The Companies Act No 71 of 2008 (as amended) ("**the Act**") currently recognizes (and has always recognized) the principle that a security may be registered in the name of a person who acts as the agent or "nominee" of the "true" or "real" owner of that security. It is a long-standing and ubiquitous business practise, especially among banks and other financial institutions, to register securities in the names of nominees. Although the use of nominee companies has been abused in a number of instances, there are many cogent, legitimate and credible reasons why a person would wish to hold his securities in the name of a nominee.

New legislation, which came into effect on 1 April 2023, has been enacted to compel disclosure of the "real" or "true" direct or indirect ultimate owner or effective controller of 5% or more of the securities in virtually all private companies. Government's aim in enacting the new legislation is to assist law enforcers in combatting money laundering, terrorist financing, tax evasion and corruption. This new legislation takes the form of the General Laws (Anti-Money Laundering and Combatting Terrorist Financing) Amendment Act No 22 of 2022, sections 55 to 61 of which amend the Act in various respects, as well as in the form of draft regulations pursuant to these new sections.

The new sections of the Act require the vast majority of private companies to keep records of the names and certain details of the "real" or "true" so-called "beneficial owners" of more than 5% of their securities, to compel such private companies to then furnish this information to the Companies and Intellectual Property Commission ("**CIPC**" or "**the Commission**") and to enable what CIPC terms "law enforcement and Competent authorities" to gain access to this information from CIPC. This manner in which Government has attempted to achieve these aims are described below.

The cornerstone provision is the new section 50(3A) of the Act, which provides that a private company "must record in its securities register prescribed information regarding the natural persons who are the beneficial owners of the company, in the prescribed form, and must ensure that this information is updated within the prescribed period after any changes in beneficial ownership have occurred." (our underlining).

The definition of "beneficial owner" is, of course, crucial. **"Beneficial owner"**, in respect of a company, means an individual [i.e. a natural person] "who, directly or indirectly, ultimately owns that company or exercises effective control of that company." (our underlining)

In other words, there are two types of beneficial owners, namely a natural person who either, directly or indirectly -

1. ultimately owns that company; or
2. exercises effective control of that company.

Unfortunately, neither the term "effective control" nor the word "control" is defined although some guidance as to the meaning of "control" may be obtained from section 2(2)(a) of the Act, which deals with related and inter-related parties, and section 3(1) of the Act, which deals with holding companies and subsidiaries.

Importantly, this definition then goes on to effectively provide that, in a number of instances, an individual is deemed to ultimately own or effectively control a private company by stating that ultimate ownership or effective control includes the following –

"(a) the holding of beneficial interests in the securities of that company;

(b) the exercise of, or control of the exercise of the voting rights associated with securities of that company;

(c) the exercise of, or control of the exercise of the right to appoint or remove members of the board of directors of that company;

(d) the holding of beneficial interests in the securities, or the ability to exercise control, including through a chain of ownership or control, of a holding company of that company;

(e) the ability to exercise control [not ownership], including through a chain of ownership or control, of –

(i) a juristic person other than a holding company of that company;

(ii) a body of persons corporate or unincorporate;

(iii) a person acting on behalf of a partnership;

(iv) a person acting in pursuance of the provisions of a trust agreement; or

(f) the ability to otherwise materially influence the management of that company."

(our underlining)

The term "**beneficial interest**" is defined in the Act.

The aforesaid two definitions do not conflict with one another. Therefore, both definitions will have to be considered in interpreting the new legislation.

METHOD OF DISCLOSURE

As is logical and therefore expected, the new disclosure requirement have been introduced into those sections of the Act which deal with a company's securities register, being the register of a company's issued securities.

Every company (including a private company) must file an annual return, within thirty business days after each anniversary of its date of incorporation. Failure by a company to do so for two or more years in succession without satisfactory reasons may result in CIPC deregistering the company. The critical change to the legislation is section 33 of

the Act, which has now been amended to require that a private company must include in its annual **return a copy of its securities register** "in such manner and form as prescribed by" CIPC within thirty days after the anniversary of its date of incorporation.

But it does not end there; new section 56(12) provides that a private company must file with CIPC "a record..... in the prescribed form and containing the prescribed information, regarding the individuals who are the beneficial owners of the company, and must ensure that this information is updated by filing notices with the Commission within the prescribed period after any changes in beneficial ownership have occurred".

Draft Regulation 30(10) then states that "[T]he Commission shall provide electronic access to view copies of the documents filed together with an annual return with the Commission ..... to such persons and on such conditions as may be determined by the Commission, after consultation with the Minister and the Financial Intelligence Centre." All we know about who "such persons" are at this stage in a CIPC statement that they must be made available to "law enforcement and Competent authorities".

Although the wording of the draft Regulations is unfortunately unclear, it would appear that –

- the onus of disclosing the beneficial owner or effective controller of a security in a private company who holds more than 5% of the company's issued securities will lie on both the securities holder and the company (if it has knowledge of the beneficial owner or effective controller). The securities holder will be obliged to disclose that information to the company even if he is not specifically requested to do so. In the case of a change in beneficial ownership or effective control of more than 5%, such disclosure will have to be made within five business days after the end of the month during which the change occurred;
- the company must update its security register as soon as practical but no later than five business days after such disclosure to reflect the change of information and then file the applicable CoR Form with CIPC within five business days after having done so;
- the following information must be included in the company's securities register in relation to each beneficial owner -

(a) the full name, date of birth, identity number (if South African) or passport number and date of birth (if non-South African);

(b) residential and postal address;

(c) email address if available, unless the person has declined to provide an email address;

(d) confirmation as to the scope of participation in and extent of ownership, or effective control of, the company; and

(e) any other supporting document CIPC may require.

According to CIPC, companies have six months within which to comply with the aforegoing. The filing process will be fully online.

CONCLUSION

There is little doubt that the definition of "beneficial owner" read with that of "beneficial interest" will undergo intense scrutiny by lawyers and other professional advisers to ascertain whether or not it is still possible to avoid disclosure of the "true" or "real" owner or effective controller of more than 5% of the securities in a private company even though the information (theoretically at least) is open to scrutiny only by "law enforcement and Competent authorities". The problem they face is that the wording of the definition of "beneficial owner" is extremely wide; this is due to the use of the words "directly or indirectly", "ultimately", "effective" and, importantly, "includes". The problem is exacerbated by the insertion at the end of the definition of a "catch-all clause", being sub-paragraph (f) thereof, which states that ultimate ownership or effective control "includes the ability to otherwise materially influence the management of that company". In other words, a test of de facto control has been introduced, the satisfaction of which will depend on the facts of the case in question.

The fear, of course, is that somehow or another people other than "law enforcement and Competent authorities" will be able to obtain this information and that the legislature has therefore "thrown the baby out with the bathwater". After all, CIPC administers about 2.1 million active entities. Only time will tell.

If you are in any doubt as to whether or not you are obliged to disclose the "actual" individual direct or indirect beneficial owner of more than 5% of the securities in a private company, we strongly recommend that you seek the guidance of your professional adviser.