

KLUWER LAW INTERNATIONAL

CORPORATIONS AND PARTNERSHIPS IN SOUTH AFRICA

MICHELE HAVENGA & NATANIA LOCKE



Wolters Kluwer
Law & Business

KLUWER LAW INTERNATIONAL

Corporations and Partnerships in South Africa

Michele Havenga & Natania Locke

This book was originally published as a monograph in the International
Encyclopaedia of Laws/Corporations and Partnerships Law.

General Editor: Roger Blanpain
Associate General Editor: Michele Colucci
Editor: Koen Geens



Wolters Kluwer

Law & Business

AUSTIN BOSTON CHICAGO NEW YORK THE NETHERLANDS

Published by:
Kluwer Law International
PO Box 316
2400 AH Alphen aan den Rijn
The Netherlands
Website: www.kluwerlaw.com

Sold and distributed in North, Central and South America by:
Aspen Publishers, Inc.
7201 McKinney Circle
Frederick, MD 21704
United States of America
Email: customer.service@aspublishers.com

Sold and distributed in all other countries by:
Turpin Distribution Services Ltd.
Stratton Business Park
Pegasus Drive, Biggleswade
Bedfordshire SG18 8TQ
United Kingdom
Email: kluwerlaw@turpin-distribution.com

DISCLAIMER: The material in this volume is in the nature of general comment only. It is not offered as advice on any particular matter and should not be taken as such. The editor and the contributing authors expressly disclaim all liability to any person with regard to anything done or omitted to be done, and with respect to the consequences of anything done or omitted to be done wholly or partly in reliance upon the whole or any part of the contents of this volume. No reader should act or refrain from acting on the basis of any matter contained in this volume without first obtaining professional advice regarding the particular facts and circumstances at issue. Any and all opinions expressed herein are those of the particular author and are not necessarily those of the editor or publisher of this volume.

Printed on acid-free paper.

ISBN 978-90-411-3388-5

© 2010 Kluwer Law International BV, The Netherlands

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise, without written permission from the publisher.

Permission to use this content must be obtained from the copyright owner. Please apply to: Permissions Department, Wolters Kluwer Legal, 76 Ninth Avenue, 7th Floor, New York, NY 10011-5201, USA. Email: permissions@kluwerlaw.com

Printed and bound in Great Britain by
CPI Antony Rowe, Chippenham and Eastbourne

Corporations and Partnerships in South Africa

The Authors



Michele Havenga is Director of the School of Law and Professor of Law in the Department of Mercantile Law, University of South Africa, where she has taught corporate law since 1986. She was previously in private practice, having been admitted to the High Court of South Africa, Transvaal Provincial Division, as an attorney, conveyancer, and notary public. She obtained the degree of Doctor of Laws in 1995 with a thesis entitled 'Fiduciary Duties of Company Directors with Specific Regard to Corporate Opportunities', and has published widely in corporate and commercial law. She was elected Visiting Fellow to Clare Hall at the University of Cambridge during 1998–1999, is presently Life Member of the same College and serves on the South African Standing Advisory Committee on Company Law.



Natania Locke is an associate professor in the Department of Mercantile Law, University of South Africa. She has taught corporate law in this department since 2001. She obtained the degree of Doctor of Laws in 2009 with a thesis entitled 'Aspects of Traditional Securitisation in South African Law', and publishes in corporate and financial law.

Table of Contents

The Authors	3
List of Abbreviations	11
General Introduction	13
§1. GENERAL BACKGROUND	13
I. Geography	13
II. Cultural Composition	13
III. Political System	14
IV. Population and Employment Statistics	15
V. Companies and Close Corporations Statistics	15
VI. Social and Cultural Values	15
§2. COMPANIES, PARTNERSHIPS AND CLOSE CORPORATIONS: HISTORICAL	16
I. Background	16
§3. DEFINITIONS AND STRUCTURE OF CORPORATIONS AND PARTNERSHIPS	17
I. Principal Forms of Enterprise	17
A. Sole Proprietorship	17
B. Partnership	18
C. Company	18
D. Close Corporation	18
E. Business Trust	18
F. Co-operative Society	19
§4. SOURCES AND HIERARCHY OF THE LAW ON COMPANIES, PARTNERSHIPS, AND CLOSE CORPORATIONS	19
I. Companies	19
A. Common Law	19
B. The Companies Act	19
II. Partnerships	20
A. Common Law	20
B. Legislation	21
III. Close Corporations	21
IV. The Constitution of the Republic of South Africa	21

Table of Contents

§5. PRIVATE INTERNATIONAL LAW	22
§6. THE LABOUR LAW CONNECTION: CO-DETERMINATION AND CORPORATE STRUCTURE	23
Selected Bibliography	25
Part I. Companies	31
Chapter 1. The Company with Share Capital	31
§1. CHARACTERISTICS	31
§2. FORMATION	31
I. Formal Requirements	31
A. The Memorandum of Association	32
B. The Articles of Association	33
II. Notification, Registration, Incorporation, and Publicity	34
III. Contracts Concluded on Behalf of a Company to Be Incorporated	34
IV. Number of Subscribers	35
V. Initial Share Capital	35
VI. Other Material Formation Requirements	35
§3. ESSENTIAL ELEMENTS OF THE LEGAL PERSON	36
I. The Company Name	36
II. The Legal Nature of a Company	37
III. Nationality, Domicile, and Residence	37
IV. The Objects Clause	38
A. The Doctrine of Constructive Notice	38
B. Section 36	38
C. The Turquand Rule	39
D. Estoppel	40
§4. CAPITAL AND SHARES	40
I. Different Concepts of Capital	40
A. Nominal or Authorized Share Capital	40
B. Issued and Unissued Share Capital	41
C. Minimum Share Capital	41
D. Paid-Up Share Capital	41
II. Alteration of Capital Requirements	42
III. Preferential Right of Subscription	43
IV. Issues of Shares at a Premium and at a Discount	43
V. Public Issue Requirements: Offers in the Primary Market	43
A. Allotment and Issue of Shares	43
B. Prospectus	44
C. Allotment and Acceptance Pursuant to a Public Offer	45

Table of Contents

VI. Securities Exchange Requirements	45
VII. Offers for Sale – the Secondary Market	47
VIII. Capital Rules	48
A. Acquisition of Own Shares by the Company	48
B. Payment of Dividends	49
C. Payment of Interest on Shares out of Share Capital	50
D. Redeemable Preference Shares	50
IX. Types or Classes of Shares	50
A. Preference Shares	51
B. Ordinary Shares	51
C. Deferred Shares	52
X. Variation of Class Rights	52
A. Class Rights and the Power to Vary Them	52
B. Rights of Dissenting Minority Shareholders	52
XI. Transfer of Shares	53
A. The Register of Members	53
B. Uncertificated Securities	53
C. Nominee Shareholders	54
D. Share Certificates and Share Warrants	54
E. Transfer of Listed Securities	55
F. Security by Means of Shares	55
G. Insider Trading	56
XII. Debentures and Other Loan Funds	57
§5. SHAREHOLDERS, MANAGEMENT, AND CONTROL	57
I. Shareholders	58
A. Shareholders' Meetings	58
1. The Annual General Meeting	58
2. General Meetings	59
3. Notice	60
4. Quorum	60
5. Proxies	61
6. Voting	61
7. Resolutions	62
8. Unanimous Assent	62
9. Minutes and Reports of Meetings	63
B. Majority Rule: Protection of Minority Interests	63
1. Common-Law Derivative Action	64
2. Statutory Derivative Action	64
3. Common-Law Personal Action	65
4. Statutory Personal Action	66
5. Ministerial Investigations and Other Statutory Safeguards	66
C. Annual Financial Statements and Reports; Profits and Dividends	68
II. Directors	70
A. Appointment and Administrative Matters	70
B. Powers of Management and Representation	71

Table of Contents

C. Duties of Directors to the Company, the Shareholders and Third Parties	72
1. Fiduciary Duties	72
2. Duty of Care and Skill	73
3. Insider Trading	74
4. Other Statutory Duties	74
a. Restrictions on Benefits	74
b. Contracts between Director and Company	76
c. Other Statutory Limitations	76
D. Liability of Directors	77
1. Personal Liability towards Others	77
2. Criminal Liability	78
3. Indemnity from Liability and Relief by the Court	78
III. Other Officers	79
A. The Company Secretary	79
B. Managers	80
C. The Managing Director	81
D. The Chairman of the Board of Directors	81
IV. The Auditor	81
§6. LIQUIDATION OF THE COMPANY	84
I. Grounds for Winding-Up	85
A. Voluntary Winding-Up	85
B. Winding-Up by the Court	85
II. The Function and Powers of the Court	86
A. Voluntary Winding-Up	86
B. Winding-Up by the Court	86
III. The Effect of Winding-Up: Liquidation	88
§7. JUDICIAL MANAGEMENT AND COMPROMISE	92
I. Judicial Management	92
II. Compromise	93
§8. ARRANGEMENTS, COMPROMISES, MERGERS, AND TAKEOVERS	94
I. Arrangements and Compromises	94
A. Compromises and Arrangements under Section 311	94
B. Arrangements under Section 389	96
II. Mergers and Takeovers	96
A. Regulation of Mergers and Takeovers	97
1. The Securities Regulation Panel	97
a. Application of the Code	98
2. The Competition Act 89 of 1998	99
B. Takeover Techniques	100
C. Defensive Measures	101
III. Reconstructions	101

Table of Contents

§9. HOLDING COMPANIES AND SUBSIDIARIES	103
I. Definition	103
II. Duty to Prepare Group Accounts	103
III. Prevention of Abuse of Control	104
§10. TAXATION OF COMPANIES AND SHAREHOLDERS	105
§11. THE COMPANY LIMITED BY GUARANTEE	106
I. The Incorporated Association Not for Gain	107
Part II. Partnership	109
§1. DEFINITION, NATURE AND ELEMENTS OF A PARTNERSHIP	109
I. Definition	109
II. Nature of a Partnership	109
III. Types of Partnership	110
IV. Essential Elements of a Partnership	111
V. Natural Consequences of a Partnership	112
§2. THE RELATIONSHIP BETWEEN THE PARTNERS	112
I. Introduction	112
II. Rights and Duties of Partners	113
III. Enforcement of Partners' Rights and Duties	114
§3. THE RELATIONSHIP BETWEEN PARTNERS AND THIRD PARTIES	115
I. Introduction	115
II. Contracts	115
A. Representation	115
B. The Principle of Mutual Mandate	116
C. Estoppel	117
D. Ratification	117
III. Delictual Liability	117
IV. Criminal Liability	117
V. Proceedings against the Partnership	118
§4. DISSOLUTION AND LIQUIDATION OF THE PARTNERSHIP	119
I. Dissolution	119
II. Grounds for Dissolution	119
A. Mutual Agreement	119
B. Effluxion of Term	119
C. Completion of the Partnership Business	119
D. Change in Membership	120
E. Court Order	120
F. War	121
G. Sequestration	121
III. Formalities for Dissolution	121
IV. Consequences of Dissolution	121

Table of Contents

V. Liquidation of the Partnership Estate	122
A. The Liquidator	122
VI. Distribution	123
§5. TAXATION OF PARTNERS	123
Part III. Close Corporations	125
§1. DEFINITION, NATURE, AND DISTINCTIVE CHARACTERISTICS OF A CLOSE CORPORATION	125
I. Background	125
II. Nature and Distinctive Characteristics of a Close Corporation	125
§2. FORMATION, NAME, AND CONVERSIONS	126
I. Formation	126
II. Name	127
§3. PRE-INCORPORATION CONTRACTS	128
§4. MEMBERSHIP AND MEMBERS' INTERESTS	129
I. Membership	129
II. Acquisition of Member's Interest	130
§5. INTERNAL RELATIONS	132
I. Association and Other Agreements	132
II. Management	133
III. Fiduciary Duties and Duties of Care and Skill	134
IV. Statutory Protection of Members and the Corporation	135
§6. EXTERNAL RELATIONS	135
§7. ACCOUNTING AND DISCLOSURE	136
I. Accounting Records and Disclosure	136
II. The Accounting Officer	137
§8. LIABILITY OF MEMBERS AND OTHERS FOR DEBTS INCURRED BY OF THE CLOSE CORPORATION	138
I. Civil Liability	138
II. Criminal Liability	140
§9. WINDING-UP, DISSOLUTION, AND DEREGISTRATION	141
§10. TAXATION OF CLOSE CORPORATIONS AND THEIR MEMBERS	143
Index	145

KLUWER LAW INTERNATIONAL

Corporations and Partnerships in South Africa

Michele Havenga & Natania Locke

This book was originally published as a monograph in the International
Encyclopaedia of Laws/Corporations and Partnerships Law.

General Editor: Roger Blanpain
Associate General Editor: Michele Colucci
Editor: Koen Geens



Wolters Kluwer
Law & Business

AUSTIN BOSTON CHICAGO NEW YORK THE NETHERLANDS

Published by:
Kluwer Law International
PO Box 316
2400 AH Alphen aan den Rijn
The Netherlands
Website: www.kluwerlaw.com

Sold and distributed in North, Central and South America by:
Aspen Publishers, Inc.
7201 McKinney Circle
Frederick, MD 21704
United States of America
Email: customer.service@aspenpublishers.com

Sold and distributed in all other countries by:
Turpin Distribution Services Ltd.
Stratton Business Park
Pegasus Drive, Biggleswade
Bedfordshire SG18 8TQ
United Kingdom
Email: kluwerlaw@turpin-distribution.com

DISCLAIMER: The material in this volume is in the nature of general comment only. It is not offered as advice on any particular matter and should not be taken as such. The editor and the contributing authors expressly disclaim all liability to any person with regard to anything done or omitted to be done, and with respect to the consequences of anything done or omitted to be done wholly or partly in reliance upon the whole or any part of the contents of this volume. No reader should act or refrain from acting on the basis of any matter contained in this volume without first obtaining professional advice regarding the particular facts and circumstances at issue. Any and all opinions expressed herein are those of the particular author and are not necessarily those of the editor or publisher of this volume.

Printed on acid-free paper.

ISBN 978-90-411-3388-5

© 2010 Kluwer Law International BV, The Netherlands

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise, without written permission from the publisher.

Permission to use this content must be obtained from the copyright owner. Please apply to: Permissions Department, Wolters Kluwer Legal, 76 Ninth Avenue, 7th Floor, New York, NY 10011-5201, USA. Email: permissions@kluwerlaw.com

Printed and bound in Great Britain by
CPI Antony Rowe, Chippenham and Eastbourne

The Authors



Michele Havenga is Director of the School of Law and Professor of Law in the Department of Mercantile Law, University of South Africa, where she has taught corporate law since 1986. She was previously in private practice, having been admitted to the High Court of South Africa, Transvaal Provincial Division, as an attorney, conveyancer, and notary public. She obtained the degree of Doctor of Laws in 1995 with a thesis entitled 'Fiduciary Duties of Company Directors with Specific Regard to Corporate Opportunities', and has published widely in corporate and commercial law. She was elected Visiting Fellow to Clare Hall at the University of Cambridge during 1998–1999, is presently Life Member of the same College and serves on the South African Standing Advisory Committee on Company Law.



Natania Locke is an associate professor in the Department of Mercantile Law, University of South Africa. She has taught corporate law in this department since 2001. She obtained the degree of Doctor of Laws in 2009 with a thesis entitled 'Aspects of Traditional Securitisation in South African Law', and publishes in corporate and financial law.

Table of Contents

The Authors	3
List of Abbreviations	11
General Introduction	13
§1. GENERAL BACKGROUND	13
I. Geography	13
II. Cultural Composition	13
III. Political System	14
IV. Population and Employment Statistics	15
V. Companies and Close Corporations Statistics	15
VI. Social and Cultural Values	15
§2. COMPANIES, PARTNERSHIPS AND CLOSE CORPORATIONS: HISTORICAL	16
I. Background	16
§3. DEFINITIONS AND STRUCTURE OF CORPORATIONS AND PARTNERSHIPS	17
I. Principal Forms of Enterprise	17
A. Sole Proprietorship	17
B. Partnership	18
C. Company	18
D. Close Corporation	18
E. Business Trust	18
F. Co-operative Society	19
§4. SOURCES AND HIERARCHY OF THE LAW ON COMPANIES, PARTNERSHIPS, AND CLOSE CORPORATIONS	19
I. Companies	19
A. Common Law	19
B. The Companies Act	19
II. Partnerships	20
A. Common Law	20
B. Legislation	21
III. Close Corporations	21
IV. The Constitution of the Republic of South Africa	21