

Companies Act, 71 of 2008

Conversion of Close Corporation to Companies

Schedule 2 of the Companies Act of 2008 (the "Act") contains provisions in respect of the conversion of close corporations to companies. Existing companies may however no longer convert into close corporations and no new close corporations may be incorporated after 1 May 2011.

Under the Act, close corporations will continue to exist indefinitely until they are deregistered or dissolved under the current Close Corporations Act, or converted to a company under the Act. The Close Corporations Act, Act 69 of 1984, and the Act will exist concurrently and close corporations will be required to comply with the provisions of both Acts.

Process of conversion

A close corporation may file a notice of conversion to a company in the prescribed manner and form, at any time.

What you should do:

In order to convert a close corporation a notice of conversion must be filed, accompanied by:

- *A written statement of consent approving the conversion of the close corporation signed by members of the corporation holding in aggregate, at least 75% of the members' interest in the corporation;*
- *A Memorandum of Incorporation, consistent with the requirements of the Act; and*
- *The prescribed filing fee.*

Section 14 of the Act, in respect of the registration of a company, applies with respect to the filing of a notice of conversion, as if it were a Notice of Incorporation in terms of the Act.

Upon conversion of a close corporation in terms of Schedule 2 to the Act, the Commission must:

- Cancel the registration of that close corporation in terms of the Close Corporations Act;
- Give notice in the Gazette of the conversion of a close corporation into a company; and

- Enable the Registrar of Deeds to effect the necessary changes resulting from the conversions and name changes.

Effect of conversion on legal status

In terms of item 2 of Schedule 2 to the Act, every member of a close corporation that is converted is entitled to become a shareholder of the company, but the shares to be held in the company by the shareholders individually need not necessarily be in proportion to the members' interests as stated in the founding statement of the converted close corporation.

What you should know:

On the registration of a company converted from a close corporation:

- *The juristic person that existed as a close corporation before the conversion continues to exist as a juristic person, but in the form of a company;*
- *All the assets liabilities, rights and obligations of the close corporation vest in the company;*
- *Any legal proceedings instituted before the registration by or against the corporation, may be continued by or against the company, and any other thing done by or in respect of the close corporation, is deemed to have been done by or in respect of the company;*
- *Any enforcement measures that could have been commenced with respect to the close corporation in terms of the Close*
- *Corporations Act, for conduct occurring before the date of registration, may be brought against the company on the same basis, as if the conversion had not occurred; and*
- *Any liability of a member of the corporation for the corporation's debts, that had arisen in terms of the Close Corporations Act, and existed immediately before the date of registration, survives the conversion and continues as a liability of that person, as if the conversion had not occurred.*

Amendments to Close Corporations Act

Since the Act and Close Corporations Act will run concurrently with each other, close corporations will have to apply the principles of both acts.

This means, for example, that the principles relating to Business Rescue, which is addressed in the Act, will also apply to close corporations. In addition the requirements regarding financial statements as addressed in the Act, will apply similarly to close corporations.

As such, all close corporations will have to prepare annual financial statements unless the corporation falls within one of the exemptions mentioned in the Act, being:

- if the corporation has not actively carried on business during the particular financial year, it can bring an application for exemption to the Companies and Intellectual Property Commission; or
- if the close corporation has only one member; or
- if all of the members of the close corporation take part in its management.

Conclusion

Based on the above, the original motivation for trading as a close corporation should be revisited to test the continuing validity thereof. With the legislative changes to both the Companies Act and the Close Corporations Act, the value of continuing trading as a close corporation warrants serious consideration.

NEED ASSISTANCE WITH THE IMPLICATIONS OF THIS ACT?

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