

THE PATENTS AND COMPANIES REGISTRATION AGENCY ACT; A CRITICAL ANALYSIS

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DATE.....**10th MAY, 2012.**.....

DEDICATION

To the memory of my late mother, here is to hoping I have made you proud.

ABSTRACT

An efficient system for the registration of companies, business names and intellectual property has over the last twenty years been recognised as vital in the boosting of the economy of a country. To this effect, a number of countries have recognized the importance of smooth and efficient business start-up procedures. In recognition of the need for a properly functioning registry, the Patents and Companies Registration Agency Act was enacted in 2010 facilitating inter-alia the creation of the Agency which replaced the Patents and Companies Registration Office and vested, in the Registrar the mandate to administer over a number of Acts dealing with companies and intellectual property.

This paper, attempts to critically analyse the Patents and Companies Registration Agency Act, giving an appraisal of the novel piece of legislation and also highlighting any areas of weaknesses the Act may have. This study will in addition, analyse the various pieces of legislation falling under the Registrar's mandate highlighting areas that may be in need for change. Furthermore, this paper will offer a comparative analysis of the Act with legislation from a few select Southern African countries.

After considering the foregoing, this paper draws findings and makes conclusions and recommendations in relation to the adequacy or inadequacy as the case may be of the Act regarding the following: weakness pointed out during the critical analysis of the Act and also any shortcomings relating to the pieces of legislation the Registrar oversees.

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- The Companies (Amendment) Act of 2010
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- The Designs Act No. 195 of 1993 of the Laws Of South Africa
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- The Patents Act No. 57 of 1978 of the Laws of South Africa
- The Patents Act, Cap 400 of the Laws of Zambia
- The Registration of Business Names Act No. 16 of 2011
- The Registration of Business Names Act, Cap 42: 05 of the Laws of Botswana
- The Registered Designs Act, Cap 402 of the Laws of Zambia
- The Trade Marks Act, Cap 401 of the Laws of Zambia

Glossary of Acronyms

ARIPO- African Regional Intellectual Property Organization

CIPC- Companies and Intellectual Property Commission

CIPRO- Companies and Intellectual Property Registration Office

IP- Intellectual Property

MCTI - Ministry of Commerce, Trade and Industry

OECD- Organisation for Economic Co-Operation and Development

OCIPE- Office of Companies and Intellectual Property Enforcement

PACRA - Patents and Companies Registration Agency

PACRO- Patents and Companies Registration Office

PCT- Patents Cooperation Treaty

PSRP- Public Sector Reform Programme

ROCIP-Registrar of Companies and Intellectual Property

TRIPS- Trade Related Aspects of Intellectual Property

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CHAPTER ONE

A SYNOPSIS OF THE PATENTS AND COMPANIES REGISTRATION

AGENCY ACT.

1.1 INTRODUCTION

Over the last twenty years, a number of countries have recognized the importance of smooth and efficient business start-up procedures. A functioning business registration system is viewed as an important regulatory requirement of any economy, and in addition, a predictable, transparent, and modern business registration system is acknowledged to help promote private sector growth and job generation. Business registration represents the beginning of an economic life cycle for entrepreneurs. The need for a system for the registration of business names, companies, various aspects of intellectual property law and anything incidental to the foregoing is one that has been acknowledged in many jurisdictions globally.

The Patents and Companies Registration Agency Act¹ No. 15 of 2010 was enacted to respond to the needs of the business community in a bid to create an efficient agency and amalgamating the mandate of the Registrar previously provided for under various pieces of legislation. The Act gives the Registrar the authorization to oversee the administration of the Companies Act²,

¹ The Patents and Companies Registration Agency Act No. 15 of 2010 assented to on 13th April, 2010

² The Companies Act, Cap 388 of the Laws of Zambia

Registration of Business Names Act³, the Patents Act⁴, the Trade Marks Act⁵, the Registered Designs Act⁶ and the Companies (Certificate Validation) Act⁷.

The Patents and Companies Registration Agency Act is an Act which among other things creates the regulatory body called the Patents and Companies Registration Agency (PACRA). What existed before the enactment was the Patents and Companies Registration Office (PACRO) which was merely a department in the Ministry of Commerce, Trade and Industry (MCTI).

This chapter seeks to give a brief historical back ground as to what was prevailing prior to the enactment of the PACRA Act. Furthermore, the statement of the problem and the significance of the study will be put into perspective also highlighting the methodology to be employed by the study. Thereafter, a conclusion will be drawn.

1.2 OVERVIEW OF THE STUDY

As was earlier noted, the need for a system for the registration of companies, business names, various aspects of intellectual property law and anything incidental to the foregoing is one that has been acknowledged in many jurisdictions globally. In light of that it has been noted that there

³ The Registration of Business Names Act No. 16 of 2011 assented to on 12th April, 2011

⁴ The Patents Act Cap 400 of the Laws of Zambia

⁵ The Trade Marks Act Cap 401 of the Laws of Zambia

⁶ The Registered Designs Act Cap 402 of the Laws of Zambia

⁷ The Companies (certificate validation) Act Cap 414 of the Laws of Zambia

has been an increased effort by governments around the world, to streamline their business registration systems in order to gain whatever advantage they could in creating growth and jobs. This essay will attempt to critically assess the efficacy of this piece of legislation and its institutions which present some very peculiar and rather subtle features.

PACRO was a semi-autonomous and self-financing executive agency of the Ministry of Commerce, Trade and Industry. It was a department under the Ministry until being hived off from mainstream civil service and commercialized under the Public Service Reform Programme established by Treasury Authority No. 4 of 1997, further to a Cabinet Directive of 30th November 1995 regarding commercialization⁸. Further to this instrument, PACRO was granted ‘administrative autonomy’ and mandated to continue administering and attending to matters incidental to the Companies Act, the Companies (Certificates Validation) Act, the Registration of Business Names Act, the Patents Act, the Trade Marks Act and Registered Designs Act. However, no amendments were effected to these statutes to harmonise them. Key functions performed in relation to these statutes included the registration of companies, business names, trademarks and industrial designs and the grant of patents. Overall, PACRO was supposed to be a regulator and a depository of business related information⁹.

The lack of a legal or statutory instrument establishing it meant albeit semi-autonomous, legally, PACRO remained a department of the Ministry. As above indicated, PACRO was only granted

⁸ Pelani Ndovi. **A critical Analysis of the Companies Act and the Companies Registry**: (Obligatory Essay University of Zambia 2006) 10.

⁹ Anthony Bwembya, Chief Executive Officer, PACRA, interview by Lweendo Haangala, 10th October, 2011

‘administrative autonomy’ for purposes of enhancing service delivery in accordance with the objectives of the Public Sector Reform Programme. It therefore enjoyed limited legal capacity to undertake most acts in its own right¹⁰. For instance, like any other Government department, it could only sue through the Attorney General. Furthermore, other rights like the ownership and enforcement of property rights, without involvement of the Central Government, was a challenge. These shortcomings were acknowledged at the time of hiving off and thus it was always Government’s intention to ultimately constitute it into a fully autonomous entity.

In addition, the lack of a constitutive legal instrument coupled with the failure to amend and thereby harmonise the various statutes meant that there was lacking, an umbrella body to superintend over the statutes¹¹. Although in practice the Registrar is the Chief Executive Officer and therefore supervises the administration of all the statutes, legally, each of the statutes had its own Registrar¹². The statutes, it must be added, did not even recognize PACRO as such and this can be inferred from the fact that prior to the 2010 amendments, they made no reference to it.

It was against this background that the long overdue PACRA Act was passed in 2010. The Act inter-alia transformed PACRO into a legal entity with perpetual succession and a common seal, capable of suing and being sued in its corporate name and with power, subject to the provisions of the Act, to do all such things as a body corporate may by law do and perform. It further

¹⁰ Anthony Bwembya, Chief Executive Officer, PACRA, interview by Lweendo Haangala, 10th October, 2011

¹¹ Zambian, National Assembly Debates (24th September, 2009)

¹² Zambian, National Assembly Debates (24th September, 2009)

created the office of the Chief Executive Officer responsible for the management and administration of the affairs of the Agency and, in particular, the various statutes¹³.

The enactment of the PACRA Act was the solution to the wide-spread problems alluded to above that PACRO faced. However, there are other difficulties still being faced which were in existence during the life-time of PACRO which have not been addressed by the Act and further some that have arisen out of the Act.

Firstly PACRA is limited to the line of rail making registration of businesses in remote areas very difficult. This situation has encouraged the growth of the informal sector thereby excluding some businesses from contributing to the Gross Domestic Product (GDP) and limiting the tax base. In addition, the lack of a decentralised business registration system currently make compliance with the provisions of various pieces of legislation expensive leading to high cost of doing business in Zambia.

Furthermore examination of the Act leads to the discovery that certain sections of the Act are in breach of the principles of natural justice. One such breach is seemingly contained in section 5 (1) (b) which empowers the Agency to receive, investigate and prosecute complaints of alleged breach of the Act. It is therefore the view of this treatise that giving the Agency powers to issue registration certificates and to receive, investigate and prosecute alleged complaints is in breach of the principle of natural justice.

¹³ Patents and Companies Registration Agency Act No. 15 of 2010

In addition, many sections of the Act give the Agency blanket authority which is subject to abuse. One such section is section 5 (2) granting the Agency the power to determine the fees is a section likely to be abused. Another such section open to abuse is section 6 (2) stipulating the people qualified for appointment to the Board of the Agency. It generally specifies the institutions and expertise for qualifying persons to be appointed to the Board with the exception of the ‘two other persons’ to be appointed by the Minister. Section 7 (3) (f) giving the Minister power to remove a member from the board somewhat makes the tenure of Board membership at the “pleasure of the Minister”.

Where there is an existence of discretionary powers, there is a likelihood of a breach which is mostly in breach of the principles of natural justice. This paper will examine the seemingly wide discretionary powers vested in the Agency and also in the Minister and attempt to determine susceptibility to abuse. Additionally, it is imperative to examine whether the Agency in carrying out its mandate adheres to the principles of good corporate governance.

In light of the above, this exposition will attempt to critically analyse various aspects of the PACRA Act, point out any shortcomings of the Act, and how these shortcomings could be addressed. The study will also undertake comparative study of similar legislation in other jurisdictions.

Stemming from the above, the general objectives of this paper may be summarised as follows; to highlight the innovations under the Act and consider its efficacy and challenges faced by the

agency in the administration of its mandate. Furthermore, this study seeks to provide a solution to any of the problems that may be highlighted. This treatise will further attempt to highlight the weaknesses of the Act and point out areas in need of improvement required to ensure the smooth execution of the mandate of the agency under the Act. It will also examine the patents and companies registration procedure and its intricacies from different jurisdictions giving a comparative analysis of the procedures to the one prevailing in our jurisdiction. Furthermore, the advent of the new Act has sparked mixed reactions from the business community and these reactions will be examined and recommendations made there to.

This study can be said to be of great significance both theoretically and practically. Theoretically, it is understood that the Act is focused regulating the institutional framework for all the enterprises that directly or indirectly promote growth, employment, innovation, stability, good governance and in assisting Zambian companies in becoming more competitive internationally¹⁴. Thus, the institution is one faced with the critical task of prompting government policy and ultimately national development as it will be under the supervision of a board constituted by government¹⁵. It is therefore significant to ensure that the mandate of the Act is one carried out meticulously and effectively. This discourse will endeavour to critically analyse the PACRA Act and also the agency, consider if the mandate is sufficient in order for PACRA to effectively carry out its job and highlight if there is a need for reform.

¹⁴ PACRA The Patents And Companies Registration Agency Bill 2010; The Companies (Amendment) Bill 2010; The Companies (Certificates Validation) (Amendment) Bill 2010; The Registration Of Business Names (Amendment) Bill 2010; The Patents (Amendment) Bill 2010; The Trademarks (Amendment) Bill 2010; The Registered Designs (Amendment) Bill 2010: Background Paper (2010) 4

¹⁵ The Act provides for a Board that runs the Agency and helps in the implementation of policies of MCTI

In light of the significance of the existence of a smooth running Registry, this study is important because registration, especially of business names and companies is a tool utilised in the everyday lives of most Zambians. The use of PACRA has become increasingly important as more and more people across the country seek to register businesses, trademarks or patents. It is important to ensure that the mechanisms employed in the registration process generally are of the highest standard in order to result in efficiency of the Agency. In addition, stable and professional business registration institutions help establish standards of trust, transparency, and predictability, and ensure that the public is informed of the facts as quickly as possible. Simply stated, the Agency is supposed to run as a ‘well-oiled machine’ catering efficiently to the needs of the business community. Thus, it is important to ensure that the legislation behind the Agency is sufficient enough to ensure the smooth running of the Agency. Furthermore, the Act focuses on regulating the institutional framework for all the enterprises that directly or indirectly promote growth, employment, innovation, stability, good governance and in assisting Zambian companies in becoming more competitive internationally¹⁶. Thus theoretically, it is therefore important to ensure that the mandate of the Act is one carried out meticulously and effectively.

In conducting research into the Agency and the Act, this paper will employ the legal centralist approach which by its nature concentrates on black letter law. To this end, the demonstrative or a priori method of logical analysis will be used so that the implications of PACRA Act as defined will be unfolded and juxtaposed with the relevant law in Zambia and other jurisdictions. It

¹⁶ PACRA The Patents And Companies Registration Agency Bill 2010; The Companies (Amendment) Bill 2010; The Companies (Certificates Validation) (Amendment) Bill 2010; The Registration Of Business Names (Amendment) Bill 2010; The Patents (Amendment) Bill 2010; The Trademarks (Amendment) Bill 2010; The Registered Designs (Amendment) Bill 2010: Background Paper (2010) 4

should therefore be kept in mind that this method emphasises logical implications of the premise or validity of the inference rather than its truth value or desirability¹⁷.

The major method of data collection to be employed will be desk research relying heavily on the Laws of Zambia, particularly the PACRA Act, Companies Act, Registration of Business Names Act, the Patents Act, the Trade Marks Act, the Registered Designs Act and the Companies (certificate validation) Act, and also the Laws of other jurisdictions where it is deemed necessary. Furthermore, the research may also show traces of information gathered by unobtrusive measure, for instance where reference to the Hansard becomes necessary.

1.3 CONCLUSION

This chapter has attempted to elucidate the title “Patents and Companies Registration Act: A Critical Analysis” by firstly giving a brief back ground to the enactment of the legislation and thereafter attempting to outline the scope of the treatise. It then went on to attempt to define the focus of the treatise highlighting certain areas that may be deemed problematic.

¹⁷ R. W. M Dias, Jurisprudence (London: Butterworths, 1976) 9-10

CHAPTER TWO

PATENTS AND COMPANIES REGISTRATION AGENCY ACT; INNOVATIONS AND CHALLENGES.

2.1 INTRODUCTION

As already stated in the previous chapter, the Patents and Companies Agency Act is the paramount law governing registration of various business institutions in Zambia providing the legal basis for what is supposedly one of the important institutions organising and galvanising the economy. The reason for this is simple; it all begins at the Agency. The Act establishes PACRA and provides for its functions and the powers of the officers of the agency.

The functions and objectives of the Act are stipulated in the preamble which states that the Act was enacted to establish the Patents and Companies Registration Agency, provide for the functions of the Agency and also to transfer from the government to the agency the functions and powers of the offices of the Registrar of the Companies, Registrar of Registered Business names, Registrar of Patents, Registrar of Trademarks and Registrar of Registered Designs¹. Its mission is to promote innovation, orderly trade and competitiveness of the Zambian industry and commerce through the provision of information and the registration system of commercial and industrial property rights².

¹ The Patents and Companies Registration Agency Act No. 15 of 2010 assented to on 13th April, 2010

² http://www.pacra.org.zm/index.php?option=com_content&view=article&id=76&Itemid=89 accessed on 10th January 2012

This chapter will attempt to critically examine the Patents and Companies Registration Act and will to this effect essentially be divided into two parts. The first part will comprise an attempt to appraise the Act examining various innovations that are as a result of the enactment of the Act and establishment of the Agency that was as a result of the enactment while the second part will highlight certain sections under the Act that have given rise to debate and the challenges still being faced by the Agency in the fulfilling of its objectives laid out under the Act.

2.2 INNOVATIONS

2.2.1 Separate legal existence and the creation of an umbrella body

The first and perhaps most noticeable innovation under the Act is the transformation of PACRO into a legal entity PACRA which now has perpetual succession and a common seal, capable of suing and being sued in its corporate name and with power, subject to the provisions of the Act, to do all such things as a body corporate may by law do and perform³.

What this entails is palpable; the Agency may enjoy all the benefits that accrue as a result of one being a body corporate at law including the owning of property and may be held responsible for human rights violations⁴. Therefore, the Agency can be held personally liable for any wrong doing as you would hold a company incorporated under the Companies Act liable.

The Act has further created an umbrella body that is seemingly vital to the registration of businesses in Zambia as it is the starting point of economic growth. The creation of the

³The Patents and Companies Registration Agency Act No. 15 of 2010.

⁴ Phillip I. Blumberg, *The Multinational Challenge to Corporation Law: The Search for a New Corporate Personality*, (1993).

statutory body has brought a sense of sanity to the Agency which did not run so smoothly before. Prior to the creation of the umbrella body applications to the Agency for instance the registration of a company name could take up to four weeks which would in turn lead to corruption and bribery as people wanted to register their companies or conduct searches as promptly as possible⁵.

2.2.2 Focus on enhancing small business enterprises.

In addition, the agency has prioritised the formalisation of small businesses as well as businesses run by the youth⁶. Consequently, in light of this, the Agency would be embarking upon mobile registration targeted mainly at these sectors of society. In furtherance of this goal, the Agency would be working with micro financing institutions and commercial banks in these mobile registrations⁷. This entails capturing the informal sector and to a certain extent formalising it and having them contribute to the country's gross domestic product.

2.2.3 Administration of Intellectual Property Law.

As regards the Agency's mandate of granting industrial property rights, it has been recognised that intellectual property is a tool for promoting socio-economic development of nations. Therefore, development of a nation is gradually becoming dependant on creations of the human mind and the application of such knowledge and ideas as intellectual capital in various areas of development which has significantly contributed to the creation of wealth in these

⁵ Christopher Mapani, Assisitant Registrar, PACRA, interview by Lweendo Haangala, 9th February 2012

⁶ Anthony Bwembya, The Registrar of PACRA speaking at a PACRA team building and end of year performance review workshop in Siavonga from 5th to 6th November 2011

⁷ The Registrar of PACRA speaking at a PACRA team building and end of year performance review workshop in Siavonga from 5th to 6th November 2011

nations. Industrialised countries have effectively utilised intellectual property as a tool for social and economic development while developing countries including Zambia have continued to lag behind in this area⁸. In this regard, stakeholders and parliament are in the process of drafting laws to repeal and replace the current industrial property legal regime. Among other new features, the draft laws will broaden the scope of protectable intellectual property assets to include service marks which are vital in promoting trade in services; geographical indications which are essential in developing natural and agricultural products; and utility models which protect minor inventions mainly by small businesses and also to widen the scope to the possible protection of traditional folklore which is currently not recognised as befitting of protection⁹.

Additionally, it has been accepted that, despite there being many stakeholders in the intellectual property field, a significant number of them are not aware of their role in intellectual property development and utilization. Therefore, pursuant to the mandate granted to the Agency by virtue of section 5 (c), awareness programmes in the print and electronic media on the importance of registering a business, patent, and a trademark would be intensified. This is also in relation to not only the aforementioned youth programme but also to awareness on the laws governed by the agency.

2.3 CHALLENGES

In spite of the innovations advanced above, the Act has received a certain amount of criticism from stakeholders and the Agency is not free from challenges. Some of the criticisms and challenges of the Agency are;

⁸ Ministry of Commerce, Trade and Industry “National Intellectual Property Policy” May 2009, 1.

⁹ Ministry of Commerce, Trade and Industry “National Intellectual Property Policy” May 2009, 1.

2.3.1 Centralisation of the Agency

The Agency has a limited outreach with offices limited to Lusaka, Livingstone, Chipata and Ndola. This is a concern because it makes the registration of businesses in remote areas very difficult. This situation has encouraged the growth of the informal sector thereby excluding some businesses from contributing to the Gross Domestic Product (GDP) and limiting the tax base. In addition, the lack of decentralised business registration made compliance with various pieces of legislation expensive leading to high cost of doing business in Zambia¹⁰.

Seemingly, this is more of a policy issue and thus not a concern for the drafters. However, upon examination it is clear that the loss is suffered by the Agency and in the long run the country loses out from this contribution to the economy. This is so, because while the Agency loses out financially, certain stakeholders away from the line of rail are susceptible to penalties incurred as a result of non-compliance with various pieces of legislation through no fault of their own. Therefore, the issue of decentralising the Agency should have been included in the Act making it possible for the Agency to be accessible countrywide. If it was not feasible to include this in the Act, the other solution would be to consider delegated legislation. What this would entail simply stated would be for the Agency to delegate their functions to other bodies that already have a physical presence country wide.

It must however be pointed out that the agency has entered into partnerships with the Citizen's Economic Empowerment Commission (CEEC) through which it provides its services in Kasama, Mansa and Solwezi and its regional offices in Chipata, Livingstone and

¹⁰ R. Misati. The Role of The Informal Sector in Investment in Sub-Saharan Africa. (December 2007) at page 2

Ndola¹¹. This is all in the bid to bring its services closer to the business community and thereby reduce the cost of registration, and furthermore, it was also entering into partnerships with local authorities and under this service, applicants would be able to collect and submit application forms and receive certificates through local authorities.

However, the current agency arrangements between some regulatory authorities, such as Ministry of Health and Ministry of Commerce, Trade and Industry, though stipulated in law, are not satisfactory as there is no operational framework as to the nature and extent of the exercise of the delegated functions, which has resulted in duplication of processes and procedures and issue of permits and licenses and in certain cases commission for carrying out those functions is not paid for¹². On the other hand the principals do not receive the revenue for the issuance of such licenses, permits or certifications, thereby raising the issue of accountability.

2.3.2 Board Appointments and Composition

As the scale in the activities of corporations had increased immeasurably, the governance of these entities has assumed considerable importance. Business corporations have an enduring impact on societies and economies and how corporations are governed, their ownership and control, the objectives they pursue, the rights they respect, the responsibilities they recognize and how they distribute the value they create has become a matter of significance not only for their directors and shareholders but also the wider community they serve¹³. In light of this

¹¹ http://pacra.org.zm/index.php?option=com_content&view=article&id=136:pacra-mounts-mobile-registrations&catid=1:latest-news accessed on 10th January 2012

¹² http://pacra.org.zm/index.php?option=com_content&view=article&id=136:pacra-mounts-mobile-registrations&catid=1:latest-news accessed on 10th January 2012

¹³ Jean Jacques du Plessis, et al Principles of Contemporary Corporate Governance. Cambridge University Press, 2010. 34

there is need to ensure that the composition of the Board is such that it is able to carry out its functions meticulously and without outside influence.

It is observed that the institutions and expertise for qualifying persons to be appointed to the Board are specified and stipulated in the Act with the exception of the ‘two other persons’ to be appointed by the Minister. Prior to enactment, several representations were made to the effect that the Board should include more members from the private sector as this would be in keeping with the Government’s policy of promoting a private-sector led economy. In light of this, appeals were made for the Minister to appoint ‘the two other persons’ from the association representing lawyers and the association representing engineers¹⁴. This is an appeal that fell on ‘deaf ears’ as the section remained unchanged.

In addition, the Minister has been given the mandate to appoint the chairperson and vice-chairperson of the board a situation prevailing only under PACRA¹⁵ (and a few other institutions such as the Zambia Development Agency) which is contrary to modern corporate governance practice. This practice of giving unfettered power to the Minister is not democratic and in the long run weakens the Board. It would be more desirable if the members of the Board elected their own Chairperson and Vice-chairperson to engender trust and confidence. The Chair-person and Vice- Chairperson should not feel indebted to anyone on their appointments and may more effectively carry out their functions.

¹⁴ Jean Jacques du Plessis, 35

¹⁵ For instance, The Zambia Centre for Accountancy Studies Act Cap 391 of the Laws of Zambia establishes a board which is at liberty to appoint its own Chairperson and Vice-Chairperson. It would seem that the only boards where the Chairperson is appointed by the Minister are Ministry affiliated boards.

Examination of section 6 stipulates the institutions and stakeholders to be appointed as a member of the board. The issue to be considered here is the relevance of certain appointments and whether or not certain stakeholders left out should have been included. For instance one might consider that a lawyer specialised in the commercial industry should have been considered to be appointed as a member of the board considering the nature of the business carried out.

Also the power given to the Minister by section 7 (b) of the Act raises some concern. This is because of the increasing trend by Government to dissolve Boards and relieve members of these Boards of their duties which effectively undermines the principles of corporate good governance¹⁶. The result will be people shying away from appointments to the Board for fear of being relieved of their duties on flimsy grounds.

In furtherance of this there is also a need to overhaul the Companies Act in order to not only enhance corporate governance but also corporate social responsibility and the creation of an ideal legal platform for modernisation of the registry¹⁷ and the furtherance of an ideal business environment. There is also a need to align the Companies Act with other relevant laws and make corporate law much more responsive to national economic development challenges. Effective enforcement of the Companies Act has also emerged as another challenge as regards compliance with some of the regulations laid out by the Act¹⁸.

¹⁶ For instance President Sata after being voted into power dissolved numerous boards around the country some with good reason and others on flimsy grounds <http://www.daily-mail.co.zm/index.php/politics/1206-president-sata-dissolves-zawa-board>.

¹⁷ The Registrar of The Patents and Companies Registration Agency, Anthony Bwembya speaking at a PACRA team building and end of year performance review workshop in Siavonga from 5th to 6th November 2011

¹⁸ Patents and Companies Registration Agency, Position Paper on the revision of the Companies Act: Areas in need for reform.

2.3.3 Discretionary powers and the principles of natural justice

Discretion denotes right or power to choose between several alternatives and every aspect of administration presupposes vesting of wide discretionary powers¹⁹. In relation to PACRA, this would include the issuance of licenses, appointment of people to the board etc.

Discretion exists in its worst form in the arbitrary will of rulers, and therefore today discretionary power claimed by government institutions and officials must have statutory basis²⁰. This preposition is fostered by the desire for certainty, fairness and the elimination of personal factors in administration.

The determinant of discretion is that the language confers an element of personal judgment and this can be as regards the act itself or the manner in which the act is done²¹. Where neither the purpose nor legislative standards are specified the discretion is said to be absolute and unfettered or unqualified.

Possible tyranny of individual public officials is a very serious problem defying both political and judicial controls because by its nature discretionary power is not susceptible to external control but it is however, a situation that can be controlled by statute.²² The lack of which may result in the administrators been authorised to legislate and even judge and furthermore

¹⁹ <http://administrativelaw.uslegal.com/administrative-agencies/discretionary-powers/> accessed on 15th January 2012

²⁰ Jackson, P. & Leopold, P. O. Hood Phillips and Jackson Constitutional and Administrative Law. (8th ed Sweet and Maxwell, London, 2001.) 60.

²¹ Connie L. Mah 'Special Report on Administrative Law; Administrative Law: The Basics' January 2007.

²² Mah 'Special Report on Administrative Law.'

execute at one go, without fear of the electorate's scrutiny for re-election or having the training of a judge respectively.

It is imperative to note that discretion is important for personalised treatment of problems in administration of public health, safety, education, licensing, planning and development etc as it is impossible for legislators to draft for every conceivable constraint. However, in certain instances they avoid wide discretionary powers in administrations as these are likely to be abused.

Examination of the Act, reveals various circumstances under which, the Minister or the board of the Agency, is at liberty to utilise its discretion in the decision making process. Some of these circumstances give rise to question the necessity of the said discretion.

The first 'red flag' to be raised as regards discretionary powers may be found in section 6 (f) of the Act. The Act in this section provides for the appointment of 'two other persons' without specifying the qualifications that the persons must possess and this is clearly a section that is open to abuse. The Minister is at discretion to appoint any random two members whether they add value to the board or not.

In addition, the Act in 7 (3) (f) vests in the Minister, the power to remove a member of the Board and the Act does not state under what conditions that power may be exercised . The aforementioned power may be abuse. This is supported by developments in parastatals where members serving on similar boards are relieved of their duties without good reasons²³.

²³ For instance President Sata after being voted into power dissolved numerous boards around the country some with good reason and others on flimsy grounds <http://www.daily-mail.co.zm/index.php/politics/1206-president-sata-dissolves-zawa-board>.

Therefore, the Act should specify under what circumstances the Minister may remove a member of the Board thus to limit the susceptibility to abuse of the said discretionary powers.

Tied to the use of discretionary powers are the principles of natural justice which concern procedural fairness and aim at ensuring a fair decision is reached by an objective decision maker. This is important because maintaining procedural fairness protects the rights of individuals and enhances public confidence in the process²⁴. Another principle of great relevance to this exposition is that of '*nemo iudex in parte sua*' which translated means that no one ought to be judge in his or her case²⁵.

The aforementioned principles are directly related to the requirement that the deciding authority must be unbiased when according the hearing or making the decision²⁶. In a manner of speaking that it is important for investigators and decision-makers to act without bias in all procedures connected with the making of a decision. A decision-maker must be impartial and must make a decision based on a balanced and considered assessment of the information and evidence before him or her without favouring one party over another²⁷. Even where no actual bias exists, investigators and decision-makers should be careful to avoid the appearance of bias and they should ensure that there is no conflict of interest which would make it inappropriate for them to conduct the investigation.

²⁴ <http://www.justice4you.org/natural%20justice.php> 25th February , 2012

²⁵ An Inaugural lecture on the Principles of Natural Justice by Justice SMT. Sujata V. Manohar, Supreme Court of India (RETD) available at http://www.itatonline.org/articles_new/index.php/principles-of-natural-justice/

²⁶ An Inaugural lecture on the Principles of Natural Justice by Justice SMT. Sujata V. Manohar, Supreme Court of India (RETD) available at http://www.itatonline.org/articles_new/index.php/principles-of-natural-justice/

²⁷ http://www.ema.gov.au/www/agd/agd.nsf/Page/Securityvetting_Whataretheprinciplesofnaturaljustice accessed on 25th February , 2012

What constitutes the observance of natural justice in all cases cannot be simply stated. The law requires fairness from a person exercising an administrative power. Granted, this is not something that can be set down in anticipation or in a fixed body of rules, as what is fair in any given situation depends on the circumstances. However, statutes must be construed in a manner that they do not contradict laid down principles that have come to be regarded as a fixed body of rules.

Section 5 (b) which empowers the Agency to receive, investigate and prosecute complaints of alleged breach of the Act raises concern as regards the principles of natural justice. Giving the Agency powers to issue registration certificates and to receive, investigate and prosecute alleged complaints was in breach of the principle of natural justice. How can it be that the agency can objectively examine a claim against it? As illustrated above, a decision maker must be impartial and show no bias when arriving at a conclusion and an investigator should ensure there is no conflict of interest. Allowing the agency to receive and carry out any complaints regarding a breach of the Act or any of the Acts administered by it shows a flagrant breach of the principles of natural justice.

Furthermore, it must be noted that there is an appeal mechanism established under each of the Acts the Registrar administers²⁸ which therefore leads to a conflict between the various statutes and the PACRA Act. The question to be raised is which Act supersedes the other when a conflict arises. This begs the question, what then is the function of the appeal procedure established under each of the Acts listed in section 5 (2). There is need for a clear distinction to be drawn between the appeal procedure in the respective Acts and the functions of the Agency as laid out in section 5. Moreover, there should be an independent body

²⁸ Supra note 28

established to receive any alleged breaches of the Act and prosecute the offences under the Acts.

In addition, as there is no express mechanism under the PACRA Act except for section 3 which provides inter-alia that the Agency is a body corporate which may sue and be sued in its own name, one must rely on the seemingly unjust section 5 (b) which vests in the agency, the power to receive and investigate all complaints of a suspected breach of the Act or any Act administered by the Agency should be reported to the Agency and an investigation carried out there in if any complaint arises. Thus the liability of the Board is limited to the scope provided for under the Acts the Agency administers via the Registrar.

2.4 CONCLUSION

This chapter has attempted to analyse the Act in a bid to highlight the innovations brought about by the enactment. Innovations which it must be stated would not be possible without the Act as prior to the said enactment; PACRO as it was so called was simply a department in the Ministry of Trade, Commerce and industry. It then went on to underline the challenges still faced by the Agency in carrying out its functions and further draw attention to certain sections of the Act that may bring rise to debate.

- ii. Ensuring Zambia's continued adherence to the various conventions and treaties on the protection of intellectual property, namely, trademarks, patents and industrial designs;
- iii. promotion of the establishment and maintenance of a computerized information centre for the publicity of company transactions, financial positions and the dissemination of technical information contained in patent documents to potential and actual users

It is the fulfilment of the above listed functions that will be the main focus of this chapter citing any challenges that the Agency may face in execution of its mandate in relation to each Act. To this effect the chapter will be divided into two parts; the first will deal with the company law aspect of PACRA, that is to say, the administration of the Companies Act and the Registration of Business Names Act while the second part will deal with the intellectual property law aspect of the Agency as it administers the Patents Act, Trademarks Act and the Registered Designs Act.

3.2 ADMINISTRATION OF COMPANY LAW

Nearly every aspect of company law and the law relating to business associations relies on PACRA as a starting point. In light of this, it would suffice to state that the Agency is an extremely vital cog in seemingly immense contraption, working together to ensure the continued adherence of various companies to the law. Key functions performed in this regard include the registration of companies and business names. Overall, PACRA is a regulator and

a depository of business related information⁶. The Agency is responsible for providing business registration for all firms operating in Zambia.

3.2.1 The Companies Act.

The Companies Act⁷ provides for the formation, administration, and winding up of registered corporate bodies. It was enacted in 1994 repealing and replacing the Companies Act of 1921. The Companies Act was further amended by the Companies (Amendment) Act No. 12 of 2010 and the Companies (Amendment) Act No. 24 of 2011. The concern of former's Amendment Act is to provide for the alignment of the Companies Act with the newly enacted Patents and Companies Registration Agency Act⁸ while the latter is mainly concerned with Part XIII of the Act which deals with receiverships and liquidations⁹.

Effectively, a company comes into being upon the issuance of a certificate of incorporation. The certificate is issued upon the completion of formal registration with the Registrar of Companies payment of registration fees and the lodgement of the necessary formal documents, comprising mainly of copies of the articles of association duly signed by initial subscribers for the shares¹⁰. The functions as listed above are the preserve of the Registrar of the Agency by virtue of the Companies (Amendment) Act No. 12 of 2010. Aside from the incorporation of companies, another legal burden placed on companies of significance to this paper is the need to ensure that companies make available to shareholders, creditors and the general public as much information as is reasonably required. Consequently, in light of this,

⁶ http://www.pacra.org.zm/index.php?option=com_content&view=article&id=76&Itemid=89 accessed on 1st March 2012

⁷ Cap 388 of the Laws of Zambia

⁸ Companies (Amendment) Act No. 12 of 2010

⁹ The Companies (Amendment) Act No. 24 of 2011

¹⁰ Section 3 of The Companies (Amendment) Act No. 24 of 2011

companies should file documents into the registry regarding various issues including particulars of directors, annual returns and copies of special resolutions¹¹

Other aspects of Company Law administered by the Agency aside from the incorporation of a company include the appointment of liquidators, receivers and also amendment of share capital of a company.

A liquidator is an officer appointed when a company goes into liquidation. He has the responsibility of collecting all of the assets of the company and settling all claims against the company before putting the company into dissolution¹².

A receiver is a person appointed for the purpose of protecting the interests of the mortgagee, the mortgagor and subsequent encumbrances, as well as guarantors of the debt secured by the debenture¹³. One has a primary duty to realise the assets charged by that debenture with a view to liquidating the debt owing to the mortgagee. A receiver's power to sell the charged assets arises from the terms of the debenture pursuant to which he is appointed together with the powers set out in a court order or deed of appointment.

The above discussion gives a few examples of the types of registries to be kept by PACRA that should be readily available to the public and to shareholders of a company in order for them to get comprehensive knowledge of the companies they deal with. Therefore, efforts must be made in order to sensitize the public in this regard.

¹¹ Various other documents are laid out in Cap 388 Sect.209 -292b and the above have been listed to give an example.

¹² P. Davies. *Gowers and Davies Principles of Modern Company Law*. Sweet and Maxwell London. 2007. Pg 827

¹³ P. Davies. Pg 842

One of the said limits is the present reality that PACRA only has four offices in Lusaka, Ndola, Livingstone and Chipata, and the low productivity and profitability of Small and Medium Enterprises (SMEs), which essentially may be perceived as adding to the cost of doing business, and which may in turn affect compliance levels²⁰. One would be led to conclude that the economics of implementation were not given much thought. It is, therefore, important that introduction of other forms of registration be considered such as using local authorities as agents for registration of businesses.

According to the Zambia Business Survey of 2010, less than two percent of SMEs are registered with PACRA or local authorities²¹. There is need to ensure that provisions in the legislation are not a barrier to the intended goal of formalisation of business activities and further examine ways to create harmonization between the Agency and the Act in such a way that the Agency does not come up against any barriers, geographical or otherwise in carrying out its work.

3.3 ADMINISTRATION OF INTELLECTUAL PROPERTY LAW

Zambia has taken strides to develop the Zambian intellectual property regime. This is evidenced by the existing legislation on intellectual property, such as copyrights, patents, trademarks and industrial designs, dating back to the pre-independence era²². However, the above legislation has not been effectively applied for successful exploitation of intellectual property rights for national development and economic prosperity.

²⁰ P. Ndovi. **A critical Analysis of the Companies Act and the Companies Registry**: Obligatory Essay submitted to the School of Law in partial fulfilment of the award of the Bachelor of Laws Degree 2006.

²¹ Report on the Registration of Business Names Act. pg 5

²² National Intellectual Property Policy drafted by The Ministry of Commerce Trade and Industry, May 2009. Pg 2.

An important challenge the Agency faces with regard to intellectual property protection in Zambia is low levels of awareness among industrialists, business houses, researchers, scientists, artists, technocrats, policy makers and the general public. Intellectual Property awareness is divided into the following three broad categories²³:

- i. Those who are aware of intellectual property but not able to use it;
- ii. Those who are aware of intellectual property and able to use it; and
- iii. Those not aware of the potential and benefits of intellectual property.

There has been obvious evidence of intellectual property activities in Zambia, there are few formal records of the intellectual property situation in the country, other than the data kept by PACRA²⁴. The major challenges that impede the effective use of IP for economic development include lack of policy, inadequate legislative framework, insufficient awareness of the vital role played by IP in national development and limited capacity in terms of human resources and infrastructure to support development, use and exploitation of IP²⁵.

PACRA provides a legal system for the registration and protection of commercial and industrial property rights and, through this, provides a legal and public depository of this information tendered for these registrations²⁶. To this effect, it administers the acts laid out below as follows;

²³ Intellectual Property Policy, May 2009. Pg 3

²⁴ Intellectual Property Policy, May 2009.

²⁵ Intellectual Property Policy, May 2009.

²⁶ Intellectual Property Administration in Zambia; Country Case Study for Study 9: Institutional Issues for Developing Countries in IP Policy Making, Administration and Enforcement by Anderson Ziconda

3.3.1 Patents Act Cap 400 of the Laws of Zambia

The Patents Act²⁷ provides for patent protection in Zambia. Under this law, the protection lasts sixteen years even though the TRIPS Agreement²⁸ stipulates protection is for twenty years. International patent protection is provided for by virtue of Zambia acceding to international treaties such as the Paris Convention, the TRIPS Agreement, the Harare Protocol and procedural guidelines under the Patent Cooperation Treaty which provides a mechanism for international application for patent protection²⁹.

The procedure for a patent application is provided for in the Patents Act which in summary provides that once properly documented, a patent application should be lodged at the Zambia Patents Office (which is a unit of PACRA) in Lusaka³⁰. Again, here one is faced with the challenge of lack of decentralisation of the Agency as the only office where one may file in a patent is the Lusaka office and as a result the number of registered patents is low.

In addition, the registration of Patents is however of limited application. For example a research and development institutions in Zambia, do not as a matter of fact register a patent on their indigenous innovative products or intellectual property rights with PACRA³¹. Furthermore, the current Patents Act does not have even a provision for registering these indigenous innovations and intellectual property rights and its procedures and processes are not adapted for such registration³².

²⁷ Cap 400 of the Laws of Zambia

²⁸ Agreement negotiated at the Uruguay Round of multilateral trade negotiations, known as the Trade Related Aspects of Intellectual Property Rights.

²⁹ *Playing by the Rules? Developing Countries in the World Trade Regime* – Available at <http://www.open.ac.co.uk>

³⁰ Sections 11- 16 of Cap 400

³¹ Intellectual Property Policy, May 2009.

³² Intellectual Property Policy, May 2009.

Given its primary purpose of distinguishing goods from different sources and considering that registration grants monopoly or exclusive rights (rights to exclude others from use of that mark), it is a precondition that a symbol contemplated to be registered as a trademark should not be descriptive of the product³⁵.

Further, a trademark should be distinctive and not confusingly similar to an already registered trademark; otherwise, competitors would ride on each other's established reputation and goodwill. The distinctiveness of a mark may either be inherent or acquired through use. The envisaged trademark should also not be contrary to morality³⁶.

Trademark registration in Zambia has not faced any major challenges aside from the fact the confusion of the distinction between the effect of the registration of a trademark and a business name.

3.3.3 Registered Industrial Designs Act Chapter 402 of the Laws of Zambia

The Registered Industrial Designs Act³⁷ provides for intellectual property rights that protect the visual design of objects or models that are not purely utilitarian and without taking into account the technical features. The registration of a design under Zambian law gives to the registered proprietor copyright protection in the registered design for a period of five years from the date of registration after which it can be renewed for another two five year periods.

Certain rights will arise as a result of being a registered designs owner. Registration gives the proprietor copyright in the registered design. The owner acquires an exclusive right to make

³⁵ G. M Kanja. Intellectual Property Law (UNZA Press for the School of Law, 2006) at Page 215

³⁶ Kanja. Intellectual Property Law. 2006

³⁷ Section 7 of Cap 402

or import for sale or for use in trade and business and to *sell any article in respect of which the design is registered in Zambia*³⁸.

Again here, the major challenge faced in the administration of the Act aside from limited outreach is the ambiguity of the distinction between a registered design and a trademark.

3.4 CONCLUSION

This chapter has attempted to shed light on the various statutes that the Agency has been given the authority to administer highlighting the task posed by each Act and attempting to highlight some of the challenges faced under each Act. It highlighted the importance of each of the various pieces of legislation and pointed out some areas that maybe in need of change. It is also clear from this chapter that the functions of the registrar are not consolidated under one Act but are contained in various pieces of legislation.

³⁸ Section 14 of Cap 402

CHAPTER 4

PATENTS AND COMPANIES REGISTRATION IN SOUTHERN AFRICA ; A COMPARATIVE ANALYSIS

4.1 INTRODUCTION

Having attempted to dissect the PACRA Act and the Acts it administers in the preceding chapters, this chapter seeks to compare the Patents and Companies Registration Agency and the Act it enforces to similar Agencies overseeing the registration of companies, business names and intellectual property in other jurisdictions of Southern Africa. The aim is to reveal similarities and differences among the systems of select Southern African countries¹ regarding their laws relating to the above. The countries used for comparison currently have broadly similar economic policies which emphasise the role of the private sector in driving economic development, an important aspect when it comes to legislation regarding the same². Highlighting the agencies responsible for the administration of registration, their similarities will be examined and thereafter their differences if any will be put into perspective.

4.2 INSTITUTIONS IN VARIOUS JURISDICTIONS

Botswana has its version of PACRA in form of Registrar of Companies and Intellectual Property (ROCIP)³ which is a department in the Ministry of Trade and Industry. The department is charged with the responsibility of incorporating companies, registering business names and Intellectual property.

¹ The Countries selected for the purposes of this discourse are Botswana, South Africa and Namibia.

² Andrew Briscoe. Review of business licensing laws of Southern Africa, Friedrich Ebert Stiftung, 1999 p 4

³ <http://www.mti.gov.bw/content/registrar-companies-ip> accessed on 12th April, 2012.

In Namibia⁴, the Companies and Patents Registration office oversees all matters incidental to the registration of business names, companies and patents. The mission of the division of the Registration of Companies and Close Corporation in the Ministry of Trade and Industry is⁵ to manage, regulate and facilitate the formation of business entities and to encourage investment through an appropriate legal framework and the existence of an environment conducive enough to ensure the flourishing of businesses.

In South Africa the relevant Agency is the Companies and Intellectual Property Commission (CIPC)⁶. The new Commission acts independently with a focus on the registration of companies and intellectual property. The Commission is as a result of a merger of two different branches in the Ministry of Trade and Industry which has brought together the skills, knowledge and manpower from the Office of Companies and Intellectual Property Enforcement (OCIPE) and the Companies and Intellectual Property Registration Office (CIPRO)⁷. Its functions are inter-alia⁸, to carry out the Registration of Companies, Cooperatives and intellectual property rights (trademarks, patents, designs and copyright) and the maintenance thereof. Furthermore, it oversees the disclosure of information on its business registers and also seeks to promote education and awareness of Company and intellectual property law.

⁴ The Namibian Companies Act, Act 28 of 2004

⁵ Ministry of Trade and Industry of Namibia. How to Register a Business In Namibia.

⁶ Companies and Intellectual Property Commission, available at http://www.cipc.co.za/AboutUs_WhoIs.aspx, accessed on 13th April, 2012

⁷ Companies and Intellectual Property Commission available at http://www.cipc.co.za/AboutUs_WhoIs.aspx, accessed on 13th April, 2012

⁸ Companies and Intellectual Property Commission available at, http://www.cipc.co.za/AboutUs_WhoIs.aspx, accessed on 13 April, 2012

4.3 SIMILARITIES

An examination of the jurisdictions in question reveals the existence of a number of similarities among the legislation of the countries. In fact, there seem to be more likeness in the makeup of the registries and requirements for registration than differences.

4.3.1 Registration of business names

The three countries have similar legislation⁹ regarding the registration of business names and to this effect, persons who trade under a name which is different from their own true names are required to register a business name. A typical requirement of such registration is that the business owner should keep a proper record of all business transactions, so that an accurate income tax return can be submitted each year.

The Registration of Business Names Act¹⁰ of Botswana requires any person who operates a business under a name which is not his/her own name to register the 'business name'. The procedure for registration is straightforward. An application form must be completed and details to be entered in the form include the proposed business name, a statement of the nature of the business, the address and postal address of the business, and personal details such as the business owner's full name, nationality and sex¹¹.

The application for the name will be refused by the Registrar if it is the same as a name already registered under the Registration of Business Names Act (or under the Companies

⁹ Andrew Briscoe p 64

¹⁰ Registration of Business Names Act Cap. 42:05

¹¹ Section 6 of the Registration of Business Names Act Cap. 42:05 of the Laws of Botswana

Act), or very similar to such a name¹². Another ground for refusal is if it gives the impression that the business is connected with the President or the Government of Botswana, or with any government of any country or with the United Nations. In addition, registration of a name will be refused if it is likely to mislead the public¹³. The Registration of Business Names Act also requires that all trade circulars and business letters showing the business name must also include the name(s) of the individual(s) or company that is carrying on the business¹⁴.

Namibia, applies similar rules regarding the circumstances under which a 'business name' must be registered. The main guidelines like that of Botswana are that; a name which in the opinion of the Registrar is undesirable will not be allowed as the name of a company or business¹⁵. Equally, a name that is calculated to mislead the public will not be allowed and in line with that, foreign words or phrases will not normally be allowed in the name¹⁶. The Act goes on further to stipulate that a shortened form of a name may not contain more than seven letters¹⁷.

The registration of business names in South Africa is regulated by the Business Names Act No. 27 of 1960¹⁸. This contains provisions relating to disclosure of names and business details, and also allows the Registrar to prohibit use of a name if it is undesirable or

¹² Section 17 (3) of the Registration of Business Names Act Cap. 42:05 of the Laws of Botswana

¹³ Section 17 (1) of the Registration of Business Names Act Cap. 42:05 of the Laws of Botswana

¹⁴ Section 22 of the Registration of Business Names Act Cap. 42:05 of the Laws of Botswana

¹⁵ Namibia does not have a separate piece of legislation dealing with the Registration of Business names, provisions are however contained in the Companies Act No. 61 of 1973

¹⁶ The registrar's directives were published in the Government Gazette no 596 of March 1993 as an amendment to the existing Act 61 of 1973, sections 42-51.

¹⁷ The Companies Act No. 61 of 1973 of the Laws of Namibia

¹⁸ Amendments to the legislation include the Business Names Amendment Act, No. 84 of 1972, the Business Names Amendment Act, No. 31 of 1979 and the Transfer of Powers and Duties of the State President Act, No. 97 of 1986

offensive, or if it is calculated to mislead the public¹⁹. Upon refusal of the application, the Registrar furnish in writing to the person against whom an order under that subsection is sought, a statement setting out the name of the applicant and the grounds on which the application is made and afford such person a reasonable opportunity of replying thereto²⁰.

4.3.2 Law relating to companies

In all the jurisdictions examined, persons who wish to take advantage of incorporation and limited liability must register a company. To this effect, each country has mainly two types of companies which have common characteristics, namely the private company which can be limited by either shares or guarantee and the public company. Each of these company forms has changed very little in over 100 years and can be traced back to English company law of the nineteenth century²¹. It must be noted that most of the countries in Southern Africa Zambia included are pushing towards the reformation of company law to have it more 'tailor made' to suit each country's needs²².

As has already been stated, all three jurisdictions host mainly three different types of companies which include private companies, public companies and a company limited by guarantee. Incorporation procedures for the companies in each country are generally the same. For instance, there is a requirement of to file a memorandum of association and articles of association which must contain the name of the company, the objects of the company, that the liability of members is limited, and the company's share capital or, if it is limited by

¹⁹ Section 5 (1) of the Business Names Act No. 27 of 1960 of the Laws of South Africa

²⁰ Section 5 (2) of the Business Names Act No. 27 of 1960 of the Laws of South Africa

²¹ Andrew Briscoe p 67

²² Stakeholders are currently examining areas in need of reform of the Companies Act in a bid for new legislation.

guarantee and a statement of the amount guaranteed by its member²³. Each country has a compliance division which takes care of the incorporation of a company, payment of annual returns by the company post-incorporation and notification of changes such as change in address²⁴. Pursuant to this, every company registered must pay annual returns; the first annual return must be paid within eighteen (18) months of incorporation and then thereafter be submitted annually. Companies unit also makes copies of the customers' companies' documents but sometimes customers make online searches.

In addition they allow for the formation of a foreign company, that is to say a company incorporated in another country seeking to do business in the host state²⁵. For example, a company, which is incorporated in Botswana, will be regarded as a 'foreign company' if it seeks to do business in South Africa or Zambia. Each country has similar registration rules, which will apply to such foreign companies.

4.3.3 Law relating to intellectual property rights

Like Zambia, intellectual property in the three countries is said to comprise both industrial property and copyright. It must also be noted that Zambia, Namibia and Botswana are parties World Intellectual Property Organization (WIPO) Convention and also of African Regional Intellectual Property Organization (ARIPO)²⁶. In addition all four countries are party to the Patents Cooperation Treaty (PCT) which is a is an international patent filing system that

²³ This is for instance provided for in section 15 of the South African Companies Act No. 71 of 2008. It must be noted that Zambia however, does not refer to a memorandum of association but rather a form of incorporation which contains the same information as the memorandum of association.

²⁴ In Botswana, this is provided for in Section 212 of the Botswana Companies Act No. 32 of 2003

²⁵ Andrew Briscoe. P 77

²⁶ South Africa has merely signed but not ratified the convention whilst it is not a member of ARIPO

allows an applicant to delay incurring the significant costs associated with an extensive filing program for about 18 months²⁷.

In Botswana²⁸, intellectual property rights are governed by the Copyright and Neighbouring Rights Act²⁹ and the Industrial Property Act³⁰ administered by a unit within ROCIP. The unit is responsible for registration of trademarks, utility models, granting patterns and also registering industrial designs³¹. All these need to be renewed after some period of time for instance, trademarks need to be renewed every ten years, utility models must be renewed after fourteen years and application must be done after seven years³². Patterns must be renewed after twenty years and there is maintenance fee to be paid for this and designs are renewed after seven years and renewal fees must be paid³³.

Intellectual property laws in Namibia cover such areas as domain names, traditional knowledge, transfer of technology, patents, copyrights and anything incidental to the foregoing. Namibia as has been alluded to is also party to several international intellectual property agreements and therefore the laws are of an international standard. A registered trade mark is valid for a period of ten years whilst the life span of a patent runs for twenty years³⁴. Namibia's intellectual property laws like Zambia are currently undergoing

²⁷ Baldwins Intellectual Property. Patents Cooperation Treaty 2010

²⁸ Ministry of Trade and Industry, <http://www.mti.gov.bw/content/registrars-companies-ip>

²⁹ Cap 68:02 of the Laws of Botswana.

³⁰ Act No. 8 of 2010 of the Laws of Botswana.

³¹ Section 5 of the Industrial Property Act No. 8 of 2010 of the Laws of Botswana

³² Ss, 85 and 43 of the Industrial Property Act No. 8 of 2010 of the Laws of Botswana.

³³ Section 56 of the Industrial Property Act No. 8 of 2010 of the Laws of Botswana.

³⁴ Patents, Designs, Trade Marks and Copyright Act 9 of 1916, it must be noted that only sections refer to patents and designs remain in force.

review in a bid to consolidate a new Act that will look into all matters pertaining to intellectual and industrial property matters of the country³⁵.

As already stated, in South Africa³⁶, the protection of the intellectual property rights of an individual is the preserve of CIPC. Upon registration, a trade mark can be protected forever, provided it is renewed every ten years upon payment of the prescribed renewal fee³⁷. The registration procedure results in a registration certificate which has legal status, allowing the owner of the registered trade mark the exclusive right to use that mark³⁸. Patents are also protected and it is important to renew one's patent annually before the expiration of the third year and one can keep the patent for up to twenty years³⁹. It is important to pay an annual renewal fee to keep it in force. The protection of designs it is afforded to aesthetic designs for a period of fifteen years, and to functional designs for ten years⁴⁰.

4.4 DIFFERENCES

The first major difference that can be identified is that fact that in Namibia and Botswana, the responsibility of the registration of business names and intellectual property vests in a department in their Ministries of Trade and Industry whilst in Zambia and South Africa, statutory bodies have been established to oversee the same.

³⁵ John Ekongo 'Bill to boost intellectual property rights,' New Era, 15th September, 2011.

³⁶ Companies and Intellectual Property Commission available at <http://www.cipc.co.za/Patents.aspx> accessed on 13th April, 2012

³⁷ Section 29 of the The Trade Marks Act No. 194 of 1993 of South Africa.

³⁸ Section 30 of the The Trade Marks Act No. 194 of 1993 of South Africa.

³⁹ Section 46 of the Patents Act No. 57 of 1978 of the Laws of South Africa.

⁴⁰ Section 22 of the Designs Act No. 195 of 1993 of the Laws Of South Africa.

4.4.1 Registration of business names

The differences in the registration relating to registering business names among the countries are minute. As has been noted, the basic requirement is that an individual (or company) who trades under a name which is different from his/her/its own true name is required to register a business name in the country's registry. The only major discrepancies arising are relating to the grounds on which a business name will be rejected. For instance in Botswana, the use of the name international is not allowed whilst the Zambian legislation on the same has no such requirement.

4.4.2 Law relating to companies

The differences in company law include the fact that two out of the four countries have developed what has been deemed a modern corporate vehicle in the form of a closed corporation. Namibia and South Africa have developed a more modern corporate vehicle which is especially suited to meet the needs of the small business.

A closed corporation is a business that is set up using a corporate business structure, but in which all the shares are held by a select few individuals who are usually closely associated with the business. Participating in a closed corporation enables a partnership to benefit from liability protection without dramatically changing the way that the business operates⁴¹. Closed corporations are not publicly traded on any stock exchanges and are, therefore, closed to investment from the general public. Shares are often held by the owners/managers of the

⁴¹ 'Closed Corporation Definition', available at <http://www.investopedia.com/terms/c/closed-corporation.asp#ixzz1rfGwiD6q> accessed on 13th April, 2012.

business and sometimes even their families. When a shareholder dies or has a desire to liquidate his or her position, the business or remaining shareholders will buy back the shares⁴².

To this effect, in South Africa⁴³, any company or close corporation is required to reserve a name for itself with the Registrar of Companies or Close Corporations prior to registration. The name will only be approved by the Registrar if it (or a close approximation of it) is not already in use, and if it is not deemed undesirable or offensive for any reason.

Another difference observed arises with regard to foreign companies. Zambian legislation provides that, a foreign company is obliged to appoint a least one and no more than nine individuals as local directors. The said local directors should be authorised to conduct and manage all the affairs, properties, business and other operations of the company in Zambia⁴⁴. At least one local director of the company shall be resident in Zambia and where the company has more than two local directors, more than half of them shall be residents of Zambia. Failure to comply with this requirement for more than two months would constitute a ground for winding up of the court on the application of the Registrar of Companies. Namibia, Botswana and South Africa reports have no reference to similar rules regarding foreign companies⁴⁵.

⁴² 'Closed Corporation Definition', available at <http://www.investopedia.com/terms/c/closed-corporation.asp#ixzz1rfGwiD6q> accessed on 13th April, 2012

⁴³ Andrew Briscoe P 78

⁴⁴ Section 248 of the Companies Act Cap 388 of the Laws of Zambia

⁴⁵ Andrew Briscoe p78

Furthermore, another feature peculiar to Zambia only is that a foreign company may be wound-up in accordance with the provisions of the Companies Act whether or not the company has been dissolved or has otherwise ceased to exist according to the law of the country of its incorporation⁴⁶. For purposes of such winding up, a foreign company is treated as if it were a company incorporated in Zambia. Where a foreign company ceases to have an established place of business in Zambia, it is required within twenty-eight days after so ceasing, to lodge a notice of that fact with the Registrar of Companies.

Where the Registrar has reason to believe that a foreign company has ceased to have an established place of business in Zambia, he shall serve a notice on the company of that fact and if after three months of the notice the Registrar is not satisfied that the foreign company is maintaining an established place of business in Zambia, the company shall be deemed to have lodged a notice of cessation of business on that day.

That said, a winding up in the host state will not affect the affairs of the company in the state of incorporation. However, case law stemming from South Africa shows that South African courts have the jurisdiction to grant a winding-up order of a branch of an external company, even though the foreign company was subject to winding-up in its country of incorporation⁴⁷.

4.4.3 Law relating to intellectual property

Aside from the fact that South Africa is not party to either the WIPO convention or ARIPO, research shows that there is no difference between the intellectual property legal regimes of the countries in question. This may be due to the fact that all of them South Africa included

⁴⁶ Section 257 of the Companies Act Cap 388 of the Laws of Zambia

⁴⁷ Re Gurr v Zambia Airways Corporation Ltd 1998 3 SA 175 (SCA)

despite not being a member of WIPO have aligned their legislation in accordance with the WIPO guidelines.

4.5 CONCLUSION

This chapter has attempted to show that there is more similarities than discrepancies in the regulatory framework of the countries used for the study. It has been observed that the regulatory framework has an important role to play in the development of a more integrated market in Southern Africa⁴⁸. It would be advantageous to the region to develop a unified regulatory environment regionally in a bid to promote a good investment climate for the region and eventually leading to the improved desire of foreigners to do business in Southern Africa.

⁴⁸ Review of business laws in Southern Africa : report prepared for the SEPAC Working Group "Policy Issues" / Andrew Briscoe. - [Electronic ed.]. - Gaborone, 1999. - 99 S. = 225 Kb, Text. - ISBN 99912-916-6-0 Electronic ed.: Bonn : FES Library, 2000

CONCLUSIONS AND RECOMMENDATIONS

5.1 INTRODUCTION

The aim of this paper as a whole is to attempt to render a critical analysis of the Patents and Companies Registration Agency Act. Having attempted to do so by firstly, giving a background outlining the statement of the problem, examining the act in its entirety and highlighting the innovations and weaknesses, taking an in depth examination into the pieces of legislation administered by the registrar and finally attempting to render a comparative analysis, it is time to take stock. The chapter attempts to firstly to outline the findings of the preceding chapters and using the findings suggest remedies to the imperfections in the law in question. Each chapter has attempted to give solutions to issues identified as problematic. This chapter will now attempt to consolidate the issues and solutions identified and thereafter to draw an overall conclusion.

5.2 FINDINGS

It is clear from the preceding chapters that a business licensing and regulatory system needs to be governed by comprehensive regulatory laws that will ensure that the regulated entities comply with set requirements. The question which was set out to be answered was whether the Act was adequate enough in order for the Agency to effectively carry out its duties. The findings can be listed as follows;

1. An analysis of the Act reveals that there have been both innovations and challenges brought about as a result of the said enactment. However, upon investigation, it became

apparent that the legislation governing the Agency is simply a constitutive Act with not much regard having been given to the peculiarity of the needs of the Agency. It is also clear that in spite of the strides made by legislation on the regulation of companies, business entities and intellectual property law there is more that can be done to ensure the smooth running of the Agency that is both legally in terms of the enactment and review of legislation and by the policy makers.

2. The Agency is endowed with the responsibility of governing various statutes, each statute posing a different challenge. Subsequent to an examination of the statutes administered by the Agency, it has been found that certain statutes are lacking in various areas and there is a need for improvement. In addition, a major problem faced by the agency is compliance with the law and regulations set out in the Act or other legislation.
3. Another finding is the fact that the Agency is too centralised at the moment and thus lacks the much needed outreach to other areas of the country and in addition there exists an issue of ignorance from the masses on certain issues (mostly those of compliance) cardinal to the regulation of companies and business names.
4. Furthermore, there seems to be wide vesting of discretionary powers in the Minister (for instance removal of a member from the board) which could in the future be problematic for the Agency. That and also the seemingly lack of adherence to the rules of corporate governance by the Board of the Agency.

5.3 RECOMMENDATIONS

Based on the findings discussed above the following recommendations can be submitted

5.3.1 Decentralisation of the agency and sensitisation of the masses.

There is a need for PACRA to decentralise its operations to districts country wide in order to enable persons have easy access to registration services; in this regard it may use existing local or central government structures and institutions in the district engaging these institutions as its agents under properly set out agency agreements. This is at the moment been conducted with the aid of the Zambia Development Agency and The Citizen Economic Empowerment Commission. However, there needs to be office established for the Agency in order for it to carry out its mandate.

As regards the issue of sensitisation, the first thing that can be done for ease of access to information is the opening and maintenance of an Agency library that can provide access to all published material in a single convenient easily accessible location. Information to be included can include; corporate information- containing information on annual accounts and business plans for PACRA¹, policy documents and also information on guidance as regards the workings and functions of the Agency. Furthermore, pursuant to this, there is a need to streamline

¹ This in turn helps with the transparency of the Agency and also in combating corruption

administrative procedures and strengthen the role of the registry in ensuring an up-to-date and reliable database of business information.

In addition, customer satisfaction surveys can be carried out by the Agency to get public opinion on their performance, duties and on the products services offered by the Agency. The surveys should monitor the performance against a number of key areas providing the public with an opportunity to render feedback whether negative or positive about the functioning of the Agency.

In a bid to sensitise the public on the issues of compliance, certain events may be organised by the Agency to support and advise business on certain issues regarding the legislation governed by the Agency². There is need to capitalise on both print and electronic media in order to educate the public on the workings of the Agency. The sensitisation can be targeted at smaller towns where and not only the towns along the line of rail. Sensitisation can be viewed as an alternative to prosecution and punishment to ensure compliance and it does go a long way with the public to educate them on something they did not know rather than punish them for their ignorance.

Other issues that may be put under consideration to provide for a smooth running of the Agency include the provision of better guidance and information of its services by developing better and accessible guidance, for instance, by making guidance available on the internet; rewriting in simpler language; separating compulsory from voluntary requirements in the and making regulations available on-line, potentially through a joint public sector

²This may include advice on how to meet one's obligations under the Companies Act.

administrative procedures and strengthen the role of the registry in ensuring an up-to-date and reliable database of business information.

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² This may include advice on how to meet one's obligations under the Companies Act.

5.3.2 Compliance and regulation of business activities.

As has been pointed out, one of the major problems faced by the Agency in carrying out its mandate is lack of compliance by the business community. Not all companies and business names comply with the regulation requirement of annual returns. In addition, there is a tendency by companies to delay in the filing of change of particulars.

In order to ensure compliance, it is the opinion of this paper that there is need to subject business activities to effective inspections on a regular basis and not only once a year when an application for a license is received. In this regard, the Government should therefore ensure that there are adequate financial and human resources to support the setting up and operations of strong inspectorates in each regulatory authority. Notwithstanding the need for regular inspections, regulatory authorities should encourage self assessment and inspect businesses that are of high risk to the public or are habitual non compliers with regulations. This will cut down on compliance costs for business and administrative costs for the regulatory authority. Two key outcomes of effective regulation and enforcement are firstly, high levels of compliance which makes the law effective in delivering its intended benefits; and secondly certainty for businesses which means less risky investment decisions.

In addition, an establishment of an inspectorate and an independent prosecution department at the agency is desirable³ and seemingly expedient as opposed to the situation prevailing under the

³ A leaf can be taken from the Zambia revenue Authority which has both prosecutors and inspectors who ensure compliance of the Act.

Act. This ensures that the body in place is independent of the Agency and abides by the rules of natural justice.

5.3.3 Repeal and assessment of laws.

Another issue arising is the fact that the laws in question are somewhat outdated and not a true reflection of the situation prevailing in the country at the moment and therefore in light of this a major overhaul of our legislation is required.

Firstly, there is a need the review and repeal and replacement of the Patents Act⁴ so that Zambians or those doing research in Zambia using cultural or indigenous knowledge can easily patent their indigenous knowledge or innovations. Presently, the Act does not provide for the protection of traditional knowledge and thus the need for the repeal. Other laws that need to be amended include the Trade Marks Act⁵ and the Registered Designs Act⁶, in particular with reference to the duration of protection of the trade mark and registered design. In as much as the laws need to be in compliance with the WIPO treaty to which Zambia is a party, they must also reflect the intellectual property needs of the country.

It must be noted with regards to intellectual property law that there is currently in place a policy set to provide guidance on all matters related to intellectual property in Zambia and achieve set objectives which include the need to encourage the use and development of appropriate intellectual property protection systems, facilitate reform of local legislation and domestication of relevant

⁴ Cap 400 of the Laws of Zambia

⁵ Cap 401 of the Laws of Zambia

⁶ Cap 402 of the Laws of Zambia

international agreements that relate to intellectual property⁷. It will also encourage research and development and collaboration between research institutions and industry and provide support and guidance from the point of developing and conceptualizing ideas to production and commercialization of goods and services. The formulation of a National Intellectual Property Policy was necessitated by the observation that over the years, there has been no policy in Zambia leading to a major constraint in the appreciation of the importance of the role intellectual property plays in the sustainable socio-economic, cultural and industrial development of Zambia⁸. The goal is that once functional, the policy will facilitate the revision of intellectual property laws in order to make them relevant to issues of protection and management of intellectual property benefits, provide a favourable investment climate for both local and foreign companies, encourage innovation and creativity for purposes of boosting social, cultural, industrial and economic development, ensure adequate and appropriate protection, recognition and respect and enforcement of IPRs. This policy will also facilitate the formulation of institutional intellectual property facilities and provide guidelines for their implementation.

As regards the regulation of companies, the process of reviewing the Companies Act should be hastened in order to bring it in line with modern company law, especially in relation to director's duties and responsibilities, corporate governance and social corporate obligations, and to bring it in harmony with the Citizens Economic Empowerment Act⁹. In addition the Act is so intricate and complex that without knowledge of the law one may not be able to read past the first page of

⁷ Ministry of Commerce, Trade and Industry; National Intellectual Property Policy

⁸ Ministry of Commerce, Trade and Industry; National Intellectual Property Policy

⁹ Patents and Companies Registration Agency ; Position paper on the revision of the companies act: areas in need of reform

the Act without being confused¹⁰. Thus Parliament should look to enacting a legislation that will deal with companies below a certain threshold¹¹. This Act can be couched in clear and concise English not too complex that one requires the retention of legal counsel in order to understand the legislation.

In addition, the functions of the Registry must be expanded to include the financial monitoring of companies. This is simply because as one of the first contacts that companies have, the registry should at least be the starting point of ascertaining the financial characters of companies by having readily available updated financial reports of the companies. This can be done by way of making it mandatory for public companies to submit in addition annual balance sheets, quarterly trial balances to the Registrar, which can be compared with for instance what the companies declare on the stock exchange and what exists in the audit reports of financial companies¹². This would prevent the formation of dubious companies formed for the sake of defrauding the public. In addition hefty penalties should be levied for late or non-submission of the same so as to ensure compliance from the business community.

Additionally, the functions of the Registrar and the Agency should have been consolidated in the Act so as if one seeks to know the confines of the powers of the Agency and the Registrar; they need not go to more than one Act to find out. As exhibited by chapter three, if one wants to know

¹⁰ Plus one look at the size of the companies Act and one is discouraged from reading the document.

¹¹ For instance, a Small Companies Act operating parallel to the principle Act regulating companies that have a net turnover of less K200,000,000.00 and less per annum.

¹² BBC Business News, 16th November, 2006. This was done in America by American Financial Regulators protecting the public from fraud by Dell Computers who were trying to win back their market after coming in second to Hewlett Packard computers.

his functions the area of the law you are examining must act as a guide and therefore of one seeks to identify his functions in relation to company law, they must look to the companies Act, it is in relation to patents, they must look to the Patents Act and so on and so forth.

5.3.4 Board composition and discretionary powers.

PACRA is an institution that makes decisions on behalf of a third party which in this case is the Government and ultimately the people of Zambia, and thus needs to ensure that the composition of the board, the appointments thereto and the execution of functions thereof are in adherence to the rules of corporate governance. There is need for a mechanism to ensure more accountability of the board to the stakeholders regarding the exercise powers vested in them.

There is also need to amend certain sections of the Act in order to ensure that there is a limitation on the use of discretionary power. In as much as there seems to not be a problem presently, abuse of discretion if not curtailed is something that could happen in the future and as such should be prepared for.

5.4 CONCLUSION

It is a trite fact that the west has prospered through the liberal market economy; that is an economy driven by the private sector. The contribution and role played by the Agency is critical to the stable and steady growth of the private sector and in turn to national development. Mostly as a result of ignorance and lack of understanding of the law, Zambia has alienated its citizens from contributing to the growth of the economy. This is a matter that can be fixed through massive sensitisation and the simplification of certain cardinal pieces of legislation.

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