

MALAWI COMPANIES ACT 2013

EXPLORING KEY CHANGES

PART ONE



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OUTLINE OF THE PRESENTATION

PART ONE

- Introduction
- The Registrar
- Types and Company Registration
 - Shares and shareholders
 - Common Seal
- Valuation of Property and securities
 - Personal Property Securities Act


PART TWO

- ▶ Directors qualifications and duties
 - ▶ Company secretaries
 - ▶ Accounts and Auditors
 - ▶ Liquidation of a Company
 - ▶ Insolvency Act




RECENT KEY CHANGES IN COMMERCIAL LAW

Change is Inevitable!

Companies Act 1984  Companies Act 2013

Bill of Sale Act 1967  Personal Property Security Act 2013

Farmer's Stop Order 1955  Personal Property Security Act 2013

Bankruptcy Act 1928  Insolvency Act 2016

INTRODUCTION

On 19th July, 2013 the former president of the Republic of Malawi, Dr Joyce Banda, assented to the New Companies Act (CA), No 15 of 2013. The CA 2013 repeals the outdated CA 1984 but will only come into force once notice has been gazetted by the Minister.

Meanwhile, the Insolvency Act which will, among others, regulate winding up of companies[S. 329,330] was assented to by the President on 24th Jan 2016. Regulations by the Minister and Chief Justice [S. 382] and electronic filing systems are being finalised.

The CA 2013 is a unique piece of legislation; it introduces a 'one person company', strengthens the Office of the Registrar of Companies and in many respects aims at reducing the cost of doing business.

[Of course 383 sections! CA 1984 – 348 sections]



WHY TRADE AS A COMPANY?

Since its inception in 1844, the co. has become the most important and powerful form of business organisation:-

1. Limited liability.
2. Separate legal personality – *Salomon v Salomon*
3. A co. owns and disposes of property in its own name.
4. A co. can sue and be sued in its own name.
5. Transferable membership is only available in a co.
6. Perpetual succession.
7. Flexible Borrowing facilities – Debenture...
8. A co. is allowed to issue shares to raise capital.
9. Management of a company is entrusted to directors.
10. Stringent disclosure and formality
(Major Disadvantage)

OFFICE OF THE REGISTRAR

Office now given prominence as it appears in S. 3 of the CA 2013 rather than S. 324 of the CA 1984 with enhanced functions.

FUNCTIONS:–

- Administering the CA 2013 and supervising incorporation and registration of companies. Various monetary penalties are provided for non-compliance.
- The Registrar is mandated to establish and maintain a co.'s registry in the Malawi Business Registration Database established under the Business Reg. Act.
- The Registrar performs such other functions as may be specified by the CA 2013 or any other written law and undertakes such other activities as may be necessary or expedient to give full effect to the CA 2013. [S. 4] e.g. supply info to Min of Lands [S. 380].

REGISTRATION OF DOCUMENTS

The CA 2013 provides for two modes of filing documents; the traditional hard copy filing and the modern electronic mode of filing [S.7]. Dealings in shares may also be electronic [S. 135 –155].

The benefits of e-filing include:-

- ▶ Improved customer service;
- ▶ Faster turnaround times;
- ▶ Improved accuracy and audit trails;
- ▶ Reduced processing costs...



Major disadvantage – cyber crime [Cash-gate/IFMIS]

LOCAL PARTICIPATION IN COMPANIES

- ▶ The CA 1984 specifically provided for local participation in companies, the CA 2013 has departed from that arrangement.
- ▶ In fact, Government was slow at implementing local participation.
- ▶ Government may however achieve similar intentions through:-
 - (i) Expropriation under the Constitution
 - (ii) Terms of a concession [Paladin/Kayerekera?]
 - (iii) Indirectly through taxation and corporate social responsibility.

ANY BENEFITS OF LOCAL PARTICIPATION (Black Empowerment)?? [Page 42 of Book]



FOUR TYPES OF COMPANIES

1. Private Ltd Liability (+ One Person Company) [S.23]
2. Public Ltd Liability [use of Plc introduced] [S. 24]
3. Companies Ltd by Guarantee [S. 25]
4. State Owned Companies [S. 26]

Any co. may change its status by re-registration e.g. private to public (Initial Public Offer – IPO) [S. 56 –62]

Companies with **unlimited liability** which were recognized under the CA 1984 are no longer provided for. In practice, investors would rarely form a co. with unlimited liability because it defeats the most single attraction of a limited liability co, namely limited liability of its members.

PRIVATE COMPANIES

- ▶ A minimum of one person (human being) and a maximum of fifty persons. Two or more persons holding shares jointly = one person co. – [S. 23(2)].

Does away with the requirement for shareholders who wished to have 100% shareholding in the co. to appoint a nominee shareholder. Dr HK Banda (99%) and Aleke Banda (1%) in Press Holding Ltd (1982) [Number of partners in a partnership now clearly restricted to 20 members– S. 378].

- ▶ Private co. under the CA 1984 (with 2 or more members) are prohibited from becoming a single member co.
- ▶ A private co. is prohibited from offering any of its securities (shares, debentures, bonds e.t.c.) to the public.

DEATH/MENTAL INCAPACITY OF SOLE SHAREHOLDER & DIRECTOR

S. 171 (3) requires every one person company to nominate a person, with his consent, to be the secretary of the company in the event of the death of the sole shareholder & director.

The secretary assumes office upon the death of the sole shareholder & director and calls for a meeting of beneficiaries of the deceased's estate for the purpose of appointing a new director or directors, if not the Registrar appoints [S. 171(9)]. Where mentally incapacitated the guardian may act as director or appoint someone [S. 171(10)]

SOME ADVANTAGES OF A ONE PERSON COMPANY

Advantage	Examples
Exemption from compliance	No need for general and Board meetings No Co secretary, No Minute Book No need to prepare an annual report and accounts.
Organised sector (Limited Liability)	One person company will bring the unorganised sector of proprietorship into the organised version of a private ltd co – increase in tax band?
Legal Status and Social Recognition (Perpetual Succession)	<i>Salomon v Salomon</i> to apply. Use of co. terms e.g. Director which is not applicable to partnerships and sole traders.
Easy to Manage	Fast decision making.
Tax Flexibility may be introduced	e.g. director's remuneration being deductible expenses which reduce profitability of the co hence lower tax.

CRITICISM OF A ONE PERSON CO.

ICAM and other stakeholders were strongly opposed to the introduction of one person co. during the consultative process, they argued – ‘A key criticism of Malawi entities is the lack of business continuity in the event of death of the owner. The one shareholder one director concept will make this worse and we wonder whether banks and other business partners will have the confidence to deal with entities where this is the case...individuals should be encouraged to operate as sole traders...’ **Resistance to change?**

WHAT'S YOUR TAKE?



PUBLIC COMPANIES (PLCs)

- ▶ Consists of a minimum of three members (under the CA 1984 S. 4 – two would do);
- ▶ Its Constitution permits it to offer its securities to the public; and
- ▶ Its Constitution permits the transferability of its securities. [S. 24] **[does it have to be registered on the Stock Exchange? – NO – MSCA *Hara v AHL* (2009)]**
- ▶ A public company may be re-registered as a private company. [S. 56] [Real Insurance/Britam??].
- ▶ Public companies are governed by the Securities Act 2010.
- ▶ Common seal mandatory for Plcs [s. 42,43]

COMPANIES LTD BY GUARANTEE

- ▶ The liability of its members is limited to the sum agreed by the members to be contributed to the assets of the company in the event of its being wound up. [S. 25]
- ▶ Formed for the sole purpose of operating as a charity or as a not for profit organization. Therefore no distributions/dividends [S. 37].
- ▶ Not much difference from what has long been understood as a Company Limited by Guarantee under the CA 1984.

STATE OWNED COMPANIES (SOC)

- ▶ S. 26(1) introduces a new type of company, a SOC, which is a company controlled by the Government.
- ▶ The provisions in the CA 2013 pertaining to public companies do apply to all SOC. However, the Minister may exempt SOC from the provisions of the CA 2013.
- ▶ **WILL ALL STATUTORY CORPORATIONS BE SOC? Not necessarily.**



OTHER DISTINCTIONS

The distinction between **HOLDING AND SUBSIDIARY** has been maintained with further [long and winded] ‘clarifications’. [S. 2]

DORMANT COMPANY – one which has no significant accounting transaction within an accounting period – declares itself dormant – [S. 2] therefore does not have to file returns – Kayelekela Mine??? Banks and insurance Co.s cannot declare themselves dormant [S. 355] per nature of business.

FOREIGN COMPANY – one incorporated outside Malawi but which has a place of business or is carrying on business in Malawi. Such a company may be registered as a foreign company in Malawi and most of the provisions in the CA 2013 have equal force against a foreign company. [S. 357]

GAME, SHOPRITE, PEP?????

FORMATION OF A COMPANY

An application for incorporation of a company must be delivered to the Registrar in the prescribed form, signed by each applicant and accompanied by written consent to act as a director or secretary...[S. 28(1)]

1. Full names and address of applicants
2. Full names, residential address of directors and secretary
3. Business occupation, directorships of in a public co. held by each director
4. the full name and residential address of every shareholder – no. of shares, whether paid up.
5. Type of Co, Registered Office
6. One person company, to state particulars of the person nominated by the proposed director to be the secretary of the company in case of resignation or death of the last remaining director.
7. Other prescribed info.
8. A declaration

FORMATION OF A COMPANY (Continued...)

A company may adopt as its constitution the model memorandum and articles of association applicable to it as prescribed in the Regulations. If none filed then the law will take it that the Model applies [S. 34]. Old companies may also adopt the model [S. 35].

Statement of capital (has replaced authorised share capital) [S. 30].

Certificate of incorporation remains conclusive evidence of the fact that all the processes of incorporation have been complied with [S. 31].

The legal effect of incorporation remains establishment of a separate legal entity – a body corporate (*Salomon v Salomon* 1897) [S. 32].

COMPANY NAMES

- Now possible to reserve a name [S. 45].
- Name not to be misleading or perpetrate the tort of passing off e.g. *ZAIN v GAIN – Celtel Malawi Limited v Globally Advanced Integrated Networks Limited* (2008), *Panjira Chicken v Panjira Poultry 2007* (2007).
- Name not to be offensive – *R v Registrar of Co. ex p Attorney General* [1991] a lady set up a co. through which to carry out her trade as a prostitute. She had applied for registration of this co. under the names ‘Prostitutes Ltd’, ‘Hookers Ltd’, and ‘Lindi St Clair (French Lessons) Ltd’ all of which were rejected by the Registrar (UK) and the rejection was upheld by the court.
- Some names need the consent of the Minister e.g. Authority, Government, Malawi, national, President... [S. 47] *Uladi Mussa v Min of Justice (Maravi Party)* [2007]. A co. may change its own name, or the Registrar or the Court may order it to do so [S. 52].

COMMON SEAL

- Under the CA 1984, it was mandatory for every company to have a common seal until 2012 when the Companies (Amendment) Act allowed choice.

- The CA 2013 now provides as follows:-
 - i) A public company **MUST** have a common seal
 - ii) Other companies may or may not have one
 - iii) However where the company has chosen to have a common seal and the company or an officer uses or authorises the use of a seal purporting to be a seal of the company on which its name is not engraved, the company or the officer is liable to a penalty.

SHAREHOLDERS

- Codes of conduct introduced for private co. and Plcs. [S. 73, 74]
- Shareholders Agreement now specifically provided for as long as consistent with the constitution and CA 2013 [S. 33(5)].
- Shareholders' rights to access information heavily entrenched.
- Private co. may dispense with shareholder's meetings [S. 66].
- Register of members no longer mandatory for private co. but proper records to be kept [S. 144, 65].

Common Law rights of minority shareholders now statutory:-

Derivative Action – a shareholder or a director may, with the leave of the Court, bring proceedings in the name and on behalf of the company or its subsidiary or intervene in proceedings to which the company or any related company is a party. [S. 337–340]

Personal Action – A shareholder may bring an action against a director or a secretary or the company, for breach of a duty owed to him as a shareholder. [S. 341] (*Prudential v Illovo* 2016)

Unfairly Prejudicial Conduct – an individual shareholder can apply to Court for an appropriate order where the co's conduct is oppressive, unfair or prejudicial. [S. 343 also under CA 1984] (*Prudential v Illovo*)

SHARES

Legal Nature of shares as personal property [S. 82].

Classification [S. 83]

- ❑ **Ordinary** – most basic type;
- ❑ **Preference** – preference in receipt of dividends & return of capital;
- ❑ **Employee Shares** – for an ESOS/ESOP;
- ❑ **Redeemable** – shares that may be bought back by the company;
- ❑ **Treasury** – new type – these are shares bought back from shareholders but which have not been cancelled. Advantageous to shareholders because it lowers the number of shares outstanding. However, not all buybacks are a good thing. For example, if a company merely buys shares to improve financial ratios such as Earnings Per Share (EPS), then the buyback is detrimental to the shareholders.
- ❑ **Deferred** – available under CA 1984 but not provided for in the CA 2013. Also referred to as ‘founders or management’ shares.
- ❑ **Bonus** – capitalisation issue (extra shares rather than cash).

ABOLISHION OF PAR VALUE

Under the CA 1984 a share had to have a par value (nominal value) say 1 share = K1. This has been abolished together with authorised capital [S. 87, 30]. All a company will have to do is to issue a statement of capital which may be amended from time to time. Old companies may continue with par value.

ICAM CRITICISM – ICAM was against the abolition because of the need to have value for the shares through authorized capital. Even the ‘stated capital’ must have a number and value of shares. they argued it would be problematic to list on the Stock Exchange because there would be need to revalue and valuation of shares was considered subjective because it depends on various methodology used. [Note – A Register of Valuers will now be maintained by the Registrar S. 131]. In addition, Government would lose revenue because incorporation fees [tax] were based on the par value... **DO WE AGREE??**

ISSUE OF SHARES AT A DISCOUNT

Under the CA 1984 it was an offence to issue shares below their par value (nominal value) as this would reduce the capital below the authorised capital.

Since the concept of authorised capital together with par value has been abolished, shares can now be issued at a discount provided the same is authorized by a resolution passed in a general meeting of the company and is further sanctioned by the Court. [S. 102]

The common law position adopted in the CA 1984 was to prohibit issue of shares at a discount. As the House of Lords held, in *Ooregum Gold Mining Co of India Ltd v Roper* [1892] the system would be rendered wholly redundant if a company could, for example, issue a £1 share for 50p and then treat it as fully paid so there were no more liabilities on the part of the shareholder. The creditors of the company might then be seriously misled about the financial standing of the company.

VALUATION OF PROPERTY AND SECURITIES

- ❖ The CA 2013 now provides for registered valuers who may may conduct any valuation required under the Act such as valuation of property/assets, stocks, shares, debentures, securities, goodwill or net worth...
- ❖ Courts have always maintained the power to value shares. For example, *In the Matter of East Africa Sailing Ltd(2012)*, the court having considered various methodologies on valuation of shares as well as case law on the same, valued the shares at U\$200,000, without seeking expert evidence, as the defendants had offered to buy the shares at that value before.
- ❖ The Registrar keeps a 'Register of Valuers.' Any person, excluding a body corporate, may apply for registration. The applicant pays the prescribed fees and makes a declaration that he shall render impartial and true valuation in accordance with prescribed rules. The Registrar has power to remove and restore names in the register of valuers.

PERSONAL PROPERTY SECURITIES ACT (PPSA) 2013

- ❖ PPSA provides for the creation of security interests in personal property, the perfection of security interests, the determination of priority between securities, the establishment of a registry of security interests in personal property, and enforcement of security interests in personal property. [Repeals Bills of Sale and Farmers Stop Orders]
- ❖ Co. A may obtain a loan from co. B to purchase machinery. Co. A may issue a debenture. Under the PPSA, the debenture is considered as a form of a *security agreement* effective between A and B.
- ❖ However, it is in the interest of co. B that its security interest is known and enforceable against the public, hence the need to for on-line perfection of the security interest by registration under the PPSA. The co. files a *financing statement* in the PPS registry & once the security is searchable by the public it becomes enforceable against third parties and takes priority accordingly. – END –