

## PRACTICE NOTE NO 1 OF 2006

### CLOSE CORPORATIONS AMENDMENT ACT, 2005 (ACT NO. 25 OF 2005)

The Close Corporations Amendment Act, 2005, amended the Close Corporations Act, 1984, with effect from 11 January 2006. These amendments provide for the introduction two important new principles, which will have an effect on the procedures to be followed for the registration of founding statements (Form CK 1) and amended founding statements (Forms CK 2 and CK 2A). These principles are firstly that trusts *inter vivos* can now, under certain circumstances, become and be members of close corporations and secondly, that close corporations may, if the required criteria are met, be appointed as accounting officers for close corporations.

The intention with this practice note is to provide guidelines to and to familiarise users of close corporations with the relevant procedural requirements to effect such membership of trustees of trusts *inter vivos* and appointment of close corporations as accounting officers.

#### A. Requirements relating to trusts *inter vivos* and membership

Section 29 (1A) of the Close Corporations Act, 1984, in its amended form, now provides:-

“(1A) A natural or juristic person in the capacity of a trustee for a trust *inter vivos* may be a member of a corporation: Provided that –

- (a) no juristic person shall directly or indirectly be a beneficiary of that trust;
- (b) the member concerned shall, as between himself or herself and the corporation, personally have all the obligations and rights of a member;
- (c) the corporation shall not be obliged to observe or have any obligation in respect of any provision of or affecting the trust or any agreement between the trust and the member concerned of the corporation; and



- (d) if at any time the number of natural persons at that time entitled to receive any benefit from the trust shall, when added to the number of members of the corporation at that time, exceed 10, the provisions of, and exemption under, this subsection shall cease to apply and shall not again become applicable notwithstanding any diminution in the number of members or beneficiaries.”.

In order to enable proper implementation of the new membership provisions and to register founding statements and amended founding statements where the trustee/s of trust *inter vivos* will become a member/s, certain information regarding the trust concerned will have to be provided in addition to the relevant CK forms. To this end the following documents will be required to be lodged together with Form CK 1 or CK 2, as the case may be, with CIPRO:

- (1) A certified copy of the Letter of Authority issued to the trustee/s of the trust by the Master of the High Court;
- (2) In the case of multiple trustees, an originally signed special power of attorney by each of the trustees appointing one of them as the representative of the trustees for purposes of holding and dealing with the member’s interest in the close corporation concerned;
- (3) A letter by the trustee, or in the case of multiple trustees, the representative trustee referred to in paragraph (2) above, in which he or she furnishes –
  - the name, registration number and address of the trust;
  - the names of all the trustees of the trust;
  - the number of beneficiaries of the trust, current at date of the letter; and
  - particulars of all the beneficiaries named in the trust deed, irrespective whether capital, income or other type of beneficiaries.
- (4) A certified copy of the section/s in the trust deed defining and/or identifying the beneficiaries of the trust, whether capital, income or other type of beneficiaries.
- (5) If the trustee is a juristic person, a letter on the letterhead of the juristic person, nominating a natural person as its representative.

An amended founding statement (Form CK 2) must be lodged whenever a change is made or occurs in respect of the particulars of –

- the trustees;
- the representative of the trustees;

- the representative of a juristic person which is a trustee; or
- the beneficiaries.

The attention of accounting officers of close corporations is further invited to the duties of accounting officers as laid down in section 62 of the Close Corporations Act, 1984, and specifically paragraph (b) (i) of subsection (3), which reads as follows:

- “(3) If an accounting officer of a corporation –
- (a).....
  - (b) during the performance of his duties finds-
    - (i) that any change, during a relevant financial year, in respect of any particulars mentioned in the relevant founding statement has not been registered;
- he shall forthwith by registered post report accordingly to the Registrar.”.

It follows that accounting officers of close corporations that have trustees of trusts *inter vivos* as members, should annually verify the number of beneficiaries of the trust concerned, firstly to ensure that the number of beneficiaries added to the number of members do not exceed 10 and, secondly, if any changes have taken place, that appropriate amendments have been registered.

## **B. Requirements relating to appointment of close corporations as accounting officers**

Section 60 (4) of the Close Corporations Act, 1984, in its amended form, now provides:–

- “(4) (a) A corporation may appoint as its accounting officer –
- (i) any person who is a member of a recognised profession listed in a notice referred to in subsection (2);
  - (ii) a firm as defined in subsection (1) of the Public Accountants’ and Auditors’ Act, 1991 (Act No. 80 of 1991);
  - (iii) any other firm, if each partner in the firm is qualified to be so appointed; or
  - (iv) any other corporation, if each member of such corporation is qualified to be so appointed.

(b) The liability of a partner in respect of debts and liabilities incurred by a firm contemplated in paragraph (a) (iii) during the partner's period as a partner and the liability of a member in respect of the debts and liabilities of a corporation contemplated in paragraph (a) (iv) during the member's period as a member may not be excluded by operation of law or in any other way.

(c) For purposes of paragraph (b), "debts and liabilities incurred" means debts and liabilities incurred by a firm or corporation, as the case may be, in connection with the performance by the firm or corporation, as the case may be, of its duties in terms of section 62."

From these provisions it is evidently clear that for a firm to be appointed as an accounting officer it must either be a common law partnership or a firm of accountants and auditors as defined in the Public Accountants' and Auditors' Act, 1991. A sole proprietor conducting his or her business under a business name (i.e. a name other than the name of its proprietor), therefore, cannot be appointed as a firm but will have to be appointed in his or her personal capacity under paragraph (i) of section 60 (4) (a). In the past this distinction was not clearly drawn and a number of appointments of firms as accounting officers were allowed where the "firm" was in fact a sole proprietor that had to be appointed in a personal capacity. These appointments will be regarded as appointment in a personal capacity of the person whose particulars appeared in the relevant letter of consent and any reference to the firm will be deemed to be a reference to the relevant person. No re-appointment will be required but such accounting officers must ensure that all future acts performed by them as accounting officers under the Close Corporations Act, 1984, or any other law must be performed in their personal capacities and not by or on behalf of a "firm". Of particular importance in this regard is the use of the correct letterhead by accounting officers who are deemed to be or are appointed in their personal capacities – such a letterhead should reflect the personal particulars of the appointed accounting officer and not that of a firm.

In order to ensure that a firm or a close corporation qualifies for appointment as accounting officer of a close corporation, the firm or close corporation to be appointed must furnish the following additional information in its letter of consent to its appointment:–

- The names of all the partners of the firm or members of the close corporation;
- the recognised professions to which each such partner or member belongs;
- the individual membership or practice number of each such partner or member; and

- the practice number of the firm or close corporation allocated by the relevant recognised profession to the said firm or close corporation (Note: the membership or practice number of individual partners or members will not be accepted as the firm or close corporation will be appointed as accounting officer and not the individual partners or members).

Prospective accounting officers must, furthermore, note that the letter of consent to their appointment must be typewritten –

- on a letterhead containing the personal particulars of the accounting officer, if the appointment is made in a personal capacity [section 60 (4) (a) (i)];
- on the letterhead of the firm, if a firm is appointed [section 60 (4) (a) (ii) and (iii)]; or
- on the official letterhead of the close corporation, if a close corporation is appointed [section 60 (4) (a) (iv)]; and

that it must be dated not earlier than three months prior to the date of lodgement.