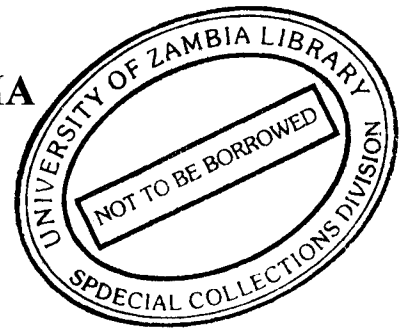


**THE UNIVERSITY OF ZAMBIA
LAW SCHOOL**



A Critical Analysis of the Companies Act and the Companies Registry

BY

NDOVI, PELANI

A dissertation submitted in substantial fulfillment of the requirement for the award of the Bachelor of Laws (LLB) degree in the School of Law, University of Zambia.

2006

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Date: 26. 01. 07

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DEDICATION

To both my parents for the excellent academic foundation you gave to me
(M.Y.S.R.I.E.P)

To you Eunice
for believing in me,
admiring and finally accepting my faith in
Christ the Lord

And to you Maclope, (mwa Ciuta, vwose vitibenge makora)
for your pride in me,
I am persuded to say that
I have not disappointed you.

**I thank you both,
you were the best.**

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Thank you

P.N

Preface

It is an authenticated fact that the development of an economy is largely dependant on thriving of the private sector; particularly, the formal private sector. It is this sector that has seen a significant growth from the rebirth of multiparty democracy in Zambia. Not in any way taking away the contribution made by the informal sector; that as it may be (that the informal sector has also contributed significantly to the economy of Zambia); it is not the area of interest that this paper will dwell on but the formal private sector.

The advent of multiparty politics also brought with it the pursuit of the market economy in preference to the controlled model type of economy that was pursued in the third republic. It is this market economy that has lead to the growth of commerce in the private sector. The Companies Registry has seen a steady growth of the number of companies being registered prior to the opening up of Zambia's economy. In order the regulate the growth in the number of companies in Zambia, the companies Act was enacted in 1994 and the moving of the companies registry to an independent building separate from the Ministry of Commerce. This was in order to adequately accommodate the growing number of people visiting the Companies Registry.

However good accommodation only of the Companies Registry, and a Companies Act that does not adequately address the needs of companies and regulation of companies in Zambia is not enough to sustain and meet the needs of companies. The essay preceded by this paper shall analyse the problems with the companies Act and also address the shortcomings of the Companies Registry.

The general objective of the study is to highlight, enhance awareness and understanding and recommend were necessary changes to the Companies Act and the operations of the Companies Registry in order to make it more efficacious in the discharge of its supervision of companies in Zambia.

A novel area that shall be investigated is the possibility and feasibility of having two companies' Acts. One to regulate companies with a turnover of more than

K200 000 000=00 per annum and other companies with lower the amount. And the paradox research shall be on how the registry can manage the two types of companies.

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Chapter One:

The History of the Zambian Company Law and the Companies Registry

Introduction

This chapter shall not only Define Company Law and particularly highlight the Zambian Company Law, but also **critically** assesses the historical development of the Zambian Company Law. The critical assessment of the development of the Zambian Company Law shall include reference to the periods that defined its development; and in order to understand fully our company law today it is expedient to also understand the Evolution of English Company from which the Zambian Company law traces its history.

In that context and for the purpose of this chapter, company law is **defined** very broadly as being the total of those legal principles which regulate both large and small scale organisations of industrial and business management and finance in most branches of economic life and which define the relative rights and duties of those participating in those organisations and delimit the powers of the organisation vis-à-vis the external world.¹ Keith Abbott (1993) defines a company as an association with personality distinct from that of its members². The Companies Act defines a ‘company’ as a company incorporated under the Act or subject to section 4 and division 14.3, an existing company³.

Company Law in Pre-Independent Zambia

¹ Munalula V. Lisimba (LLM) (1981) Company in Zambia – Its Impact on Members Creditors and Workers (A dissertation submitted in partial fulfillment of the requirements for the degree of Master of Laws at the University of Zambia).

² Company Law 5th edition DP Publication Ltd, London.

³ The Companies Act, 1994. Cap 388 of the laws of Zambia.

There were no companies in the territory later to be named Northern Rhodesia (NR), before colonialism, and hence no significant legal framework for the regulation of company formation.⁴ Africans just traded in their personal capacity and so had no need for companies or did not even know that such entities existed. The usual form of trade was the barter system, which is the exchange of goods with other goods.

This position of the non-existence of any registered company operating in Zambia, was made history when the British South Africa Company (BSA Co.) began its economic excursions in Northern Rhodesia. The BSA Co. a British Company incorporated in England in 1889 by Royal Charter, took over the territory in 1890, very few companies were operating outside its management. As a government, the British South African Company retained and exercised legislative functions in the two colonies of Southern Rhodesia and Northern Rhodesia. The system existent was the Registration of Deeds, introduced in 1891, through which a Principle Registry was establish in Salisbury and a branch office in Bulawayo were articles of association of companies with limited liability were recorded. But with increased mineral operations, companies slowly emerged and to administer them, the BSA Company issued a **government notice no. 68 of 1898 which adopted the Cape Colony Act no. 25 of 1892.**⁵ This now provided the legal framework for the registration of companies, which registration was in Cape Colony, Bulawayo and Salisbury. The BSA Company could not however cope with the growing number of administrative functions as a commercial company and government and so it gave its powers back to the British government. Negotiations for this began in 1921 leading to the passage of the **Northern Rhodesia Order in Council in 1924** and adoption of the **United Kingdom Companies Act 1908** in the same year by the colonial administration, and under that Act, companies could now be registered in Northern Rhodesia.

⁴ Law Development Commission, Preliminary Survey of Company Law in Zambia. No. 5, 1983. p3

⁵ Law Development Commission, Preliminary Survey of Company Law in Zambia. Paper No. 5 1983. p.3.

William Tordoff (1979) in his book “Administration in Zambia”⁶ acknowledges the impact of colonialism on national integration as being fundamental in the sense that the Zambian Nation would not have existed in its present form without colonial rule. In that fact, the laws of Zambia, particularly Company Law, is not an exception.

John Mwanakatwe (1977) points out that The British South Africa Company (BSA Co.) was the most notable company to start operating in Northern Rhodesia (present day Zambia), which was incorporated in England under a royal charter. ‘The BSA Co. ruled Northern Rhodesia from the 1890s to 1924.’⁷ Between 1899-1920 there was not much in Northern Rhodesia in terms of commercial and industrial activity for the obvious reason that the white settlers did not realize the enormous economic potential the territory had. However with the steady development of commerce the need rose for business laws in particular a legislation to govern the formation of companies, ... in 1921 largely in response to for some form of legal control over trade and commerce, the **Companies legislation ordinance was introduced by virtue of a B.S.A Company proclamation No. 18 on 20th October 1921.**⁸ This is the legally accepted genesis of company Law in Zambia. The background to this development was that in 1898 the BSA Co. issued a government notice⁹ to adopt the Cape Colony Act¹⁰ to provide legal framework for company registration and companies were indeed registered.¹¹ Before the introduction of the **Companies Proclamation of 1921** Northern Rhodesia like Southern Rhodesia, was using a system of registration of deeds based on a system analogous to that in force in Cape Colony. Under that system was inaugurated to the two Rhodesias in 1891 a Principal Registry was established in Salisbury and a branch office in Bulawayo were articles of association of companies with limited liability were recorded. **By government notice no. 68 of 1898, form B of act No. 25 of 1892** of the Cape Colony was formerly adopted in the two Rhodesias as the form of articles of association of unlimited companies having a

⁶ Pg 5 University of Manchester.

⁷ William Tordoff [1979] Administration in Zambia University of Manchester

⁸ British South Africa Proclamation No. 18 in John Mwanakatwe’s Obligatory Essay [1977] UNZA Library, Special Collection, unpublished.

⁹ BSA Notice No. 68 of 1898.

¹⁰ Cape Colony Companies Act of 1892.

¹¹ Makala Horace (2005) The Companies Act, Chapter 388 of the Laws of Zambia; a general critique and its impact on commerce in Zambia (obligatory essay)

capital divided into shares. After this notice there were therefore two types of companies in Rhodesia namely a company with limited liability and a company with unlimited liability¹².

Assessment of the 1908 Companies Act: The Northern Rhodesia proclamation of 1921 did away with unlimited companies and only provided for incorporation of companies with limited liability, thus reverting to a legal position as it was before 1898. In effect Cap 686 only provided for the registration of companies with limited liability.

The British South Africa Company rule lasted up-to 1924 when the Crown declared the territory a British protectorate and in the same year Northern Rhodesia adopted the English Companies Act of 1908. Companies were registered, regulated and governed by the said Act through out the colonial period up-to federation years. Efforts were made in 1950 to codify the Act or to come up with a federal Companies Act through a commission to review the then law relating to companies. It is not surprising that this review failed and was abandoned because the federation itself was a failure.¹³

Why The BSA Co. and its Activities cannot be taken as the beginning of Company Law in Zambia

The first point that can be used to settle this position is the nationality of the individuals in control of the BSA Co. In the case of **Daimler Co. Ltd v Continental tire and Rubber Co. (Great Britain) Ltd**¹⁴ the court was prepared to draw aside the veil of incorporation in order to establish that a company was owned by nationals of an enemy country so that to do business with it would be illegal because it would be trading with the enemy. In that case after the outbreak of war with Germany, the tire company, which was registered in England and had its registered office there, sued the Daimler Company for money due in respect of goods supplied to Daimler before the out-break of war.

¹² Ibid not 1

¹³ George Lipimile (1987) The Operations and Practice of a Companies Registry, Obligatory Essay p. 9

¹⁴ [1916] 2 AC 307

The second authority that can be used to authenticate this position is the case of **Swedish Central Railway Co. Ltd v Thompson**¹⁶. The company was incorporated in 1870 to construct a railway in Sweden, the registered office of the company being in London. Later the management of the company was moved to Sweden but the registered office remained in London, dealing only with formal administrative matters such as share transfers. All dividends were declared in Sweden, and no part of the profits was ever sent to England, except payment of dividend to English shareholders. The Commissioners of Income Tax assessed the company for tax on income received in Sweden. *Held-* A company could have more than one residence, though only one nationality and domicile. This company was resident in Sweden and London, and since residence was relevant for Income Tax purposes, the assessment of the commissioners was affirmed.

What is relevant to this essay from the **Swedish Central Railway case** is that a company can only have one nationality and domicile. Thus a company may be resident in a number of countries where it has several centers of control in different countries but with a single nationality. The situation of the registered office ... fixes the company's nationality ... and its domicile ...¹⁷. So then in the case of the BSA Co. its nationality and domicile is British. However as a government the BSA Co. played the role of caretaker for the Queen, who through the High Commissioner of Cape Colony, retained and exercised legislative functions...¹⁸

Company Law in Post-Independence Zambia

¹⁶ [1925] AC 495.

¹⁷ Ibid not 11

¹⁸ Munalula V. Lisimba (LLM) (1981) Company in Zambia – Its Impact on Members Creditors and Workers (A dissertation submitted in partial fulfillment of the requirements for the degree of Master of Laws at the University of Zambia).

Munalula Lisimba (1981) in his thesis on 'Company Law in Zambia'¹⁹ alludes to the fact that Zambia at independence inherited English Company Law, which was Capitalist and was designed to regulate and protect private companies. After independence this system of company law become increasingly unsuitable to the needs of the country especially as new leaders wanted the state to assert and assume a more effective in management of the strategic mining and industrial concerns. This was only possible by take-overs of those concerns, which hitherto were owned and controlled by private capital. Take-overs however did not affect the form and structure of inherited company law, which continued to be applied and enforced in its entirety without regard being had to the changed needs of the Zambian economic system. The result was that there was a growing gap between company law on the one hand and commercial practice and procedure on the other.

The History of the Development of Zambian Company Law during the UNIP era

The inherited English Companies Act²⁰ was not changed to suit the changing times. Colonial legislation aimed at bolstering colonial policies hence did not in anyway embrace the aspirations of the general citizenry in the new Zambia. In an attempt to regulate and domesticate the administration of companies, changes were seen being introduced soon after independence for example foreign companies such as Standard Chartered Bank registered and incorporated in England and extended operations to Northern Rhodesia in 1925 was struck off the companies register following a government directive requiring foreign banks to be incorporated locally. One other such company was the BSA Co. itself that ceased to operate in 1965²¹. Dr. Kaunda in the subsequent years after independence was very prominent and radical in his policies and endeavor to review most legislation that was believed to be outdated for independent Zambia. This is evidenced from his address of the delegates at the National Council when he intimated that it was deliberate government policy to do away with laws that tried to clog the country's desire to develop in a chosen direction and therefore

¹⁹ Ibid

²⁰ 1908

²¹ Mwanakatwe p.4

it was critically imperative to scrutinize the country's legal structure with a view to identify obsolete features thereof that needed to be repealed.²²

At the dawn of 1970, considerations to review the Companies Act was done after the watershed speech. Government intended to control private capital and foreign companies but sadly, this review never saw the light of day, it was never approved and to this day it is still unpublished²³. In 1977, the registrar of Companies proposed some amendments rumored to have been based or modeled on the British and Ghanaian Companies Act of 1948 and 1965 respectively²⁴.

A committee was set up by the law development commission to review the whole companies Act in order to bring it in tandem with post independence economic goals. This was in light of the fact that the Act had not gone through any significant changes from what it was in 1964.²⁵ The UNIP National council in 1985 passed resolution to make proper amendments to the Companies Act²⁶ in order to facilitate the implementation *inter alia* worker participation. A working party was constituted that looked at certain features of the Act and included what should be contained what should be contained in the articles of association which was going to be dually modeled to allow a choice for incorporating companies.²⁷ Further, the same working party looked at formation and registration of companies in relation to problems peculiar to these aspects of company law as it relates to parastatal companies in the country. Accountability was also looked at. For private companies affected by the foregoing also features such as disclosure; took center stage as well as annual returns for inspection by the public²⁸.

²² Watershed speech by Kenneth Kaunda at UNIP National Council, 30/06/75.

²³ George Lipimile p.9.

²⁴ George Lipimile. p.10

²⁵ Ibid.

²⁶ Cap 686

²⁷ Law Development Commission Company Law review working party. 1985

²⁸ Ibid

Later that same year a company law review project²⁹ was constituted against the backdrop of the then company law being predicted on the English companies Act of 1908 and as such was considered outdated. The main areas of inquiry included company formation or incorporation. This covered besides private and public companies parastatal companies too. The commission would further look and advise what type of company, minimum number of members to form a company whatever type it would be and also the minimum share capital requisite to a given particular type of company.³⁰ The doctrine of *Ultra vires*, Financial control and auditing provisions, control of directors, their qualification, appointment, remuneration and their removal. Secretaries were also affected in the same manner. Disclosure in annual returns,³¹ inspection was also a major concern, the annual general meeting as well as determination of financial year and publication for books of accounts.³² Guidelines on winding up companies and rules relating thereto for example the protection of creditors and the public as well as the responsibility and liability of shareholders alike lastly but not least, was the aspect of workers participation which failed because it attracted a lot of debate and discussion. Despite all these recommendations, the Companies Act³³ still remained unamended. Priority to amend Cap 686 waned as the crescendo of the birth of the third Republic and the multiparty politics was at hand.

The History of the Development of Zambian Company Law in the MMD era

In 1990 the law development commission drafted a companies' Act that did not become law as intended. The same year saw the emergence of the MMD whose popularity overwhelmed the whole

²⁹ Ibid.

³⁰ Ibid

³¹ Ibid

³² Ibid

³³ Cap 686

nation with the contents of its manifesto during elections. In its manifesto the MMD promised *inter alia* to review all laws that had become obsolete with time since independence.³⁴

Following the landslide victory of the MMD in 1991 election in October, eager to impress the masses did within a year of being in office move in the direction of restating the Zambian law among which was the Companies Act. In March 1992 a team of experts was constituted to look at legislation pertaining to companies, trade and industry.³⁵ The team came up with areas it considered needed review and among these were bankruptcy, liquidation and company formation for both limited and unlimited; directors fiduciary duties, the submission of accounts and lastly but not least minimum share capital.

Following the deliberations by the team and the influenced also by the world's famous financiers such the IMF and the World Bank who demanded certain policies to be implemented. For example Trade Liberalization and reduction in barriers to foreign investment; as two out of ten that are relevant in this paper under the **Washington Consensus**; The Companies Act³⁶ finally become law on 17th June 1994 to provide for the formation management and administration of companies and also to provide for matters connected with or incidental to the law relating to companies.

Many a suggestion and proposals have been made for example the final report of a summary proposals and recommendations to the Companies Act³⁷ from ZICA members and Stakeholders³⁸ and the Jenkins Committee on Company Law. Suffice to say that the Zambian Company Law is still developing so as to meet the needs and aspirations of the local and foreign investors alike.

³⁴ Makala Horace p.10

³⁵ Ibid

³⁶ Cap 388

³⁷ Cap 388

³⁸ www.zica.com.

Chapter Two:

The Basic Tenets of a sound Companies Act.

Introduction

Having dealt with the history of the Zambian company law in the preceding chapter, this chapter highlights the basic tenets of a sound Companies Act. The subtitles of this chapter are the proposed sections for the Small Companies Act (SCA). The SCA is an act the writer is proposing to be enacted. The SCA should be friendly, that is the language of the SCA should be simple and less complicated. Its audit demands for example should be on pre drawn audit forms that can be simply filled out and submitted to SCA Auditors at The Patents and Companies Registration Office (PACRO). The budget implications on the remuneration of the SCA Auditors at PACRO will be fund from the nominal fee payable on lodging of audit forms. Similarly, other mandatory requirements can be made simpler in the case of their form on the one hand and the manner of lodging them in on the other hand. Simplified procedures will encourage compliance from Small Companies. As an Alternative to lodging several details separately, the several details can be lodged as one in the annual returns. We now begin laying out the basic tenets of a sound SCA.

A company is an artificial person endowed with legal personality and set up for some common purpose. Frequently it will be with a view to trading at a gain (as with companies limited by shares); but occasionally the purpose will be educational, religious, or some other non-commercial purposes (as with companies limited by guarantee).³⁹

³⁹ Jerry de Frietas (1996) Company Law 3rd Edition London Castlevale Handbooks

Doctrine of Incorporation: Any two or more persons (or in the case of a private company, at least one person) associated for some lawful purpose may, by subscribing their names to a memorandum of association and otherwise complying with the requirements of a companies act in respect of registration, form an incorporated company. A company is incorporated on registration and on incorporation it becomes a legal entity separate from its members, enjoying all attributes of corporate status.

Section six⁴⁰ provides that any two or more persons (or in the case of a private company, at least one person) associated for some lawful purpose may, by subscribing their names to a memorandum of association and otherwise complying with the requirements of the Companies Act⁴¹ in respect of registration, form an incorporated company. A company incorporated on registration⁴², and on incorporation it becomes a legal entity separated from its members, enjoying all the attributes of corporate status. It has a name; it may have a common seal under which legal documents such as written contracts and share certificates may be signed on its behalf; and it may have an official seal to enter into foreign transactions where its memorandum permits it to trade outside Zambia. It may own and dispose of its property and may enter into contracts with anyone including any of its members. In relation to such activities, the company itself is primarily liable; not its members or directors. This concept of corporate personality is sometimes referred to as **Doctrine of Incorporation.**⁴³

Illustration of the Doctrine of Incorporation

⁴⁰ Cap 388

⁴¹ Cap 388

⁴² Cap 388 S. 11

⁴³ Jerry de Frietas (1996) Pg 2

In **Salomon v. Salomon & Co. Ltd** ⁴⁴ Salomon a sole trader, converted his boot business into a limited company and minimized the risks to the assets transferred to the company by taking the price for the assets partly in fully paid shares and partly in a debenture secured by a floating charge on the company's general assets (a debenture is evidence of a loan and where it is secured it has to be repaid before unsecured debts and shareholder's capital. This is important where the company does not have enough assets to repay everyone). Salomon held all the company's 20,007 shares except for six shares which were held by his wife and five children; and he was appointed managing director. A year later the company went into insolvent liquidation and it was discovered that the assets were only sufficient to discharge Salomon's debenture and that there was nothing left for the unsecured creditors. The liquidator challenged the validity of the debenture on grounds that:

- (i) Salomon and the company were one and the same person so that the company could not have owed Salomon any money and
- (ii) Salomon had willfully overvalued his business when he sold it to the company.

The House of Lords rejected both arguments and laid down the following principles:

- (a) Once a company is incorporated legally it has to be treated like any other independent person, with rights and liabilities appropriate to itself (Per Lord Hulsbury LC);
- (b) Though it may be that after incorporation the business is precisely the same as it was before, the same person are managers and the same hands receive the profits, a company is not in law the agent of its subscribers or trustee for them (Per Lord Macnaghten);

⁴⁴ [1897] AC 22.

(c) Where a promoter sells property to a company he has set up no one can complain that the price is extravagant if there is a full and frank disclosure to the members.

In **Macaura v. Northern Assurance Co.**⁴⁵ Macaura the owner of a timber estate, insured against fire and later assigned the whole of the timber to a one man company owned by him and his nominees but forgot to assign the insurance policy to the company and to obtain the necessary consent of the insurers. When the timber was destroyed by the fire the insurers refused to pay on grounds that, Macaura did not have insurable interest in the timber (as insurance law requires). The House of Lords held that even though Macaura owned the company by virtue of his shareholding, the company was a separate person from its members and owned the timber in its own right. So Macaura had no insurable interest in the timber. In **Foss v. Harbottle**⁴⁶ two shareholders brought an action on behalf of a company against its directors who, as promoters, had sold property to the company at an undisclosed profit. Vice Chancellor Wigram refused to depart from the rule, which required that “the corporation should sue in its own name and its corporate character”, dismissed the action. Here the general meeting, and not individual shareholders, should have brought the action.

A Company’s Constitution: A company’s constitution is contained in two documents: a **memorandum of association**, and **articles of association**. The former is the dominant document, regulating the relation between the company and outsiders and limiting its activities to those set down in the objects clause of that document. It is to this document that a company owes its existence as an official person. The articles comprise a subordinate document regulating the company’s internal affairs.

⁴⁵ [1925] AC 619

⁴⁶ [1843] Hare 461

Meetings and The Board of Directors: A company has two controlling elements: the general meeting and the board of directors. The general meeting comprises the company's members (or share holders, if the company has a share capital) who act collectively by resolution. A resolution is a motion, which is passed at a meeting. Company legislation identifies four types of resolution: an ordinary resolution which is a resolution passed by a simple majority of members voting in person or by proxy at the meeting; a special resolution which requires a three-quarters majority but the length of notice depends on the type of meeting at which the resolution is to be passed; and an elective resolution (relevant only to private companies) which requires the consent of all the members and with a minimum of 21 days notice of both the terms of the resolution and of the meeting. Unless company legislation states otherwise, an ordinary resolution is the appropriate form of resolution to be used. The board of directors is appointed by the members, and is given the task and powers to carry on the day-to-day administration of the company.⁴⁷

Lifting The Veil: This subsection of chapter two I regard as the conscience of the company's Act. It is action concerned with lifting the veil that shall awaken company members to the consequences of abusing the veil. The principle set out in **Salomon v. Salomon**⁴⁸ that a body corporate is a separate entity from its members led to the phrase "the veil" as a screen between them. This at times causes problems and some cases it can be lifted so that the human and commercial reality behind the corporate personality can be taken to account. The veil can either be lifted by either the judiciary or by statute⁴⁹. The philosophy of creating an artificial personality in a company necessarily creates a separation between the company and its members. Notwithstanding the virtues of the separation like perpetual succession; that is a company has a life beyond that of its members, there has grown a

⁴⁷ Ibid Pg 1

plethora of cases in which the separation doctrine has been abused. For this reason a sound company's act must at least the following provisions to correct the abuse:

Veil Lifting by Company Legislation

- (a) **Reduction in Numbers:** where a public company carries on business with less than two members for more than six months then if the remaining member is aware of this he will be personally (with the company) for all those debts of the company which were contracted after the six months have expired⁵⁰ exception shall only be in cases where the court is satisfied that the member or director had made reasonable efforts to prevent the business from being continued, or that it is otherwise just and equitable to do so.
- (b) **Fraudulent Trading:** where in the course of winding up an insolvent company it appears that the company's business was being carried on with an intent to defraud creditors. Then any person including a member who knew of this and was party to the fraud may be made personally liable for all or any of the company's debts and liabilities.⁵¹ For a person to be made liable for fraudulent trading there must be actual dishonesty⁵² per **Maugham J in Re Patrfick Lyon Ltd**⁵³ or recklessness⁵⁴ **Re Peake Hall**,⁵⁵ and this is often difficult to prove. In this way a competent but dishonest director will be caught.
- (c) **Wrongful Trading:** Wrongful trading is unlike fraudulent trading in that it can be used to indict an honest but incompetent director. Where in the course of winding up an insolvent company, the liquidator finds that a director or former director has been guilty of wrongful

⁴⁸ [1897] AC 22

⁴⁹ Jerry de Frietas (1996) Company Law 3rd Edition London Castlevale Handbooks

⁵⁰ Cap 388 Sect. 26

⁵¹ Cap 388 Sect. 300 and 301

⁵² Jerry de Frietas (1996) Company Law 3rd Edition London Castlevale Handbooks

⁵³ [1933] Ch. 786

⁵⁴ Op Cit., Pg 6

⁵⁵ [1985] in Jerry de Frietas (1996) Company Law 3rd Edition London Castlevale Handbooks

trading he may apply to the court for an order that the wrongdoer should contribute towards the company's assets.⁵⁶ Wrongful trading occurs where a director continues to trade on behalf of the company beyond period when a reasonable person would have reached the conclusion that there was possibility of the company surviving.

(d) **Misdescription of the Company:** Where an officer signs or authorises to be signed on behalf of the company any negotiable instrument or order for goods without mentioning the company's accurately, he will incur personal liability if the company dishonours the documents. Name means 'corporate name'. Thus if a director accepted a bill of exchange on behalf of the company by signing its trading name rather than its corporate name, he will incur personal liability should the bill be dishonored (**Max form Spa v. Mariani and Goodville Ltd**).⁵⁷ In **Hendon v. Adelson**⁵⁸ the directors were held liable for a cheque they issued which cheque instead of having 'L & R agencies Ltd' as the correct name of the company had 'L. R Agencies Ltd.' Three company officials, authorised to issue cheques, issued one, which the company dishonored. The court held that these officials were personally liable to the holder of the cheque. However in **Jenice Ltd v. Dan**⁵⁹ the court took a more liberal view⁶⁰ and drew between the omission of a word from the name of the company and the misspelling of a word which causes to the director dealing with the company. Finally on the same⁶¹ a person will not be allowed to enforce personal liability

⁵⁶ Cap 388 Sect. 300/301

⁵⁷ [1981] 2 Lloyd's Rep 54

⁵⁸ [1973] The Times, June 16, 1973, Mackenna J

⁵⁹ [1993] BCLC 1349

⁶⁰ Cap 388 Sect. 194(3)

⁶¹ Cap 388 Sect. 194(3)

against the officers of the company if he himself was responsible for the misdescription

Durham Fancy Goods Ltd v. Micheal Jackson (Fancy Goods) Ltd.⁶²

- (e) **Group Accounts:** Where a company has subsidiaries the veil is extended to conceal the separate identity of the subsidiaries for the accounting purposes, and the holding company will have to prepare group accounts to reflect the financial position of the whole group⁶³.
- (f) **Trading without a Certificate**⁶⁴. A public company shall not transact any business or exercise any borrowing powers or incur any indebtedness, except for purposes incidental to its incorporation ... unless the registrar has issued it with a certificate... if a company enters any transaction in contravention of this section and fails to comply with its obligations in connection therewith within thirty days after being called upon to do so, the directors of the company shall be jointly or severally liable to indemnify the other party to the transaction in respect of any loss or damage suffered by him by reason of the failure of the company to comply with those obligations.

Judicial Veil Lifting

The judiciary uses the lifting of the veil to counter fraud, sharp practice and oppression under any of the following circumstances:

- (a) **Fraud:** Where the company is a 'sham' (i.e a front for a fraud) the courts will pierce the veil of incorporation, thus ignoring its corporate identity.⁶⁵ In **Gilford Motors Co. Ltd. v. Horne**,⁶⁶ a former director of the plaintiff company who had bound himself by a restraint of trade clause formed a company (of which his wife and an employee were the sole directors

⁶² [1968] 2 QB 839

⁶³ Cap 388 Sect. 165

⁶⁴ Cap 388 Sect. 15(1), (8)

⁶⁵ Jerry de Frietas (1996) Company Law 3rd Edition London Castlevale Handbooks

⁶⁶ [1933] Ch. 935

and share holders) for the same purpose of enabling him to get round the restraint clause. An injunction was granted against both the former director and the company he formed from carrying on the business because the company was 'a mere cloak or sham'. Similarly, in **Re Bugle Press**,⁶⁷ two persons holding 90% of the shares in their company wanted to purchase the remaining share held by the minority shareholder. So they formed a new company which then attempted to invoke what is now Schedule 12 of the Financial services Act 1986(UK) to compulsorily purchase his shares. Under this schedule if a company makes an offer to the members of another company to purchase their shares, then if the offer is accepted by the holder of no less than 90% of the shares in the offeree company, the offerer company may compulsorily purchase the remaining shares. Not surprisingly, the court refused to treat the new company as a separate entity, holding in fact it was the majority shareholders attempting to commit a fraud on the minority shareholder.

(b) Enemy Character (Illegality): The courts have been prepared to draw aside the veil of incorporation in order to establish that a company was owned by nationals of an enemy country so that to do business with it would be illegal because it would be trading with the enemy (**Daimler Company Ltd v. Continental tyre and Rubber Company (Great Britain) Ltd**).⁶⁸ Where the personal quality of a company's shareholders or those controlling it are crucial to determine its character, then public interest may require the courts to peep behind the veil of incorporation (e.g., to see whether the company is under the control of alien enemies in war time⁶⁹, as in **Daimler Case**.⁷⁰

⁶⁷ [1960] 3 WLR 956

⁶⁸ [1916] 2 AC 307

⁶⁹ Jerry de Frietas (1996)

⁷⁰ [1916] 2 AC 307

(c) **Group Enterprise:** The concept of agency, has sometimes been used by the court under which, subsidiary companies are regarded as the agent of its holding company, even though there is no agency agreement as such between them in regard to the transaction concerned.⁷¹ Thus in **Firestone Tyre and Rubber Company Ltd v. Lewellin**⁷² An American company formed a wholly owned subsidiary in England to manufacture and sell its brand of tyres in Europe. The subsidiary was managed free from day to day control yet for purposes of tax the subsidiary was said to act as an agent and consequently the American company was liable to pay tax in United Kingdom. Similarly in **Smith Stone and Knight Ltd. v. Birmingham Corporation**⁷³ a subsidiary company and its holding company were treated as being the same enterprise because the day-to-day business of the subsidiary was controlled by the holding company through its nominees (who were also directors of the holding company) and therefore the subsidiary was trading as its agent.

(d) **Quasi partnerships:** Where a director who is removed from office is seeking a winding up order on the 'just and equitable' ground of insolvency the courts will peep behind the veil to see whether the company is in essence a quasi-partnership. In **Ebrahim v. Westbourne Galleries Ltd**⁷⁴ the court considered that the just and equitable provision does not, as the respondents suggest, entitle one party to disregard the obligations he assumes by entering a company, nor the court to dispense him of it.⁷⁵ Facts in that case were that Nazar (father) and George Nazar (son) together held majority shares in a company with Ebrahim (who previously before George was co-opted was in partnership with Nazar). The company dealt in Persian carpets. Ebrahim petitioned that the Nazars buy his shares or the company be

⁷¹ Smith and Keenan (1999)

⁷² [1957] 1 All E.R. 561

⁷³ [1939] 4 All E.R. 116

⁷⁴ [1973] 2 WLR 1289

⁷⁵ Smith and Keenan (1999)

wound up. This was after by resolution at a general meeting Mr. Ebrahim was removed from being director. The House of Lords agreed to wind up the company. The company being regarded as a partnership so that a general-partner deprived of a say in management in the absence of a contrary agreement is entitled to dissolve the firm.

Promoters: In **Twycross v. Grant**⁷⁶ Cockburn C.J. defined a promoter as any person who ‘undertakes to form a company with reference to a given project and to set it going and ... and takes necessary steps to accomplish that purpose’. A promoter’s functions are to prepare the documents necessary for the registration of the company, and nominate the directors, auditors, bankers, and appoint the company secretary. He may also buy property on behalf of the intended company: and if it is to be public he may draw up the prospectus⁷⁷. Duties and liabilities of a promoter are threefold. Firstly, in equity his position to the company is of fiduciary nature, so he must not accept bribes or make secrete profits, must keep proper accounts, and make full disclosures of his interest either to an independent board of directors or to the members via the prospectus or other means. For breach of any of these duties the company has the remedies in damages (**Re Leeds & Hanley Theatre of Varieties Ltd.**)⁷⁸ Rescission, it may rescind the transaction (**Erlanger v. New Sombrero Phosphate Co.**)⁷⁹ and Recovery of profit (**Gluckstein v. Barnes**)⁸⁰ if the company in unable to rescind a contract. Secondly, at Common Law, were the promoter had issued a prospectus he under a duty not to make untrue statements therein. Thirdly where the promoter is responsible for the listing of particulars or prospectus he is under a duty not to make false or misleading statements in them.⁸¹

⁷⁶ [1899] 2 CPD 469

⁷⁷ Jerry de Frietas (1996)

⁷⁸ [1902] 2 Ch 809

⁷⁹ [1878] 3 App Cas

⁸⁰ [1900] AC 240

⁸¹ Jerry de Frietas (1996)

Directors and Company Secretaries: A company being an artificial person cannot manage itself. It needs natural persons to exercise its managerial powers. These persons are called directors. Every company must therefore have one, and the test of whether a person is a director is functional. He is a company officer and can be not necessarily an employee.⁸² A sound companies act must include types of directors, their appointment and removal, the position of directors, duties, rights and remuneration. Lord Denning in **Panorama Development (Guildford) Ltd. v. Fidelis Furnishing Fabrics Ltd.**⁸³ “Times have changed. A company secretary is a much more important person nowadays. He is an officer of the company with extensive duties and responsibilities. He is certainly entitled to sign contracts connected with the administrative side of the company’s affairs, such as employing, staff, ordering cars and so forth”. Thus it is expedient that a company’s act make provision, to be considered as sound, legislation on a company secretary. Such legislation should include the appointment, rights and duties, powers and removal of a Company Secretary.

Corporate Finance: There are various ways of funding a company’s activities but in the main, the two most common ways are through the company’s own members, by an issues of shares or through long term loan creditors, by an issue of debentures. In both cases the law regulates the manner in which such finances can be raised by making a distinction between public and private companies.⁸⁴

The basic legal distinction between the two terms ‘share’ and ‘debenture’ is that a share constitutes the holder a member of the company, whereas the debenture holder is a creditor but not a member of it (**Knights Bridge Estate Trust Ltd. v. Byrne**)⁸⁵. However it should be borne in mind that a person may become a member without being a shareholder, in that a company may not have share capital. Thus a company’s act ought have provisions differentiating the types of shares; variation of classical rights; application and allotment, share

⁸² Ibid. Pg 111

⁸³ [1971] 2 QB 711

⁸⁴ Ibid.

⁸⁵ [1940] A.C. 613

certificates and warrants.⁸⁶ Such an Act has and recognizes membership and must expressly state methods of becoming a member of the company and the requirements relating to capacity as well as the register for such members. Further, debentures are a liability for the company hence legislation that governs the administration of a company should in no uncertain terms provide for such charges and incidental aspects such as power to borrow, *ultra vires* borrowing and borrowing in excess of authority.⁸⁷

Majority Rule and Minority Rights: Majority rule is a cardinal principle of company law that majority shareholders cannot sue for wrongs done to their company, or to complain of irregularities in the conduct of its internal affairs any action on behalf of the company has to be brought by the board of directors or by a general meeting of members.⁸⁸ This is known as the Rule in **Foss v. Harbottle**.⁸⁹ That is an individual member can only sue in the name of the company (the corporate person) being the proper plaintiff (**Pavlides v. Jensen**)⁹⁰

Sound company law also provides for protection against abuses by the company and controlling shareholders. Legislation should provide for minority shareholders to initiate investigation, or apply to the courts for relief on grounds of ‘conduct unfairly prejudicial’ to them or petition for the compulsory winding-up of the company on the ‘just and equitable ground’ (**Ebrahim v.**

Westbourne Galleries Ltd.)⁹¹

Insider Dealing: Insider dealing is where a person buys or sells securities when he, but not the other party to the transaction, is in possession of confidential information, which affects the value of those securities. Furthermore the confidential information in question will generally be in his possession because of some connection, which he has with the company whose securities are to be dealt in (e.g.

⁸⁶ Keith Abbot, *Company Law* (1993) 5th edition pg 131-145

⁸⁷ *Ibid.*

⁸⁸ Jerry de Freitas (1996) 150

⁸⁹ [1843] 2 Hare 461

⁹⁰ [1956] 2 All ER 518

⁹¹ [1972] 2 WLR1289

he may be a director, employee or professional adviser of the company).⁹² Insider dealing is a crime and should be legislated as such including investigation (Re an Inquiry under the Company Securities (Insider Dealing) Act 1985⁹³, prosecution and penalties.

Accounts and Audit: The directors of a company must keep accounting records sufficient to show and explain the company's transactions. They must disclose with reasonable accuracy at any time throughout the financial year, the financial position of the company at that time.⁹⁴ A sound company's Act should provide for the preparation of annual accounts and if a company has subsidiaries, group accounts showing the state of affairs and profit or loss of the company and the subsidiaries... legislation should include the fact that such accounts be presented at the general meeting.⁹⁵

An audit is a process which, is concerned to establish and confirm confidence in the accounting yielded by the company's records and systems so that an opinion may be given upon the accounts which have been prepared by the company from those records and systems. The audit is carried out primarily for the shareholders as a check upon the directors' stewardship, but it is also obviously also of benefit to creditors and potential investors.⁹⁶ Statute law relating to auditors should include their appointment and qualifications, rights, duties and powers (**Re London and General Bank**)⁹⁷, remuneration, removal and resignation.

Corporate Insolvency – Winding up Generally A company's life can be brought to an end by a process called winding-up.⁹⁸ (**Middlesborough Assembly Rooms**)⁹⁹. The liquidator whose work in

⁹² Jerry de Frietas (1996) 159

⁹³ As in Jerry de Frietas Pg. 162 (1996) [1988]

⁹⁴ Denis Keenan [1999]

⁹⁵ Ibid. Pg. 414.

⁹⁶ Ibid. Pg. 415.

⁹⁷ [1895] 2 Ch 166

⁹⁸ Op cit Pg. 480

⁹⁹ [1880] 14 Ch. D 104

a sound company's act should include the appointment, qualifications, rights and duties, powers, remuneration and removal carries through the process. There are two methods of winding-up; i.e. compulsory winding-up by the court or by a voluntary winding-up, which may be either a member's winding-up or a creditor's winding-up. Further company legislation should include winding up by striking off either by the registrar or by a private company's application for striking off.¹⁰⁰

Corporate insolvency looks at those aspects of insolvency law, which are designed to rescue the company and prevent winding up. Directors should resort to such arrangements before a wind-up begins if later such initiatives can be resorted to by liquidators or the administrators.¹⁰¹

Reconstruction and Amalgamation (Mergers and Takeovers): The words Reconstruction and Amalgamation distinguish between internal reconstruction, external reconstruction and amalgamations (**mergers and takeovers**). Internal reconstruction occurs where there is an internal reorganization of a company's share or loan capital ... and affects only one company.¹⁰² External reconstruction occurs where a company forms a new company, which purchases the undertaking of the original company and the carries on business with the same shareholders¹⁰³ (**Re Alabama, New Orleans, Texas and Pacific Junction Rly. Co, Re.**)¹⁰⁴. Amalgamation by its very nature involves separate companies. It occurs where two or more companies or their businesses are combined into one company, or into control of one company.¹⁰⁵ All such circumstances should be legislated in a sound Company Act.

Foreign Companies: A Foreign Company is a company incorporated otherwise than in Zambia. A company formed in Zambia may change its residence to a foreign country but it nevertheless

¹⁰⁰ Denis Keenan [1999] Pg. 480

¹⁰¹ Ibid

remains a Zambia company, subject to the jurisdiction of Zambian courts, domiciled in Zambia, and if a registered company bound to comply with the provision of the Companies Acts.

Difficulties may however arise in determining what system of law is the law of the place of incorporation.¹⁰⁶ A company, unlike a natural person, cannot of its own volition change its domicile.¹⁰⁷ But the legal rules from time to time in force in the place of incorporation may clearly change.¹⁰⁸ In case of war or sour diplomatic relationship (like The French Broadcasting Corporation in Kigali Rwanda, which is, under Presidential directive not to broadcast in Rwanda amid the tense relationships between Rwanda and France after the French judge Jean-Louis Bruguiere indicted President Paul Kagame his nine aides on grounds that they had shot down the plane carrying former Rwandan President Juvenal Habyarimana which sparked the 1994 genocide in Rwanda) sound company legislation must anticipate such cases.¹⁰⁹ Foreign companies are under a duty to disclose all information about their intended activities in the foreign country. Finally, a foreign company may be compulsorily wound-up as an unregistered company and on winding up Zambian law should apply in connection with the administration of its assets¹¹⁰ (**Re Suidair International Airways Ltd.**)¹¹¹

¹⁰² Jerry de Frietas (1996) 144

¹⁰³ Ibid

¹⁰⁴ [1891] 1 Ch 213

¹⁰⁵ Jerry de Frietas (1996) 144

¹⁰⁶ L.C.B. Gower [1979] Pg. 746

¹⁰⁷ Kuenigl v. Donnersmarck [1955] 1 Q.B. 515

¹⁰⁸ As in Banco de Bilbao v. Sancha at Pg. 746 L.C.B. Gower [1979]

¹⁰⁹ <http://news.bbc.co.uk>

¹¹⁰ L.C.B. Gower [1979] Pg. 748

¹¹¹ [1951] Ch. 165

Chapter Three:

The Commercialisation, Organisational Structure and Legislation of The Patents and Companies Registration Office

PROCEDURES IN THE ZAMBIAN COMPANIES AND BUSINESS NAMES REGISTRY

Introduction

The Patents and Companies Registration Office (PACRO) is an Executive Agency of the Ministry of Commerce, Trade and Industry. It is charged with the administration and enforcement of five national statutes, namely:

- a) The Companies Act, Cap 388 of the Laws of Zambia;
- b) The Registration of Business Names Act, Cap 389 of the Laws of Zambia;
- c) The Patents Act, Cap 400 of the Laws of Zambia;
- d) The Trademarks Act, Cap 401 of the Laws of Zambia; and
- e) The Registered Designs Act, Cap 402 of the Laws of Zambia.

We are going to discuss the processes involved under the Companies and the Registration of Business Name Acts.¹¹²

The Companies and Business Names Registry: The Companies Registry therefore, provides a means by which the Government can implement its policies, which are not provided for under statute necessary for the regulation of company activities. Apart from the incorporation of Companies, the Companies Act provides for the protection of shareholders, creditors and intending investors¹¹³ that the activities of those people responsible for their management, should be subject to a considerable degree to statutory regulation and control. Of equal importance too, is the need to ensure that

¹¹² A. M Banda-Bobo Paper Presented at the United Nations Public Service Award (2003) New York

¹¹³ Cap 388 Sect. 209-292

companies make available to shareholders, creditors and general public as much information as is reasonably required.

In both of the above instances, companies are required to file particulars about themselves and their transactions and this information is required when the company is formed, or from time to time during its existence. Consequently, companies are required to file or lodge with the Companies Registry, application for incorporation at formation, and later, particulars of mortgages or charges which it creates on its property, particulars of Directors, an annual return of its members, return of allotment, its registered office, changes in the company name, copies of all special resolutions.¹¹⁴ This duty on companies is important and crucial that it be complied with so that the registrar can regulate and supervise the activities of companies. In addition this information deposited with the Registrar is open to the public who wish to inquire and know particulars of a company before dealing with it. This in itself is a public security feature because of its transparency. However the public at times do fall prey to individuals purporting to be director of a company, with ostensible authority to bind such companies into contracts, but in actual fact they are not (**J. P. Karnezos v Hermes Safaris Limited**)¹¹⁵. PACRO is partly to blame for the lack of knowledge that the public has the right to information of the companies they deal with in that no deliberate effort is made to sensitize the public on this right. On the other hand it is the responsibility of the public to inquire into such information whenever the need arises, at a nominal fee of course.

Types of Registers Required by Law to be kept by the Registrar of Companies and Business

Names in Zambia

¹¹⁴ Ibid.

¹¹⁵ [1978] ZR 197 (HC)

The Business Names Register: This is the most frequently used Register by newly emerged businesspersons because of its simplicity and the relatively low rates of registration fees. It contains all information as presented in the statement form including the Registration number.¹¹⁶ Zambian entrepreneurs have more commonly preferred the Business Names Register because it is less complicated than the companies one in terms of requirements before registration. It is less expensive compared to the registration of a company. It not surprising that most Zambians have preferred to engage into commerce by way of business names (over 38,000 Business Names and 32,000 Companies have been captured on the electronic database¹¹⁷), this is only a reflection of the fact that most Zambians are too poor to spare any of their income into the logistics of and the promotion costs that precedes the formation of a company. In addition the costs of submission of audited accounts has caused most Zambians to shy away from operating as Incorporated Companies. The novel Act for Small Companies will only require Small Companies to fill in a **Pre Drawn Audit Form (PDAF)**. This shall be in fulfillment of the requirement of Audited Annual Accounts. The PDAF should also be available via PACRO website. To ensure compliance by Small Companies to PDAF requirements, PACRO should create a desk and employ a professional Accountant to receive and scrutinize PDAF reports. Submission of a PDAF report should be at a reasonable fee. The PDAF desk can be remunerated from the fees payable on lodging the PDAF report. PDAF will ease the hassle and make the requirement for the deployment of independent auditors cheaper. Small Companies can use the PDAF reports as collateral for subsequent borrowing of capital.

The Local Companies Register (LCR): This contains a record of all local companies, public and private, which are registered in Zambia. It contains particulars as to company name and number, date of incorporation, nominal capital, registered office and principal business of company.

¹¹⁶ Cap 389

¹¹⁷ An interview with Mr. B.A. Katebe the Assistant Registrar PACRO November 2006

clause, shall be governed by the Small Companies Act in case of a dispute. The Small Companies Act should include this provision in the arbitration clause. This is in order to protect Small Companies from being patronized.

THE REGISTRATION OF BUSINESS ACT, CAP 389

Types of Business Names Registrations: There are three types of registrations effected under the Business Names Registration Act. These are:

- a) Registration by an individual, fill Form III
- b) Registration by a firm, fill Form II
- c) Registration by corporation, fill Form II and I.

Any of the above may register by lodging a statement in writing, duly signed, with the Registrar of Business Names in the prescribed forms I, II or III as the case may be.¹²³ None corporate bodies such as churches may register a trade name by filling Form II & IX.¹²⁴

Procedure for Registration: An applicant presents his application at the front office where the officers check whether there are anomalies in the manner the form is filled. If the form is correctly filled, it is stamped with a “checked” stamp upon which the applicant is advised to go and make payment to the cashier against that a receipt is issued.¹²⁵ The checking point is used to advise and ensure clients fill in the forms correctly. In this way all the standard information can be captured.

Name Clearance: The Registrar maintains a Register of all Companies and Business Names. And with the computerization of the Companies Registry which has resulted in the capture of over 38,000 Business Names and 32,000 Companies on the electronic database, this has meant that all

¹²³ Cap 389 of the Laws of Zambia

¹²⁴ Ibid

¹²⁵ PACRO The Procedures Followed in Approving Company and Business Names 2006 edition PACRO Lusaka

Companies and Business Names that are compliant in terms of post-registration requirements are all on the database in addition to all newly registered Companies and Business Names. Besides, the Registrar also maintains an electronic index (query analyser), which contains names of all registered entities only.¹²⁶ As such, when an application is received, it is sent to the Information System Unit where the database is situated for search. Search results are then provided in form of a computer print out. The search is aimed at ascertaining whether there is already an identical (**Re M. McCarthy & Co. (Builders) Ltd. (No. 2)**)¹²⁷ or similar name or the name is undesirable. If the name is suitable, it is registered by entry on the Register of Business Names. Before the Certificate is typed, the file is sent to the computer room for the name to be added to the electronic index. The Certificate is then issued and the file is again sent back to the Computer room for data entry.¹²⁸ The computerization of Name Clearance has in the process reduced the time it takes to do a search and provide a quick result to the applicant. While this is a positive development at PACRO, nothing is said about the clerks whose responsibility was to carry out manual identical or similar or undesirable name checks after the system was computerised. Were the clerks trained to handle the new jobs, retrenched or replaced by computer literate personnel? Most of the IT staff were deployed from the Central Statistical Office after the 1990 census.

Post Registration Changes: Section 8 of the **Registration of Business Names Act**¹²⁹ requires any changes in respect of registered particulars to be furnished with the Registrar within 14 days of their occurrence by filing Business Name Form VI. This is so in order that the Registrar may be able to keep track of the operations of Business Names. Without this provision it would not be possible to

¹²⁶ An interview of Mr. B.A. Katebe the Assistant Registrar PACRO November 2006

¹²⁷ [1976] 2 All E.R. 339

¹²⁸ Ibid

¹²⁹ Cap 389

keep up with changes such as addresses and physical location of business, actual active business names of the registered business names.

Annual Returns: Regulation 10 of the **Registration of Business Names Regulations 1998**¹³⁰ requires every business name to file an annual return not later than three months after the end of its financial year by filling Business Name Form VIII. This is one of the most abrogated regulations by Business Names. The lack of staff to ensure compliance and to prosecute the offending Business Names has compounded the problem. Thus the statistics on record of active Business Names (38 000) can be doubted as the true reflection of the total number of Business Names in operation. This is because the number of Business Names captured on registration is not authenticated by the inspection. That is the number Business Names that have include details of Business Names that have ceased to operate. It is important that PACRO enforce annual returns regulations in order to capture the true number of active Business Names.

Cessation of Business Name: Any firm or individual who ceases to carry on business has a duty to notify the Registrar within three months of the Cessation by filing a notice in a prescribed form called Business Name Form VII.¹³¹ There are no statistics and details of compliance on this regulation and PACRO has no capacity to enforce this regulation because of the shortage of inspectorate staff.¹³² Lack of funds to support the staff cannot be used as an excuse because through returns alone PACRO can collect K1 330 000 000.00 (One billion three hundred and thirty million

¹³⁰ Statutory Instrument No. 100 of 1998

¹³¹ Ibid

¹³² An interview of Mr. B.A. Katebe the Assistant Registrar PACRO November 2006

kwacha) per annum from the Business Names captured on the electronic database. An amount more than enough to remunerate the extra staff.¹³³

Fees Payable

a) Business Name Registration	-	K 80,000.00
b) Registration by body Corporate	-	K 105,000.00
c) Change of Name	-	K 105,000.00
d) Change of other particulars	-	K 65,000.00
e) Annual Return	-	K 35,000.00
f) Late filing of annual Return (Penalty)	-	K 70,000.00
g) Certification fee	-	K 15,000.00
h) Issue Copy Certificate	-	K 30,000.00

The Minister responsible only reviews fees through issue of a Statutory Instrument.¹³⁴

THE COMPANIES ACT, CAP 388

Types of Companies: There are three types of Companies under Cap 388. That is Private, Public and Foreign Companies. Under Private Company Category are an addition of companies namely, Private company Limited by shares, Private Unlimited Company and Company Limited by guarantee.

Procedure for Registering a Foreign Company in Zambia: Applicant lodges certified copies (from country of origin) of Companies Charter or Memorandum and Articles of Association together with Application for Registration as a Foreign Company, which is obtainable from the Companies Registry at a minimal charge. The Registrar issues a Certificate of Registration after being satisfied that the application satisfies all the requirements.¹³⁵

¹³³ This amount is an estimate from the 38 000 registered Business Names (as given by Mr. Katebe) not taking into account the number of defunct or non operational Business Names.

¹³⁴ Ibid

¹³⁵ Cap 388 Sect 245

LOCAL COMPANY INCORPORATION PROCEDURE

Applicant submits a letter to apply for name clearance: If the name is available, they are advised through a letter of acceptance by either postal service or they personally collect the letter from the registrar. Applicants then buy an application form from the cashier called "Application for incorporation as a Company Limited by Shares"¹³⁶ or as the case may be. Other forms and documents that accompany the application are:

Proposed Articles of Association, if any, these being optional.

Statutory declaration of compliance that the requirements of the Act in respect of incorporation and of matters precedent and incidental thereto have been complied with (Companies Form 11)¹³⁷ sworn before a commission for oath;

A signed consent from each of the persons named in the application as a Director or Secretary;

Declaration of compliance with Minimum Capital (Not applicable to Company Limited by guarantee) sworn before a Commission for Oath (Companies Form 55)¹³⁸;

A declaration of guarantee by each guarantor (Limited by guarantee Company);

The Act does not make it obligatory to register Articles of Association at incorporation, and if a company is incorporated without Articles, the Standard Articles in the Companies Act are deemed to be the articles of a company. The Standard Articles cease to apply when the Company files its own copy of articles. Further the Zambian Companies Act has dispensed with the Memorandum of Association and issues as to the objects of the company are indicated in the application for incorporation.¹³⁹ Upon lodgment of relevant documentation and payment of relevant fees, of course after the Registrar is satisfied that the application meets all the requirements, the company is entered

¹³⁶ Sect 6 – 12 Cap 388

¹³⁷ The Companies (prescribed forms) Amendment Regulations No. 30 of 2005

¹³⁸ Ibid

¹³⁹ Form II Companies (prescribed forms) Amendment Regulations No. 30 of 2005

in the Register of Companies. The Same procedure as for business names as regards indexing and data entry is followed.¹⁴⁰

Certificates Issued: In respect of Companies Limited by share, three Certificates are issued, namely:

- a) Certificate of Incorporation;
- b) Certificate of Share Capital;
- c) Certificate of Minimum of Capital.

Certificate of Minimum Capital is only issued where a company furnishes the Registrar with a declaration that subscription to the minimum value of K50 000.00 (Private Company) or K1 000 000.00 (Public Company) has been paid to it.¹⁴¹

Minimum Authorised Capital for various types of Companies¹⁴²

- | | |
|--------------------------------------|----------------------|
| a) Private Limited liability Company | - K 5,000,000.00 |
| b) Public Limited liability Company | - K 50,000,000.00 |
| c) Bureau De Change | - K 250,000,000.00 |
| d) Finance & Insurance Company | - K 500,000,000.00 |
| e) Bank | - K 1,000,000,000.00 |

Post Incorporation Requirements: All Companies are required by law to comply with the requirement to file annual returns and notices of any changes that occur during the life of a company.

Annual Returns are supposed to be filed three months after the end of the financial year or one month after the Annual General Meeting (AGM)¹⁴³. Failure to comply attracts a penalty of K

¹⁴⁰ An interview of Mr. B.A. Katebe the Assistant Registrar PACRO November 2006

¹⁴¹ Ibid

¹⁴² Op cit

¹⁴³ Sect 138 Cap 388 of the Laws of Zambia

145,000.00 on top of the normal fees. The same penalty applies on other statutory documents if filed later than the stipulated time¹⁴⁴.

Closure of Dormant Companies: The Registrar may initiate closure of Companies on establishing that a particular company is not carrying on Business by invoking the provision of **Section 361 of the Companies Act**¹⁴⁵.

Fees Payable:¹⁴⁶ Some of the fees payable are as follows:-

On Incorporation of a Private Limited liability Company, fees are calculated at 2.5% of the authorized Capital plus K 120,000.00 broken as follows:

a) Certificates of Incorporation	- K 30,000.00
b) Certificates of Share Capital	- K 30,000.00
c) Certificates of Minimum	- K 30,000.00
d) Companies Form 5	- K 10,000.00
e) Companies Form 11	- K 10,000.00
f) Sealing	- <u>K 30,000.00</u>
Total	K 120,000.00

a) Annual Returns	- K 40,000.00
b) Annual Return Public Company	- K 60,000.00
c) Late Filing fees (Penalty)	- K 145,000.00

Annual returns fees vary depending on the nature of the Company. Public companies and financial institutions attract higher filing fees. For example, annual return for a public bank is K 750,000.00 and K 500,000.00 for a private bank¹⁴⁷.

¹⁴⁴ Op cit

¹⁴⁵ Cap 388

¹⁴⁶ Ibid

¹⁴⁷ An interview of Mr. B.A. Katebe the Assistant Registrar PACRO November 2006

THE COMMERCIALISATION, ORGANISATIONAL STRUCTURE AND LEGISLATION GOVERNING BUSINESS REGISTRATION IN ZAMBIA

Introduction

The Patents and Companies Registration Office (PACRO) is an Executive Agency of the Ministry of Commerce, Trade and Industry (MCTI), which is charged with the responsibility of facilitating and regulating the registration of commercial and industrial property rights. Prior to its commercialization, it was a Department under the same Ministry and was known as the Department of Patents Trade Marks, Registered Designs, Companies and Business Names.¹⁴⁸ It has successfully undergone most of its commercialization process, save for the legislation aspect that is the statute establishing the institution. The Bill to be called The Patents and Companies Registration Office Act is however, ready for presentation to Parliament. The office has also accomplished much of the computerization program with about 60%- 70% of the records kept electronically.¹⁴⁹

Functions:¹⁵⁰ The main functions of PACRO are as follows:

- a) To run a legal system for registration and protection of commercial property such as the registration of Companies, Business Names and the registration of Mortgages and charges and matters incidental thereto on the one hand, and the protection of industrial property, namely patents, trade marks and registered designs on the other hand.
- b) As a legal depository of information on registered commercial and industrial property rights. Various stakeholders and the government in decision-making and as leverage from which to monitor economic performance use the information.
- c) Collection of Revenue in order to contribute to the Central Treasury and for its own operations.

¹⁴⁸ An interview of Mrs. A. M. Banda-Bobo the Registrar PACRO November 2006

¹⁴⁹ Op cit

¹⁵⁰ Ibid

Statutory authority for executing the above functions is derived from the five statutes, which the office administers. These are:

- a) The Companies Act, Cap 388;
- b) The Registration of Business Names Act, Cap 389;
- c) The Patents Act, Cap 400;
- d) The Trade Marks Act, Cap 401;
- e) The Registered Designs Act, Cap 402.

COMMERCIALISATION OF PACRO

Background: In 1991, the Government of the Republic of Zambia embarked on a policy of Public Service Reform Programme (PSRP), which aimed at restructuring various government Ministries as a way of downsizing the number of departments directly part of main Ministries functions. The government therefore, identified 17 departments, PACRO inclusive, that were capable of independent existence financially and operation wise. This would include the Civil Service staff respectively being removed from the government payroll and granting such departments autonomous existence.¹⁵¹

Pre-Commercialisation Stage: Subsequently, Cavmont Merchant Bank and the Nordic Consulting Group (NCG) and the department itself were at various stages commissioned to look at modes of hiving-off and the long-term sustainability of such an arrangement.¹⁵² The consultants produced a report, which had 3 scenarios, namely: maintenance of the status quo, privatization and commercialization.¹⁵³

¹⁵¹ An interview of Mrs. A. M. Banda-Bobo the Registrar PACRO November 2006

¹⁵² An interview of Mr. B.A. Katebe the Assistant Registrar PACRO November 2006

¹⁵³ Ibid

Commercialisation: Following Cabinet approval and the issuance of a Treasury Authority on restructuring of the Ministry of Commerce, Trade and Industry in July, 1995, the Technical Committee on Commercialisation of Government Departments constituted by Government and, chaired by the Permanent Secretary, Management Division, called a meeting in October, 1997 to review the Cavmont Report and to give the direction on the way forward.¹⁵⁴

Committee Recommendations: The Committee recommended that the department be commercialized with the responsible Minister retaining the role of Overseer. The decision therefore, entailed the following implications:

- a) Autonomous administration of the office and finding its own accommodation;
- b) Retention of income;
- c) De-linkage of staff from the Civil Service;
- d) Come up with organization structure and remuneration ranges;
- e) Giving staff the option of remaining in the Civil Service or to join the commercialized entity;
- f) Introduce legislation and amendments to reflect the new changes; and
- g) To come up with the modalities of commercialization and the implementation plan.¹⁵⁵

Purpose of Commercialisation: The objectives for commercializing PACRO included the following:

- To relieve Government of the cost of enforcement of the Commercial and Industrial Property Laws.
- To enhance and ensure corporate governance and compliance with Company Law
- To provide an efficient transparent qualitative, and cost effective service to the public; and
- To attract, retain and develop a cadre of highly professional staff committed to quality, customer care and productivity.

In addition to the above, the institution was to continue being responsible for:

¹⁵⁴ Ibid

¹⁵⁵ The Cavmont Report 1995

- (a) Discharging functions connected with or incidental to the five statutes mentioned above;
- (b) Supporting and supplementing activities of other government agencies;
- (c) Providing Government with the leverage from which to monitor economic performance; and
- (d) Ensuring Zambia's adherence to various conventions and treaties on protection of industrial property rights.¹⁵⁶

What Has Been Done

- a) The office has acquired its own office accommodation from its own resources, saving the institution from paying rentals;
- b) The office has and continues to carry out staff orientation in order to keep staff abreast of performance expectations of the commercialised office and to develop a business culture including customer care, communication skills, delegation, financial appreciation, etc;
- c) All existing staff were taken on by PACRO and placed on a three year contract which most of the staff served and paid gratuity on completion;
- d) In order to strengthen staff understanding of their new roles in a commercialized entity, new job descriptions for all positions were developed with a view to enhancing accountability and institutionalizing performance management systems;
- e) Since staff of the department would no longer enjoy Civil Service Conditions of Service, a **new code of Conditions of Service and Grievance procedure** was drawn up and adopted;
- f) The office has since developed its own financial regulations and accounting procedures and employed qualified accounting staff in order to enhance financial accountability, and
- g) PACRO has since developed its five-year Strategic Plan whose objectives *inter alia* are to decentralize the operations of the office. So far a Regional office has been opened on the Copperbelt Province; another one is due to open in the Southern Province before the end of this year. The institution has also redesigned its mission and goal statements.¹⁵⁷

Computerisation: In an effort to provide an efficient and quality service to the clients and stakeholders, PACRO embarked on computerization of its Companies Registry. So far, well over

⁵⁶ An interview with Mr. B.A. Katebe the Assistant Registrar PACRO November 2006

⁵⁷ Ibid

32,000 and 38,000 Companies and Business Names respectively have been captured on the electronic database. The computerisation of the office has greatly enhanced the generation of information to the general public and other stakeholders such as the Bank of Zambia, Business organisations, Zambia Revenue Authority, Central Statistical office, Local and foreign investors, Banks, The Pension Scheme Authorities, Law Enforcement Agencies, etc. all of which need the information for various purposes.¹⁵⁸

Structure and Internal Roles and Legislation: In order for PACRO to achieve its objectives set out in the strategic plan, it has been constituted into departments and units representing **core** and **support** functions, with the Registrar being the Chief Executive officer and assisted by two Assistant Registrars for Commercial and Industrial Property. These are:

- a) Administration;
- b) Finance;
- c) Information Systems;
- d) Commercial;
- e) Industrial Property;¹⁵⁹

CORE FUNCTIONS

Commercial Department: This is the Department, which is responsible for administration of the Companies Act, Cap 388 and the Registration of Business Names Act, Cap 389. It offers services for registration of Companies and other matters incidental thereto under the former Act and the registration of sole proprietorships and partnerships under the latter Act.¹⁶⁰

⁵⁸ Ibid

⁵⁹ An interview with Mr. B.A. Katebe the Assistant Registrar PACRO November 2006

⁶⁰ Ibid

Industrial Property Department: This department is responsible for administration of three statutes namely, The Patents Act, The Trade Marks Act and the Registered Designs Act, Cap 400 – 402 respectively. Which are the core functions of the department.¹⁶¹

Administration and Finance: The department's main role is to collect revenue and provide support services for the smooth running of the organization. Under here fall the Human Resource Unit, Stores, Procurement, Legal and Transport portfolios, and finance.

Information Systems Department: The department's role is to organize and manage the institution's information resource electronically for easy retrieval.¹⁶²

Legislation: The year 1994 saw the repeal of the old Companies Act, Cap 686 and the advent of the current Companies Act, Cap 388 of the Laws of Zambia. The new Act, which came into being in June 1995 introduced some changes in the national system for company incorporation. However, other than the Companies Act and the Registration of Business Names Act, which under went a complete repeal, the other three statutes governing the administration of Industrial Property, still remain outdated.¹⁶³

CHANGES THAT HAVE RESULTED FROM ACHIEVEMENTS

Improved Service Delivery: Among the positive changes experienced from the various achievements since commercialization is the improvement in quality of service delivery with regard to incorporation of Companies and registration of Business Names. Prior to this, a person setting up a company had to submit to the Registrar Memorandum of Association in addition to Articles of Association, which proved to be too cumbersome. Under the new Act however, the Memorandum of

¹⁶¹ An interview with Mr. B. Mwalongo the Assistant Registrar (Industrial Property) PACRO November 2006

¹⁶² An interview with Mr. B.A. Katebe the Assistant Registrar PACRO November 2006

¹⁶³ An interview with Mr. B. Mwalongo the Assistant Registrar (Industrial Property) PACRO November 2006

Association has been dispensed of and so has been Table A the latter having been replaced with Standard Articles contained in the Act. One can incorporate a company by filling an application for incorporation only.¹⁶⁴

Further, despite the increase in the number of clients per day, there has been comparatively an improvement in service delivery partially due to the computerization, which has reduced the lead-time it takes to provide a service. Currently, the longest period, which the office can delay an application in a queue if such an application, does not have complications that may require the applicant's attention is 48 hours from the time of lodgment.¹⁶⁵

Lessons Learnt and Conclusion: Prior to commercialization, the institution's budget was part of its parent Ministry. Funding was very difficult to acquire even for the very essential basic necessities and programmes to enable it raise revenue for the Central Treasury.¹⁶⁶ The biggest lesson learnt, perhaps in upgrading efficiency and effectiveness of PACRO through commercialization is that in the new environment, the office with the limited financial autonomy at its disposal has the capacity to enhance the quality of its service delivery without any Government funding. So far, **PACRO has been subsisting on its own resources and has never received any financial help since 1998**¹⁶⁷.

In conclusion, the achievements and challenges experienced by PACRO in its commercialization process have and are being used elsewhere by the Government to commercialise several other departments not yet commercialized. It is a real success story.¹⁶⁸

¹⁶⁴ Form II Companies (prescribed forms) Amendment Regulation No. 30 of 2005

¹⁶⁵ An interview with Mr. B.A. Katebe the Assistant Registrar PACRO November 2006

¹⁶⁶ Ibid

¹⁶⁷ Op cit

¹⁶⁸ Ibid

Chapter Four:

Recommendations on the Companies Registry

Introduction

In this chapter I shall identify and recommend improvements to the now executive PACRO. Let us look at some critical areas of improvement or rather those that would help PACRO to rise to the demand for service and results.

Compliance: Mr. Katebe, the PACRO Assistant said, “The major problem faced by PACRO in administration of the Companies and The Registration of Business Names Act, is lack of compliance by the business community. Not all Companies and Business Names comply with the regulation on the requirement of annual returns. Abrogation of the requirement of filing in annual returns is the most notorious among regulations that are not complied with. Among others is the period given in which to file changes of particulars. However, to remedy the situation, PACRO has embarked on sensitization campaigns using both the print and electronic media to remind the business community about their need to comply with the law”. “This is in spite of the fact that PACRO undertakes physical inspections of business premises to ensure compliance”, Mr. Katebe said.

The Obvious answer though not the only answer is expanding the inspectorate department and creating a department of prosecutors. The inspectorate department should have qualified accountants and the department of prosecutors should have lawyers deployed. Leaf can be taken from the progress that has been made from Zambia Revenue Authority (ZRA) and The Immigration office which both have prosecutors and inspectors who ensure compliance of the respective acts they

enforce. The proposed Patents and Companies Act¹⁶⁹ should provide legislation for inspectors and prosecutors. In this way companies can know the mandate of both the inspectors and prosecutors.

Among the functions of the Companies' Registry should be included the financial monitoring of companies. As one of the first contacts that companies have, especially foreign companies with the country, the companies registry, should at least be the starting point of ascertaining the financial character of companies. For example at the Holiday Inn was a famous restaurant, the Makumbi restaurant, that was frequently patronized by most Lusaka residents and visitors. Surprisingly, it was suddenly closed and its general local employees were left unpaid for salaries in arrears and other perks like gratuity. Its management clandestinely left for their country of origin.

Surely, someone must have noticed irregular financial activities such as transfer of huge profits to countries of origin by the foreign management of the restaurant. To close this gap in our laws, example can be drawn from the American Financial Regulators, who in their latest work have protected the unsuspecting stock investing public from fraud by Dell Computers.¹⁷⁰ In Zambia, this may be done by way of making it mandatory for public companies to submit annual balance sheets and quarterly trial balances to the Registrar, which can be compared with what companies declare on the stock exchange in case of a public company and what exists in the audit reports of the public companies. A penalty should be levied for all late submissions. To ensure efficiency, a desk can be created under the PACRO Registrar's office to receive such submissions at a fee of course, to remunerate the same office.

¹⁶⁹ Which I was not privileged to because it is yet to be in bill form after cabinet approves that it be taken to parliament

¹⁷⁰ BBC Business News 16th November 2006. (Dell Computers was for a long time the leading world distributor of computers but are now second to Hp computers. In trying to win back their market have used all methods even hook and crook including fraud on the stock exchange)

In addition it should be mandatory that foreign companies should have their accounts audited by indigenous accountants or accounting firms upon whom the duty should lay to report any financial irregularities to the Registrar and other relevant bodies. Parent Companies of subsidiaries in Zambia should sign a mandatory addendum of at least up-to 50% responsibility for liability created by their subsidiaries in which should be included also an optional commitment to supervise such subsidiaries. This will help create a double supervisory system. That is the Companies Registry on the one hand and the Parent Company on the other.

Corruption: PACRO as an executive agency of the Ministry of Commerce has a point of service, at which point corruption was notorious¹⁷¹, the Vice Chairperson of the Anti-Corruption Commission ACC, Christine Mulundika, pointed out during the launch of the Policy on Corruption. At the same launch on corruption the Vice President of the Republic of Zambia Mr. Rupiah Banda said, ‘corruption has significantly eroded the capacity of the state to deliver socio-economic development to its citizens’. He said the absence of a national policy on corruption meant that there had been no guidelines and no systematic ways of addressing the scourge in Zambia since independence. He said that according to the national baseline survey report, **80 per cent** of households and public officials in Zambia rated corruption in the public sector as a very serious problem, **67 per cent** of managers rated it as the most burdensome obstacle to business in Zambia’¹⁷².

He said these statistics were worrisome for a country like Zambia, which had poor people in the majority. Mr. Banda said the need for a corruption prevention policy could not be over emphasized adding that government would therefore ensure that the policy is implemented. He said that the policy entailed that both public and private bodies would be required under the provisions of the Anti-Corruption Commission (ACC) and Cabinet office to form **integrity committees** whose mandate would be to design and execute programmes that were

¹⁷¹ The Zambia Daily Mail, Thursday, November 23, 2006. Volume 10 No. 278

¹⁷² Ibid

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¹⁷¹ The Zambia Daily Mail, Thursday, November 23, 2006. Volume 10 No. 278

¹⁷² Ibid

aimed at preventing corruption in their respective organisations.¹⁷³ Though Zambia has ratified the African Union (AU) convention on the prevention and combating of corruption and the United Nations convention against corruption. Chief government spokesperson, Vernon Mwaanga, said the ratification of the two protocols meant that Zambia had now ratified all the conventions at regional and international levels. Mr. Mwaanga stated that it would now make it easier to build partnerships between the government and other stakeholder in the fight against corruption¹⁷⁴. However as Member of Parliament for Kabwata Constituency Given Lubinda stated that ratification was not enough, the convention needed to be taken to parliament for domestication¹⁷⁵. With the two conventions PACRO can (on an international level, incase of foreign companies) also take advantage and monitor corruption in conjunction with relevant anti-corruption bodies such as the Anti-Corruption Commission (ACC). The advent of the two conventions means that the law regulating corruption has been internationally harmonized. Harmonization of laws removes the conflict of laws on the fight against corruption, inclusive of corruption by foreign companies that may claim not to be amenable to Zambian law on account of an arbitration clause that ousts the jurisdiction of the Zambian courts, in a contract agreement.

Companies Registry as an executive body detached from government now than ever should be free of corruption. To that end, in keeping with the recommendation by the Vice President, the Companies Registry should form an **integrity committee** to design and execute programmes to prevent corruption.

Environmentally Friendly Investment: Employment in the West is a major parameter used to measure economic performance of any government. This is why the United States of America has decided to sign the Kyoto Protocol¹⁷⁶ (an international effort to control global warming) on green

cit.

Times of Zambia Thursday, January 11, 2007 No. 13 754

Zambia National Broadcasting Corporation, 1900hrs main news Thursday 11, 2007

The Kyoto Protocol sets minimum internationally accepted amounts of emission or production of pollution into the environment by industries and companies. The Kyoto Protocol is an international effort to control global warming. The Protocol is relevant to Zambia to be able to regulate and only allow companies to produce manageable amount of emissions. If the limit of worst production is not known it would be difficult to regulate, prosecute and convict culprits that cause the worst harmful to the Zambian environment.

house emissions for fear that many American citizens will loose jobs¹⁷⁷. This is so because industries will have to down size their annual production, which would need less manpower, to meet the minimum pollution emission allowed by the Kyoto Protocol. For this reason it is important for the Environmental Council of Zambia to second an Environment officer(s) to PACRO. PACRO being one of the first stops of both local and foreign investors, the seconded officer(s) would be able to monitor and receive compliance commitments.

Reduction of unemployment levels is one of the Millennium Development Goals (MDGs), which should be achieved by 2015.¹⁷⁸ In order to improve the economy by way of employment, it should be mandatory for companies to include the number of Zambian citizens they have in permanent and contractual employment in the annual returns. In addition such information should be included in the annual report of the Companies Registry. That is in addition to all these recommendations the companies registry should annually publish its findings, annual returns and its activities and achievements in a bulletin and on a website. This is important to ensure that its transparency is guaranteed.

PACRO as an executive agency of the Ministry of Commerce must have a **Board of Directors** and a **Steering Board** made up of senior ministry of commerce personnel and independent members from the private sector and supported by PACRO Directors. The Steering Board should meet quarterly to provide advice on the governance of the agency, in particular its corporate plan, targets and performance. Its composition should reflect an aim of drawing on best practices from the public and private sectors.

¹⁷⁷ <http://www.bbc.com> achieves

¹⁷⁸ Interview of Mr. L. Hikaumba by ZNBC; ZNBC 1900hrs news 1st January 2007

Customer Satisfaction Surveys should be carried out by PACRO in order to get public opinion on its (PACRO) performance, duties and on the products services PACRO offers. To do this in a structured manner PACRO should develop a quarterly Customer Satisfaction Survey. This survey should monitor the performance against a number of key areas and provide the public with an opportunity to make opinions, good or bad, known. In this way PACRO can be able to improve its services.

Events; Each year PACRO should organise or attend a variety of events to support and advise businesses. This should include attending business-focused exhibitions throughout Zambia and organising seminars to support new directors and secretaries or simply, in place of seminars, organise PACRO Information Days. PACRO officers should travel throughout Zambia to:

- promoting PACRO services
- advising businesses on how to meet their obligations under the Companies Act
- to provide opportunities to meet and discuss issues with staff in provincial and district offices.

All such events should be advertised well in advance through the print and electronic media. Granted these events have budget implications, however the compliance rate would definitely be improved by such events. Sensitization is an alternative to prosecution and punishment to ensure compliance of victims and would be offenders. Either, sensitization events or prosecution and punishment can promote compliance.

Library: PACRO should maintain a Library that can provide access to all published material, in a single convenient, easily accessed location. The materials should be divided into separate topic areas:

- Corporate Information - which contains information on Annual Accounts and business plans for PACRO.

- Policy Documents - containing information on the internally and externally focused policies maintained. If some of the materials could be translated into local languages to give equal opportunity to Zambians it would go a long way.
- Guidance - containing all published guidance booklets.
- Forms - providing easy access to a full list of PACRO online forms.
- Register Magazine Archive.
- Miscellaneous - this area should contain general published information not covered by the other headings.

Statistics and Surveys: The statistical surveys should contain monthly statistical reports on the activities within the company register, and on the workload and performance PACRO. The information to be disseminated through the statistical surveys should include, for example, the information in appendix ii and I.¹⁷⁹

Supplying PACRO: information on how PACRO can be supplied should be posted on the PACRO website so that it is done in a transparent manner. The information on the website should include the total amount or its estimate in the alternative that PACRO spends annually on goods and services supplied by third parties and the range of products such as stationery to highly technical equipment and services. Such information should also be advertised in the print and electronic media to capture the population that is not computer literate. In this way, not many shall be prejudiced especially the computer illiterate. How suppliers are selected and pre qualifications to be met by any intending supplier for instance:

- One must accept Zambian law as the governing law of any contract, and accept the jurisdiction of the Zambian courts.
- One must accept PACRO conditions of contract.

¹⁷⁹ The statistics in the appendix I and ii are the Nov 2006 Companies House Registry publications of the UK.

- One must have a company policy statement covering the health and safety and environmental aspects of your operations, which meet current legislative requirements.
- One's company must have no convictions for offences, relating to fraud, corruption, or other major breaches of the Companies Act.

One must also have to meet additional criteria dependent on the particular goods or services that PACRO needs. These can include:

- details of ones financial standing
- technical competence
- delivery record
- quality assurance procedures
- safety performance
- environmental performance
- capacity.

PACRO may also wish to inspect facilities, examine samples of ones work and take up references from ones customers. Any information that one gives PACRO will be treated confidentially. If one is interested in becoming a pre-qualified supplier such a one should complete PACRO's supplier pre qualification questionnaire. Deliberately, PACRO should have a policy statement on procurement to this effect:

“In PACRO's procurement process all staff are bound by a strict code of professional conduct. In particular, they will not accept gifts or lavish hospitality. We observe commercial confidentiality at all times, and act impartially and fairly in all our dealings”.

Other details like contacts can also be added to both the website and other hard copies of publications.

Chapter Five:

Recommendations on the Companies Act (1994) and Conclusion

The Memorandum of Association: Conspicuous of Cap 388 is that it does not give any requirements for the Memorandum of Association as was earlier required. This means that the need for a memorandum has been done away with. The Memorandum of Association was a document of great importance in relation to outsiders. It stated very clearly what the company was authorized to do and had six main clauses to show the company's name, registered office, objectives, liability, capital and what type of associations it can make. The Memorandum of Association has been replaced by a memo, which should contain details as are listed in section 6 of Cap 388.

The use of the term 'may' in section 7 which deals with the Articles of Association makes it optional for a Company to have articles as opposed to making it mandatory. This means it is now possible for a company to trade in all sorts of businesses as it does not have articles to restrict it as a company was restricted in **Ashbury Railway Carriage & Iron Co v Riche**¹⁸⁰ where it was held that a company could not perform a contract outside its objects clause. This is the *ultra vires* rule and is not applicable in Zambia. Making the Articles of Association optional and taking away the memorandum will allow a company to enter any sort of transaction encouraging fraud and formation of companies that are shams. Though this position is not supported by evidence, the true repercussions of dispensing with the Memorandum of Association are yet to surface.

A Company can find it easy to maintain a monopoly by using the term "and general dealers" on the memorandum of association which gives companies leverage to deal in any business even business

¹⁸⁰ [1875] L.R. 7 H.L. 653

that might not even be incidental to or consequential to the objects authorised by the memorandum. The optional requirement of a memorandum as phrased in form I¹⁸¹, is not in the recommendation of the spirit of case law on memorandum of association. In the **J P. Karnezos v Hermes Safaris Limited**¹⁸² Sakala J as he then was recommended and said “I entirely agree with the suggestion of the Jenkins Committee (1949 - 1962) recommending the virtual abolition of the doctrine and protection to third parties who might have acted reasonably in the circumstances. I hope that any future changes to the Companies Act will take into account the hardships caused by the doctrine of *ultra vires* and make provisions to modify it”.

Facts in the Karnezos case were that, the plaintiff entered into an oral agreement with one Papadopoulos the general manager of the company. The man according to the plaintiff was deported before he made his claim. Document one confirming, the deal was written by an official of the defendant company, on the company's headed paper. The plaintiff was cheated into entering into this agreement by believing that he was dealing with the company when the official he dealt with had no power to purchase burnt maize for the company. The plaintiff claimed from the defendant a sum of money for goods sold and delivered. By an oral agreement with the manager of the defendant company, the defendant agreed with the plaintiff to purchase burnt maize. Under the objects clause of the memorandum of association of the company the goods the company could buy did not include burnt maize. It was contended by the defendant that the purchase of the burnt maize was not within the power of the company (**Re German Date Coffee Company**)¹⁸³.

Applying the law as I find it, Sakala J said, ‘I have to regrettably hold and I so hold that the oral agreement entered into between the plaintiff and the defendant company was *ultra vires* and void on the ground that the company had no power to purchase the burnt maize. Accordingly, I enter judgment in favour of the defendant company.

¹⁸¹ Cap 388

¹⁸² [1978] ZR 197 (HC)

¹⁸³ [1882] 20 Ch. D. 169

I do not agree with Sakala J's recommendation that the *ultra vires* doctrine should be abolished; in that case he supported his recommendation in order to protect innocent people like the plaintiff "Karnezos". The plaintiff, Karnezos, in my view is already protected, unless the law had taken away the right of access to a company's memorandum of association from the Companies Registry. My recommendations on this part fall in two parts:

- (a) The objects clause should be a mandatory requirement to be filed in by all companies as a way of declaring to the public that the company has a clearly thought out plan of business. However there should be a distinction between small companies and large ones (small companies to include such companies that have a net turnover of K200 million or less per annum). Thus the form I for small companies should read; the articles do not restrict the business the company may conduct, however the principle business(s) of the company are... and any other business incidental and consequential to the principle business. For the large companies the memorandum of association should be mandatory and be observed as in the **Karnezos case**. Thus the non-restriction of conduct of business for small companies should be such as are incidental and consequential to the principle business.
- (b) That **sect 22**¹⁸⁴ should apply to large companies in the sense of **Ashbury Railway Carriage & Iron Co v Riche**¹⁸⁵

Parallel Impugning Legislation: Parallel impugning Legislation dampens the spirit of the Companies Act. For example the **Zambia Development Agency (ZDA) Act**¹⁸⁶, which has repealed the investment Act 1994,¹⁸⁷ gives a lot of discretion to the minister in terms of incentives to give

¹⁸⁴ Cap 388

¹⁸⁵ [1875] L.R. 7 H.L. 653

¹⁸⁶ Statutory Instrument no. 11 of 2006

¹⁸⁷ Sect 84 ZDA

that meet a certain threshold.¹⁸⁸ It is at such points of service that corruption ensues.

it is left to the minister and however he sees fit to give incentives, it difficult to limit such
n with any provisions of Law. This would limit the work of the inspectors and prosecutors
sted in chapter 4. Therefore the **ZDA**¹⁸⁹ should regulate even the incentives to be given to
s and such incentives should be subject to inspection and prosecution on failure to comply
law by relevant officers.

company's act shows that we are serious with development and company law, improving
are of our people and eradicating poverty. Otherwise we as a country are seen as
nists who have no regard for national development but selfish gain and easily bribable. Laws
investors first look at before investing into a country. However if such laws are arbitrary
s tend to overlook them and negotiate directly with the government of the day through the
Ministry and Minister in charge. Comprehensive laws go a long way to show that we as
ns are looking for serious investors thus deterring international swindlers like Galedoo¹⁹⁰.

the creation of a company necessarily affects the personal tax position of its individual
s, in some cases increasing their tax burden. Sometimes the opposite is true, that is,
g the opportunities for reducing the incidence of taxation. The constant concern of the
Revenue Authority is naturally to eliminate such opportunities. This is true, at least is so far
main aim of incorporation is tax avoidance rather than a legitimate business purpose. From
time for reasons of fiscal policy, tax legislation disregards the separate legal personality of
ies. The courts should be prepared to disregard the separate legal personality in the case of

4 – 68 Part VIII

ory Instrument no. 11 of 2006

oo was an international con-man that duped Dr. Kaunda, first President of the Republic of Zambia that he could
of natural grass, yet that was a front he (Galedoo) created to mine precious metals and dubiously externalize
of Zambia.

er over-liberal schemes of tax avoidance without any necessary legislative authority. In such
s the courts should have the discretion to dismiss the company as a mere sham (**Re Bugle Press**
. ¹⁹¹ Legislation of tax fraud to clearly enhance the courts' power to lift the veil in cases of fraud
ot be over emphasized. Given the fact that it is tax that is the main source of revenue for
ernment it is expedient that that Parliament make tax laws to cure the mischief of tax fraud.

an offence for any citizen to make a profit without paying tax. Were an individual operates a
ll Company and wishes to avoid the cost implications and the hassle of determining how much
his/her company is obliged to pay can pay what is known as presumptive tax. As the name
gests, this is tax paid on the basis of an assumption of the annual takings of a Small Company.

Corporate Torts: In the common law jurisdiction there are isolated cases were the courts have used
remedies to pierce the corporate veil. However there are many cases in the United States and
ada. A tort may be inducing breach of contract, deceit and conspiracy; these torts have been used
recent cases. **In British Columbia court of appeal in BG Preeco 1 (Pacific Coast) Ltd. v Bon**
et Holdings Ltd. ¹⁹² the court held that the **Salomon case** was to be adhered to, but there was a
ct remedy in deceit against principle directors and shareholders where they had misled the
ntiff by switching the name of the company with assets to a shell company. This was clearly an
ve effort by the directors and shareholders to abuse Salomon's principle as a shield to effect
eit against the plaintiff. There would appear to be great potential here for undermining the venous
Salomon's principle and this perhaps reflects the fact that its application in tort area has always
n less justifiable than in contract. Many tort victims have no choice in the selection of tort feisor.
re domination and under capitalisation seem particularly relevant to presume the veil. In view of

[1960] Ch 270
[1989] 60 DCR (4th) 30

the growing sophistication of commerce, tortfeasors that would warrant lifting of the veil should be included in the Companies Act.

The Companies Act refers to many a legislation such as the Securities Act,¹⁹³ the Immigration and Deportation Act,¹⁹⁴ the Investment Act now repealed by the Zambia Development Agency Act,¹⁹⁵ the Mines and Minerals Act,¹⁹⁶ the Tourism Act,¹⁹⁷ the Income Tax Act¹⁹⁸ and many more other Acts whose licensing of an entity is dependant on whether such entities have been registered under the Companies Act. The law relating to companies is clear enough to establish its place and relationships with the said Acts. For this relationship to be fully appreciated, the Zambia Law Development Commission together with the Registrar of Companies must come up with a handbook on business law like one used in the UK at the Companies House for easy reference and enlightenment for all that use the law alike.

Conclusion

Being in a third world country and writing on company law, I do so write with a passion to contribute through the law, to the economic emancipation of this country from poverty. 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 a Companies Act and the Companies registry is critical to the stable and steady growth of the private sector. It is through the private sector's steady growth that citizens will be absorbed in to employment; when citizens are employed they have financial empowerment to make the most of their lives and that of their dependants.

Cap 354 of the Laws of Zambia
Cap 123 of the Laws of Zambia
Stat Instrument no. 11 of 2005
Cap 213 of the Laws of Zambia
Cap 155 of the Laws of Zambia
Cap 323 of the Laws of Zambia

have looked at the tenets of an ideal Companies Act. Bearing in mind that Zambia's economy is a minor and developing economy there is need for a separate Companies Act couched in simpler language to the ordinary Zambian. My proposal is that a companies act be enacted and be called the 'Small Companies Act' to govern companies that have a net turnover of two hundred million (K200 000.00) and less per annum. Such a move would help many Zambians who need expert advice from a Lawyer to understand the current Act. The Small Companies Act should operate parallel to the principle Companies Act and in case of a lacuna in provisions of the Small Companies Act the principle Act should be consulted. However this consultation should not abrogate the vested rights of all Companies but promote them.

The Small Companies Act can operate in simple and clear language on tax for a reasonable average Zambian. (In fact that should be the spirit of the language of the Small Companies Act). Zambians prefer to operate their businesses informally because of the fear of tax and the complication of procedures with Zambia Revenue Authority (ZRA). However this can be made simpler by replacing 'Presumptive Tax' which tax is less complicated in both procedure and calculation. To be comprehensively understood, citizens need to be verbally sensitized and encouraged to pay tax. Most of the fear of paying tax is due to a lack of understanding of the legislative requirements for the fulfillment of tax obligations. In fact, tax regulation and obligation are such as do not encourage compliance.¹⁹⁹

The International Monetary Fund (IMF) on the 10th of January 2007 was taken to task over its tax proposals to government, because it proposed a tax scheme that would over burden the already overburdened Zambians. One of the proposals made by the IMF was that government should increase tax

Times of Zambia Thursday, January 11, 2007 No. 13 754

on land rates and introduce VAT on mealie meal²⁰⁰. The formal working class of whom government has found it easy to tax through their employers would mostly feel the impact. Government the spirit of the promotion of entrepreneurship, should first enact friendly entrepreneurship laws, such as the Small Companies Act and tax laws that are inclusive proposals from a cross section of the citizens of Zambia. In this way government can create a new source of tax from the private sector that is admonished to pay tax through sensitization. IMF tax proposals have been rejected by the business community, trade unions and ordinary citizens.²⁰¹

For the foregoing reasons, that are the lack of understanding of laws on commerce, Zambia has most of its citizens alienated from contributing to the growth of the Zambian economy through the payment of tax from entrepreneurship and commerce. It is thus imperative to enact a Small Companies Act and a Principle Companies Act that is in the spirit of endeavoring to secure the most compliance in terms of returns and tax obligations.

Times of Zambia Thursday, January 11, 2007 No. 13 754
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**Monthly Statistics - Register/Compliance/Liquidations and Dissolutions
November 06**

Register size	England & Wales	Of which Public Companies	Scotland	Of which Public Companies	Great Britain	Of which Public Comp
Week ending						
05/11/2006 Total Register	2,294,510	12,323	129,012	454	2,423,522	12,777
12/11/2006 Total Register	2,294,054	12,316	129,182	456	2,423,236	12,772
19/11/2006 Total Register	2,297,498	12,315	129,312	455	2,426,810	12,770
26/11/2006 Total Register	2,298,430	12,299	129,512	456	2,427,942	12,755
03/12/2006 Total Register	2,302,859	12,291	129,791	454	2,432,650	12,745
05/11/2006 Active Register	2,104,935	11,003	117,908	381	2,222,843	11,384
12/11/2006 Active Register	2,107,700	11,004	117,967	383	2,225,667	11,387
19/11/2006 Active Register	2,109,969	11,001	118,205	381	2,228,174	11,382
26/11/2006 Active Register	2,113,555	10,997	118,306	381	2,231,861	11,378
03/12/2006 Active Register	2,115,418	10,987	118,540	379	2,245,324	11,366
05/11/2006 LLP Total Register	20,657		1,026		21,683	
12/11/2006 LLP Total Register	20,850		1,030		21,880	
19/11/2006 LLP Total Register	20,956		1,036		21,992	
26/11/2006 LLP Total Register	21,097		1,040		22,137	
03/12/2006 LLP Total Register	21,175		1,053		22,228	
05/11/2006 LLP Active Register	19,516		966		20,482	
12/11/2006 LLP Active Register	19,681		970		20,651	
19/11/2006 LLP Active Register	19,801		975		20,776	
26/11/2006 LLP Active Register	19,912		979		20,891	
03/12/2006 LLP Active Register	20,006		992		20,998	

Soft Compliance - % filed (not including LLP's)	England & Wales % compliant	Scotland % compliant	Great Britain % compliant
Accounts	95.0	95.3	95.0
Annual Returns	94.0	95.3	94.1
Both	90.1	92.0	90.2
Hard Compliance - % filed on time based on company sample of 100,000 (not including LLP's)	84.6	84.3	84.5
Accounts	61.3	62.3	61.4
Annual Returns	55.3	56.8	55.6
Both			

Week ending	England & Wales	Scotland	Great Britain
05/11/2006 Total Liquidations	257	15	272
12/11/2006 Total Liquidations	479	8	487
19/11/2006 Total Liquidations	317	16	333
26/11/2006 Total Liquidations	413	22	435
03/12/2006 Total Liquidations	326	10	336
Monthly total	1,792	71	1,863
05/11/2006 Compulsory Liquidations (Incl In above)	33	8	41
12/11/2006 Compulsory Liquidations (Incl In above)	169	5	174
19/11/2006 Compulsory Liquidations (Incl In above)	157	6	163
26/11/2006 Compulsory Liquidations (Incl In above)	172	13	185
03/12/2006 Compulsory Liquidations (Incl In above)	70	3	73
Monthly total	601	35	636
05/11/2006 Receivers Appointed	8	-	8
12/11/2006 Receivers Appointed	19	1	20
19/11/2006 Receivers Appointed	12	-	12
26/11/2006 Receivers Appointed	3	-	3
03/12/2006 Receivers Appointed	5	-	5
Monthly total	47	1	48
05/11/2006 In Administration (Ent Act)	894	-	894
12/11/2006 In Administration (Ent Act)	69	2	71
19/11/2006 In Administration (Ent Act)	51	-	51
26/11/2006 In Administration (Ent Act)	59	-	59
03/12/2006 In Administration (Ent Act)	46	1	47
Monthly total	1,119	3	1,122
05/11/2006 Dissolutions	1,106	221	1,327
12/11/2006 Dissolutions	7,501	133	7,634
19/11/2006 Dissolutions	3,344	258	3,602
26/11/2006 Dissolutions	6,300	140	6,440
03/12/2006 Dissolutions	2,732	131	2,863
Monthly total	20,983	883	21,866

COMPANIES HOUSE STATISTICS - WORKLOAD & PERFORMANCE

For the period November 06

Documents	England & Wales		Scotland		Great Britain	
	Month	% change on same period 2005/06	Month	% change on 2005/06	Month	% change on 2005/06
	Annual Returns	168,892	9.7	9,600	16.6	178,492
Accounts	186,054	10.1	10,423	12.8	196,477	10.2
Mortgage	19,841	-3.0	1,847	5.2	21,688	-2.4
Liq. & Rec.	11,275	-4.1	309	-37.3	11,584	-3.3
Other Stat. Docs	268,072	6.8	16,988	0.2	316,061	6.5
Number of:						
New Companies Incorporated	35,447	-3.6	1,925	13.6	37,272	-2.9
Change of Name Registered	4,855	-12.4	370	-34.2	5,225	-14.4
<i>broken down into week ending</i>						
05/11/2006 New Companies Incorporated	7,330	9.8	388	14.8	7,718	10.1
12/11/2006 New Companies Incorporated	8,997	-2.1	301	-7.1	7,298	-2.4
18/11/2006 New Companies Incorporated	6,776	-8.4	392	-27.7	7,170	-26.6
26/11/2006 New Companies Incorporated	7,201	3.5	340	8.3	7,541	-3.7
03/12/2006 New Companies Incorporated	7,141	9.3	404	25.1	7,545	10.1
05/11/2006 Change of Name Registered	889	-26.5	73	-7.6	862	-27.2
12/11/2006 Change of Name Registered	948	-4.4	79	-19.0	1,027	-5.4
19/11/2006 Change of Name Registered	939	-22.3	97	-2.9	1,006	-21.3
26/11/2006 Change of Name Registered	1,084	-8.6	81	-68.1	1,165	-19.1
03/12/2006 Change of Name Registered	995	9.2	70	6.1	1,065	9.0

Software and Web filed documents

During November 85.5% of incorporations were filed electronically and 27.8% of Document Examination Branch forms, ie 29.2% of all documents accepted.

Output: November 06

Image Based Company Searches		Fiche Based Company Searches	
Total Image searches	Month	Total Fiche Searches	Month
373,519	373,519	1,648	1,648
% change on 2005/06	6%	% change on 2005/06	-33%

Public Targets - % achieved as at November 06

Service Availability on CHD	Web Service Availability	Image Quality	Data Capture Accuracy
99.6%	99.6%	99.8%	99.4%

Disputes & Queries GB	Late filing Penalties Disputes cleared	1,561	All complaints (excl LFP) rec'd	3,334
November 06	Replied within 10 days	1,525	Replied within 5 days	86%
	Replied within 10 days (percentage)	98%		