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Benefit corporations for Africa? A South African perspective on alternative corporate forms

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ABSTRACT

The question of the potential for alternative corporate forms in Africa is a significant one. Alongside the dominant current which argues that the traditional corporation is the way forward for economic growth in South Africa, several other streams of thought have contested and been critical of the traditional corporate model. Within the range of structures alternative to the traditional corporation, this article focuses on the particular legal form of benefit corporations. The benefit corporation has made its entry into what one might term the global statute book through the jurisdictions of over twenty American states. While the South African Companies legislation was overhauled and replaced in 2008 with a completely revamped statute, no specific provision was made for a benefit corporation. Since 2008, two practices alternative to further revising the statute book have developed in South Africa: third-party certification and hybrid structuring. While the legal potential to craft a benefit corporation in South Africa exists, there is little evidence of this legal potential and form being developed to date, despite a growing appreciation and interest in the social enterprise sector.

ARTICLE HISTORY

KEYWORDS

Benefit corporation; social enterprise; community interest company; corporate social responsibility; corporate lawyering; legal form; corporate form; public benefit corporation; South Africa; law reform

1. Introduction

There have been significant developments in the legal form of business enterprises in South Africa over the past two decades, including the development and implementation of a new corporate legislative regime. This article aims to trace and examine these developments, with particular interest in corporate and non-corporate structures that combine profit and public welfare objectives. Both corporate and non-corporate structures that combine profit and public welfare objectives fall within the broader set of organisations which are alternative to the traditional form of the corporation. The traditional form of the corporation itself may be understood as consisting of three elements: limited liability, separation of ownership and management, and a focus on profits for shareholders. Until recently (e.g. after the global financial crisis of 2008), these 'alternative' organizations were generally regarded as a rather marginal component of the

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economy. The traditional limited liability corporation acting for profit and with a separation of ownership and management appeared as vibrant as ever – and indeed was central to much of the vision around economic development.

This was also the case in recent times in South Africa. While a different state of affairs (management control) characterized pre-1994 South African corporations, from the advent of constitutional democracy the dominant Anglo-American model of corporate governance has come to dominate, separating management and ownership and most crucially solidifying the overarching focus on profits for shareholders. As Padayachee (2013) shows, this was quite a fundamental and distinctive development in South Africa, with the movement 'along the governance spectrum towards an Anglo-American approach, sharing features of the light-touch, regulatory kind found in the UK'(Padayachee 2013, 285). Now driven by the imperative of shareholder rights and wealth maximization, it has been the corporation in its traditional form that has been looked to for growth, whether state-owned or not. Indeed, Padayachee makes the point that state-owned corporations have been governed by a state-generated policy that requires these corporations to pursue the maximization of profits(Padayachee 2013, 278).

Nonetheless, alongside this dominant current – pushing the model of the traditional corporation – several other streams of thought have contested and been critical of this conclusion that the way forward for growth is the traditional corporation. One critical stream of thought has considered the option of employee ownership. To what extent could other stakeholders, such as employees and customers – beyond the traditional notion of stakeholders as shareholders – be drawn into the activities and governance of the firm? This approach to the organization of the firm has more affinity to the German and Japanese models of corporate governance than to its Anglo-American counterpart. But at the time of the transition from apartheid, when there was widespread recognition of the need to shift corporate ownership away from its exclusively white base, South Africa lost out on its opportunity to embed a more democratic approach to economic ownership and organisation when tentative early moves towards co-determination were opposed by a majority of trade unions for various reasons(Padayachee 2013, 275–77).

A second critical stream of thought has focused on cooperatives and various not-for-profit organisations(Ellerman 2015; Ridley-Duff and Bull 2019). In South Africa, the cooperative model is generally a small-scale legal form used for community development, usually at local level.The official expression of this thinking was reflected in the publication by the Department of Economic Development of a working paper (intended to be prior to a Green Paper) on social enterprises – the National Social Economy Draft Green Paper 2019 – which categorised non-profit institutions in South Africa into 'three distinct sub-groups, namely, voluntary associations, not-for-profit trusts (based on data held by the Department of Social Development), and not-for-profit companies registered with the Companies and Intellectual Property Commission as per the Companies Act of 2008.' This three-part classification derives from the Nonprofit Organisations Act (Nonprofit Organisations Act 71 of 1997)which allows a registration facility for these three distinct types of not-for-profit organisations. It is implemented through a voluntary accreditation administered by the Directorate of Non-Profit Organisations within the Department of Social Development. This paper noted that 'whilst this definition provides a way to measure activities in the Social Economy, it is likely to be an underestimate since it

excludes the informal sector, volunteer activities, as well as for-profit organisations that have a very clear social, environmental or public benefit mission (i.e. social enterprises).'

This sector has been growing fast. According to the working paper:

> the number of registered NPIs nearly doubled between 2010 and 2014, growing from 70,315 in 2010 to 120,227 entities in 2014, with the majority of NPIs being registered as "voluntary associations".
>
> (National Social Economy Draft Green Paper 2019, 30–31)

In 2014, the sector comprised 114,103 voluntary associations, 3,865 non-profit companies and 2,250 not-for-profit trusts, although these official numbers may overstate the number of organisations in the sector, given that a more focused recent study on social enterprises found only 453 firms fitting the definition of that study(Social Enterprises in South Africa Discovering a Vibrant Sector 2018).

A third current offering an alternative to the dominant model of the Anglo-American for-profit corporate model, at least to some extent, is the development of the public interest doctrine in competition law. Competition law in South Africa applies not to profit-making but rather to 'economic activity', a very broad phrase. Competition law thus applies to the actions of not-for-profit companies as well as to the activity of profit-seeking firms. For instance, if a company providing bicycles at a low cost to persons travelling from the townships to jobs in the centre of a city were dominant in the economic market for providing such transport, the company would be subject to the restrictions of competition legislation and would be liable to enforcement action and penalties should it abuse that position of dominance (as it is not a violation ofcompetition legislation to occupy a position of dominance, only to abuse that dominance). (Kelly et al. 2017, 44–45)

While the application of competition law in South Africa to the economic activity of non-profit entities is not globally distinctive, the contemporary public interest doctrine in terms of which the competition legislation is both framed and interpreted is. While the historical roots of competition are densely intertwined with notions of cooperation and the form of the corporation – as shown by the example of agricultural cooperatives in pre-WWII America(Woeste 1993, 25–30) – the proximate origins of the South African public interest doctrine lie in the political context in which the competition legislation was drafted – involving a recognition of the severe economic inequality that confronted South Africa precisely at the moment that the formal political equality of each of its citizens was affirmed and consolidated with the democratic transition of 1994 and the Constitution of 1996 (Klaaren 2019). Further, the public interest doctrine has been well elaborated over now twenty years by the field-specific institutions set up to enforce that legislation(Lewis 2012). Finally, amendments to the Act passed in 2018 and implemented in 2019 have expanded the scope of the legislation over non-efficiency considerations.

Fourth, after a decade of state capture, the role of state owned corporations is again on the agenda in South Africa.Resisting the framing of 'looters v saviours', Ayabonga Cawe views state owned enterprises as 'a vehicle to consolidate personal, narrow and at times geopolitical alliances, rather than sustained domestic and developmental accumulation'(Cawe 2017). This debate is being pushed beyond questions of corruption narrowly defined towards considering the role of state-owned corporations in South

Africa's economy more broadly. It is beginning to broaden out beyond concern with any one component – such as for-profit companies and also state-owned corporations – to ask, how diverse is the corporate sector in South Africa? (Michie 2015).

In addition to these above four lines of critical thinking, in recent years alternative business enterprises have also come to be seen in some countries as potentially attractive in light of their ability to tackle various economic and social concerns, and because of their relative resilience during the financial and economic crises of the first decade of the 2000s. This period of time has also seen the emergence of a new type of philanthropy, namely impact investing, or for-profit philanthropy. In a parallel development, there is a resurgence of scholarly and policy interest in alternatives to the traditional corporation. Indeed, in South African business schools, the study both of corporate social responsibility and of alternative corporation forms is spreading and becoming more prominent. One example of the latter trend within business school research and teaching is the establishment of the Bertha Centre at the Graduate School of Business (GSB) at the University of Cape Town (UCT).

Against the above background, it is worthwhile to examine to what extent, under what conditions, and with what variant characteristics alternative corporate forms may be emerging in countries around the world, South Africa among them. The expansion of the corporate form into the non-profit world and the expansion of the public interest motive into the corporate sphere are developments worth examining. This dual expansion represents a direct engagement with market power. This examination also raises the possibility of interrogating the notion of value, exploring how radically differing senses of value between public and private within these alternative structures (including benefit corporations) are – and are not – bridged, managed, and quantified.

Within the range of alternative structures, this article will focus on the particular legal form of benefit corporations. In some ways – at least globally – the benefit corporation may be seen as a spin-off from the rise of the corporate social responsibility discourse. However, the strength and impact of that discourse in South Africa has been sharply questioned(see Loewenstein 2013; Fig 2005; Atal 2017; Rajak 2011).

As described (and defined) below, the benefit corporation is closely identified with a specific legal form embedded in a wave of company laws passed in the past two decades in the United States and several other jurisdictions with well-developed capitalist economies. It is worthwhile to investigate the phenomenon of the benefit corporation from a South African perspective. Such a viewpoint may be built from attention to the drafting history of the recent company law revision as well as to the claimed instantiation of this corporate form in African jurisdictions including South Africa. It furthermore draws upon academic writing on these topics of public corporate benefit and the overlap of public and private value. Where treating matters of law, the aim is thus not only to ask questions of what the law explicitly provides for but also what spaces and potentials exist. We are thus asking whether a niche in law and business exists where significant numbers of particular forms of alternative organisations – such as public benefit corporations – might emerge.

The next section looks at the entry of this particular legal form, the benefit corporation, into what one might term the global statute book. The following section then returns the focus to South Africa, and discusses the replacement of the old companies legislation in 2008 with a completely revamped statute. The fourth section details the

contours and prevalence of two practices alternative to revising the statute book, certification and hybrid structuring. The fifth section offers some reflections and concludes.

2. The entry of the benefit corporation into the global statute book

There has always existed at least some extent of diversity in legal forms of corporate entities – pursuing a mixture of profit and public benefit – in statute books in jurisdictions around the world. What might be termed 'social hybrid' legal forms include the benefit corporation in the US, the Community Contribution Company in British Columbia in Canada, the UK's Community Interest Company, Italy's *sociali impresa*, France's social solidarity co-operative, and Belgium's Social Purpose Company (Rawhouser, Cummings, and Crane 2015). What is of particular interest here is the entry into this global statute book of the legal form of the benefit corporation. With competence over incorporation legislation residing at the state rather than the federal level, over twenty American states had by 2015 introduced this new corporate form into their statute books, with more still considering the change.

Benefit corporations may be defined as firms incorporated under a jurisdiction's corporate legislation, subject to the usual private sector tax regime, but spelling out 'their social commitments in their corporate governing documents for all potential investors to see'(Rawhouser, Cummings, and Crane 2015, 4). In the U.S., the movement towards benefit corporations is the strongest of three or four closely associated legislated trends, the others going by the labels of Low-Profit Limited Liability Companies, Flexible Purpose Corporations, and Social Purpose Corporations (Rawhouser, Cummings, and Crane 2015, 3). A model legislation exists for benefit corporations and has served as the template for adoption (with amendments). In addition to mandating the public benefit purpose, this model legislation proposes two other key elements to the corporate form: that the corporation file an annual report of its public benefit activities (measured against a third-party standard) with the state, and that its directors be mandated and monitored to consider such public constituencies in their decision-making(Loewenstein 2013, pp. 1013–27). The dominant U.S. model differs from the form of a community interest company in the UK in that the UK form has a mandatory asset lock provision – ensuring that the company does not transfer assets for less than full consideration (other than for the benefit of the community) – and a specific regulatory body, the Office of the Regulator of Community Interest Companies (Office of the Regulator of Community Interest Companies 2019).

The arguments in the U.S. for and against the introduction of the benefit corporation legal form have taken on several dimensions: legal, impact, identity, and demand. In the legal dimension, proponents have argued that this legislative reform 'creates greater flexibility for organizations to strike a balance between non-profit and for-profit practices' (Rawhouser, Cummings, and Crane 2015, 21). Opponents have pointed to problems in determining the boundaries of the hybrid category so as to regulate it effectively. In the impact dimension, proponents have argued that there is a social spill-over effect, that by 'providing an infrastructure to measure and compare social impact, the Benefit Corporation category increases the credibility and visibility of social goals for all forms of business'. Opponents have countered that there is a category threat here – that 'social hybrid legislation could weaken existing for-profit and non-profit organizational

categories'. In the identity dimension, supporters of the benefit corporation legal reform note that the new form will increase stakeholder clarity – that the 'creation of a new legal category creates clarity by reducing confusion among investors and consumers about the underlying philosophical differences between would-be social hybrids and "traditional" for-profit firms'. Opponents have argued that the novelty of benefit corporations might lead to confusion for investors and stakeholders. In the demand dimension, proponents argue that existing organizational categories have become culturally'out of alignment with the needs of the environment, and that creation of a new category such as social hybrid organization better addresses extant needs'. Opponents respond that the category is redundant and there is simply no need for this reform. One Illinois state legislator argued on the floor of his state legislature along these lines: 'I think it is something of an outrage to imply that corporate America doesn't already pursue a great deal of the eleemosynary pursuits, in fact, leads the way many times in instances of sustainability, all kinds of charitable contributions, provides leadership to those organizations and to imply by this Bill or to suggest that a B corporation is somehow superior to what is already occurring throughout the country, I think is without merit'(Rawhouser, Cummings, and Crane 2015, pp. 26–27).

The trajectory and impact of the benefit corporation varies from nation to nation. There have been studies critical of the movement towards benefit corporation – at least in its latter stages – in the United States. One study of the more than 30 American legislative histories to date (at state level) concludes 'the discursive framing is dynamic and contested over time'(Baudot, Dillard, and Pencle 2019). The authors found a discourse 'evolving from a focus on enabling for-profit firms to broaden out their objectives to include social goals beyond profit maximization to a focus on exposing activities traditionally carried out by government or not-for-profit entities to market discipline'. Exposure of state enterprises to market discipline appears to mean to these scholars that benefit corporations 'are a manifestation and means by which the responsibility for public services and public welfare is transferred to the private sector along with the associated public resources.'

One might question whether this argument would be transferable to emerging economies. Some scholars argue that 'some businesses in emerging markets developed long-term concerns and strategies about the responsibility of business to society. Although such concerns were also found in paternalistic and philanthropic businesses in the West, their equivalents in emerging markets were typically motivated differently, and their commitment was typically more extensive. This reflected a number of factors, including the extent of social deprivation in many countries, entrenched inequality in wealth distribution, institutional voids that meant public policies were unhelpful in addressing such deprivation, and religious beliefs. The extent of deprivation and the nature of the institutional voids may have worked to prompt some businesses at least to pursue a broad stakeholder view of capitalism'(Austin, Dávila and Jones, 2017, 563).

3. The statute book in South Africa and the overhaul of the companies act

As drafted and enacted, the currently operative companies legislation in South Africa, the Companies Act 71 of 2008, provides in section 8(1) two distinct choices: 'Two types of companies may be formed and incorporated under this Act, namely profit companies

and non-profit companies.' The making of this foundational distinction between profit and not-for-profit companies was a departure from the earlier regime the Companies Act replaced. As one of the chief drafters of the 2008 legislation has noted, 'The new Act recognises that the motivation for forming a company is the most fundamental distinction, both in relation to the structure and design of the company, and in the need for regulation of the company. Some people wish to incorporate a company as an instrument to generate wealth, others as an instrument to pursue shared interests, or provide a public benefit. Accordingly, the new Act fundamentally departs from the scheme of the previous Act by distinguishing between profit and non-profit purposes as the threshold categorisation for companies'(Knight 2010, 9). Knight goes on to note that the 'nearest the new Act comes to blurring the distinction between categories of companies is found in s 9(1), which subjects state-owned companies to every provision of the Act that applies to a public company'(Knight 2010, 10).

A non-profit company suffers several disadvantages as compared to a for-profit company. While it is not required to register for an alternative tax regime, if it does register as a Public Benefit Organisation (PBO), it is generally limited to generating no more than 5% of its revenues from trading (that is, for-profit) activities. Perhaps most significantly, the provisions relating to capitalisation of companies and election of directors do not apply to non-profit companies. As Knight notes, in terms of section 10, 'non-profit companies are excluded from the application of many provisions, including entire chapters, of the new Act, which cannot apply to them because they do not have shares or issue other securities. On the other hand, they are subject to a modified application of certain provisions of the Act (for which see s 10) and to a special set of distinct requirements that could not apply to profit companies, as set out in Schedule 1 of the new Act'(Knight 2010).

The benefit corporation legal form was considered in the revision of the companies legislation in South Africa undertaken a decade ago but it was not adopted. We should ask why. One reason for the non-adoption of the benefit corporation form was likely that it would complicate – at least to some degree – a statute book that the primary government department with responsibility for the reform of the company law, the dti, was trying to simplify. The dti proposed, as one of its primary objectives in the reform of company law, the simplification of company formation procedures. The reforms proposed and adopted also pursued the goal of reducing the costs of forming and maintaining a company. This reason has a parallel above with one of the themes of the opponents of benefit corporations in the US, relating to stakeholder clarity.

The overall bid behind the Companies Act was to encourage entrepreneurship within the Republic. The encouragement of entrepreneurship now forms part of the fundamental purposes of the Companies Act. Previously, the differing procedures for the formation of different types of entities, and the complicated and expensive processes that needed to be followed, were obstacles in the path of those who sought to create corporations. The reform legislation enacted into law in 2008 thus saw the narrowing of the types of entities which may be registered by the discontinuing of the registration of close corporations (a previously operative and distinct route towards corporate formation of small firms), as well as the simplification of company formation requirements. Some have lamented the impact of the Companies Act 2008, discontinuing close corporations(Henning 2010).

There was one brief surfacing of the question of the diversity of legal forms in the parliamentary consideration of this legislation. On 13 August 2008, the relevant legislative committee was considering the Bill that would give birth to the Companies Act 2008. In a submission that was made publicly before the committee, the South African Music Royalty Organisation (SAMRO) argued that the Bill as drafted was flattening the forms of corporate entities that were allowed to exist and operate and that SAMRO's own particular form was not recognized and would be altered by the passage of the Bill. SAMRO's legal corporate form was in the character of a limited guarantee company and had been itself grandfathered into the legislation that the Companies Bill would be repealing and replacing. SAMRO's representative argued that 'SAMRO was recognised as a public company. It appeared that non-profit companies were excluded from the definition of "public company" in the Bill. SAMRO thought it was important that non-profit companies, as public benefit organisations, continued to be recognised as public companies'(Companies Bill [B61 – 2008]: Public Hearings | PMG, 2008). This argument appears not to have been specifically and publicly responded to by the dti and the Bill appears not to have been altered in any direct response. The SAMRO argument was both in favour of a greater diversity of legal forms and in favour of a crossing of the divide between public and private in the recognition of value in the corporate form.

Where within this discourse does one find the debate that is being held elsewhere regarding alternative business structures? There are perhaps three locations. The first location where this debate is occurring is of course in the above-mentioned green paper policy development process being undertaken by the Department of Economic Development. However, that policy process does not encompass the companies legislation, except indirectly where the Companies Act allows for the incorporation of a non-profit company that can seek non-profit institution status.

Second, the values, interests and considerations that are raised in the debate over benefit corporations may be found at least to some extent and implicitly in the shareholder versus stakeholder argument, which forms part of the classic discourse over corporations. This debate is usually framed around the question 'in whose interests should the corporation be run?'. Over the past several decades, there has been express recognition of the changing corporate environment, towards one with a greater social and ethical concern, higher standards of accountability and transparency, an increase in globalisation, as well as an emphasis on the importance of investor-friendly domestic laws to encourage investment. Arguably, this trend in the corporate sector even in South Africa started prior to 1994.

South Africa has chosen to adhere to what has been termed the 'enlightened shareholder value' approach. This approach states that the company should promote, as its primary interest, the interests of shareholders. This means that the primary objective of the company remains profit maximisation. The interests of other stakeholders are included, as subsidiary (but nevertheless important) interests. As stated above, the company has to comply with legislative requirements, as they apply to various other stakeholder interests. However, the company may not abandon the interests of the shareholder, in favour of wishing to promote the interests of other stakeholders. The rationale is that the enlightened shareholder value approach endorses the success of the company, as a going concern, which will have the knock-on effect of fostering healthy relationships with other stakeholders. Noteworthy here is s 7(d) – one of the purposes

provisions of the Companies Act of 2008 – which reaffirms the company as a means of achieving both economic and social benefits. As such, one could argue that the company may not solely pursue economic benefits without consideration of other interests. One significant institutional change wrought by the 2008 Companies Act is the introduction of a requirement for a social and ethics committee for certain categories of companies, including for-profit companies. Havenga has argued that these provisions 'give prominence to the value attached to concerns beyond profit-making'(Havenga 2015, 285). These social and ethics committee, she argues, 'could and should play [a role] in advancing corporate social responsibility, sound ethical leadership and, especially, human rights imperatives'(Havenga 2015, 286).

Third, in addition to and beyond the 'stakeholder versus shareholder' debate, another location for the South African version of the benefit corporation debate is over the question of the South African constitutional dispensation providing mandatory standards which companies must maintain – succinctly put, the application of the Bill of Rights to corporations. This debate has already been introduced above regarding the role of the social and ethics committees in promoting compliance with human rights imperatives. These constitutional standards are encapsulated in various rights and pieces of legislation, providing for a range of interests, including but not limited to, labour relations, environmental considerations and social transformation. These are considerations that benefit corporations would also recognise as being core to their business structure. Significant scholarly attention has been paid to this issue, examining whether and how the horizontal application of the Bill of Rights fundamentally changes the nature of the corporation (see for example Katzew 2011; Bilchitz 2008).

Looking at these three debates and their locations, it is possible that an important niche was missed and continues to be overlooked, namely the place of legal form in advancing social enterprises. In the work that was undertaken to explore the substantive effect of the Constitution, there was insufficient attention given to the form of the corporation, at least in the drafting of the 2008 new Companies Act.

The Bertha Centre Guide to Legal Forms points out that for-profit legal forms can operate like a social enterprise in several ways: '[e]stablish a board to safeguard the social mission; [c]hange the Memorandum of Incorporation to reflect the dual mission and how profits will be reinvested in the business; [g]et an international accreditation as a social enterprise/use international rating systems to measure the impact; … and [o]penly share financial statements and social impact reports'(Bertha Centre for Social Innovation and Entrepreneurship 2016, 11). Instances given of accreditation include the Trading for People and Planet accreditation by the Social Enterprise Mark, B-Corporation Certification, the Global Reporting Initiative's Sustainability Reporting Framework, and the Impact Reporting and Investment Standards (IRIS) by the Global Impact Investing Network.

The result is that only a weak and non-distinctive form of incorporation as a benefit corporation is available in South Africa. It is non-distinctive because it is in form not distinguishable from the dominant for-profit traditional corporation. It is weak because the public benefit mission cannot be irrevocably designed – cannot be 'hard-wired' – into the corporation. The change in the Memorandum of Incorporation reflecting the public benefit mission and the reinvestment of profits may be reversed by the shareholders.

4. Certification and hybrid structuring: two alternative practices

As an alternative to a benefit corporation, two practices are arguably developing in South Africa that serve much the same purpose as would the explicit incorporation as a benefit corporation. One is the practice of benefit corporation certification, mentioned above regarding the Bertha Centre Guide to Legal Forms. A number of South African and African companies are certified by an external organisation as benefit corporations, even though they are not legally incorporated as benefit corporations. The other practice that arguably provides much the same attributes as a benefit corporation is the development and use of hybrid corporate structuring models. An example of this is an ownership or group-level model such as used by NICRO where a non-profit corporation creates and holds an interest in a for-profit entity. This section examines these two activities as practices of implementation. Through showing the limited nature of the benefit corporation phenomenon, these practices demonstrate the relatively tenacious power of the corporate legal form – power that cannot be sourced solely in the enforcement actions of the state but derives rather from taken for granted concepts and from activities such as corporate lawyering and advising.

4.1. Benefit corporation certification

B-Lab East Africa, based in Nairobi – and affiliated to one of, if not the most significant standards bodies existing globally – provides benefit corporation certification to companies incorporated in Africa, including South Africa. B-Lab East Africa considers itself to be 'part of a global movement that supports people using business as a force for good'(B Lab East Africa | B The Change 2019). In order to provide certification, B-Lab East Africa requires that corporations take into consideration not only the interests of company shareholders, but that of other stakeholders as well, such as employees, customers, suppliers, the community and the environment.

This means that a certain application and evaluation process is followed. Prior to certification being granted, a 'B Impact Assessment' must be undertaken. The assessment evaluates both the company's daily operations and its business model. The mention of the latter leads one to believe that a real or substantial identifier must be present in company certificates, highlighting that the company in consideration complies with benefit corporation standards. A company submits its B-Impact Assessment to B-Lab East Africa and thereafter the assessment is reviewed and if all criteria are met and checks are satisfactorily passed, the benefit corporation will be offered the certification.

B-Lab East Africa has provided certification to thirty-four African companies, eight of which operate in South Africa. A further 15 companies are incorporated in Kenya, and two in Ghana. These companies operate in disparate fields and markets, from consultancy and venture capitalism, to wine farming and inspirational speaking. They range in size from a sole proprietorship to a large firm associated with a JSE-listed company. In order to provide a more full and contextual picture, the eight companies incorporated in South Africa are listed below, with a brief explanation of their fields and their operations.

i.**Lubanzi Cape Venture Wine Co**: Lubanzi produce and sell wine. Their focus is on the process of wine making, placing value on the agricultural labourers, responsible for creating the wine. They recycle profits back into programmes that benefit workers.

ii.**Chris Bertish – Impossible**: Chris Bertish is an international inspirational speaker, author and environmentalist. He formed the company, with the foundational maxim of inspiring change and long-term sustainability practices for the planet.

iii.**Ecolution Consulting**: Ecolution is a sustainability consultancy firm, practicing in the South African built environment and industry sectors. It provides consulting services on ecofriendly building design, as well as general sustainability and 'green' practices.

iv.**LifeCoUnLtd SA Investments**: LifeCoUnLtd SA Investments is a wholly owned subsidiary of LifeCoUnLtd Impact Trust. The company develops, supports and invests in enterprises that will have a positive impact on society and the economy, such as renewable energy, architecture and venture capital. The corporation claims to have delivered a social impact to over 112 000 beneficiaries and 5 000 young entrepreneurs.

v.**Imani Development**: Imani Development is a private economic and development consultancy firm, practicing mainly in Eastern and Southern Africa. They provide consulting services on economic growth and poverty reduction in developing nations.

vi.**IQbusiness**: IQbusiness is an independent management consultancy firm, with the goal of being more responsive to the wide array of challenges facing organisations in modern economic environments.

vii.**Simanye**: Simanye has two business arms, which work together in achieving their goal of driving profitable business and integrating inclusive strategies that will benefit all company stakeholders. First, Simanye offers consulting and auditing services in a range of specialised fields, including B-BBEE (broad-based black economic empowerment), economic development, social enterprise and impact assessment. Secondly, Simanye provides funding to innovative impact enterprises.

viii.**Zoona**: Zoona provides venture capital, business management tools and entrepreneurial support, with a focus on young entrepreneurs, who might otherwise lack the opportunity, resources and support to achieve these goals.

In order to extend the portrait of these companies and the movement they are part of into an analysis of their legal form, we read and analysed the incorporation documentation of the eight companies identified above, to the extent available. Most prominent among this documentation is the Memorandum of Incorporation (MOI), one of the crucial documents in terms of South African legislation. While the process of obtaining the company MOIs proved to be more complex than expected, it was established that seven of the above eight companies are registered in and operate in South Africa. Six of these companies are registered as private companies (Pty) Ltd, and one is registered as a close corporation (CC). The remaining identified company is registered in the United States and only operates in South Africa. It is registered as a limited liability company (LLC).

For the purposes of this research, all eight companies were contacted personally, first by email and then by a follow up phone call, requesting a copy of their company MOI. A brief explanation of the research was provided. It was also expressly stated that the information would be used for academic purposes solely. All eight companies declined to provide hard copies of their incorporation documentation. The US registered company offered 'any' assistance in the form of explanation, and two other companies were open to answering limited questions. The remainder of the companies were unwilling to assist.

In an alternative attempt to obtain the company MOIs, claims for such documentation were lodged with the Companies and Intellectual Property Commission (CIPC). As part

of the set of administrative reforms associated with the passage of new companies legislation in 2008, the CIPC only enables and allows for electronic lodging for companies registered after 2011. Further, only a short form on the MOI would be sent. Of the eight companies, only three were registered after 2011. We lodged a claim for these three company MOIs. Upon receipt, it was clear that the MOIs were standardised, with all three being identical, apart from the company names and other technical registration information.

Subsequent to the above efforts, one of the companies reverted to us. Realizing that they were in touch with researchers from an academic law school, this company requested legal advice as to how to incorporate the B Corp standards and principles into their company documentation. [We understood that this was due to no such advice being received.] Coupled with the standardised, identical MOIs received from the CIPC, this approach has led us to suspect that B Corp certification has no real impact on the underlying memorandum of incorporation. It is not clear whether there has been an impact on the business model itself, as stated. According to our preliminary experience, certification appears to focus its attention on the external image of the company rather than ensuring through legal means (even if reversible and internal to the corporation) the stability and direction of the business model.

This was not what we had expected to find. According to a *Guardian* newspaper piece, '[o]nce companies clear the social and environmental review by B Lab, they have a year or two to take whatever legal steps – a reincorporation as a benefit corporation or change to their bylaws – are necessary to require their directors and officers to consider all stakeholders, and not just shareholders, when making decisions. Under the new structure, shareholders have the right to hold directors and officers accountable to this broader mission'(Gunther 2016). It should also be mentioned that we see no obstacle in the interpretation of the Companies Act of 2008 to this legal lock-in. The companies legislation in South Africa may be interpreted to allow for a 'for-profit' company capitalised by shares having a Memorandum of Incorporation that specifies the pursuit of public benefit and ensures that dividends are reinvested back into the company.

4.2. Hybrid corporate structuring models

A recent and thorough legal analysis of the various forms that social enterprises may take in South African company law undertaken for the Bertha Centre lists seven distinct legal forms. These seven forms are divided across the for-profit/non-profit divide with four for-profit legal forms and three non-profit legal forms(Bertha Centre for Social Innovation and Entrepreneurship 2016, 3). The for-profit legal forms include sole proprietorships/partnerships, private companies, business trusts, and co-operatives. The non-profit forms consist of voluntary associations, non-profit companies as defined in section 1of the Companies Act, and non-profit or charitable trusts.

This analysis recommends the use of hybrid structures in order to allow for a non-profit firm to, for instance, have control over and benefit from the activities of a for-profit subsidiary. According to the Bertha Guide, 'a hybrid structure can allow for a social enterprise to harvest the benefits of both sides of the not-for and for-profit spectrum. It most often applies to an enterprise that has outgrown its current form and therefore rarely applies to start-ups. The hybrid structure aims to reconcile conflicts between

sources of funding associated with for-profit and non-profit legal forms'(Bertha Centre for Social Innovation and Entrepreneurship 2016, 10). The paper goes on to outline three hybrid principles: '(1) A non-profit entity holds a proprietary interest in a for-profit entity and therefore receives profits from the profit entity, such as dividends when the non-profit entity holds shares in a private company; (2) A for-profit entity is a member in a non-profit entity and often makes donations to the non-profit entity; and/or (3) A contractual arrangement between the non-profit entity and for-profit entity exists, which allows the non-profit to receive income from the for-profit. For instance, the non-profit entity renders services to the for-profit entity or the non-profit entity leases assets from the for-profit entity. In both cases, the non-profit entity receives payment from the for-profit entity. It is important that agreements between such for-profit and non-profit entities are concluded at "arms-length". In many instances it is simply easier for social enterprise with a for-profit legal form to partner with an existing non-profit organization. It is recommended that a social enterprise seeking to enter into this typeof hybrid model obtain legal advice before taking this step'(Bertha Centre for Social Innovation and Entrepreneurship 2016, 10).

One legal practitioner reports having drafted public benefit memoranda of incorporation for three for-profit companies as part of typical hybrid structures. In these structures, the usual arrangement is for a non-profit company to own and control the for-profit enterprise. This same legal practitioner reports four more similar transactions are underway. There is thus some evidence that the hybrid structure practice, as also noted in the Bertha Legal Guide document, continues to develop and to be used in South African corporate legal practice. Nonetheless, the most experienced practitioners in the social enterprise field in South Africa agree that there are a number of risks and disabilities associated with these often-attractive hybrid structures. They are thus by no means recommended as the default option.(See "Opportunities for Social Enterprises with For-Profit Legal Forms | Marcus Coetzee" 2019).

Indeed, from a legal and organisational perspective this advice seems well-founded, as there are several problems with the efficacy of hybrid structures. Hybrid structures are of course by definition complex. They increase the legal and transactions costs associated both with corporate formation and with other corporate life-cycle events such as mergers and acquisitions. At least as importantly, they may reduce the agility of the social enterprise and its ability to compete in the markets in which it operates. Unlike an integrated for-profit entity, a hybrid structure will face difficulties in structuring and balancing incentives between profit and public benefit objectives. Finally, these hybrid structures will likely face obstacles should they attempt to achieve scale.

5. Conclusion

What remains somewhat puzzling is why the option of amending the memorandum of incorporation of a 'for-profit' company – with the intention of achieving scale for the public benefit to be pursued (as opposed to the practice of a hybrid structure) – remains apparently untested and relatively unexplored in South Africa. Only the most experienced and knowledgeable lawyers or practitioners in the field are aware of its existence and potential. It is certainly true that there is apparently not a huge demand for this legal form. But, as shown by the growth globally of large-scale philanthropy mixing for-profit

and donation business models, the form will be a good fit for certain entrepreneurs, investors, and donors. It would appear that, apart from those deeply knowledgeable and experienced in the field, the conceptual options for corporate form mirror and replicate those of the Companies Act 2008. As noted above, the legislation has a rigid distinction at its heart – an entity is either a for-profit company or it is not – albeit that the former may take on a corporate social investment or corporate social responsibility mandate. This article does not make the case for necessarily putting the option of incorporating in the form of a public benefit corporations into the South African statute book – but it does identify a niche that may be filled by, for instance pro-bono public benefit lawyering and which might be occupied and exploited by social entrepreneurs pursuing at the same time profit and public benefit.

While there are several reasons to be sceptical of an uncritical diffusion of the benefit corporation form to South Africa, there remain rooted traditions of contestation over democratic capitalism in the South African polity that this legal form speaks to. Thus, one should not as of yet conclude that there is no potential for this legal form to assist in economic transformation. It may be that the benefit corporation is not appropriate for the South African and other African jurisdictions. But it hasn't yet been tried.

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