corporations to a very significant extent, and in this manner also curbs the abuse of the limited liability offered by the close corporation.

### **Personal liability**

In further empowerment efforts, decriminalisation has played an important role. This entails the removal of certain actions from the cadre of criminal sanction and lending the victim of economic crime an appropriate civil remedy. The *Close Corporations Act* has, in addition been a model for non-criminalisation — a conscious legislative effort not to apply the criminal sanction in the first place. In this process the personal liability of the members of the close corporation has been an effective tool.

One of the anomalies in the *Close Corporations Act* was the mechanism for the enforcement of the 10-member maximum contained in section 63(c). Analogous to section 66 of the *Companies Act*, members were held personally liable for every debt of the corporation where the membership exceeded 10 members. Section 66 however, enforces a minimum membership and produces the result of a piercing of the corporate veil. In effects this could be interpreted as meaning that there is no maximum membership for the close corporation as a business entity, and that there are in fact two types of close corporations, those with limited liability and limited membership, and those with personal liability for the members but unlimited membership! This could place the close corporation in a legislative environment for which it was not designed. It would, for instance, be possible to employ the close corporation for raising capital from the public. To prevent such a scenario, the particular provision, section 63(c) has been repealed.

### **Other amendments**

For many years the jurisdiction of the magistrate's courts have been uncertain in disputes involving close corporations. The *Magistrates' Court Act* <sup>64</sup> now expressly makes provision for the jurisdiction of these courts in section 29(fA) in the liquidation of close corporations. The amendments to the *Close Corporations Act* clarify the availability of this cheaper procedure for most other actions stemming from the provisions of the main Act.

Some new provisions have been made with reference to the name of the close corporation, specifically a definition of the term "name" and compulsory name reservation. The requirement is aimed at the prevention of duplication and the elimination of undesirable names, which may lead to confusion or the detriment of creditors and consumers. As South Africa recognises eleven official languages, the registration of translations of a name could be against the public interest should a business be allowed to trade under eleven names, even if it has the same meaning in all eleven forms.

The *Close Corporations Act* has also been amended to make it clear that in certain circumstances the participation, directly or indirectly, in the management of the close corporation, not only by members is prohibited, but in fact the participation by any other person who is thus disqualified is also prohibited.

It has occurred in practice that members holding either a minority or a majority of the member's interest in the close corporation hold the others at ransom by not attending members' meetings, thereby rendering the corporation impotent in the passing of resolutions. Amendments have been effected to the principal Act to provide for situations such as these where members' meetings are to be held but a quorum is not present.

The accounting officer of the close corporation has also been under review and for practical purposes the length of time allowed for the appointment of a new accounting officer has been extended from 14 to 28 days. A vacating accounting officer is obliged to inform the Registrar of Close Corporations of any contravention of the *Close Corporations Act* of which he is aware, upon resignation or removal.

The ineffective section 72-procedure available to close corporations in liquidation has been substituted to provide for an relatively cheap, fast and practical procedure to effect a composition between the creditors and the corporation in question.<sup>65</sup>

### **Simplification effected and protection enhanced**

The result is that the *Close Corporations Act* has been simplified in significant respects while the protection creditors in general and of third parties dealing with the corporation in particular has been greatly enhanced.

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64 Magistrates' Courts Act 32 of 1944.

65 Cilliers Benade Henning Du Plessis Delpont *Close Corporation Service* (Issue 13).

In closing it may be interesting to note that these developments in South Africa did not pass without remark outside Southern Africa. Thus Professor Len Sealy of Gonville and Caius College, Cambridge described the Act as “a model worth very serious consideration” and considered it to be a much bigger success than the “unanimous written resolution” and “elective regime” amendments introduced for private companies by the British Companies Act of 1989. A report on alternative structures for small businesses in the United Kingdom pointed out that the South African close corporation has been highly successful, *inter alia* because of “its own intrinsic merit”, while Professor Janet Dine of the University of Essex recently expressed a “particular fondness for some aspects of the South African Close Corporation”. In her comprehensive 1996 survey of company law in more than twelve jurisdictions as part of the review of the Hong Kong Companies Ordinance, Professor Cally Jordan stressed that the South African *Close Corporations Act* “has proved to be one of the most remarkable innovations in South African company law” and one, at that, which appears to have been singularly successful.<sup>66</sup>

### Close Corporations

The *Close Corporations Act* 69 of 1984 (the “Act”) has proved to be one of the most remarkable innovations in South African company law.<sup>67</sup> The Act introduced a new form of incorporation for closely-held enterprises with several unique and innovative features with effect from the first of January 1985.<sup>68</sup> It provides a simple, inexpensive and flexible form of incorporation for the enterprise consisting of a single entrepreneur or small number of participants, designed with a view to meeting his or their needs and without burdening him or them with legal requirements that would not be meaningful in his or their circumstances.

The drafters of the *Close Corporations Act* were very sensitive of the fact that criminal law is a blunt and largely ineffective instrument for ensuring that technical or administrative duties are complied with. For this reason the *Close Corporations Act* creates only eleven offences. As sanction for non-compliance with the new system reliance is placed firstly on self-enforcement. Members failing to observe the relatively few basic rules of the system with its obvious benefits, forfeit their protection by incurring a personal and concurrent liability with the close corporation for the debts of the corporation. Section 63 provides for such a liability in regard to restrictions or duties imposed in eight different sections in the Act. Secondly, the Registrar is empowered in a few instances to impose a penalty and this is given the force of a civil judgement.<sup>69</sup>

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66 See Henning ‘Close corporations: A Statistical survey’ 1998 (July) *Amicus Curiae* 30.

67 Jordan *Review of the Hong Kong Companies Ordinance — Consultancy Report* (March 1997) 2-18.

68 See in general Naudé ‘The South African close corporation’ 1984 *Journal for Juridical Science* 119; Henning ‘Close corporations’ in *The Law of South Africa* Volume 7 part 3 (First re-issue) (1996) 497-500; Ping-fat ‘Not too close for comfort’ 1992 *International Corporate Law* 17.

69 Section 15(3).

The close corporation has met with wide and enthusiastic approval despite a generally unfavourable economic climate, as appears from the following comparative table.<sup>70</sup>

Because non-criminilisation forms a central theme of the *Close Corporations Act*, the growth of close corporations at the expense of incorporated companies in a very real sense effected the decriminalisation of South African entrepreneurial law and more particularly its corporate law.

**Table 1: Cumulative Registration**  
Cumulative Annual Registration [Incorporation and Conversion]  
of Close Corporations and Companies

Year	Close Corporations	Companies
1985	15 911	5 848
1986	39 298	11 084
1987	68 660	17 757
1988	104 752	25 150
1989	146 543	32 357
1990	185 462	39 425
1991	220 015	46 040
1992	255 020	52 788
1993	288 020	61 559
1994	331 813	73 620
1995	387 973	89 160
1996	452 797	108 851
1997	524 157	132 800

#### 2.3.4 Corporate Law Reform in Botswana

Botswana's *Companies Act* was enacted in 1959 and was closely modeled on the Southern Rhodesia *Companies Act* 1951, which was in turn modeled on the English *Companies Act* of 1948.<sup>71</sup> Pursuant to this enactment, some major amendments were enacted in 1995.<sup>72</sup> These reforms related primarily to transparency share ownership and the transfer of shares but also introduced a number of provisions on the office and functions of the Registrar of Companies.<sup>73</sup> In addition, the procedure for the reduction of capital was simplified so as to make provision for a more expeditious method which does not involve the confirmation of the court.<sup>74</sup>

70 Henning 'Close Corporations 1985-1997: a statistical survey' July 1998 *Amicus Curiae* 31.

71 Balule 1998:2; Kiggundu 1995:498.

72 Companies (Amendment) Act 1995: Laws of the Republic of Botswana Act 7/1995.

73 Balule 1998:2. For a complete discussion on these topics, see Kiggundu 1995:499.

74 Kiggundu 1995:505.



In 1998, the government of Botswana was engaged in the process of appointing a consultant to undertake a complete review of the Companies Act in order to update the act and ensure that it would ultimately be compatible with modern company law so as to provide for integrity in business practice.<sup>75</sup>

This consultant would be expected, *inter alia*, to conduct the following activities in pursuance of this stated aim:

- a) review and evaluate the effectiveness of the *Companies Act* and determine whether there have been any problems in its implementation;
- b) identify and remove any provisions of existing legislation which are or could be obstacles to attracting foreign investments;
- c) identify and incorporate any provisions which can facilitate and attract investment;
- d) review the *Companies Act* to ensure that it is compatible with and satisfies the requirements of the International Financial Service Centre and the operations of international business companies, especially with regard to the ownership of of-shore business activities, secrecy and confidentiality;
- e) review the *Companies Act* to find out how it relates to other relevant legislation such as the *Banking, Insurance and Stock Exchange Acts*;
- f) to simplify the *Companies Act* so as to make it easy to understand the provisions of the Act; and
- g) to produce a modern *Companies Act* that reflects the social and economic aspirations of Botswana and its business environment.<sup>76</sup>

It is clear that there is significant emphasis on attracting investment and bringing Botswana on a par with the rest of the world to the extent that reforming corporate law can achieve this. In addition, the following areas in dire need of reform have been identified:

- a) the provisions relating to company formation, which, *inter alia*, makes no provision for the formation of one-man private companies;
- b) the reform of the doctrine of *ultra vires* as it is applicable in Botswana;
- c) the provisions relating to the payment and distribution of dividends;
- d) pre-incorporation contracts;
- e) corporate share repurchased; and
- f) minority shareholder protection.<sup>77</sup>

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75 Balule 1998:2.

76 Terms of Reference: Review of the Companies Act (Botswana).

77 Balule 1998:2-5; Kiggundu 1995:508-517.

### 2.3.5 Corporate Law Reform in Zimbabwe

The Zimbabwean *Companies Act* was promulgated in 1952 as the Southern Rhodesia *Companies Act* 1951 and was, as mentioned, largely based on the 1948 *Companies Act* of Great Britain.<sup>78</sup> This act was amended in 1993 and a *Private Business Corporations Act* has been enacted, which follows closely the example of the South African *Close Corporations Act*.<sup>79</sup>

The 1993 amendments to the *Companies Act* mainly effected the following amendments to company law in Zimbabwe:

- a) it allowed for the formation of single member companies but still required the appointment of two directors;
- b) the *ultra vires* doctrine was abandoned, as was the doctrine of constructive notice;
- c) the reform moved away from capital maintenance in favour of the dual requirements of solvency and liquidity, accordingly permitting the granting of financial assistance for the acquisition of shares and allowing a company to purchase its own shares;
- d) the permitted utilisation of share premiums was extended so as to make provision for the use for the purchase of shares for employees and directors who are not members of the company;
- e) the regulations relating to the financial statements of companies was reformed so as to align them more closely with International Accounting Standards;
- f) the paramount duty of the company to its shareholders was extended to make provision that directors may also, in the management of the company, take into consideration the interests of the employees and their dependents;
- g) greater protection was provided for minority shareholders; and
- h) a number of amendments were effected in relation to the winding-up process.<sup>80</sup>

## 3. Conclusion

In the foreword to the millenium edition of the Official SADC Trade, Industry and Investment Review, President Joaquim Chissano, Chairman of SADC highlights the need for investment:

Despite far-reaching reforms to achieve macro-economic stability, the region continues to receive low levels of foreign direct investment. SADC can, however, not only rely on external sources of capital, it

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78 Kiggundu 1995:498.

79 Kennedy 1998:1.

80 Kennedy 1998:1-3.

needs to mobilise regional resources for cross-border investments through joint ventures.<sup>81</sup>

The Southern African Development Community has not been hesitant to take cognisance of other harmonisation models. Initiatives and organisation such as the South-American Mercosur and the European Union has been held up as examples of integration processes.<sup>82</sup> These are, however, not the only examples of regional integration and harmonisation. It may well be noted that SADC is not the only cooperative association of states in Africa.<sup>83</sup> There are other organisations, among which:

- a) ECOWAS — the Economic Community of West African States,<sup>84</sup> which first formally set out its plans for the creation of a form of economic and monetary union at the Monrovia Group meeting as early as 1968;
- b) OHADA — an organisation of francophone Western and Central African States;<sup>85</sup>
- c) CEAO — the West-African Economic Community;
- d) EDEAC — the Central African Customs and Economic Union;
- e) OCAM — the Mauritian Common Organisation; and
- f) CEPGL — the Economic Community of the Great Lakes Regions.<sup>86</sup>

It has been suggested that the Southern African development Community adopt the approach — or combination of approaches that will make investors in the region feel most comfortable.<sup>87</sup>

This said, one hesitates to think of the impact of a concurrent harmonisation attempt by all of these countries, many of whom belong to more than one economic grouping — in fact, the word domino effect comes into mind, with all its positive and negative connotations.

The free flow of capital has been identified as a critical factor in the process of reducing poverty, along with the lowering of trade barriers.<sup>88</sup> While the

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81 Southern African Development Community 2000:1.

82 Rotberg 1998:11.

83 See in general Martin 1989:3-25.

84 The member states of this organisation are Benin, Burkina Faso, Cape Verde, Cote d'Ivoire, The Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra Leone and Togo.

85 See Frilet 2000:213-221 on the especially good example of harmonisation within Africa. OHADA utilises a series of uniform acts, amongst which a uniform act for general commercial law.

86 Schulze 1997:65.

87 Goldstone 1998:2.

88 Rotberg 1998:11. The legal basis for the harmonisation of corporate law in the European Union is the right of establishment which not only provides for the mutual recognition companies, but also for the possibilities of mergers and other form of corporate combination. See in this regard O'Neill 2000:173-174.

trade protocols have been adopted<sup>89</sup> and much has been made of the harmonisation of stock exchange listing requirements and central banking regulation, it is an effort at harmonising corporate law that is noticeably absent.

However, it is not only corporate law harmonisation that needs to be addressed in order to safeguard the markets in the region: when considering the future of financial regulation in the region, it is important to consider the role of financial intermediaries. They ultimately provide a host of services critical to the functioning of any financial market.<sup>90</sup> Regulation is required to safeguard not only the consumers of financial services but also to reduce systemic risk.<sup>91</sup>

Attention should also be paid to accounting standards and the manner in which financial instruments and derivatives will be reported on.<sup>92</sup> In addition to stimulating economic growth in the region through the facilitation of a sound financial accountability framework, it is felt that upgrading the accounting system will promote social stability and foreign investment.<sup>93</sup>

Despite this, the fact cannot be overlooked that the corporate laws which generate the very shares to be traded on the stock exchanges and the financial statements to be audited, are in need of urgent inclusion in the harmonisation processes of the Southern African Development Community.<sup>94</sup> If anything, the harmonisation of corporate laws should only add impetus to the establishment of the common market.<sup>95</sup>

Harmonisation is, in itself not an end.<sup>96</sup> The question may, however, well be posed whether member states violate their duty in terms of the SADC treaty when they embark on corporate law reform processes that will take them further away from the goals set — and not closer.

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89 The stated aim is to realise a free economic trade zone by 2004, in which goods could cross borders without tariffs and taxes. See Matloff 1997:6. See also Grimett 1999:208-236; Brown 1998:1 and Pakote 1997:29-42.

90 Cecchetti 1999:1.

91 Cecchetti 1999:2.

92 See in general Brown 1998:1-7 and Crawford 1997:111.

93 Laliberte 1999:1.

94 In this regard, see the discussion in Wachter *et al* 1989:70-104 on the issues identified in the European Union harmonisation process.

95 Wachter *et al* 1989:12. See also the comment of Balule 1998:1 that a first step towards this is that each member state review its legislation and effect changes that will create an environment conducive for the operation of corporate entities in the region.

96 Wachter 1989:64.

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