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A Critical Analysis of Swaziland's Companies Bill of 2004

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I hereby declare that I have read and understood the regulations governing the submission of Master of Laws dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

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A Critical Analysis of Swaziland's Companies Bill of 2004.

B. Outline

I. Introduction

'Company Law provides the legal basis for one of the most important institutions organizing and galvanizing the economy, corporate business entities'.¹

Professor Kahn Freund² wrote;

'Business organization is in a constant state of flux, and the law cannot hope to keep abreast of developments if it ascribes to its own provisions the quality of immutability'
'...Company law is in need of constant revision and can never reach a stage of 'finality'

It is as a result imperative that the company laws of a country undergo reform consistent with its changing economic, social and technological trends and is in line with international standards.

II. Need for Reform

For almost a century, Company law in Swaziland has been stagnant. The country's current Companies Act as amended is a 1912 statute. Even though certain sections have been amended, the statute is still archaic and a major obstacle for the effective administration and operation of business in the country. The last amendment was in 1994, being the amendment of the table of fees to be paid by a company under Legal Notice number (LN 55/1994). This necessitated an urgent need for reform.

The South African DTI³ guidelines for corporate reform highlight that, internationally company law review is a continuous process that ensures that laws are reflective of

¹ The Department of Trade and Industry, South African Company Law for the 21st century, guidelines for corporate reform, May, 2004 <<http://www.dti.gov.za/ccrdlawreview/companylaw.htm>>, accessed on the 20th November, 2006.

² O Kahn Freund, 'Company law Reform' (1946) 9 *MLR*, 235 at 235.

market practices and societal needs. The Swaziland Companies Act of 1912 has not been comprehensively reviewed to take cognizance of the changing political, social and economic developments in the country.⁴

The Companies Act of 1912, being a colonial and obsolete statute is deficient in critical areas notably, capital rules, corporate capacity, corporate governance, share holder protection, accounting and disclosure, which is not an exhaustive list. In addition, as expressed in the South African DTI guidelines for corporate reform, and echoed in the Ministry of Enterprise and Employment's Consultative document⁵ 'we now live in a world of greater globalisation, increased electronic communication, there is greater sensitivity to social and ethical concerns, fast changing markets, greater competition for capital, goods and services'.⁶ Swaziland cannot be left behind and its company law should be cognizant of these developments.

With the advent of the fall of American corporate giants like Enron, WorldCom and other corporate giants through out the world, corporate governance has attained heightened importance and attention in government policy circles and in other spheres. Corporate governance reform has therefore become a topical issue. In order to address these corporate failures, many jurisdictions have enacted laws and /or corporate governance codes⁷ as an attempt to minimize or prevent corporate failures and curb losses to the investor. Swaziland's Company law, more particularly its corporate governance ethics has to be in harmony with these international trends.

³ DTI (note 1) at 14

⁴ It gained independence on the 6th September 1968. It is a member of regional and international organizations such as the Southern African Development Community (SADC) and the United Nations and A new constitutional framework has been adopted and is operative with effect from 8th February 2006.

⁵ Ministry of Enterprise and Employment, 'A review of the Swaziland companies act, 1912, a consultative document'. Herein after referred to as the 'Consultative Document' (Document on file with author).

⁶ DTI (note 1) at 14 and the Consultative document (note 5)

⁷ Legislative reforms as cited in Gerald Acquah-Gaisie, 'Towards more effective corporate governance mechanisms' (2005) 18 Australian Journal of Corporate Law 1 at 18, include, the US Sarbanes-Oxley Act 2002, Australia's Corporate Law Economic Reform (Audit Reform and Corporate Disclosure) Act 2004, Britain's Corporate Responsibility Bill 2003, Company Law Reform Bill 2005 (which is now an Act.) and German's Act on Control and Transparency of Enterprises (KonTraG), Reports on the prevention of collapses include the UK Cadbury Committee on Corporate Governance Report, Smith Report and Higgs Report, Australia's Ramsay Report, and the recommendations of France's Committee on Corporate Governance. Corporate Governance codes have been adopted.

III. Review of the Companies Act of 1912

In 1998, The Government of Swaziland embarked on an exercise to review the Act with a view of producing a new modern Companies Act that would reflect Swaziland's social and economic environment and aspirations.⁸ The reform process encompassed the review of the Companies Act of 1912 and the common law relating to these corporate entities. The review did not include partnership law.

The Ministry of Enterprise and Employment in conjunction with the common wealth secretariat appointed a company law expert, Professor John Kiggundu, an associate Professor in the Department of Law at the University of Botswana. He has published extensively in the areas of company law and Private International law in learned international journals.⁹ Professor Kiggundu was appointed to work with a drafting team which was already in place. The details of the appointment of the drafting committee will be discussed in chapter two of this paper.

The review of the 1912 statute has produced a Swaziland Companies Bill of 2004 which is currently being debated by cabinet.¹⁰ Recently the Companies Bill of 2004 was tabled before the House of Senate and approved with amendments¹¹. The Companies Bill of 2004 is yet to be tabled before the House of Assembly. This will occur after the submission of this paper. At the submission of this paper, the Companies Bill of 2004 will not have been assented to by The King of the Kingdom of Swaziland in terms of section 108 of the Constitution of Swaziland.

The Swaziland Companies Bill of 2004 has incorporated changes such as deregulating smaller companies, decriminalizing non-compliance, establishing a Registrar of Companies office under the Public Service Act, establishing a Standing Advisory

⁸ Consultative document (note 5)

⁹ John Kiggundu, 'Company Law and Partnership Law in Botswana' (Morula Press: Botswana, 2000) 3

¹⁰ <http://www.swaziobserver.org.sz>, accessed on the 31/08/06.

¹¹ Amendments made by the Senate as regards the Companies Bill, 2004 (Document on file with Author).

Committee on company law, introducing comprehensive rules on corporate capacity and agency, pre-incorporation contracts, share capital, administration of companies, director's liability, accounting and disclosure amongst other pertinent changes.¹²

IV. Scope of the Paper

This paper seeks to critically analyze the effectiveness of Swaziland Companies Bill of 2004 in addressing corporate issues in the Kingdom and as an international competitor in the 21st century. The scope of this analysis will cover the fundamental rules pertaining to the birth, maintenance and existence of companies, more particularly rules pertaining to the formation, governance and capitalization of companies as specifically identified in the consultative document¹³ and will not include the death of companies vis a vis, the winding up of companies.

In assessing the competitiveness of this legislation and whether it is in harmony with other company legislations, this paper will make a comparison of the companies' acts of countries in the SADC region and internationally, where necessary. In the SADC region this paper will make comparisons of the companies Act of, Namibia¹⁴ who has recently reviewed its company and commercial laws, Botswana who has also partially reviewed its commercial law¹⁵ and South Africa who is about to overhaul its company laws. On the international arena the company laws of the United Kingdom¹⁶ as an exporter of Company law to most commonwealth countries, and particularly because the United Kingdom has also embarked on an exercise to review its company laws as well.

This paper will also conclude with recommendations for improvement of corporate law in Swaziland.

¹² Consultative document (note 5) at 4 – 19.

¹³ Consultative document (note 5)

¹⁴ Companies Act no.28 of 2004

¹⁵ Companies (Amendment) Act 7/ 1995

¹⁶ Companies Act of 2006

1. The Legal Situation in Swaziland.

1.1 General Introduction

I. **Geography**¹⁷

The Kingdom of Swaziland is a landlocked country in Southern Africa with a surface of 17,363 square kilometers. It is bordered by Mozambique and South Africa. The major cities in the country are Mbabane which is the capital city with a population of 60,000 (sixty thousand) and Manzini which is the principal commercial city, with a population of 65,000 (sixty-five thousand.) Lobamba is the royal and legislative capital.¹⁸ The overall population in 2004 was measured at 1.1 million.¹⁹

The country is divided into four regions. The Highveld, Middleveld, Lowveld and Lubombo Plateau. The Highveld measures 5000sqms with temperate climate suitable for afforestation²⁰. The Middleveld measures 5000sqms and is characterised by abundant rain fall in summer with good grazing and fertile soil for crops.²¹ The Lowveld is 6500sqms and is described as a typical African bushveld, with intense sugar cane farming under irrigation.²² The Lubombo Plateau runs along the eastern border of Swaziland.²³

The terrain of the country is mountainous plateau to savanna, and the climate is near temperate to tropical.²⁴

II. **Cultural Composition**²⁵

The majority of the population is 97 (ninety –seven) percent Swazi and 3 (three) percent Europeans.²⁶ Traditionally Swazis have been subsistence farmers and herders, but

¹⁷ <http://www.gov.sz/> accessed on the 10th December,2006

¹⁸ (note 17)

¹⁹ <http://www.state.gov/> accessed on the 10th December, 2006

²⁰ (note 17)

²¹ (note 17)

²² (note 17)

²³ (note 17)

²⁴(note 19)

²⁵ (note 17)

²⁶ (note 17)

some now work in the growing urban formal economy and in government. Some Swazis work in the mines in South Africa. The country's official languages are SiSwati and English. Official Government business is conducted in English.

III. Government and Political Conditions

His Excellency King Mswati III is the traditional²⁷ and hereditary²⁸ head of State, and The Head of Government is the Prime Minister²⁹, The Honourable Absalom Themba Dlamini.

Swaziland attained its independence on the 6th September, 1968 and is one of the few remaining monarchs in the world. On July 26, 2005 King Mswati III ratified Swaziland's constitution. It came into effect on the February 8, 2006. This is Swaziland's first constitution in over 30 years. The constitution is the supreme law of Swaziland.³⁰

Swaziland has a bicameral parliament of which consists of a Senate and a House of Assembly.³¹ The senate consists of not more than thirty-one members, half of whom should be female. Twenty of the above senators, eight of whom should be women are appointed by the king,³² and ten by the house of assembly. The House of Assembly consists of not more than seventy-six members. Not more than sixty members are appointed through popular vote in their constituencies and not more than ten are nominated by the king.³³ Both members of the house of Assembly and Senate serve for a period of five years.

According to the constitution the King is vested with executive authority³⁴. The king must approve legislation passed by parliament before it becomes law³⁵. Judicial power in

²⁷ Section 228 of the constitution of The Kingdom of Swaziland, 001/2005.

²⁸ Section 4 of the constitution of the Kingdom of Swaziland

²⁹ Section 66(2) of the constitution of the Kingdom of Swaziland.

³⁰ Section 2 of the Constitution of The Kingdom of Swaziland.

³¹ Section 94 of the constitution of the Kingdom of Swaziland.

³² Section 94(3) of the constitution of the Kingdom of Swaziland.

³³ (sic) Section 95(1)a and 95(1)b of the constitution of the Kingdom of Swaziland.

³⁴ Section 64(1) of the constitution of the Kingdom of Swaziland.

³⁵ Section 65(4) a of the constitution of the kingdom of Swaziland.

Swaziland vest in the Judiciary.³⁶The Judiciary consists of a dual court system of traditional courts under chiefs and a Roman-Dutch system comprising magistrates courts, High Court, and the Supreme Court³⁷.

For local administration Swaziland is divided into four districts, each with an administrator appointed by the king.³⁸ Parallel to the government structure is the traditional system consisting of the king and his advisers, traditional courts, 55 tinkhundla (sub regional districts in which traditional chiefs are grouped), and 366 chiefdoms³⁹.

IV. An Overview of the Economy⁴⁰

Swaziland is regarded as a developing country. Most of the high-level economic activity is in the hands of non-Swazi's, but ethnic Swazis are becoming more active. With the advent of the Job creation fund there will be an influx of small to medium businesses. The Job creation fund was initiated by His Majesty King Mswati III in 2005 in partnership with local stakeholders, (including banks, private companies, public companies etc) in order to assist indigenous Swazi's meeting the funds required criteria to establish businesses in an effort to lessen the current un-employment rate.

The past few years have seen wavering economic growth, which has been exacerbated by the economy's inability to create new jobs at the same rate that new job seekers enter the market. This is due in part to the country's population growth rate, which strains the natural heritage and the country's ability to provide adequate social services, such as health care and education. Overgrazing, soil depletion, drought, and floods are persistent problems⁴¹.

Nearly 60% of Swazi territory is held by the Crown in trust for the Swazi nation. The balance is privately owned, much of it by foreigners. For Swazis living in the rural area, the principal occupation is either subsistence farming or livestock herding⁴².

³⁶ Section 140(1) of the constitution of the kingdom of Swaziland.

³⁷ Section 139 of the constitution of the kingdom of Swaziland.

³⁸ See chapter VII of the Constitution of the kingdom of Swaziland in general.

³⁹ (note 19)

⁴⁰ <http://www.info.swz/> accessed on the 10th December 2006

⁴¹ (note 40)

Surrounded by South Africa, except for a short border with Mozambique, Swaziland is heavily dependent on South Africa for nearly all its imports and to which it sends more than half of its exports. The economy is based on agriculture - subsistence agriculture occupies more than 60% of the population - and the agro-industry. Export earnings, which amount to around 70% of GDP, come primarily from agro-industries, sugar and wood pulp. Mining has decreased in importance in recent years with the depletion of deposits⁴³.

Although Swaziland is a middle-income country with a per capita GDP of US\$1,340, adult per capita consumption for the poorest 40 per cent of its population is equivalent to US\$230. HIV prevalence, high unemployment and the continuing spread of poverty pose major challenges to economic growth and stability⁴⁴.

⁴² (note 40)

⁴³ (note 40)

⁴⁴ (note 40)

1.2 A synopsis of the History of Company Law in Swaziland.

Cheffins,⁴⁵ once observed that, 'the UK has a distinguished pedigree as an exporter of legal concepts and innovations, in part because Britain's status as a colonial power served to ensure that the English common law system was introduced in many areas throughout the world'

It is therefore opportune to highlight that companies are therefore not indigenous to Swaziland. They have their origins in the United Kingdom. The law governing companies is part of Swaziland's received law.⁴⁶ It is therefore prudent at this juncture to reflect on the historical background leading to this inherited law.

In 1652, the Dutch Settlers arrived and began to occupy the part of South Africa, now known as the Western Cape and settled there⁴⁷. In 1795, the British occupied the cape for the first time.

This occupation was broken from 1803 to 1806 by the Batavian Republic.⁴⁸

In 1806 English forces defeated the Dutch settlers and took the Cape of Good Hope as a British possession. South African law reflects this history of successive colonial governance⁴⁹. The British ruled the Cape as a self-governing colony until the formation of the Union of South Africa in 1910⁵⁰ When they occupied the Cape, the British allowed the Dutch settlers to apply their own law⁵¹. This law was Roman-Dutch which the settlers

⁴⁵ B.R.Cheffins, "Our common legal heritage: fragmentation and renewal (1999) 30 Law Librarian 4-5, cited in Tsepho Mongalo "South Africanizing Company Law for a modern competitive global economy, (2004) Vol 121 issue 1 SALJ 93 at 93

⁴⁶ Swaziland's received law is Roman Dutch Common Law in terms of Section 3 of the General Administration Act 11 of 1905 of Swaziland, which provides that 'the Roman Dutch Common Law, save in so far as the same has been heretofore or may from time to time hereafter be modified by statute, shall be the law in Swaziland'.

⁴⁷ "The Dutch East India Company originally sent Jan Van Riebeeck to establish a base/outpost at the Cape of Good Hope in 1652. The intention was to simply to enable the company ships to refresh themselves with vegetables, meat, water and other necessities en route to the East Indies. This Outpost became a fully fledged post and more Dutch and other Europeans started to settle there. The Dutch Rule ended in 1806 and the British took over." <http://en.wikipedia.org/wiki/joint-stock-company/> accessed on the 10th December, 2006.

⁴⁸ <http://en.wikipedia.org/wiki/joint-stock-company/> accessed on the 10th December, 2006.

⁴⁹ <http://www.llrx.com/features/southafrica.htm/> accessed on the 8th December, 2006.

⁵⁰ After the South African Anglo-Boer War (1899 -1902), Britain took control of all parts of South Africa, and in 1910, a Union of South Africa was established with four provinces: the Cape, Natal, the Orange Free State, and the Transvaal. Following this amalgamation, the legal systems of the four territories were made more consistent, partly through legislative innovation, and partly through the activities of the new Appellate Division of the Supreme Court, the highest court country-wide in terms of the 1909 South Africa Act. <http://www.llrx.com/features/southafrica.htm/> accessed on the 8th December, 2006

had brought with them from the Netherlands. The British introduced English Statutory and Common Law Principles to supplement Roman-Dutch law in those areas where it was deficient or non-existent.⁵² Company law was one such area and English company law was accordingly introduced at the Cape”.⁵³

Although the concept of the company in Britain can be traced as far back as the fourteenth century⁵⁴, this paper will concentrate on the historical development of the registered company as a company incorporated or formed by registration under a general enabling companies act.

The Joint Stock Companies⁵⁵ Act of 1844 was the first Act in Britain to allow incorporation in terms of a general enabling Act.⁵⁶ This Act made provision for only one type of company namely the unlimited company⁵⁷ and it also provided for the institution of the Office of the Registrar of Joint Stock Companies where prescribed documentary

⁵¹ Consultative Document (note 5) at 2

⁵² Roman-Dutch Law did not always cater for the requirements of the modern society that developed during the 19th century, necessitating legislative innovation, which was often based on English acts and interpreted using relevant English precedent. The advocates and judges of the superior courts were usually trained in England and tended to rely on their English treatises. As a result of such factors, the Roman-Dutch law of the Cape Colony was overlaid with a heavy English law influence. The Cape legal system was, in turn, followed by the British colony in Natal, and also, in many respects, by the Zuid-Afrikaansche Republiek (the Transvaal) and the Oranjevrijstaat (the Orange Free State) - the Boer Republics established by Dutch trekkers in the mid-nineteenth century.

<http://www.lrx.com/features/southafrica.htm/> accessed on the 8th December, 2006

⁵³ Consultative Document (note 5) at 2

⁵⁴ Maria Susanna Wandrag, 'The Distinction between private and public companies in South African company law; A Historical analysis and comparative evaluation.' Magister Legum thesis. University of the Orange Free State, 1997) 4

⁵⁵ 'A joint stock company is a type of business partnership in which the capital is formed by the individual contributions of a group of shareholders. Certificates of ownership or stocks are issued by the company in return for each contribution, and the shareholders are free to transfer their ownership interest at any time by selling their stock holding to others'.

'Ownership of stock confers a number of privileges. The company is managed on behalf of the shareholders by an elected Board of Directors. Consequently, the share owner may attend an annual general meeting, and vote for directors and sometimes the principal officers. The shareholders receive an annual report, and vote upon the yearly audited set of accounts. Other resolutions upon important decisions can be put to them. There are other meetings. Which may be called, either regularly or by special resolution of either the Board or the shareholders themselves. The shareholders are usually liable for any company debts that exceed the company's ability to pay. However, the limit of their liability only extends to the face value of their shareholding. Ordinary shares entitle the owner to a share in the company's net profit'.

http://en.wikipedia.org/wiki/joint-stock_company/ accessed on the 10th December, 2006.

⁵⁶ Cilliers and Benade et al, 'Corporate law', 3rd ed (LexisNexis Butterworths: Durban, 2000), 21

⁵⁷ Cilliers (note 56) at 21

information relating to companies had to be kept for public inspection.⁵⁸ The Joint Stock Companies Act of 1844 also provided for the following;

- 'the formation of companies with unlimited liability by the lodging of prescribed documentation at the Office of the Registrar followed by the issue of a certificate of incorporation;
- the preparation and delivery of full and fair audited balance sheets and the auditors' reports to all shareholders;
- the reading of the report of the directors at the annual meetings of companies; and the filing of the balance sheets and auditors' reports at the Office of the Registrar⁵⁹;

The members were held personally liable for the debts of the company.⁶⁰

The Limited Liability Act of 1855 accepted the unlimited liability of members as a given fact but created the machinery for the limitation of such liability to the amount due by members on their shares.⁶¹ The Limited Liability Act 1855 further required that companies with limited liability should have the word 'limited' as the last word of the name of the company, a minimum membership of 25 and minimum subscribed and paid-up capital⁶².

The Limited Liability Act in addition, provided for the winding-up of the company in the event of three-fourths of the capital being lost and further provided that the directors of a company should be personally liable where they authorised the payment of a dividend when the company was insolvent or where the directors made loans to members.⁶³

⁵⁸ Honourable Mr. Justice H.C.Nel, 'Commission of inquiry into the affairs of the Master bond group and investor protection in South Africa.' Corporate law and Securities regulation in South Africa; Cape town April, 2001 Vol 1, (Nel Commission.) 59. <http://www.doj.gov.za/2004dojsite/commissions/comm-nel.htm/> Accessed on the 12th December, 2006

⁵⁹ Nel Commission. (note 58) at 59

⁶⁰ Cilliers (note 56) at 21

⁶¹ Nel Commission. (note 58) at 59

⁶² Nel Commission. (note 58) at 59

⁶³ Nel Commission. (note 58) at 59

The Joint Stock Companies Act of 1856 consolidated the two former Acts and thus made provision for two kinds of Companies, the unlimited company and the limited company. This Act can lay claim to being the first modern English Companies Act.⁶⁴

The Joint Stock Companies Act of 1856 further introduced the following;

‘A limited company with a fixed capital structure. It introduced the memorandum and articles of association and abolished the compulsory audit of balance sheets and introduced a system of winding up under the Companies Act. The present South African Public Company having a share capital is a direct descendant of the latter.’⁶⁵

It was followed by an amending Act in 1857 and then by the consolidating Companies Act in 1862 which served as the model for most of the Commonwealth countries.⁶⁶

- ‘It prohibited the association of more than 10 persons for the purpose of carrying on banking and the association of more than 20 persons for the purpose of carrying on any other business for gain unless registered as a company;
- allowed seven or more persons to form an incorporated company with or without limited liability, but if limited, that word had to be added to the name of the company;
- empowered the Board of Trade to appoint inspectors to inspect the affairs of a company;
- contained schedules for the optional use by companies dealing with such matters as the payment of dividends, accounts and the audit of the accounts’⁶⁷.

The Cape Joint Stock Companies Limited Liability Act of 1861 was the first company legislation in South Africa and almost verbatim adoption of the English joint stock

⁶⁴ Cilliers(note 56) at 21

⁶⁵ Nel Commission. (note 58) at 60

⁶⁶ Nel Commission. (note 58) at 60

⁶⁷ Nel Commission. (note 58) at 60.

companies Act of 1844 and the limited liability Act of 1855 which were already repealed at that stage.⁶⁸

When the cape passed that Act the other South African colonies followed Suit, Natal, the Orange Free State and Transvaal passed similar legislation.⁶⁹

The Transvaal passed the De Akte Van Maatschapijen met Berperkte Verantwoordelijkheid Act of 1874 based on the 1861 cape statute. In 1909, the Transvaal Companies Act 1909 replaced the 1874 Act. This Act was based on the English Companies (Consolidation) Act of 1908⁷⁰. Swaziland's Companies Act of 1912 was based on the Transvaal Companies Act of 1909.⁷¹ Company law in Swaziland has not changed from the 1912 statute despite amendments to certain sections in the act, it remains relatively archaic. Swaziland has not substantially changed its company law despite changes in company law in other countries who share a common Roman Dutch heritage, like, Botswana, Lesotho, Namibia, South Africa and Zimbabwe.⁷²

1.2.1 A Synopsis of the development of the Swaziland Stock Exchange

I. Background⁷³

Despite having an archaic and outdated companies act, there has been a gradual realisation by the public that investment in securities is a very profitable and secure form of investment. A move towards a formal structure for capital markets development in Swaziland goes back as far as 1989 when a working party, under the direction of the Central Bank, was commissioned to examine if there were economic benefits to be derived from the establishment of a stock exchange.⁷⁴ The working party concluded that there was a need and an opportunity for such a move.

In July 1999, a fully-fledged stock exchange, the Swaziland Stock Exchange (SSX), was inaugurated. Exchange operations are conducted under the supervision of the

⁶⁸ Consultative Document (note 5) at 3

⁶⁹ Consultative Document (note 5) at 3

⁷⁰ Consultative Document (note 5) at 3

⁷¹ Consultative Document (note 5) at 3

⁷² Consultative Document (note 5) at 3

⁷³ <http://www.ssx.org.sz/> accessed on the 12th December, 2006

⁷⁴ (note 73)

Capital Markets Development Unit (“the Unit”) of the Central Bank, which has regulatory oversight over the operations of the market.⁷⁵

The Unit was formed in 1999. It does not only oversee the operations of the Exchange but authorises and supervises collective investment schemes and fund managers.

II. Structure

The Exchange is made up of various members (including listed companies, stockbrokers, and institutional investors) and is regulated by a Committee of the Exchange. The Stock brokers include, African alliance Swaziland, Swaziland Stock brokers Limited, Interneuron Swaziland. The Committee consists of two representatives from licensed stockbrokers, one representative from the Central Bank who acts as chairperson, one representative from the listed companies, a representative from institutional investors and a representative from transfer secretaries. A representative from the Capital Market Development Unit serves as secretary to the Committee.⁷⁶

Some of the companies listed on the Swaziland stock exchange, include Nedbank Swaziland Ltd, Newera partners Ltd, Royal Swaziland Sugar Corporation Ltd, Swaziland Property Investments Ltd, Swazi Spa Holdings Ltd, Swaziland Empowerment Ltd.

1.2.2 Application of the Companies Act of 1912

Section 199 of the Companies Act of 1912, provides that the act has restricted application to banking and insurance companies in so far as it is not inconsistent with other laws. Section 200 of the Companies Act of 1912, specifically prohibits the application of this act to co-operative agricultural societies, building societies, trade unions and friendly societies. These societies are governed by the Co-operative societies Act no. 28 of 1964, the Building Societies Act no 1 of 1962, and the Trade Union and Employers Organization Act no.12 of 1966 respectively. Friendly Societies are not regulated by legislation as yet. However, section 200 (1) (a) has a proviso which specifically

⁷⁵(note 73)

⁷⁶ (note 73)

stipulates that the above mentioned societies shall be permitted to register under part I of the Companies Act of 1912 for incorporation pending the enactment of any law providing for their registration and management.

1.3 Shortfalls of the 1912 Companies Act⁷⁷

1.3.1 The office of Registrar of Companies

I. Establishment of the Office

Section 212 of the Companies Act, 1912 provides for the establishment of an office for the registration of companies, and an officer referred to as the Registrar of Companies, who shall exercise such powers for the effective registration of companies. The Companies Act of 1912 makes provision for 'other officers and clerks' that shall assist the Registrar of Companies in the effective registration of companies under this Act.

One of the shortfalls of the Companies Act is that it does not adequately outline the duties and functions of the Registrar of Companies and it does not specifically provide for the establishment of the portfolio of Deputy Registrar who would be empowered to carry on the functions of the Registrar in his or her absence. It merely makes a provision for 'other officers and clerks' in which the Deputy Registrar's office could be established, however, I believe this portfolio requires to be properly established by the Act and the duties, functions and powers of the Deputy Registrar have to be clearly outlined in the Act.

In practice, the office of Registrar of companies is a position created under the Ministry of Enterprise and Employment, whereas the actual registration of companies occurs in the Ministry of Justice, with the exception of companies incorporated in terms of section 21 of the Companies Act of 1912. Registration of Section 21 companies, amalgamations and mergers require the consent of the Ministry of Enterprise and Employment.⁷⁸

⁷⁷ The Government of Swaziland in conjunction with the Commonwealth Secretariat has embarked on an exercise to review the current Companies Act of 1912 in Swaziland, and a consultative paper was prepared identifying the areas in need of review in the Companies Act of 1912. These are the areas from which I have couched the shortfalls of the 1912 Companies Act.

⁷⁸ Interview with the legal advisor for the Ministry of Enterprise and Employment, Mrs. Theresa Mlangeni on the 14th September, 2006 at 10am and see also section 21 of the Companies Act of 1912.

II. Hindrances encountered by the Office

The current Companies' Act of 1912 is highly criminalized and yet the office of Registrar of Companies is not equipped to investigate alleged breaches contained in the Companies Act.⁷⁹ The office of Registrar of companies does not have the capacity to police all companies in Swaziland. There have been no prosecutions for offences under the existing companies act for many years.

For the effective administration of the office, the Registrar of Companies should be a person who is conversant with the law⁸⁰, this will enable the Registrar to be conversant with detailed company law issues, and the office of the Registrar of Companies should fall under one Ministry. The functions and duties of the Registrar should be clearly outlined and the office should be fully equipped with qualified personnel and resources for the efficient functioning of the office.

1.3.2 The Standing Advisory Committee on Company Law

The absence of a Standing Advisory Committee on Company Law has been seen as a short fall of the Companies Act, 1912. A Standing Advisory Committee is crucial for the constant review of the Companies Act in the country and to ensure that company law in Swaziland is in harmony with international trends.

1.3.3 Company Formations

I. Types of Companies

Section 5 of the Companies Act of 1912, allows for the incorporation of two types of companies. A company having a share capital⁸¹ and an unlimited company⁸². Both of the above types of companies can be either Public or Private Companies. The Companies Act

⁷⁹ Swaziland Institute of Accountants stake holder submissions page 5.(Document on file with author)

⁸⁰ Preferably a person who has a minimum of a basic diploma or a degree in law.

⁸¹ Section 5(1) defines this company as, 'a company having the liability of its members limited by the memorandum to the amount unpaid on the shares respectively held by them.'

⁸² Section 5(2) defines this company as, 'a company not having any limit on the liability of its members'

also provides for the incorporation of a special type of company, the section 21 company which is registered with limited liability.

A. Companies having a share capital

Section 6 of the Companies Act of 1912 requires companies having a share capital to state in its memorandum of association, the amount of such capital and the number of par value shares it is made up of. Each subscriber of shares is required to take a minimum of one share and sign opposite his name and indicate the number of shares he has taken. The Companies Act does not specifically refer to par value shares but shares of a fixed amount. (which are par value shares). Further the memorandum of association is required to mention the name of the company with 'limited' as the last word in its name. The memorandum is further required to mention the place in which the registered office of the company is situated in Swaziland, state the objects of the company and mention that the liability of its members is limited.

Section 7(2) of the companies act requires unlimited companies having a share capital to similarly mention the amount of such capital and the number of par value shares it is made up of. Each subscriber of shares is required to take a minimum of one share and sign opposite his name and indicate the number of shares he has taken.

B. Unlimited Companies

Section 7 of Companies Act of 1912, requires the memorandum of association of unlimited companies to mention the name of the company, the place in which the registered office of the company is situated in Swaziland, and the objects of the company.

II. Mode of forming a company

A. Minimum Membership

Section 4 of the Companies Act of 1912 provides that a minimum of seven persons can form a public company and no ceiling is prescribed by the act, whereas in the case of a private company, a minimum of two persons and not more than fifty persons can form a

private company. Kiggundu's⁸³ describes these formalities, as anachronistic, anomalous and with no legal or practical justification. Blackman⁸⁴ mentions that if the membership of a public company falls below the minimum requirement of seven members, the company does not cease to exist or become illegal. It may however have other consequences.

Blackman mentions that a private company that loses all its members can also continue a legal existence but there are no consequences prescribed by the Act.⁸⁵ The Companies Act of 1912 provides for sanctions for both private and public companies falling below the legislated threshold of members. Section 112 (d) of the Companies Act of 1912 provides that a public company which falls below the minimum membership required of seven persons and a private company which falls below the minimum membership required of two persons may be wound up by the court. Section 102 of the Companies Act provides that members carrying on business with members who are below the statutory threshold for more than six months with intention shall be severally liable for the companies debts contracted during that time without any other member being joined in the action.

It is interesting to note that the Act does not mention what sanctions are imposed on a private company operating with more than the maximum number of members.

The provisions for minimum membership limit the freedom of individual business persons from incorporation as individuals and from acquiring the benefit of limited liability.

The restriction of individual incorporation is a hindrance in the growth and development of the economy especially in the small business sector because many private companies are in reality so-called one man companies in that the second member is nothing more than a nominee of the first.

⁸³ John Kiggundu, 'Company law reform in Botswana; The agenda for the twenty-first century' (1996) 117 *SALJ* 508

⁸⁴ M S Blackman, R D Jooste and G K Everingham, 'Commentary on the Companies Act'. Vol 1, Juta and Co Ltd, Lansdowne 2002. at 32

⁸⁵ Blackman in this instance is referring to the South African Companies Act of 1973, which allows the incorporation of a private company by a single member.

B. Persons who may form a company

Section 5 of the Companies Act of 1912 provides that ‘...any person may form...’ a company. Blackman⁸⁶ aptly points out that there is no restriction on the type of person who may incorporate a company. This interpretation is derived from the word, ‘any’ and the word ‘person’ from interpretation laws. It follows that the wording in this Act is wide enough to incorporate companies being members of other companies, foreigners etc. Blackman points out the exceptions to the above. He mentions that provisions of particular statutes limit the class of persons who can be members of some companies. He particularly refers to the Attorney’s Act and in Swaziland it would be the Legal Practitioner’s Act which limits certain classes of persons from being members of a professional company. Minors who are not assisted by their guardians lack the contractual capacity to form a company.

C. Purpose for which a company may be formed.

Section 5 of the Companies Act of 1912 provides that a company may be formed for ‘...any lawful purpose...’ This section provides that as long as the purpose for which a company is being formed does not contravene common or statutory law, it is eligible for incorporation. Blackman⁸⁷ highlights that an unlawful purpose on the part of the subscribers or promoters of a company will not affect the validity of the registration if the objects of the company are lawful. Further, Blackman mentions that there is no requirement for a company to operate to make a profit, however this is in respect of associations not for gain. (Section 21 companies.)

III. Distinction between Private and Public Companies

The Companies Act does not define public companies. Private companies are defined in section 3 of the Companies Act of 1912. The characteristics of a private company are that it is restricted by its articles to do the following;

- Transfer its shares,
- Invite the public to subscribe for its shares or debentures,

⁸⁶ Blackman (note 84) at 32

⁸⁷ Blackman (note 84) at 32

- Have more than fifty members. (Excluding employees).

Section 3 of the Companies Act does not embody all the differences of these two types of companies. Other differences contained in the Companies Act, include that a private company is not obliged to lodge an audited balance sheet on an annual basis,⁸⁸ a private company is exempt from the restrictions imposed on a public company regarding commencement of business,⁸⁹ a private company is exempt from the restrictions imposed on a public company, in the case of the first allotment of shares where no invitation was made to the public for the subscription of such shares,⁹⁰ a private company is exempt from filing a statement in the form of a prospectus on the first allotment of shares or debentures,⁹¹ a private company is exempt from the restrictions regarding the appointment of directors in a prospectus or in a statement in lieu of a prospectus⁹²

IV. Registration of Companies.

Section 16 of the Companies Act mentions that when registered, the memorandum and articles bind the company and its members.

Section 17 of the Companies Act of 1912 provides that for the registration of a company, both the memorandum of association and the articles (if any)⁹³ together with a copy certified by a notary public or by two directors on oath have to be transmitted to the Registrar of Companies. Upon the payment of the prescribed fee, if the memorandum and articles of association are in accordance with this act, the Registrar of companies shall register them by filing the certified copy and return to the company the original memorandum and articles (if any), with the date of registration endorsed. Section 19 of the Companies Act of 1912 provides that the issuing of a certificate of incorporation by

⁸⁸ Section 26(4) of the Companies Act of 1912, provides that, 'save in the case of a private company, the summary referred to in subsection (3) shall include a statement in the form of a balance sheet, audited by the company's auditors, containing summary of its share capital, its liabilities and its assets, giving such particulars as will disclose the general nature of such liabilities and assets and how the values of those fixed assets have been arrived at provided that such balance sheet need not include statement of profit and loss.'

⁸⁹ Section 85(6) of the Companies Act of 1912.

⁹⁰ Section 83(8) of the Companies Act of 1912.

⁹¹ Section 80(2) of the Companies Act of 1912.

⁹² Section 70(3) of the Companies Act of 1912.

⁹³ Section 12 of the Companies Act of 1912, provides that a limited company is not mandated to register articles of association but unlimited companies are mandated to register articles of association together with the memorandum of association.

the Registrar of Companies shall be conclusive evidence that all requirements of the Act pertaining to registration have been complied with.

1.3.4 Corporate Capacity and Agency

Section 9 of the Companies Act of 1912 specifically restricts the alteration of the memorandum of association except in the circumstances expressly provided for in section 11 of the Companies Act. The restriction of the alteration of the objects to the five stated purposes in the Companies Act makes it difficult in practice for companies to alter their objects as a way of minimizing the rigours of ultra vires⁹⁴. The Legislature in Swaziland has not addressed the problems associated with the ultra vires doctrine and neither have the Swazi courts developed the common law in a bid to minimize the rigors of the ultra vires doctrine, so much emphasis will be placed on English and South African case law which is of much influence in our courts.⁹⁵ The Ultra Vires doctrine has its foundations in the common law and is discussed below.

I. The Ultra Vires Doctrine

A. Meaning of the doctrine

The Paperback Oxford English Dictionary⁹⁶ defines 'ultra vires' as an act, 'beyond one's legal power or authority.' Therefore all acts beyond a company's capacity can be said to be acts 'ultra vires' the company.

B. Rationale for the doctrine

The ultra vires doctrine has created much debate and criticism in company law. The ultra vires doctrine had the effect that a company had no capacity to act beyond the scope of the objects stated in its memorandum of association even if the act had been agreed upon by all the members of the company. R C Williams⁹⁷ points out that, 'the rationale for the ultra vires doctrine was to protect investors in the company (its members

⁹⁴ Consultative Document (note 5) at 9

⁹⁵ Johnson v Commonwealth Development Corporation [1979-1981] SLR 233 at 236. This case stands for the proposition that decisions of the courts in South Africa are of high persuasive value in Swaziland.

⁹⁶ Paperback Oxford English Dictionary, (Oxford University Press Inc: New York, 2002) at 910.

⁹⁷ RC Williams, 'Concise Corporate and Partnership Law' 2nd ed. (Butterworths : Durban, 1997) at 135

and debenture holders) and creditors of the company.’ The ultra vires doctrine sought to protect investors who had invested their money into the company, and giving them the assurance that their money would only be employed for the objects stated in the memorandum. It sought to protect creditors by ensuring that the company funds to which they look to for payment would not be dispersed in activities not stated in the objects clause⁹⁸.

Blackman⁹⁹ points out that the use of the term ‘ultra vires’ has been widely condemned. In many judgments acts void of illegality were referred to as ultra vires acts. He mentions that it is advocated that the term ‘ultra vires’ should only be used to refer to acts null and void by lack of authorisation in the objects clause.

C. Effect of the doctrine

The effect of the ultra vires doctrine as enunciated by Holmes JA in *Orange Benefit Society v Central Merchant Bank*¹⁰⁰, is that it renders any act which falls outside the ambit of the companies’ memorandum null and void. As mentioned earlier, even the prior consent of the members of the company or their subsequent ratification does not make any difference.

Blackman points out that when an ultra vires transaction is declared void, each party is obliged to restore to the other what was received and where that is no longer possible, courts are generally prepared to allow an enrichment action on the ground of unjust enrichment.¹⁰¹

RC Williams¹⁰² points out that the ultra vires doctrine became a ‘trap for the unwary and a nuisance to the company itself. It was a trap in that persons who contracted with a company in good faith might discover that the contract was ultra vires and therefore void and unenforceable. It was a nuisance to the company itself in that it was barred from entering into ultra vires contracts even where all its members were in favour of the contract.’ McLennan articulates that, ‘if directors of a company caused a company to enter into an ultra vires transaction, they could be made accountable for damages

⁹⁸ *Ashbury Railway Carriage and Iron co v Riche* (1875) LR 7 HL 653 at 667

⁹⁹ Blackman (note 84) at 18

¹⁰⁰ 1976(4) SA 659(A) at 672-3.

¹⁰¹ Blackman (note 84) at 18

¹⁰² RC Williams (note 97) at 135

sustained by the company; such personal liability was based on breach of their common law fiduciary duty to act within their powers'¹⁰³ In order to curtail the effects of the ultra vires doctrine most companies were now being drafted with clauses in the memorandum including every conceivable trade or activity. This included activities which bordered more on powers, for instance provisions relating to the borrowing and lending of money, the hiring of premises, the drawing and accepting of bills, etc¹⁰⁴ Mc Lennan aptly points out that even though the drafting of wide objects clauses minimises the risk of an inadvertent ultra vires act by the company, it still remains a trap for the unwary third party.¹⁰⁵

D. Doctrine of constructive notice

The ultra vires doctrine is intertwined with the doctrine of constructive notice in terms of which anyone dealing with a company (including its members) is deemed to be fully acquainted with the company's public documents, one of which is the memorandum with its objects clause.¹⁰⁶ Accordingly no person can assert against the company that he was unaware of the limitations placed on the company's capacity by its objects clause as formulated in the memorandum. Section 17 of the Companies Act of 1912, requires every company in Swaziland to file its memorandum and articles in the office of the Registrar of Companies. These documents are available for inspection by any member of the public. They can even be duplicated on payment of a fee.

¹⁰³ J S Mc Lennan, 'The ultra vires doctrine and the Turquand rule: A suggested solution' (1979) *SALJ* 329 at 329.

¹⁰⁴ Mc Lennan (note 103) at 332

¹⁰⁵ Mc Lennan (note 103) at 333 cites the case of *In re Jon Beauforte (London) Ltd* as a stark illustration of the trap of the widely couched object clauses. In this case, a company which was authorised by its memorandum of association to carry on the business of costumiers and gown makers, embarked on the business of making veneered panels and erected a factory for this purpose, an activity which was not authorised by the objects clause. The company later went into liquidation. Among the proofs of debt was one for coke supplied to the company. The suppliers argued that the fuel might have been used for legitimate purposes. This argument could have succeeded but for the fact that the company's letter head, which had been used in ordering the coke, described the company as 'veneered panel manufacturers'. The court affirmed the decision of the liquidator to reject the claim on the ground that the contract to which it related was ultra vires. Rouxburgh J enunciated in that case that, '...The correspondence shows that they had notice of that, and as they had constructive notice of the contents of the memorandum of association, that had notice that the transaction was ultra vires the company...' [1953] 1 All ER 634 at 636. see also *Introductions Ltd v National Provincial Bank Ltd* [1969] 1 All ER 887.

¹⁰⁶ RC Williams (note 97) at 135

Kiggundu,¹⁰⁷ points out that the doctrine of constructive notice is ‘harsh and outmoded and unrealistic and can even cause grave injustice to third parties...’ Even though Kiggundu was referring to Botswana, however, Swaziland as a developing country in the SADC region can also identify with some of the reasoning expounded by Kiggundu. He points out that in Botswana, a sizeable proportion of the population is illiterate, even those who are literate cannot read English. In Swaziland the literacy rate in 1995 was estimated at 76.7 percent.¹⁰⁸ Even though a sizeable portion of the population in Swaziland statistically is literate, the second leg of Kiggundu’s argument holds true. He expounds that, even if the third party can read, the material to be read is complicated and bulky.

Professor L S Sealy¹⁰⁹ further emphasizes on this point and mentions that, ‘businessmen need to make decisions promptly’; therefore, expecting them to read through the company’s registered documents is too costly in terms of time and trouble. In addition, Kiggundu mentions that businesses are done by means of email, facsimile, telephone, video conferencing and other means availed by modern technology. It is therefore unrealistic and impractical to expect businessmen to inspect the registered documents of the company they are dealing with at the other end of the country or globe.

E. Turquand Rule

In the case of *Royal British Bank v Turquand*¹¹⁰, an important legal principle was laid down. This rule says that, when a third party deals with a company, he is entitled to assume that all its internal requirements have been complied with.¹¹¹ A person who deals with a company is entitled to the benefit of the Turquand rule only where he believes in good faith that the person who professes to be the company’s agent does in fact have the authority to act for the company.¹¹² Blackman points out that a ‘modern formulation of the rule is that of Lord Simons in *Morris v Kanssen* where he approved the following formulation of the rule in *Halsbury’s Laws of England*.’ ‘...Persons contracting with a

¹⁰⁷ Kiggundu (note 83) at 510

¹⁰⁸ <http://www.info.swz/> accessed on the 10th December, 2006.

¹⁰⁹ Kiggundu (note 83) at 510.

¹¹⁰ [1856] 119 ER 886

¹¹¹ Cilliers(note 56) at 191

¹¹² Cilliers(note 56) at 192

company and dealing in good faith may assume that acts within its constitution and powers have been properly and duly performed, and are not bound to inquire whether acts of internal management have been regular’¹¹³

I. Rationale for the Turquand Rule

The Turquand rule is an attempt by the judiciary to mitigate the effect of the doctrine of constructive notice.

Blackman¹¹⁴ mentions that the rationale for the rule is that, ‘the assumption in favour of the third party acknowledges that acts of internal management are not on record and are not, therefore easily verifiable. To demand a prompt inquiry ‘into all the minute transactions which may have taken place indoors would have been onerous and would put persons dealing with a company in an impossibly precarious position.’

Lord Simons in *Morris v Kanssen* echoes this position and expounds that, ‘The wheels of business will not go smoothly round unless it may be assumed that that is in order which appears to be in order’¹¹⁵

II. Restrictions to the Turquand Rule

There are restrictions to the Turquand Rule which Blackman aptly expounds on. He mentions that the Turquand rule does not apply to third parties who were aware that internal formalities had not been complied with.¹¹⁶ It further does not apply where a director or an officer of a company was not acting on behalf of the company within the confines of his usual authority.¹¹⁷ In order for a director or officer of a company to act within the confines of his usual authority, he must have been properly appointed so to act for the company.¹¹⁸ The Turquand rule protects outsiders only. Insiders of the company are not protected by the rule because they are presumed to know whether internal requirements have been complied with or not. Blackman stresses that members of a

¹¹³ Blackman(note 84) at 33

¹¹⁴ Blackman(note 84) at 34

¹¹⁵ [1946] 1 All ER 586 592 (HL) cited from Blackman(note 84) at 34

¹¹⁶ Blackman(note 84) at 34, see also Cilliers(note 56) at 192

¹¹⁷ Blackman(note 84) at 36

¹¹⁸ Blackman(note 84) at 38

company are not outside the ambit of the protection of the Turquand rule because ‘a member is in a similar position to that of a third party in regard to information’.¹¹⁹

1.3.5 Pre-Incorporation Contracts

Pre-incorporation contracts are a significant feature of company promotion. In Swaziland, they are regulated by the common law rule in *Kelner v Baxter* and the Roman Dutch Common Law doctrine of *stipulatio alteri*. The current Companies Act of 1912 does not provide for pre-incorporation contracts.

A pre-incorporation contract is one which entered into for on behalf of the company before it is incorporated.¹²⁰ The company’s promoters are mostly the people who enter into these contracts. Kiggundu¹²¹ mentions that, “the promoters enter into these contracts either for their own benefit or for the benefit of the unborn company’. In relation to the unborn company, the promoter may purchase certain property so as to ensure that the company has got their property on incorporation. They may also buy some materials for the company to use in its business after incorporation. He further points out as far as the promoters’ personal benefit is concerned, they may use such contracts as a way of extracting financial benefit from promoting the company, especially where they sell their own businesses to the company’.

Three questions arise in relation to these contracts. Firstly, what is their nature? Secondly, how do these contracts affect the company after its incorporation? What are the rights of the parties to these contracts?¹²²

I. The common law rule.

Prior to incorporation the company is not a legal person which can be party to a contract. The promoters of a company cannot therefore under the common law, act as or conclude contracts as the representatives of a company still to be formed.¹²³ If nevertheless, an attempt is made by a person to enter into a contract on behalf of a

¹¹⁹ Blackman(note 84) at 40

¹²⁰ John Kiggundu, ‘Company law: some interesting aspects in Botswana’(1989) 15 Commonwealth Law Bulletin at 1524

¹²¹ Kiggundu (note 120) at 1525

¹²² Kiggundu (note 120) at 1524

¹²³ Cilliers(note 56) at 52

company not yet in existence he may be personally bound by the contract. After its incorporation the company will not be entitled to any of the rights under such a contract.¹²⁴

Just as the contract cannot be enforced against the company it too cannot enforce the contract against the third party concerned. It cannot ratify or adopt the contract. If the company is interested in the contract, it must enter into a new contract on the same terms as the pre-incorporation contract. This is known as novation.¹²⁵ The old contract is discharged and replaced by the new one. Novation could be expressed or implied. Kiggundu¹²⁶ mentions that the common law position has generated much debate mainly for two reasons. Firstly, it is not entirely clear as to when the promoters will be held personally liable. Secondly, it is not easy to see why company should not adopt or ratify the contract after incorporation if this is in its interests and is done in good faith. Much of the debate on the personal liability of promoters has centered around the interpretation of *Kelner v Baxter*¹²⁷ and *Newborne v Sensolid*¹²⁸. It is prudent therefore to analyse these two cases seriatim.

In *Kelner v Baxter*, A,B and C entered into a contract with the plaintiff to purchase goods 'on behalf of the proposed Gravesend Royal Alexandra Hotel Company'. The goods were supplied and consumed in the business. Shortly after incorporation, the company in question collapsed, and the plaintiff sued A,B and C on the contract for the price of the goods. The court of common pleas held them liable.¹²⁹

Erle CJ enunciated that; '...I agree that if the Gravesend Royal Alexandra Hotel Company had been an existing company at this time, the persons who signed the agreement would have signed as agents of the company. But, as there was no company in existence at the time, the agreement would be wholly inoperative unless it were held to be binding on the defendants personally'

¹²⁴ Cilliers(note 56) at 52

¹²⁵ Kiggundu(note 120) at 1525

¹²⁶ Kiggundu(note 120) at 1525

¹²⁷ [1866] LR 2 CP 176

¹²⁸ (1953) 1 All ER 708

¹²⁹ Hahlo's cases and Materials on company law 3rd (Sweet and Maxwell: London 1987) page 165

In the Newborne case the facts were as follows;

‘The Plaintiff was the promoter and prospective director of a limited company, Leopold Newborne (London), Ltd., and the Plaintiff’s name “Leopold Newborne”, was written underneath. In an action for breach of contract brought by the Plaintiff against the defendants, it was held that the contract was made, not with the Plaintiff, whether as agent or as Principal, but with a limited company which at the date of the making of the contract was non-existent, and, therefore, it was a nullity and the plaintiff could not adopt it or sue on it as his contract’

In the final analysis however the matter revolves around intention. In the case of *Kelner v Baxter*, the court found that the promoters had intended to be personally liable on the contract. In the *Newborne v Sensolid* case the promoter never intended to be personally liable on the contract. He did not contract as a principal but simply as an agent of an unborn company. He cannot therefore personally enforce the contract.¹³⁰

II. Roman Dutch Law Position

Under Roman Dutch Law, a person (known as the *stipulans*) may enter into a contract as principal with another person (known as the *promittens*) under which contract the *promittens* promise the stipulans to confer a certain benefit on a third party (the *stipulatio alteria*).¹³¹ The third party need not be in existence at the time of the contract.

Accordingly, this mechanism can be used by a promoter whereby he contracts as principal for the benefit of the unborn company. The company can then adopt the contract on incorporation.¹³²

Legislative intervention would be appropriate, however to solve the problems of ratification and adoption of pre-incorporation contracts.

¹³⁰ Kiggundu(note 120) at 1526

¹³¹ Kiggundu(note 120) at 1525

¹³² Kiggundu(note 120) at 1525

1.3.6 Company Names

Section 10 of the Companies Act of 1912, provides for the registration of names and change of names of companies.

The Consultative document¹³³ highlights that a comprehensive set of rules regulating company names is necessary. The Consultative document advocates that rules regulating the powers of the Registrar of Companies to regulate identical, similar, misleading, undesirable and deceptive names and inadvertent registration should be clearly outlined in company legislation. The current Companies Act of 1912 does not have comprehensive rules on names and change of names of companies. Section 10 provides for tedious procedures in the event a company seeks to change its name, which entail the approval of the Minister in writing in addition to a special resolution. (Section 10(5)).

1.3.7 Corporate Finance

Corporate finance is used to refer to the area of company law which deals with equity, and debt financing of companies, share capital, acquisition by companies of own shares, financial assistance etc.¹³⁴ These concepts are discussed seriatim below;

I. Share Capital

Company securities fall into two main categories, namely shares and debentures¹³⁵. A person who holds a share is a member of the company with all the rights which the company articles grant to its members. A debenture holder is not a member of the company, but is merely a person who has lent money to the company and is therefore a creditor of the company.¹³⁶ Share capital may be divided into par value shares or may be constituted by shares of no par value. The Companies Act of 1912 does not have a provision for the division of shares into non par value, it however, does provide for the division of shares into par value. This provision is contained in sections 6 and 7 which in a nutshell provide that both a limited and unlimited company with a share capital must

¹³³ Consultative document (note 5) at 13

¹³⁴ See generally, Eilis Ferran, 'Company Law and Corporate Finance' (Oxford University press: New York, 1999)

¹³⁵ Cilliers (note 56) at 221

¹³⁶ Cilliers (note 56) at 221

state the total amount of the share capital and the division of the share capital into shares of a fixed amount.

II. Maintenance of Share Capital

Cassim¹³⁷, mentions that the theoretical basis of the capital maintenance rules continues to be the protection of creditors from the abuse of limited liability by the directors and shareholders of a company. The basis for this principle is that the issued share capital of a company is seen as a guarantee fund, or a permanent fund intended for the protection of creditors.¹³⁸ Creditors seldom deal with a company on the basis of its issued share capital, as it is not an indicator of its creditworthiness and for capital to be an adequate safeguard, it must be adequate in the first place. Cilliers points out that, Capital Maintenance is not only an imperfect way to protect creditors, but that the English common law rules that applied the principle were notoriously imprecise and uncertain.¹³⁹

In the case of *Trevor v Whitworth*,¹⁴⁰ which is the locus classicus on the doctrine, it was enunciated by Lord Watson that;

‘The company had purchased, prior to the date of the liquidation, no less than 4 142 Of its own shares; that is to say, considerably more than a fourth of the paid up capital of the company had been either paid, or contracted to be paid, to shareholders, in consideration only of their ceasing to be so...if the claim under consideration can be supported, the result would seem to be this, that the whole of the shareholders, with the exception of those holding seven individual shares, might now be claiming payment of the sums paid upon their shares as against the creditors, who has a right to look to the moneys subscribed as the source out of which the company’s liabilities to them were to be met’

According to Cilliers, the above sentiments by Lord Watson indicate that the capital maintenance rule did not develop as an independent rule, but as an extension of the Ultra

¹³⁷ F.H.I.Cassim, ‘The reform of Company Law and the Capital Maintenance Concept’ (2005) Vol.120 Issue 1 *SALJ* 283 at 284

¹³⁸ Cassim (note 137) at 285

¹³⁹ Cilliers (note 56) at 322

¹⁴⁰ (1887) 12 App Cas 409 (HL) 416

vires rule. The common law principles could be summarised that the act in respect of the capital must not be ultra vires and must not prefer the share holders above the creditors.¹⁴¹

A number of sub-rules flow from the Capital maintenance rule and these are outlined seriatim below. They relate to the reduction of capital, corporate share repurchases, the prohibition against a company giving financial assistance for the purchase or subscription of its own shares, redemption of shares and dividends.

III. Reduction of Capital

In terms of the common law, a company may not buy back its shares, may not pay dividends out of capital and may not issue shares at a discount. Sections 44-53 of the Companies Act of 1912, has entrenched these principles and prohibits companies from reducing its capital except as allowed by the Companies Act. The Consultative document points out that the traditional method of reducing capital is provided for by sections 44-53 of the Companies Act by the passing of an appropriate special resolution and subsequent application to court for confirmation.

The method of capital reduction provided for by the Companies Act is tedious requiring the consent of creditors in writing and the confirmation of the courts which is dreary and time consuming.

IV. Corporate Share Repurchases

At common law, a company was not permitted to purchase its own shares. This rule was stated in *Trevor v Whitworth* by Lord Mac Naghton¹⁴² and the rule was subsequently followed in South Africa. This is clearly evident from the case of *Unisec Group Ltd v Sage Holdings Ltd* where it was held that, 'since the earliest days of company law, it has

¹⁴¹ *Cohen v Segal* 1970 (3) SA 702 (W) 705-06

¹⁴² *Trevor V Whitworth* (note 140) at 432, 436, where he enunciated that, 'the third point is one of general importance. It raises the question whether it is competent for a company..., on the principle of limited liability, to purchase its own shares when it is authorised by its articles to do so. The consideration of that question, as it appears to me, necessarily involves the broader question whether it is competent for a limited company under any circumstances to invest any portion of its capital in the purchase of a share of its own capital stock, or to return any portion of its capital to any shareholder, without following the course which parliament has prescribed..., they cannot draw on a fund in which others as well as themselves are interested. That I think is the law, and that is the good sense of the matter.'

been firmly recognised that a company cannot buy its own shares for the reasons set forth by Lord Herschell in *Trevor v Whitworth*. (1887) 12 AC 409(HL) at 416¹⁴³

RC Williams,¹⁴⁴ points out that *Trevor v Whitworth* is further the authority for the proposition that, a company could not purchase its own shares even if its memorandum authorises it to do so. He highlights that the ‘rationale for this is that such a purchase has the effect of an unauthorised reduction of the company’s capital, and that it would prejudice the company’s shareholders if it were allowed to traffic in its own shares’¹⁴⁵. The consultative document mentions that the modern trend in company law is to allow companies to purchase their own shares subject to adequate safeguards. The consultative document further points out that the facility allowing companies to purchase their own shares has several advantages such as enabling the company to buy out a dissentient shareholder.

V. Financial assistance by A Company for the purchase of its own shares

Company law generally prohibits companies from giving, whether directly or indirectly, and whether by means of a loan, guarantee the provision of security or otherwise, of any financial assistance for the purpose of or in connection with a purchase or subscription made for any shares in the company, or where the company is a subsidiary company, its holding company. This rule was introduced as a statutory provision in English company law in 1929 and as a result does not appear in our Companies Act of 1912. The Greene Committee¹⁴⁶ recommended a statutory prohibition whereby a company was prohibited from providing any financial assistance in connection with the purchase of their own shares by third persons, whether this assistance was in the form of loan, guarantee, security or any other form. The Jenkins Committee,¹⁴⁷ saw the purpose of the prohibition of financial assistance as ‘being aimed at the abuses likely to arise where persons, who cannot provide the necessary funds from their own resources or by borrowing on the strength of their own credit, acquire control of a company with large

¹⁴³ 1986(3) SA 259 (T) 264 by Coetzee J.

¹⁴⁴ RC Williams (note 97) at 124

¹⁴⁵ RC Williams (note 97) at 124

¹⁴⁶ Company Law Amendment Committee (Greene Report) Cmd 2657 (1926) par 30 cited in Cilliers(note 56) at 329 at para 20.25

¹⁴⁷ Report of the Company Law Committee (Jenkins Report) Cmnd 1749(1962) par 173 cited in Cilliers(note 56) at 330 at para 20.27

assets on the understanding that those assets will be utilized to pay for or secure the payment of their shares.’ In such cases, Cilliers¹⁴⁸ highlights that there ‘would be a strong likelihood that the company would be made to part with its funds or encumber its assets either on inadequate security or for an inadequate consideration. In such a case the interests of creditors and minority shareholders of the company would, at best, have been subjected to an improper risk, while, at worst, such creditors and shareholders may only be left with a claim for damages against the directors of the company if it should fail.’

Exceptions to this rule are allowed in instances where lending is a part of the companies ordinary business and where loans are made to its bona fide employees other than directors to enable them to purchase or subscribe to shares in the company on their own behalf.¹⁴⁹

VI. Redemption of shares

The redemption of shares is closely related to corporate share repurchases. The present companies Act does not provide for redemption of shares. Blackman¹⁵⁰ expounds that ‘redemptions’ and ‘repurchases’ of shares refer to the taking back by a company of shares issued by it and in return, the payment by the company of money or assets to the shareholder or shareholders concerned. Blackman further points out that, in the case of a redemption, the company takes back shares pursuant to a contract contained either in the articles of the company or in terms of the issue of the shares, which provides for the redemption of the shares by the company at the option of the company or of the holder of the shares or on a date specified in the articles or the terms of issue, in return for a specified consideration, or a consideration calculated by reference to a formula or fixed by a third person.¹⁵¹

¹⁴⁸ Cilliers(note 56) at 330 at para 20.27

¹⁴⁹ Cilliers(note 56) at 330 at para 20.28

¹⁵⁰ Blackman (note 84) at 43

¹⁵¹ Blackman (note 84) at 43

VII. Dividends

The distribution of dividends in Swaziland is regulated by the common law. A dividend is a distribution to members of a company, out of a company's profits.¹⁵² If a company has made no profits, it cannot distribute a dividend because it is unlawful for a company to pay a dividend out of capital, as this would amount to an unauthorised reduction of the company's capital.¹⁵³ The prohibition of the payment of dividends out of share capital is one of the sub rules of the capital maintenance rule. The rationale for this prohibition is expounded by RC Williams as follows, 'a company's capital is intended to be a fund out of which its creditors can be paid if the company is placed in liquidation and it must not be used for unauthorised purposes such as the payment of dividends.'¹⁵⁴

1.3.8 Administration of Companies

The consultative document highlights that in an attempt to achieve the motifs of simplification and deregulation, the Bill introduces several modern rules on the administration of companies. It proposes that private companies should be permitted to deal with certain company matters by written resolution instead of holding a meeting. Furthermore, private companies should be allowed by passing an elective resolution to dispense with certain company rituals and procedures such as the holding of an annual general meeting, the laying of accounts before the annual general meeting and the reappointment of an auditor.

1.3.9 Directors

A central tenet of company law in Swaziland is that director's fiduciary duties are only owed to the company and its shareholders. These are derived from the common law. The companies' major providers of finance, creditors are not mentioned and that means no fiduciary duty is owed to them by directors. However, company law is evolving more into recognizing the broader social role of enterprises.

¹⁵² RC Williams (note 97) at 261

¹⁵³ RC Williams (note 97) at 261

¹⁵⁴ RC Williams (note 97) at 127

The current Companies Act contains some rules on directors but they are outdated and inadequate. At common law, directors are under the fiduciary duties of loyalty and good faith and the duty of care, skill and diligence. But there are duties which require statutory regulation. These include director's interests in contracts with the company, their interest in the company's securities, loans to directors and people connected to them. The Act is silent on most of these matters.

1.3.10 Shareholder Remedies

The protection of minority shareholders is an important aspect of company law. At common law they are protected by the exceptions in the rule in *Foss v Harbottle*.¹⁵⁵ Company law is based on the principle of majority rule that is to say that the affairs of a company are decided by the majority of votes in that company.¹⁵⁶ The minority is obliged to subject itself to the wishes of the majority. In *Foss v Harbottle* it was enunciated that, as long as the majority acts lawfully, the court will refuse to interfere in the conducting of a company's affairs at the instance of a minority. *Wigram VC*¹⁵⁷ stated it as follows;

'[T]he Majority of the proprietors at a special general meeting assembled...has the power to bind the whole body and every individual corporator must be taken to have come into the corporation upon the terms of being liable to be so bound. [W]hilst the court may be declaring the acts complained of to be void... the governing body of proprietors assembled at the special general meeting may bind even a reluctant minority is decisive to shew that the frame of this suit cannot be sustained whilst that body retains its functions'

Majority rule implies that the majority may under certain circumstances ratify unlawful acts.¹⁵⁸ The rule in *Foss v Harbottle* is based on two principles, namely separate legal personality and majority rule. In respect of wrongs done to the company or internal irregularities in the management of a company, minorities are powerless if the acts

¹⁵⁵ (1843) 2 Hare 461 67 ER 189 at 203-04

¹⁵⁶ *Hurter* 1998 TSAR 414.

¹⁵⁷ *Foss* case (note 155)

¹⁵⁸ *Cilliers* (note 56) at 296

complained of can be ratified or condoned by a simple majority.¹⁵⁹ As a result of this rule an individual member cannot assert his right against the company if the irregularity is ratifiable by the majority. However a minority is not subject to an unlawful exercise of majority power¹⁶⁰.

In *Sammel v President Brand Gold Mining Co. Ltd*¹⁶¹, Trolip JA held that, 'the minority undertakes to be bound by any decision that the majority takes in accordance with the law'

Certain wrongs and irregularities cannot be ratified. An attempt by the majority to ratify such acts is not binding on minorities and they can therefore institute action to assert their rights as unratifiable wrongs and irregularities fall outside the scope of this rule. The main problem is to determine which wrongs and irregularities can be ratified. A principle which impedes the rule in *Foss v Harbottle* is that a member of a company in his capacity as member acquires certain rights from the constitution of the company, the Companies Act and the Law in general which he can assert against the majority acting as the company.

On the other hand this principle is based on the nature of the corporate constitution as an enforceable contract between the company and every member and between members inter se and, on the other hand, is based on the fact that a member can assert rights which are conferred on him by legislation and the common law and that the majority cannot divest him of these rights. This was more fully extrapolated in the case of *Eales v Turner*¹⁶², it was held that counsel in that case had rightly conceded that an individual shareholder may appear as plaintiff in proceedings to restrain a company of which he is a member from commencing an illegal act...'

There is also great uncertainty as to the exact scope of the rule in *Foss v Harbottle*. The Companies Act contains two remedies. First, a minority shareholder can petition the court to have the company wound up, and the court may grant the order if in its opinion it

¹⁵⁹ Cilliers (note 56) at 297

¹⁶⁰ Cilliers (note 56) at 297

¹⁶¹ 1969 (3) SA 629 (A) 679

¹⁶² (1928)WLD 173

is just and equitable to do so.¹⁶³ Secondly, the Minister or the company may appoint inspectors to investigate the affairs of the company¹⁶⁴. The rule in *Foss v Harbottle* is riddled with substantive and practical problems. The statutory remedies mentioned above are inadequate.

1.3.11 Auditors

The auditor plays an important role in company reporting. Lopes L.J¹⁶⁵ in describing a company auditor faced with the possibility of the discovery of fraud and deceit in preparation of its accounts, equated him to a watch dog and not a blood hound. His functions are crucial to the operation of the doctrine of disclosure. The formulation by Lopes L.J of a company auditor has been described by R. Baxt¹⁶⁶, as the most popular formulation of the function of a company auditor and the most relied upon by the profession in the twentieth century as a basis for the standard expected of auditors. The Companies Act contains provisions on appointment and remuneration of auditors¹⁶⁷ and the powers and duties of auditors.¹⁶⁸

The auditor's obligations to the company appointing him derive from two main sources namely,

- a) the statutory provisions governing his office and functions ; and
- b) the terms of his contract with the company.¹⁶⁹

Lord Alverstone in *London Oil Storage Co. v Sear Hasluck & Co*¹⁷⁰, stated that;

‘The auditor is...contemplated by law to protect the interest of the company and its shareholders as such... He has got to bring to bear upon [his] duties reasonable and watchful care, but has got to discharge those duties remembering that the company looks

¹⁶³ Section 112(g) of the Companies Act of 1912

¹⁶⁴ Sections 96-98 of the Companies Act of 1912

¹⁶⁵ R Baxt, ‘The Modern Company Auditor – A Nineteenth –Century Watchdog?’ (1970) 33 Modern Law Review 413 at 413.

¹⁶⁶ R Baxt(note 165) at 413

¹⁶⁷ Section 99 of the Companies Act of 1912

¹⁶⁸ Section 100 of the Companies Act of 1912

¹⁶⁹ Cilliers (note 56) at 410

¹⁷⁰ R Baxt(note 165) at 419

to him to protect their interests. He is not, however, supposed to be a man constantly going about suspecting other people of doing wrong...he is not bound to assume when he comes to do this duty that he is dealing with fraudulent and dishonest people...If circumstances of suspicion arise, it is the duty of the auditor, in so far as those circumstances relate to the financial position of the company, to probe them to the bottom.'

With the onerous duties placed upon auditors, in light of modern economic and business requirements to be a company watch dog, in detecting errors and frauds, it is imperative that company law adequately outlines the statutory provisions on the duties of auditors. The 1912 Companies Act contains inadequate provisions on the duties of auditors, removal of auditors, or resignation, the duties of the auditor are not detailed, issues such as legal liability of auditors is not dealt with.

1.3.12 Accounting and Disclosure

The importance of disclosure cannot be overemphasized. Disclosure is of great significance in many branches of the law especially where some form of contract is involved. The gist of the doctrine is that a party must be aware of any facts material to any transaction to which he seeks to engage himself. The Doctrine is derived from common law and statute. The doctrine is so important that a company cannot start business before some of the disclosure requirements have been complied with. Thus the Swaziland companies act of 1912 mandates the publication of the companies' memorandum and articles to be lodged with the registrar of companies and with the registered office of the company.

Any resolutions amending the memorandum or the articles of the company are required to be lodged with the registrar's office for inspection by an interested party. As a developing country, Swaziland is characterized by small private businesses in which the directors are usually the same as the shareholders. These small private companies are usually one man companies. As such these companies are usually undercapitalized and collapse very easily, leaving creditors with no remedy. Creditor protection is therefore very essential. Membership of some companies incorporated in

Swaziland consists of foreigners. It is thus easy for such persons to have a company incorporated, squander its profits and leave creditors without a remedy. The law relating to disclosure has to ensure that such risks are minimized.

The Current Act does not contain comprehensive rules on accounting and disclosure. Rules relating to accounting records, the directors report, the auditors report, the contents of accounts and interim accounts, ensuring that they are in line with international trends.

2. The Swaziland Companies Bill of 2004

2.1 The Guiding Principles of the Swaziland Companies Bill, 2004

In an interview with Mrs. Theresa Mlangeni, the legal advisor of the Ministry of Enterprise and Employment¹⁷¹, she mentioned that the amendment of the 1912 companies act was initially a voluntary exercise. The review of the legislation was embarked upon by Mr. Arthur Fandam,¹⁷² Mr. Clark Tom,¹⁷³ Mr. Rob Cloete,¹⁷⁴ Mrs. Theresa Mlangeni,¹⁷⁵ Mr. Dwa Mina.¹⁷⁶

This voluntary review of the act began in 1993/1994. This exercise was carried on every Wednesday after working hours by this dedicated team. The main purpose for the amendment of the act was the fact that it was archaic, obsolete and a stumbling block in the corporate sphere. These professionals took it upon themselves to begin the process to amend the act, as the legislature had given the amendment of the companies act a back seat. This voluntary drafting team eventually incorporated the Registrar of Companies, Mr. Ndlovu.

In 1998, the Ministry of Enterprise and Employment in conjunction with the commonwealth secretariat, recommended that a full time expert be engaged to draft the companies bill. This expert was Professor John Kiggundu from the University of Botswana. Professor John Kiggundu is an associate professor in the department of law at the University of Botswana. Upon his appointment, professor Kiggundu found a draft

¹⁷¹ Interview held on the 14th September, 2006 at 10:00am at the Ministry of Enterprise and Employment in Mbabane, Swaziland with the legal advisor of the Ministry, Mrs. Theresa Mlangeni. A successive interview was also held on the 5th January, 2007 at 9:00am at the Ministry of Enterprise and Employment in Mbabane.

¹⁷² A director at KPMG, a chartered accountancy firm at the Central Bank Building, Mbabane Swaziland. Refer to attachment of Email dated the 28th and 29th November, 2006.

¹⁷³ A chartered accountant with Chartered Accountancy firm, Price Water House Coopers at MTN Park Mbabane, Swaziland.

¹⁷⁴ A Private Practitioner, at a Mbabane Based Law Firm, Cloete Corporate.

¹⁷⁵ Ms Theresa Mlangeni, Legal advisor at the Ministry of Enterprise and Employment in Mbabane..

¹⁷⁶ Senior Crown Counsel at the Attorney General's Chambers at the Ministry of Justice and Constitutional Affairs in Mbabane, Swaziland.

companies act in place¹⁷⁷. This draft company's act was produced by the voluntary drafting team.¹⁷⁸ The draft company's act which was produced by the voluntary drafting team was almost a reproduction of the South African Companies Act of 1973.¹⁷⁹ The draft company's act was discarded and Professor John Kiggundu spent almost fourteen months commuting between Botswana and Swaziland whilst involved in the drafting process of the Companies Bill of 2004.¹⁸⁰

The drafting of the Companies bill has been influenced by certain modern trends, policies and principles in company law. These include the following;

1. Simplification

The review of the Swaziland Companies Act 1912's Consultative document mentions that simplicity was a guiding principle in the drafting of the company's bill. The consultative document mentions that, 'the law must be clear, simple and workable for the benefit of the courts, businessmen and all other interested parties.' The consultative document highlights that company law should be geared towards wealth creation and therefore legislation should not increase bureaucracy and administrative costs at the cost of the primary purpose of the company. To echo the sentiments of the Swaziland Companies Bill consultative document, the South African Department of Trade and Industry's policy paper¹⁸¹ concurs with this view as follows, 'Simplicity should be a guiding principle in the language used, the manner in which the provisions are drafted, in the grouping of subject matter and most importantly the processes embodied in it..., it should be possible for small businesses and their advisors to understand the administrative requirements without having to resort to expert advice'.

2. Deregulation

The Swaziland Company's bill Consultative document describes deregulation as one of the latest developments in company law internationally. The Consultative document mentions that small private companies should be allowed to run their affairs with as little

¹⁷⁷ (note 171)

¹⁷⁸ (note 171)

¹⁷⁹ (note 171)

¹⁸⁰ (note 171)

¹⁸¹ DTI (note 1)

regulation as possible. They should not be overburdened with expensive and time consuming procedures and regulations. Doing so simply increases their overheads and eats into their profits. In keeping with this principle, the company's bill contains reforms that are intended to deregulate companies with particular emphasis on private companies.

3. Decriminalisation

The Companies Act of 1912 contains numerous criminal offences. The Consultative Document mentions that many of these offences relate purely to non-compliance with administrative procedures. Prima facie, criminal sanctions are supposed to serve as a deterrent thereby ensuring compliance. But in practice, criminal prosecutions in company law are very rare. Consequently, directors and other officers of the company can afford to contravene or ignore the company law provisions knowing very well that they will not be prosecuted.

The trend in modern company law therefore is a shift from criminal sanctions towards civil sanctions, penalties and administrative remedies. The drafting committee of the 2004 bill has adopted this approach by eliminating as many criminal sanctions as possible and substituting them with administrative or civil remedies. Criminal sanctions have been retained only in those areas where it was inevitable. Related to the principle of decriminalization is the issue of prison sentences and fines. In the majority of cases these have been left open to give the courts the discretion to impose the appropriate penalty in the circumstances. Where the fines or sentences have been spelt out they have been substantially increased to reflect changed circumstances.

4. Disclosure

The Consultative Document highlights that company law is premised on the doctrine of disclosure. Disclosure is part of the price the company pays for limited liability. The rationale of this important doctrine is to protect creditors and share holders. Accordingly, the corporate law must ensure that there is appropriate and adequate disclosure of various company matters. The bill is very much influenced by this doctrine.

5. Harmonization

The consultative document mentions that Swaziland is one of the six countries in the region that inherited the Roman –Dutch legal system. Swaziland is also a member of the Southern African Development Community (SADC) and the Southern African Customs Union (SACU). As already pointed out Swaziland's corporate law has not kept pace with regional and international developments in corporate law. The enactment of a new companies Act will give Swaziland an opportunity not only to modernize its corporate law but to approximate it with that of other countries in the region.

6. Corporate Governance and Corporate Social Responsibility

The consultative document mentions that corporate governance and corporate social responsibility have gained prominence in the accounting and company law fields. Directors are expected to observe the code of conduct of best practice. This means among other things that they are expected to ensure that the company fulfills its responsibilities towards its employees and the community at large. The drafting of the provisions on directors, auditors, and accounting and disclosure have been influenced by these considerations.

7. Consultations

The consultative document indicates that one of the objectives of the Ministry of Enterprise and Employment in the reforming of the Companies Act of 1912 is transparency. The Ministry of Enterprise and Employment wanted to ensure that all stake holders and members of the general public are involved in the process of producing the new Companies Act. Thus the Consultative document was prepared with the sole purpose of enabling stakeholders and the general public to contribute towards the process of producing a new corporate law for the country.

The drafting of the Companies Bill of 2004 involved extensive consultative processes of various stake holders. Stake holders were provided with the consultative document referred to in this study by the Ministry of Enterprise and Employment through the Legal Advisor's offices. There were two major stake holders meeting which were held to address the inputs of stakeholders on the proposed amendments to be incorporated in the

bill. A workshop for senators was held on Friday the 8th of April, 2005. A Workshop was also held for the House of Assembly where Professor Kiggundu and ICOSA presented the reforms envisaged by the Companies Bill to the Parliamentarians.

Other consultative processes were held with the Law Society, the Institute of Accountants, Private Practitioners and other key stake holders individually who also made an input into the Companies Bill.¹⁸²

2.1.2 Application of the Companies Bill of 2004

Section 3 of the Companies Bill of 2004 applies to all companies incorporated under the act, foreign companies and to all existing companies incorporated under the repealed act, except as is otherwise provided herein. Section 3(5) provides as follows;

This Act shall not apply –

- a) with reference to any company the formation, registration and management which are governed by the provisions of any law relating to building societies, insurance companies, trade unions and employer's organisations, or co-operative societies or companies, save in so far as may be otherwise provided in any such law; or
- b) with reference to any company or foreign company or society which is subject to the provisions of any law relating to banks or insurance companies or societies in so far as those provisions are inconsistent with this Act.

It is interesting to note that the Companies Bill expressly prohibits the application of the bill to the formation, registration and management of building societies etc which was permitted in the Companies Act of 1912.

2.1.3 Establishment of the Office of the Registrar of Companies

The Companies Bill of 2004 strengthens the office of Registrar of Companies.

Section 4 of the Companies bill of 2004 provides for the establishment of the office of the Registrar of Companies and the office of the Deputy Registrar of Companies and further provides that the Registrar of Companies and the Deputy Registrar shall be responsible

¹⁸² (note 171)

for the administration of this Act and shall perform the functions and powers conferred on them by this Act. Section 5 of the Companies Bill of 2004 outlines the functions of the Registrar of Companies. Section 6 of the Companies Bill, provides for a seal of office which shall be affixed to every memorandum and articles of association, certificates of incorporation and any copy of a document issued by the registrar in lieu of the original documents.

It is interesting to note that sections 5 and 6 of the Companies Bill of 2004 are couched similarly to section 2 and 4 respectively of the Companies Amendment Act of 1995 of Botswana. In a nut shell, English Company Law forms part of Botswana's inherited law. The current Companies Act of Botswana was initially the Companies Proclamation number 71 of 1959, which is now the company act of Botswana. It can be mentioned that Botswana's 1959 company statute is modeled on the English 1948 Companies Act¹⁸³. The Companies proclamation has been amended in 1961 by the Companies amendment law¹⁸⁴, and it has also been amended in 1989 to eliminate the outdated provisions. The 1995 act is the latest amendment to the act.¹⁸⁵

The strengthening of the office of the Registrar of Companies is a fundamental component for the effective functioning and administration of company law in Swaziland.

2.1.4 Standing Advisory Committee

The Companies Bill of 2004 provides for a Standing Advisory Committee on Company Law. In terms of Section 14(1)(a), the Minister may appoint a standing advisory committee on company law consisting of a Chairman and such ex officio and other members as he may from time to time determine.

Section 14(2), outlines the main function of this committee which is to, 'make recommendations to the Minister in regard to any amendments to this Act and shall advice the Minister on any matter referred to it by the Minister'

¹⁸³ Kiggundu (note 83) at 499

¹⁸⁴ Law 8/1961

¹⁸⁵ Kiggundu (note 83) at 499.

It is hoped that the Standing Advisory Committee will be appointed as soon as the Companies Bill, 2004 is passed into law and becomes an Act and that the Standing Advisory Committee will be vigilant in ensuring that Swaziland's Company law is in harmony with other acts in the region and is in line with international trends. Section 16 of the Namibian Companies Act¹⁸⁶, which provides for the establishment of a Standing Advisory Committee on Company Law, encompasses detailed provisions on the composition of their Standing Advisory Committee, its functions, tenure of office and is a model which could be followed. The Namibian Standing Advisory Committee consists of Five members appointed by the Minister of whom in terms of section 16 (1),-

(a) one must be a judge, retired judge or legal practitioner with specialised knowledge of corporate law and nominated by the Law Society of Namibia;

(b) one must be an academic involved in corporate law at a tertiary institution appointed by the Minister in consultation with the Minister responsible for Higher Education;

(c) one must be a chartered accountant nominated by an association which represents chartered accountants in Namibia; and

(d) two must be persons whom the Minister reasonably believes will be useful to the SAC.

Section 17 of the Namibian Companies Act, provides for the functions and powers of their Standing Advisory Committee, amongst its functions is to make recommendations with regard to amendments to the Act which appear appropriate, advise the Minister on matters referred to the Committee by the Minister, however section 17 (1) (d), provides for the crucial function with regard to the ensuring that company law in that country is kept up to date with international trends and in harmony with other company laws, is the Standing Advisory Committee function of making recommendations to the Minister responsible for Higher Education with regard to the establishment of a research component at a tertiary institution in Namibia.

¹⁸⁶ (note 9)

Section 18 of the South African Companies Act, also specifically prescribes the composition of the members in the Advisory Committee. It provides that the Standing Advisory Committee, should consist of a judge, a retired judge or a senior advocate of the Supreme Court of South Africa as Chairman, and such ex-officio and other members as he may from time to time determine: provided that the Minister shall consult the Minister of Justice before he so appoints a judge or retired judge.

The requirements of both acts are not particularly similar, the Namibian Act has detailed requirements of the composition of their Standing Advisory Committee and the South African Act requires specifically that the Chairman should in the rank of a Judge, a retired judge or a senior advocate of the Supreme Court. The similarities of both of these two acts, is that one of the members of the Standing Advisory Committee should be a Judge, either retired or not, or a senior practitioner. The Namibian requirements would be more desirable for purposes of developing corporate law in the Swaziland.

2.1.5 Types and Forms of Companies

Section 15 (1) of the Companies Bill, 2004 provides for the incorporation of the following types of companies,

- a) a company having the liability of its members limited by the memorandum to the amount unpaid on the shares respectively held by them and in this Act referred to as a company limited by shares; or
- b) a company having the liability of its members limited by the memorandum to such amount as the members may respectively undertake to contribute to the assets of the company in the event of it being wound up and in this Act referred to as a company limited by guarantee; or
- c) a company not having any limit on the liability of its members and in this Act referred to as an unlimited company.

In terms of sub section 2, all the above types of companies may either be public or private companies.

In terms of section 16(1) (a), a private company means a company having a share capital and which by its articles,

- Restricts the right to transfer its shares; and
- Prohibits any offer to the public for the subscription of any shares or debentures of the company.

According to section 16(2) a private company is not allowed to alter its articles in such manner that they no longer include all of the provisions referred to in subsection (1) unless it is at the same time converted into a public company.

The Companies Bill provides for the following concessions to private companies;

- Section 248 provides that a private company may elect in accordance with section 185 to dispense with the laying of accounts and reports before the company in general meeting;
- Section 233 provides that a private company may dispense with the obligation to appoint auditors annually;
- Section 167 provides that the quorum for meetings of a private company, not being a private company having one member, two members entitled to vote, present in person or by proxy;
- Section 161 provides that in the case of a private company having only one member, such member present in person or by proxy shall constitute a meeting;
- Section 156 allows a private company to elect by elective resolution to dispense with the requirement to hold an annual general meeting;
- Section 172 provides that the voting rights of a member of a private company shall subject to section 170 be determined by the articles of the company.

In comparison, the Namibian Companies Act, at section 20, provides for the creation of only two types of Companies, a company having a share capital and a company not having a share capital and having the liability of its members limited by the memorandum, being a company limited by guarantee. It does not provide for an

unlimited company, and a company limited by guarantee in terms of the Namibian Companies Act, is a Public Company.¹⁸⁷ As opposed to the Swaziland Companies Bill, A company limited by guarantee can be either a public or a private company.

The United Kingdom's Companies Act of 2006, provides for limited and still provides for unlimited companies. Sections 3 of the Bill provides for limited and unlimited companies and section 4 of the Bill provides for public and private companies. It is interesting to note that in terms section 4(1) of the Bill, a private company is a company which is not a public company. In terms of section 4(2) a public company is a company which limited by shares or limited by guarantee and having a share capital—

- (a) whose certificate of incorporation states that it is a public company, and
- (b) in relation to which the requirements of the Companies Acts, or the former Companies Acts, as to registration or re-registration as a public company have been complied with on or after the relevant date.

In South African, two basic types of companies in terms of the Companies Act of 1973 can be incorporated, namely companies having a share capital and companies not having a share capital and limiting liability of their members by the memorandum of association.¹⁸⁸ Companies having a share capital are further divided into either private or public companies. Section 20 of the South African companies Act, defines what characterizes a private company. Ms Wandrag,¹⁸⁹ points out that the definition of a private company in the 1973 Act was copied from the first union Companies Act of 1926¹⁹⁰ and is essentially the same as the definition of a private company in the British Companies Act of 1907.

The definition of a private in the Companies Bill of 2004 is similar to the 1973 Act except for the limitation on the maximum membership. The Companies Bill does not provide for a limitation on membership. Kiggundu who drafted the Companies Bill of

¹⁸⁷ Section 20 [3]

¹⁸⁸ S19 of Act 61 of 1973

¹⁸⁹ Wandrag(note 54) at 69

¹⁹⁰ S104 of Act 46 of 1926

2004 mentions that there is no rationale for the provisions of a minimum and maximum threshold on the membership of a private and public companies.¹⁹¹ He mentions that these provisions are 'anachronistic and anomalous', he further says the 'rationale for these arbitrary numbers is difficult to fathom; there exists no legal or practical justification for them'.

He proposes that companies should be formed by any two persons associated for a lawful purpose and furthermore, the formation of private company by one person should be permitted. Kiggundu incorporated these recommendations in the Companies Bill of 2004. The United Kingdom's Act has relaxed the regulation of private companies and does not prescribe that private companies conform to the restrictions of share transfers, prohibition of any offer for public subscription of their shares. Public companies on the other hand have to comply with the threshold requirement of a minimum share capital of 50,000.00(fifty thousand pounds).

The South African Corporate laws Amendment Bill provides for 'public Interest companies and limited interest companies. A company is a 'public Interest company if it;

- It's articles provide for an unrestricted transfer of its shares; and
- It is permitted by its articles to offer shares to the public; or
- It decides by special resolution to be a public interest company,
- It is a subsidiary of a company described in the above three items (clause 1(b)) proposing to insert s1(6) (a) into the Act.

A company is a limited interest company it is not a public interest company. Clause 1(b) proposing to insert section 1(6)(d) into the Act.

This definition has been described by J.L.Yeats¹⁹², as 'the corner stone of one of the primary objectives of the corporate law reform process.' 'The definitions form the legislative basis for distinguishing between these two types of companies as part of an overarching process of replacing all existing company forms (public and private

¹⁹¹ Kiggundu (note 83) at 508

¹⁹² J.L.Yates, 'The Drafters Dilemma: some comments on the Corporate Laws Amendment Bill, 2006'. (2006) Vol 123 Issue 4 *SALJ* 601 at 601

companies and apparently in the fullness of time, close corporations) with one simple flexible choice of business vehicle.’

She mentions that, ‘it is a stated philosophy of the DTI to move away from the ‘largely artificial’, separation between the different business forms to recognize only one form of business vehicle and to provide for a simple, easy company formation process’.

2.1.6 Company Formations

Section 27 of the Companies Bill provides that any two or more persons associated for a lawful purpose, or where the company to be formed is to be a private company with a single member, any one person for a lawful purpose, may form an incorporated company by complying with this Act in respect of registration. This section is in line with the objectives of the Bill of deregulation.

It is interesting to note that the section 37 of Namibian Companies Act and section 32 of the South African companies Act, still provide that the minimum number required in the formation of a public company is seven persons and in the formation of a private company, the minimum number of persons is two. Though both Acts provide for the option of the formation of a private company with a single member.

Section 7 of the United Kingdom’s Company’s Act on the other hand provides that a company is formed by one or more persons by subscribing their names to memorandum of association, complying with the requirements of the Act pertaining to registration. The section further provides that a company may not be formed for an unlawful purpose.

The White Paper¹⁹³ takes the view that the starting point for company law should be the small firm, with additional or different provisions for larger companies where necessary. It proposes to tailor the core of British company law to fit the smallest companies, which are mostly private companies, and to then add additional safeguards as necessary.

¹⁹³ Johan de Lange, ‘Company Law Reform in the United Kingdom’ vol 13 part 1 SALJ 13 at 14

This approach of the White Paper is sensible and may also be practical. The approach of using the small firm as the starting point for company law, and adding additional and more sophisticated burdens as and when the growth of the enterprise warrants it, would complement promoting small and medium-size enterprises by ensuring the accessibility of the corporate form at the most basic levels of economic activity.¹⁹⁴

The sentiments of the White Paper are true even in the situation of Swaziland where most companies formed are private companies and I believe the bill has managed to cater for the needs of the small to medium size enterprises and tailor the companies' bill to fit even the smallest company. The Companies Bill, though long overdue, has come at a crucial time especially with the promotion of small and medium business by His Majesty King Mswati III in 2005¹⁹⁵ through the establishment of a job-creation fund initiated in partnership with local stakeholders. This fund is aimed at assisting local citizens meeting the funds' required criteria to establish businesses in a bid to lessen the current unemployment rate.¹⁹⁶ This is based on the premise that a profitable company leads to the consequential development of the economy which steers in the creation of employment opportunities.

2.1.7 Corporate Capacity and agency

The Consultative document highlights that the companies' bill of 2004 contains seven inter-related reforms which attempt to resolve the problems of corporate capacity and agency;

- A. It abolishes the doctrine of Ultra Vires by giving companies unlimited capacity.¹⁹⁷ It however retains the requirement to set out the objects of the company in the memorandum. The company will therefore have the option of being incorporated as a general commercial company that can engage in any

¹⁹⁴ De Lange (note 193) at 14

¹⁹⁵ <http://www.swazibusiness.com/sbyb2006/index.php?f=06/> accessed on the 5th December, 2006

¹⁹⁶ <http://www.state.gov./e/eb/efd/2005/42127.htm/> accessed on the 5th December, 2006

¹⁹⁷ Section 29 (1) of the Companies Bill of 2004.

business activity whatsoever or it could limit its objects in the memorandum and the authority of its directors and officers in the articles.

- B. Having given the company unlimited capacity, the Bill simplifies the procedure for the alteration of objects. It allows a company to alter its objects for any purpose by special resolution. The five grounds for alterations in section 11 of the Companies act of 1912 have been abolished and the remedies for dissenting share holders have been streamlined and strengthened.
- C. The defence of ultra vires has been expressly abolished. Neither the company nor the third party will be allowed to plead ultra vires to escape liability where the company has acted beyond its stated objects.
- D. In order to ensure security of transactions, the Bill proposes that the authority of the board of directors to bind the company in acts with third parties dealing with the company in good faith shall be deemed free of any limitation.
- E. The Bill explicitly abolishes the doctrine of constructive notice; third parties dealing with the company are under no obligation to examine the company's memorandum or articles or any other document in order to ascertain limitations on the company's capacity or on the directors' authority.
- F. The Bill codifies the second limb of the Turquand rule, a third party dealing with the company should not be concerned to ascertain whether matters of internal management have been complied with.
- G. The Bill retains Ultra Vires at the internal level; a member will be allowed to bring proceedings to restrain the company from doing anything outside the objects set out in the memorandum and the directors from acting beyond their powers.

These seven reforms of the Companies Act 1912 incorporated in the Companies bill to resolve the problems of corporate capacity and agency were highlighted by Kiggundu¹⁹⁸ before the drafting of the Bill in relation to the reform of the Botswana Companies Act.

Section 28 of the Companies Bill, 2004 provides that, 'where the company's memorandum states that the object of the company is to carry on business as general commercial company the company shall have power to do all such things as are incidental or conducive to the carrying on of any trade or business by it'

Section 29 of the companies' bill provides that a company's capacity shall not be limited by its memorandum. Section 29(2) provides that a member should be allowed to bring proceedings to restrain the company from doing anything outside the objects set out in

Memorandum and section 29(3) (a) restrains directors from acting beyond their powers. Section 29(3) (b) allows for the ratification of ultra vires transactions by special resolution. Section 30 deals with the powers of directors to bind the company and section 31 provides that there is no duty on a transacting party to enquire or investigate on the capacity of a company to transact or the authority of directors to bind the company. There is an express abolition of the doctrine of constructive notice in section 32(1) of the Companies bill.

The abolition of the doctrine of constructive notice has been criticised by practicing attorneys, Cloete Corporate in a commentary made at the request of the Federation of Swaziland Employers and Chamber of Commerce and the Select Committee on the Companies Act of the Parliament of Swaziland¹⁹⁹. The following criticisms were levied;

- The practitioner's commentary mentions that there is no rationale for the removal of the doctrine of constructive notice and the doctrine of ultra vires, in that to do

¹⁹⁸ Kiggundu (note 83) at 511, these were made referring to the companies act in Botswana of 1959, but due to both Botswana and Swaziland's company law being based/inherited from English Company law, These recommendations are easily applicable to Swaziland.

¹⁹⁹ Cloete Corporate Commentary on Companies Bill of 2004. herein after referred to as the 'practitioner's commentary' (Document with author) at 5-7

away with both doctrines would lead to a confusion of the law. The commentary further mentions that whilst it might not be a problem to have a variation of the two doctrines, it would definitely be leading to a process of changing the law completely and thus causing confusion where these two doctrines were to be removed explicitly or completely.

- Section 30(b) does not seem to make sense at all. It invites people to act in a manner that simply states that they can act knowingly fully well that the powers of the directors to bind the company do not exist and that this will not be considered an act of bad fault. The practitioners' commentary points out that this is not what the *Turquand Rule* states and in fact section 31 of the Bill is a more appropriate distillation of the rule although extremely out of place.
- Section 31 should be done away with so that there is no such freedom allowed to parties transacting with companies and rather the rule in *Paddon and Brock Ltd vs Nathan 1906 TS 158 at 163* be the rule that person do have some sort of duty when dealing with the company to see that the directors prima facie have power to do an act which they purport to do, the operative word there being prima facie.
- The practitioner's commentary points out that section 30(b) is in effect almost tantamount to a replication of section 36 of the Companies Act of 1973 of South Africa which has in itself been criticised extensively.
- The practitioner's commentary recommends that there is a need to maintain the ultra vires doctrine in Swazi Law to the extent that it is applied now at present in South Africa.
- The practitioner's commentary mentions that the manner in which the *Turquand Rule* is stated in section 30, 31 of the Bill is not the correct statement and accordingly it is suggested that section 30(2)(b) should state the following;

‘Where the directors of a company do an act under which the Articles of Association they might or could have power to do, persons dealing with them are not bound to investigate the private concerns of the company and to ascertain whether a condition precedent which may exist to the due exercise of the power has in fact been performed’

Kiggundu seems to have relied on the English Companies Act of 1985 with regard to this section.²⁰⁰ Such that section 35(1) of the English Companies Act of 1985, is a replica of section 29(1) of the Companies Bill among other sections. Andrew Griffiths²⁰¹ mentions that the wording of the section is not completely free from ambiguity and could be interpreted in a way that would negate its obvious intention.²⁰² He aptly points out that s 35(1) of the English Act of 1985 ‘only applies to the limitation of a company’s contractual capacity by the terms of its objects clause. It does not apply to any other restrictions on the intrinsic ability of a company to be a party to a contract and in particular it does not mitigate the impact of statutory prohibitions.’

Even though section 35 of the English Companies Act has substantially removed the contractual capacity as a problem facing third parties, the objects clause is still relevant and the powers of directors are still circumscribed by their company’s objects clause and thus can only be overridden by a special resolution of the shareholders.

Section 35 by itself would create a potential problem, as Andrew Griffiths mentions that it’s sufficient to ensure of a contract that is not made or authorised by the directors, but is also ratified by a special resolution. Otherwise a third party may still have to overcome the distinct legal problem presented by the directors’ lack of actual authority to bind the company.

²⁰⁰ The law relating to Company’s Capacity in England is governed by s 35(1) of the Companies Act 1985, which was inserted in its current form by the Companies Act of 1989. The revised section was inserted by the Companies Act, 1989, s108 and took effect on the 4th February 1991. see John de Lacy, ‘The Reform of United Kingdom Company Law’ (Cavendish Publishing Limited: London, 2002) at 108

²⁰¹ De Lacy, (note 200) at 108

²⁰² De Lacy, (note 200) at 108

Section 35A (1) remedies the problem. Section 35A was also inserted by the Companies Act, 1989. Section 35A (1) is a replica of section 30(1) of the Companies Bill of 2004.

In terms of the Practitioners Commentary, the problematic section is s 30(b) of the Companies Bill, a replica of section 35A (2) (b), which provides that,

‘A person shall not be regarded as acting in bad faith by reason only of his knowledge that an act is beyond the powers of the directors under the company’s memorandum or articles of association’

As earlier mentioned, the practitioner’s commentary points out that section 30(b) is in effect almost tantamount to a replication of section 36 of the Companies Act of 1973 of South Africa which has in itself been criticised extensively.

Andrew Griffiths mentions that the effect of this section is that it does not confer unlimited actual authority on the directors of a company, nor does it entitle third parties to rely on their unlimited apparent authority in all circumstances. The third party must be dealing with the company in good faith.²⁰³ The question which now arises, is when would a third party not be so dealing with a company and thus be unable to rely on the directors’ unlimited apparent authority.

The meaning of good faith is crucial to third parties dealing with companies. Section 35A(2)(b) of the English Act of 1986, equivalent to section 30(2)(b) of the companies bill both elaborate further on this as follows, ‘a person shall not be regarded as acting in bad faith by reason only of his knowing that an act is beyond the powers of the directors under the company constitution’

Section 35A(2)(c) which is section 30(2)(c) of the Companies Bill provides that, ‘no person shall be presumed to have acted in bad faith unless the contrary is proved’

Section 35B which is section 31 of the bill provides that, ‘ a third party to a transaction with a company is not bound to enquire as to whether it is permitted by the company’s memorandum or as to any limitation on the powers of the board of directors to bind the company or authorise others to do so. The wording of section

²⁰³ De Lacy, (note 200) at 113

35A entails that bad faith entails more than knowledge of the directors' lack of authority to bind the company, even where the third party's knowledge is actual rather than constructive. There is uncertainty as the standard of fault or carelessness that should be used to gauge a recipient's constructive knowledge.²⁰⁴ In *Cowan de Groot v Eagle Trust*, Knox J²⁰⁵ said the following,

'In my judgment it may be that the underlying broad principle which runs through the authorities regarding commercial transactions is that the court will impute knowledge on the basis of what a reasonable person would have learned, to a person who is guilty of commercially unacceptable conduct in the particular context involved'

The concept of commercially acceptable conduct should be used as a standard for determining the required lack of good faith. Andrew Griffiths mentions that knowledge of the directors' excess of power should at least increase the onus on the third party to ensure that the company directors are not acting fraudulently or infringing their duty to act in good faith in their company's best interest. Section 322A(2) of the 1985 Act which is section 33(1) of the bill, provide that where a company enters into a transaction in which the directors and others so related as mentioned in the subsection, exceeding their powers under the company's memorandum or articles, the transaction is voidable at the option of the company. Which means it is contingent on the company to rescind it.

I concur with the Practitioner's commentary that in the advent of the abolition of the doctrine of ultra vires sections, there is still greater doubt on the impact of sections 30 and 31, the meaning of good faith and how knowledge of a third party regarding a breach of the memorandum and articles of a company should affect their ability to rely on the above sections. I disagree however that the ultra vires doctrine should be maintained to the extent at which it is applied at present in South Africa as this is tantamount to incorporating section 36 of the South African Companies Act, 1973 into our law and it has been extensively criticised, as rightly noted by the practitioner's commentary.

²⁰⁴ De Lacy, (note 200) at 117

²⁰⁵ [1992] 4 All ER 700 at 761h.

Section 36 of the South African companies Act provides that, ‘no act of a company shall be void by reason only of the fact that the company was without capacity or power so to act or because the directors had no authority to perform that act on behalf of the company by reason only of the said fact and except as between the company and its members or directors, or as between its members and its directors, neither the company nor any other person may in any legal proceedings assert or rely upon any such lack of capacity or power or authority’

Blackman²⁰⁶ points out that section 36 has its origin in the American Model Corporation Act. He refers to three reasons why South Africa should not have adopted it. Firstly, the word ‘power’ in the phrase ‘capacity or power’ is ambiguous. In Australia it was suggested that the word ‘power’ added nothing to the word ‘capacity’. Blackman expounds that the Van Wyk De Vries Commission, framed the section in this manner to put to effect the following recommendation, ‘...if the Act lays down that no act shall be held void on the grounds that it is ultra vires the objects of the company would eliminate the ultra vires problem in respect of third parties’. Blackman further points out that, ‘what is more is that s34 of the Act provides that every company shall have ‘plenary powers’ to attain its main and ancillary objects except such powers as are expressly excluded in the memorandum. This not only perpetuates the distinction-it also permits a company to deny its directors the right to enter into certain kinds of transactions. In making the recommendation which resulted in s34 the commission stated the express exclusion of certain ‘powers’ would have no implications as far as third parties were concerned. The Act, however contains no express provision to that effect. Therefore if the word ‘power’ in s36 is not interpreted to mean one of the company’s powers, the Act will contain no such provision, and third parties will, by virtue of the doctrine of constructive notice be affected by such an exclusion.’

The second²⁰⁷ reason expounded against the adoption of this s36, ‘is to provide that those acts which were formerly ultra vires and hence void are now no longer void is in truth to give companies the capacity to perform such acts. Therefore such acts can no longer be

²⁰⁶ Blackman (note 84) at 21

²⁰⁷ Blackman (note 84) at 22

described as acts beyond the ‘capacity or power’ of a company. It makes sense to say that no act shall be void by reason only of the fact that it is void. Clearly, what both the commission and the legislature intended to say was that no act shall be beyond the capacity of a company and hence void by reason only of the fact that it is beyond a company’s objects.’

Thirdly,²⁰⁸ ‘the term ‘ultra vires’ was not used to denote all acts beyond the capacity of a company. It was used only to describe those acts which were beyond the capacity of a company by virtue of the fact that they were beyond the scope of the company’s objects. Section 36 at first sight seems to confer unlimited capacity on the company and seems confusing’

McLennan,²⁰⁹ advocates for the overhaul of section 36 and its’ accompanying sections, being sections 33 and 34 and mentions that they should be replaced with new ones. He describes them as inoperable and further advocates for the abolition of the doctrine of constructive notice. I believe the Standing Advisory Committee should be mandated with the task of investigating the suitability of this portion of the law to Swaziland.

2.1.8 Pre-incorporation Contracts

Section 34(a) and (b) of the Companies Bill of 2004 provides a solution to the problems associated with pre-incorporated contracts. It provides for the ratification of contracts entered into by a person professing to act as agent or trustee for the company before its incorporation. This contract is provisional pending adoption by the company after its incorporation. The requirements which have to be fulfilled for the contract to be binding are;

- The contract must be in writing; (Cilliers²¹⁰ points out that this provision is wide enough to include an oral contract subsequently reduced into writing)
- It must have been entered into by a person who professed to act as agent or trustee of an unborn company;

²⁰⁸ Blackman (note 84) at 22

²⁰⁹ Mc Lennan (note 103) at 357

²¹⁰ Cilliers (note 56) at 58 para.5.06

- The memorandum on its registration must contain as one of its objects the ratification or adoption of or the acquisition of rights and obligations in respect of such contract; (Cilliers²¹¹ highlight that the specific contract must be described in the memorandum so that it can be identified with certainty.)
- The contract or a certified copy of it must be delivered to the Registrar simultaneously with the delivery of the memorandum during the registration process; and
- The company must actually adopt or ratify the contract after its incorporation. (Cilliers expounds here that, ‘if the preceding requirements are complied with and the company ratifies the contract after it has been duly incorporated, the contract comes into existence between the company and the other party. In cases of companies with a share capital, a contract ratified before the date on which the company was issued with a certificate of incorporation to start business is provisional and cannot be binding until that date’)

This section is relatively similar to section 35 of the South African companies Act and section 42 of Namibian Companies Act.

Cilliers²¹² describes section 35 as permissive, not peremptory. It was introduced to enable promoters to enter into contracts as agents even though the company was not yet in existence and not as a codification of the law relating to pre-incorporation contracts. Promoters can make use of other methods. Promoters can still make use of the common law contract benefit for third parties. (*Stipulatio alteri*).

The Companies Act of Botswana²¹³ contains a provision which is tantamount to a replica of section 34 of the Companies Bill of 2004. The English Bill has also made reforms to this section. In the explanatory notes to the Bill, it is mentioned that this section re-enacts section 36C of the 1985 Act. In terms of this section, a company is not bound by a contract purportedly made on its behalf before it came into existence unless

²¹¹ Cilliers (note 56) at 59 para.5.09

²¹² Cilliers (note 56) at 60

²¹³ S33, see Kiggundu(note 120) at 1526

the obligations are novated, i.e. a new contract must come into existence after incorporation on the same terms as the old one. Novation may be express or implied.

Section 52 of the English Bill provides as follows;

‘(1) A contract that purports to be made by or on behalf of a company at a time when the company has not been formed has effect, subject to any agreement to the contrary, as one made with the person purporting to act for the company or as agent for it, and he is personally liable on the contract accordingly...’

In terms of this section a promoter is personally liable whenever he purports to contract on behalf of an unborn company subject to any agreement to the contrary.

Kiggundu²¹⁴ points out that this section indicates the importance of intention in pre-incorporation contracts. Before the statutory reform, the promoters were personally liable if they intended to be personally liable. This was enunciated in *Kelner v Baxter*. Under section 36(4) of the English Companies Act of 1985 and in also in the English Bill section 52, they are personally liable unless there is a clear intention to the contrary.

The Botswana Act, which provides a similar provision as that contained in the Swaziland Act, provides a more attractive position because it directly attempts to resolve problems of ratification and adoption of pre-incorporation contracts by the company after its incorporation, which is the shortfall in the common law.

2.1.9 Company Names

Section 37 of the Companies Bill regulates the procedure for the selection of company names and restrictions of names which are not permissible to be used. This section has imported some of the requirements for names stipulated in section 10 of the Companies Act of 1912.

Some of the imported provisions include that no name shall be reserved and no company shall be registered by a name which is identical with that for which a reservation is current, or calculated to deceive unless the registered company is in

²¹⁴ Kiggundu (note 120) at 1527

liquidation and has consented in such manner as the Registrar may require.²¹⁵ Further both pieces of Legislation provide that a company name may not be registered if it causes annoyance, offence to any person or it is a name suggestive of blasphemy or indecency. The Companies Bill makes an addition to the list and provides that a name representing an occupation for which personal qualifications are required may not be registered, if the person seeking to register the name of the company does not have those qualifications.

In terms of the Companies Act of 1912, the words, 'Imperial', 'Royal', 'Crown', 'Empire', 'Government', are prohibited to be used in the names of Companies with out the consent of the Minister. The Companies Bill of 2004 removes from this list the word, 'Imperial', and 'Empire', and adds the names, 'Common wealth', 'Prime Minister', 'State', 'United Nations', or any other name which will suggest patronage of the King or Ngwenyama or of the Government of any other country or any department of Government of the General Assembly of the United Nations.

The reservation of a company name is made in writing to the Registrar in both statutes and the reservation period in the Companies is extended from a month (30 days) in the Companies Act of 1912 to two months (60 days) in the Companies Bill of 2004.

Section 38 of the Companies Bill provides for the change of Company Names. Section 10 of the Companies Act of 1912 provides for the name and change of name of Companies. Both statutes provide that a Company may change its name by special resolution. However the Companies Act of 1912 required the approval of the Minister in writing which the Companies Bill has done away with.²¹⁶ The result of the change of name in both statutes requires the Registrar of Companies to enter the new name in the register of companies in place of the former name and issue an altered certificate of incorporation.²¹⁷

Both statutes indicate that the change of name does not affect any rights, debts, liabilities or obligations of the company, nor render defective any legal proceedings by or

²¹⁵ Section 37(2) of the Companies Bill of 2004 and Section 10(1) of the Companies Act of 1912

²¹⁶ Section 38(1) of the Companies Bill of 2004 and Section 10(5) of the Companies Act of 1912

²¹⁷ Section 38(2) of the Companies Bill of 2004 and Section 10(6) of the Companies Act of 1912

against the company and any legal proceedings that could have been continued or commenced by or against the company prior to such change of name may be continued against the company under its new name.²¹⁸ The Companies Bill of 2004 includes more comprehensive rules which are not contained in the Companies Act of 1912, on names of companies. The Bill requires that change of names be advertised in the by the Registrar in the Gazette and in the newspaper published and circulating in Swaziland, for the benefit of creditors and any grievances pertaining to company names, recourse to court is the stipulated route. The Companies Bill introduces formal requirements pertaining to the formal requirements of names of companies, use and publication of a name by a company and contains an offence for the improper use of the words 'Limited', or 'incorporated'.

2.1.10 Corporate Finance

The topical issue in company law is whether core company law should attempt to protect the interests of creditors and other providers of corporate finance. As mentioned in chapter one, share capital comprises of both debt and equity. Debt plays a pivotal role in corporate finance. Ferran acknowledges the significant role of creditor self- protection through contractual negotiation and the bargaining process.²¹⁹ Against the backdrop of corporate reform in many jurisdictions and the drive to deregulate company law, Ferran²²⁰ mentions that, 'if excessive over-regulation is to be avoided, core company law should play only a modest role in protecting the interests of creditors; and/ or that protection, whether within core company law or in other areas of the general law, should be targeted at specific categories of creditor who cannot protect themselves through contractual negotiation rather than being generally available'.

The tropical issue of capital maintenance comes into the spot light and the impact of the capital maintenance rules on the development of corporate finance practice. Cognisance

²¹⁸ Section 38(4) of the Companies Bill of 2004 and Section 10(7) of the Companies Act of 1912

²¹⁹ Eilis Ferran, 'Creditors' interests and 'Core' Company Law' 1999 Vol 20 no.10 *The Company Lawyer* 314 at 315. Cassim (note 137) at 283 highlights that in the United states, which has a totally different approach to the issue of 'creditor protection' much reliance is placed on creditor protection through contractual negotiations on the assumption that those who provide debt financing are perfectly capable of looking after themselves through the bargaining process. Cassim points out that this approach ignores involuntary creditors and those creditors who simply do not have the power to protect themselves through contractual negotiations.

²²⁰ Ferran (note 219) at 315.

has to be taken of the fact that Swaziland's business environment is still developing and adequate safe guards for creditors and minority share holders need to be in place and in the same breath avoiding the need to over regulate as highlighted in the consultative document. The capital maintenance concept encompasses other concepts namely; Firstly, various rules relating to the raising of capital, secondly, a company may not purchase its own shares, thirdly, the prohibition against a company giving financial assistance for the purchase of or subscription for its own shares and fourthly, the rule that dividends may not be paid out of capital. These rules are discussed below.

I. Share Capital

Section 63 of the Companies Bill provides that the share capital of a company shall be divided into shares having a par value. Section 63 is a replica of section 74 of the South African Companies Act of 1973.

John Armour²²¹ describes a par value as a 'notional capital amount associated with each share. It need bear no resemblance to their market value'

The problem with this provision is that Par value shares have been criticised for being artificial, arbitrary and detached from economic value.²²²

The South African Department of Trade and Industry²²³ mentions that part of the reform of South African Company Law entails the abolition of par value shares. The concept of par value shares has been criticised in the country of its origin, England. Ferran mentions that it is clear that the concept of mandatory par values has long since passed its sell by date and should be abolished.²²⁴

²²¹ John Armour, 'Share Capital and Creditor Protection, Efficient Rules for a Modern Company Law' 2000 Vol 63 MLR 364.

²²² DTI (note 1) at 34

²²³ DTI(note 1) at 34

²²⁴ Ferran (note 219) at 319. Ferran also mentions that the 'maintenance of capital principle requires that designated reserves should not be returned to share holders. The identification of the reserves that are subject to the principle is of obvious importance and a modern system of company law should strive to define the relevant reserves clearly and with a minimum of complication. Patently, the present rules which impose a division for accounting purposes between the par value of shares and share premiums but which require share premiums to be treated, for the most part as if they were capital, do not achieve this. The attribution of an arbitrary par value to shares which, usually bears little relation to the price at which they are actually issues, is a source of potential confusion to investors.' At 318

It is difficult to fathom therefore why the drafters of the bill chose to retain this provision, more particularly because Kiggundu²²⁵ acknowledges that even though company shares of a company having a share capital must have a nominal value, the par value system has lost its original appeal. The trend in many jurisdictions is the option of non par value shares.²²⁶ Kiggundu²²⁷ mentions that in practice, it does not really matter whether the shares are par value or no par value. What matters is the proper maintenance of the capital raised by the issue of either type of share or both types. Kiggundu recommends that it is preferable to leave to the individual companies to fix the value of the shares to be allotted, provided that is not manipulated to achieve certain personal or fraudulent objectives.

As John Armour points out, 'in light of the insistence on the minimum issue price, if shares in a private company are allotted for non-cash consideration, then no serious attempt is made to ensure that the assets supplied are in fact worth the par value of the shares.' He points out that in case of public companies, the value of non-cash consideration is subjected to an independent expert's valuation, however there is no requirement that shares in any company be issued at their full market price, where it is greater than par'

Section 65 of the Companies Bill seeks to remedy such a situation where shares are allotted for non-cash consideration by prescribing that assets acquired by the issue of shares of a company should be valued and such value should be properly recorded in the books of the company. If such value of the assets is more than the par value of such shares, the difference between the par value of the shares and the value of the assets so acquired shall be transferred to the share premium account.²²⁸

II. Raising Capital

One of the common law rules relating to capital maintenance is the prohibition of the issuing of shares at a discount to their par value. Section 68 of the Companies Bill

²²⁵ Kiggundu (note 83) at 508

²²⁶ Ferran (note 219) at 319 Ferran mentions that the United Kingdom's company law review steering group notes published in 1999 advocates for the abolition of par value shares. Ferran highlights that no par value shares are widely recognised in the United States, Canada, Australia.

²²⁷ Kiggundu (note 83) at 510

²²⁸ S 65(2) of the Companies Bill of 2004.

provides that a company may issue at a discount shares of a class already issued provided the following conditions have been complied with;

- Such issue has been authorised by special resolution specifying the maximum rate of discount at which the shares are to be issued,
- Not less than one year must at the date of issue have elapsed since the company commenced business, or the date of the first issue of the class of shares and,
- Such issue has been sanctioned by the court;

Section 68 of the Companies Bill is a replica of Section 81 of the South African Companies Act of 1973. Cassim²²⁹ highlights that the rationale for this provision is based on the equity principle that when shares are issued in a particular issue they should all be issued at the same price. This prevents discrimination between shareholders in the price at which shares in a particular issue are allotted. Yet paradoxically, although shares cannot be issued at a discount, they can be issued at different share premiums. Section 81 of the South African Companies Act of 1973 is soon going to be abolished with the abolition of the provision of par value shares.

III. Reduction of Capital

Section 69 to 76 of the Companies Bill provides for the procedure for the reduction of capital. In terms of the Companies Bill, a company limited by shares may by special resolution reduce its share capital in any way other than paying off capital in instalments if authorised by its articles, if it has no creditors or all of the creditors have consented to the reduction of capital and the reduction of capital affects all its shares or any class of shares proportionally.

Kiggundu seems to have relied on the Botswana's amendment Act of 1999 in light of this section.²³⁰ This section further provides that an affidavit signed by a director or officer of the company as at the date of the special resolution confirming either the consent of the creditors or that there are no creditors should be annexed to the copy of the

²²⁹Cassim (note 137) at 286

²³⁰Kiggundu (note 83) at 505.

special resolution, together with the written consent of the creditors and lodged with the Registrar for registration. Section 75 of the Companies Bill provides that a company shall cause to be published in the Gazette a notice of the reduction of its capital in respect of every special resolution for the reduction of capital registered by the Registrar within two months after the date of such registration. Section 71 provides for creditors and shareholders who are aggrieved by the reduction of capital in terms of section 69, who may bring an application to court for relief.

In contrast, sections (s83 - 90) of the South African Companies Act, dealt with the reduction of capital requiring a special resolution and in limited circumstances a court's sanction in order for a company to reduce its capital, which sections were repealed in 1999,²³¹ and the twin tests of liquidity and solvency were adopted. It seems that our Bill has adopted what other SADC jurisdictions have abandoned. The crucial question which remains in our law is how far should the law pertaining to share capital seek to protect creditors and how efficient is it at protecting creditors and as a result is the law likely to enhance efficiency.

IV. Corporate Share Repurchases

Corporate shares repurchases were not provided for in the 1912 Act. Section 77(1) of the Companies Bill provides that generally, corporate repurchases are prohibited. A company limited by shares may acquire its own shares otherwise than for valuable consideration and subsection 1 does not apply to;

- 1) the redemption or purchase of shares in accordance with the provisions of this act,
- 2) the acquisition of shares in a reduction of capital duly made;
- 3) the purchase of shares in pursuance of an order of the court under section 46 or section 214; or
- 4) the forfeiture of shares, or the acceptance of shares surrendered in pursuance of articles, for failure to pay any sum payable in respect of the shares.

Section 84 of the Bill of 2004, provides for corporate share repurchases if the company is authorised by its articles and the members by special resolution in general meeting

²³¹ Repealed by the Companies Amendment Act 37/1999

have consented to it. Payment of the shares acquired by the company shall be made out of the company's distributable profits. Kiggundu²³² highlights that the rationale for the prohibition against corporate share repurchases is to avoid a reduction of capital to the prejudice of the company creditors and also to stop companies trafficking in their own shares. The advantages of corporate share repurchases are that it enables a company to buy out the dissentient shareholder and it is useful in that it allows for the buyback of employee shares in employee schemes when the employee ceases to be an employee.²³³

Section 87 of the South African Companies Act provides for share buybacks. The procedure is two fold. Firstly, a tender offer coupled with an offering circular. This procedure entails an offer to acquire unlisted shares from all registered shareholders. The second type of procedure is a share repurchase on the open market, which is not regulated by the companies act but by the listings requirements of the JSE Securities Exchange. The procedure for share buy backs protects shareholders in so far as it attempts to ensure equality of treatment of shareholders holding the same class of shares.²³⁴

In drafting this section, Kiggundu echoes Cassim's sentiments that there has to be adequate safeguards for shareholders and creditors. In a bid to ensure that safeguards are in place, the Companies Bill, provides safeguards which include, disclosure, approval by shareholders, (section 84) specifying the sources of the funds for the repurchase, (section 85) cancellation of repurchased shares (section 86) and adequate remedies for dissenting shareholders. (section 214)

The above safeguards seem to be more protective of shareholders. Cassim points out that the liquidity and solvency test is more protective of creditors. The Senate has amended section 77 which has the general proviso prohibiting the acquisition of shares by a company subject to exceptions. The section has been amended completely and now provides that corporate share repurchases is permitted subject to safeguards mentioned in the section. The amendment still requires a special resolution of the company and for the articles to authorise the acquisition of shares. This amendment also introduces the liquidity and solvency test, which is applied in South Africa.

²³² Kiggundu (note 83) at 513

²³³ Kiggundu (note 83) at 513

²³⁴ Cassim (note 137) at 290

V. Financial Assistance by A Company for the purchase of its own shares

Section 78 – 81 deal with financial assistance by a company for the acquisition of its own shares. Generally financial assistance is prohibited (s78). The exception is in respect of financial assistance in the empowerment sense, for the benefit of employees. This section has come under great scrutiny and has been severely criticised for empowering only employees of a company and yet sections 80 and 81 were meant to be more empowering, though they are subject to the liquidity and solvency test as well. This section is not drafted around section 38 of the South African Companies Act which received a lot of criticisms itself and many writers have made contributions advocating for the amendment of this section. With the advent of Black Economic Empowerment (BEE) in South Africa, the Section 38 has been amended by the Corporations Amendment Bill²³⁵ which provides a company is not prohibited from giving financial assistance for the purchase of or subscription for shares of that company or its holding company if the company adheres to the liquidity and solvency test, and the transaction is sanctioned by a special resolution and that the directors must account for contingent liabilities which may arise including that of giving the financial assistance.

The Senate has made amendments to section 80, which is now in a more empowering sense subject to the provisions of section 77 allowing financial assistance to be given to bona fide swazi citizens other than directors for the purchase or subscription of shares to be held by them beneficially. The question is to what extent will this empowerment section work as in comparison, BEE has a threshold requirement for each sector and imposes sanctions to those companies who do not comply with the legal requirements of BEE. Section 80 introduces a commendable proviso of empowering the swazi, however it still all depends on whether private and public companies want to empower the swazi. I believe more needs to be done to ensure that more and more Swazis participate fully in the economy of the country.

VI. Dividends

²³⁵ Section 9 of the Corporations Amendment Bill of 2006

Section 95 of the Companies Bill provides for the payment of dividends. In terms of this section dividends are payable subject to the liquidity and solvency test. Directors of a company will be rendered liable jointly and severally for being in breach of this section. Section 90 of the South African Act provides for the payment of dividends subject to the provisions of this section and where authorised by the articles of the company to shareholders subject to the liquidity and solvency test. The difference between section 95 and section 90 of the South African Act is that in section 90, 'payment' is widely couched to include any direct or indirect payment or transfer of money or other property to a shareholder of the company but it excludes an acquisition of shares in terms of section 85, a redemption of redeemable preference shares in terms of section 98, any acquisition of shares in terms of an order of court and the issue of capitalisation shares in the company.

2.1.11 Share holders remedies

Companies are in theory at least 'economic democracies', the will of the majority prevails.²³⁶ One of the consequences of this is the ancient rule in *Foss v Harbottle*. The rule is not only logical but essential. It would lead to chaotic multiplicity of litigation if any share holder had *locus standi* to sue for wrongs done to the company.²³⁷

Unfortunately, as in other democratic institutions, corporate majorities sometimes act unfairly or oppressively towards their minorities. In order to curtail this, evolved what came to be known as the Share holders' derivative action.²³⁸ This action is representative and not personal. In the event of success, recovery goes to the company and not the plaintiff.

Sections 214 -230 of the Companies Bill provides for the remedies of shareholders. The section provides that a member can make an application to court under this section where the member feels that the acts by a company are unfairly prejudicial, unjust or inequitable or that the affairs of the company are being conducted in a manner unfairly prejudicial,

²³⁶ RC Williams (note 97) at 237

²³⁷ See generally Cilliers (note 56)

²³⁸ See generally Cilliers(note 56)

unjust or inequitable to him or some part of the members of a company. The acts complained of could relate to the following;

- Any alteration of the memorandum of the company under section 46 or 47
- Any reduction of the capital of the company under section 69
- Any variation of rights in respect of shares of a company under section 86
- Or the conversion of a private company into a public company or vice versa.

These sections are a replica of sections 252 – 268 of the South African Companies Act of 1973.

2.1.12 Administration of companies

The Companies Act of 1912 did not contain comprehensive rules pertaining to the administration of companies. Section 149 – 190 of the Companies Bill deals with the administration of companies. This sections provides comprehensive rules pertaining to the establishment of a registered office by a company prior to commencement of business, rules pertaining to the meetings of a company, voting right of shareholders, resolutions of members.

2.1.13 Auditors

The duties of the company auditor play an important role in company reporting. The functions of the company auditor are crucial to the doctrine of disclosure as the auditor is relied upon to expose any malpractice within the company. Emma Ladakis,²³⁹ highlights that, 'the fundamental role of the auditor is to provide an independent and expert assessment of the financial report prepared by a corporation. Although the report is returned to the shareholders, and aims to provide them with assurance as to the reliability of the information provided, effective performance of an auditor's duties does not necessarily establish the auditor as a good gate keeper for the investing public'

²³⁹ Emma Ladakis, 'The auditor as gate keeper for the investing public: Auditor Independence and the CLERP reforms- a comparative analysis. (2005) Vol 23. C&SLJ at 416

Gaisie²⁴⁰ mentions that 'an audit is a deterrent, but the auditor is not responsible for preventing fraud and error. He further points out that auditors consider the risk of material misstatements resulting from fraud or error. They obtain reasonable, not absolute, assurance that material misstatements will be detected, much evidence is persuasive rather than conclusive'

With the advent of corporate collapses in the United States and in the other countries, greater responsibility is placed on the auditor to be a whistle blower or gate keeper in the event any irregularities are observed in a company as a means of promoting greater corporate governance. In South Africa, the Auditing Profession Act of 2006²⁴¹, mandates individual auditors upon being satisfied or having reason to believe that an unlawful act or omission committed by any person responsible for the management of that entity has taken place or is taking place to report such irregularity to IRBA. It is imperative that the Swaziland Institute of Accountants ensures that Accounting and Auditing Standards compliment the Companies Bill and enhance good corporate governance.

Sections 231-244 of the Companies Bill of 2004 deals with the appointment, disqualification, removal, resignations, duties and remuneration of auditors. It prescribes the qualification of an auditor by prescribing that a person not qualified to act under the Accountants Act, 1985 can not qualify for appointment as an auditor.

Section 231(2) of the Bill provides an exemption for private companies whose shareholders do not exceed five members and the equity investment of the company does not exceed fifty thousand emalangenzi to be exempt from appointing an auditor. This is a commendable reform. Most private companies in Swaziland are small concerns and the deregulation of these companies will relieve them of the expensive and time consuming burdens of company procedures. So the appointment of an auditor in such concerns should be optional.

²⁴⁰ Gaisie, (note 7) at 9

²⁴¹ Section 45(1) (a)

2.1.14 Directors

For purposes of good corporate Governance it is important for the Companies Act to adequately clarify rules governing the conduct of directors and remedies available for the violation of the rules. Directors play a fundamental role in ensuring good corporate governance. The directors' fiduciary duties are found in the common law. In some cases these are not completely clear with conflicting case law. At common law the duties of directors fall into two basic categories, 1) a fiduciary duty to the company 2) a duty of skill and care.

The Director's fiduciary duties has four aspects to it, the duty to act in good faith, to exercise his powers for a proper purpose, to avoid a conflict of interest and not to misuse company property. The duty to display reasonable skill and care has two angles to it, the degree of skill and the degree of care. The above common law principles are augmented by the underlying statutory duties.

Sections 191 to 213 provide for the appointment, duties, disqualification of directors, scope of the power of directors, prohibition with respect to loans by directors, indemnity of directors etc. The above sections relating to directors are relatively similar to sections 208 to 251 of the South African Companies Act of 1973. In as much as these provisions may be comprehensive, there is still a need to codify the common law duties of directors to a certain extent so as to give directors a degree of certainty of their overall duties, and these could be accessible in one legislation. Chapter 3 of the white paper on the UK company law reform bill states as follows²⁴²,

"The government believes that companies work best where the respective roles and responsibilities of directors and members or shareholders are clearly understood, where there is effective communication and engagement between directors and shareholders, and where there are efficient mechanisms for taking decisions critical to the running of the company... The Bill will provide greater clarity on what is expected of directors, making it easier for all to understand what those duties are. In particular the Bill will make clear that, while directors must promote the success of the company for the benefit of its members, this can only be achieved by taking due

²⁴² Gaisie (footnote 7) at 28

account of longer term performance and wider interests, such as the interest of its employees and the impact of the company's operations on the community and on the environment'

The codification of the fiduciary duties of directors is crucial and is a step that has been taken in other jurisdictions like the United Kingdom. This is a task which still awaits the Standing Advisory Committee.

2.1.15 Accounting and Disclosure

It is imperative that there is transparency in the administration of the company and maximum disclosure of information concerning the affairs of the company to facilitate the proper assessment of the financial position and performance.

Disclosure is part of the price the company pays for limited liability. The rationale of this important doctrine is to protect creditors and shareholders. It is believed that disclosure will lead to exposure.

Sections 245-264 provides comprehensive rules relating to accounting and disclosure. Section 258 provides for the disclosure of director's emoluments and pensions which is in line with good corporate governance. This section also provides for detailed financial statements which encompass the directors and auditor reports for the benefit of the members in general meeting.

3. The shortfalls of the Companies Bill of 2004

Firstly I would like to point out that Professor Kiggundu, together with the drafting team did a commendable job on the drafting of the Companies Bill of 2004. He took an outdated and inadequate act in disharmony with the laws of the countries in the region and has produced a workable act, or at least a basis which can be improved on to make it fully competitive with other acts in the region.

However the Companies Bill of 2004 has been extensively criticised by various stakeholders and this section will lay out their criticisms. Some of the criticisms have been already highlighted and dealt with in the preceding chapter of this paper. This chapter will mainly highlight those criticisms from stake holders which have not been dealt with in the preceding chapter.

The criticisms are presented in a table format so as to incorporate the Senate's comments in the same table and making it easier to identify the criticisms levied by stakeholders and the comments on those criticisms from the house of Senate.

The Swaziland Institute of Accountants and the Practitioner's Commentary have made the following criticisms on the Companies Bill of 2004.

No.	Section reference	Comment	Suggested Amendment/s by stake holders	Senate's comments
1	Section 2	The definition of Minister refers to two ministers.	The Minister responsible for companies needs to be defined and the anomalies as to which Minister is responsible need to be resolved.	The senate has not incorporated this suggested amendment. approved the Bill with the definition of the two ministers as it currently stands in the Bill.
2.	Section 4	The office of the Registrar of companies is given responsibility for the administration of the act which is an arduous task considering the existing work load the Registrar currently has.	This section should be changed so as to limit the Registrar's responsibilities to the receipt and recording of information for the benefit of the public.	The senate did not specifically address the query raised by the stakeholder but made an insertion to section 4 by inserting a subsection 3 which provides that the Registrar and his deputy should be either Attorneys of the High court or Registered Accountants in terms of the Legal Practitioners Act of 1964 or the Accounts Act of 1985 respectively.

3	Section 9(1),	In terms of this section, fees are to be paid by affixing stamps.	This requirement should be dropped, as affixing stamps is no longer the practice and will result in considerable, unnecessary expense for government.	The senate has not incorporated this suggested amendment.
4	Section 12	This gives the court power to require security to be given for costs in legal proceedings by companies.	This section appears to amend, the provisions of either the High Court or Magistrate Court and needs to be reconsidered.	The senate has not incorporated this suggested amendment.
5	Section 46	Under section 46(1), if an application is made to the court by less than 15 percent of the company's shareholders for any alteration of the company's memorandum to be cancelled, the alteration shall have no effect unless confirmed by the court.	This needs to be amended as it effectively means that 15 percent of the shareholders can hold the company to ransom. This will make it difficult to attract outside investors to Swaziland.	The senate has not incorporated this suggested amendment.
6	Section 53(3),	The Registrar, as sufficient evidence of compliance with the requirements of the Act, shall accept a declaration by an attorney or by a director or secretary of the company.	This needs to be reconsidered. It is not clear who will enforce the provisions of section 53(3). At present companies are only to be registered by attorneys but large number of companies are registered without the involvement of an attorney.	The senate has not incorporated this suggested amendment.
7	Section 60.	This section puts the liability for the company's debts on the remaining member in the event that the number of members falls below two, even where the company's inability to pay may have nothing to do with the number of members.	This section need to be amended. If the requirement is for a public company to have two members, any third party that can show that they are disadvantaged can take action against the persons responsible, without necessarily limiting it to the remaining member.	The senate has not incorporated this suggested amendment.
8	Section 66	This section allows the payment of interest out of capital where the shares of	The provisions of this clause are vague. E.g. lengthy period is not defined. It is not clear	The senate has not incorporated this suggested amendment.

		the company have been issued to raise money to be used for the construction of the buildings or for the provision of plant, which cannot be made profitable for a lengthy period.	why the rate of interest has been capped at 20 percent. This section is at odds with modern commercial practices and should be removed.	
9.	Section 253(3)(a),	If the directors are of the opinion that the group financial statements need not deal with a subsidiary, the company shall apply to the Registrar for his approval for the group accounts not to deal with that subsidiary. Having to apply to the Registrar for approval is an unnecessary complication.	The requirement to apply to the Registrar should be removed.	The Senate has not incorporated this amendment.
10.	Section 261(a),	The duty of the auditor of a company is to examine the financial statements. The term examine is ambiguous and does not necessarily have the same meaning as audit	Better to use the word audit whose meaning is clearly, understood instead of examine. This provision should also include a reference to international standards on auditing.	Section 26 1(a), replace the word examine with audit.
11.	Section 261(i),	This sets out the auditor's duties as to the annual financial statements. Paragraph (i), as it is written does not make sense. The words 'Financial statements fairly present the are' missing.	The words generally accepted accounting practice should be replaced with Swaziland and International Financial Reporting Standards.	Section 261(1), amend clause 261(1), by removing the words, generally accepted accounting practice between the words with and applied and replacing them with Swaziland and International Financial Reporting Standards.
12.	Section 262(1),	This section requires that the audit should be in accordance with accounting standards.	This can be improved by including a reference to International Standards on Auditing and Auditing guidelines laid down by the Swaziland Institute of Accountants, instead of generally accepted accounting guidelines.	Amend clause 262(1), by removing the words generally accepted accounting guidelines between the words the and as and replace them with international standards on auditing and auditing guidelines.
13.	Section	A public company shall send to the	The requirement of certification should be	The senate has not incorporated this suggested

	263(3),	Registrar a copy, certified to be a true copy by a director and the company secretary, of the annual financial statements. Why is certification necessary, as the directors will have signed the accounts as required by section 259(1),	dropped.	amendment.
14.	Section 283	This deals with voidable and undue preferences.	This provision needs to be reconsidered as it proposes to amend both the common law and the insolvency act.	The senate has not incorporated the suggested amendment.
15.	Section 288(1) (a),	A company shall be deemed to be unable to pay its debts if a creditor who is owed a sum not less than E100 has served a demand requiring the company to pay the debt and the company has 21 days thereafter failed to pay.	The amount of E100 that is stipulated in the Bill is far too low and should be changed to a higher more realistic amount.	The amount of one hundred emalangeni is replaced with the amount of five thousand emalangeni.

4. Recommendations and Conclusion

This portion of the paper will conclude with general recommendations as specific recommendations pertaining to the addressed areas of Company law have been addressed in the preceding chapters.

I would like to echo the words of Professor Kahn Freund, when he said, '...Company Law can never reach a stage of 'finality'; it is in need of constant revision'. The Companies Bill is a commendable achievement and a base for future improvement and modification. As a result the vigilance of the Standing Advisory Committee is crucial in ensuring that company law in Swaziland meets the economic needs of the country in terms of growth, and constantly promotes enterprise.

In as much as our Company Law has been reformed, it should not be reformed to cater for a 19th century society when we are in the 21st century and that our company law should not be incorporating provisions which are now being amended in other SADC countries.

Swaziland Company law is currently in transition and further research has to be conducted into the specific needs of Swaziland business. In as much as there is need for our company law to be in harmony with the laws in the SADC region, it is also prudent to ensure that our law caters for our specific needs in light of our social and economic environment and aspirations. For example, The South African Department of Trade and Industry is advocating towards the abolition of private and public companies in favour of one, simple flexible choice of business vehicle. As our company law is still in transition, this may not be specifically suitable for our environment at present.

We live in a society with increased electronic communication, which has also infiltrated into company law. The United Kingdom's company Act of 2006 provides for the publication of poll results taken at a general meeting in quoted companies on the website. (Section 315), it further provides for the sending of documents relating to meetings in electronic form.(Section 315). South Africa has followed this trend. The Department of

Trade and Industry's guidelines for corporate reform in the 21st century provide that the process of corporate formation should be automated as far as possible and formation should be done entirely through electronic filings. The process of updating this information should be as simple as possible to reduce the burden on companies but also to ensure that stake holders have sufficient information about companies to assess their risk in contracting with such companies.

Swaziland Company law should basically work towards electronic registration in order to be competitive and for purposes of ensuring that starting and running a business is made easy.

I also concur with the South African Department of Trade and Industry's recommendation that the Companies Act should not leave matters of fundamental importance to its schedules or to common law. The Act and its regulations should as far as possible combine all legislation relevant to the formation and management of companies so that one reference is provided for business.

Further, there is a need for a website for the Companies act and government department dealing with companies to make information concerning companies more accessible and include explanatory notes so that even the lay man and investors are able understand the laws and investment climate in the country.

Lastly, it would be prudent to ensure that easily accessible and user friendly information about the new Company's Bill made available and disseminated to guide the public, share holders and directors.

C. Table of Abbreviations

C&SLJ	Company and Securities Law Journal
CILSA	Comparative and International Law Journal of Southern Africa
DTI	Department of Trade and Industry
MLR	Modern Law Review
SALJ	South African Law Journal
SLR	Swaziland Law Reports

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