

Companies Act 2002 Overview*

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Introduction

The Companies Act 2002 (The Act) although assented to by the President on 27 June 2002 only came into effect from 1 March 2006. The new law repealed the Companies Ordinance (Cap. 212), 1932, an archaic piece of legislation based on the English Companies Act 1929, and aims to put in place a relevant and modern legal framework.

Brevity is not a feature of this Act, which contains 490 sections, 140 more than its predecessor. Key areas of change include in relation to the following:

- Accounts and audit (including of remuneration of individual directors))
- Annual returns (including requirement for audited accounts to be attached, even for private companies)
- Companies in distress (including rescue mechanisms for companies approaching insolvency, and detailed rules on the management of insolvent companies and on winding up of companies)
- Directors and officers (including age limits, increased accountability, increased regulation and disclosure
- Increased filing fees and penalties
- Meetings and resolutions
- Protection of minority shareholders
- Protection of third parties in relation to company's and its officers' capacity to act
- Protection of investors in listed companies
- Reduction of share capital

This newsletter summarises some of the salient features of the new Act. This newsletter is a guide and therefore not a substitute for professional advice. If you would like to discuss any of the issues in this newsletter, please speak to your usual contact at PricewaterhouseCoopers, or refer to the contact list at the end of this document.



Registration of companies

Following additional provisions made with regard to registration of companies:

- A proposed company name can now be reserved for up to 60 days pending finalisation of the registration documents (S30).
- It is now compulsory to appoint the first company secretary before registration (S14, 187).
- Particulars of date of birth of directors to be given (S14, 194).
- Particulars of other directorships of directors to be filed with the



Registrar now limited to last five years (S14), although the register of directors is required to record particulars of all other directorships (S210).

- A general commercial company no longer required to list a large number of object clauses in its memorandum (S7).
- Table A to be annexed to the company's articles where the table is partly or fully adopted by the articles (S11).
- Change of object clause no longer requires court sanction unless challenged by shareholders (S8).
- Reduction in capital no longer requires court confirmation unless challenged by creditors (S69 -72).
- Change of a company name now required to be gazetted by the Registrar (S31).
- New provisions for the change of private company into public company and vice versa (S8).

In view of substantial changes in the legislation existing companies may wish to consider adopting a new memorandum and articles, either using the Tables provided within the Act, or adopting these partially.

Company Secretary

Appointment of a company secretary made compulsory, but no formal qualification requirement is prescribed (S187).

Directors

Increased accountability of directors by amplifying their duties and clearly documenting them. Previously, directors' duties were primarily covered by common law. The Act codifies these duties. In particular, it requires directors to act in the best interest of the company, its members and employees and exercise due care, skill and diligence in all their actions (S181 – 185).

Appointment of directors of public companies to be voted on individually (S192).

A director can now be removed by an ordinary resolution notwithstanding provisions to the contrary in the memorandum and articles or in any agreement with him (S193).

Significant disclosure requirements with regard to directors including: age, shareholdings in the company, each director's emoluments, loans, interests in contracts, service contracts, pensions, and compensation for loss of office (S203 – 212). Private companies may well be concerned at the requirement for public disclosure of confidential information relating to individual director's emoluments as opposed to the total directors' emoluments (as was required to be disclosed under the Companies Ordinance).

Prohibitions in relation to directors including prohibition of the following: appointment of directors below the age of 21 and above 70 (S194-195), payment of tax free remuneration or provision of loans to directors and connected persons (S199 -200).

Accounts and audit

Books of account are required to be preserved for six years from the date on which they are made up (S 151). (This is a year longer than the record keeping requirement in terms of the income tax and VAT legislation.)

Directors now required to prepare individual company accounts as well as consolidated group accounts, both of which will show a true and fair view in accordance with the generally accepted accounting practices and NBAA regulations (S154).

Directors' report to include a fair review of the changes and development of the business of the company and its subsidiaries (S159).

Auditor's report to cover each component of individual accounts as well as group accounts (balance sheet, profit & loss account and cash flow statement). Auditors to also report whether the contents of the directors' report are consistent with those in the accounts (S161).

Scope of the auditor's report expanded to included specific disclosures required on non-compliance with certain matters. These include confirmation on the following: whether proper accounting records have been kept and proper returns received from the branches, whether the accounts are in agreement with the accounting records and branch returns, whether auditors have obtained all the required information and explanations, and whether accounts include disclosures on emoluments and benefits of directors as required under section 206 (S163).

The time limit within which the directors are required to lay the company's audited accounts before the company in general meeting is now 7 months from the end of the company's accounting period in case of a public company, and 10 months in case of a private company (S166).

Certain companies are exempted from audit but only dormant companies are likely to qualify in view of a ridiculously low threshold: annual turnover below Shs 1.5 million and gross assets below Shs 750,000 (S171).

A certified copy of the audited accounts, directors' report and auditor's report is now required to be delivered to the Registrar except where the company is exempt (under S171) from the requirement to appoint an auditor (S167).

Every director of the company shall be liable to a daily fine (as yet unspecified) for any delay in laying the accounts before the general meeting and delivering a copy to the Registrar. In case of non-compliance with this requirement any member, creditor or the Registrar may serve a notice on the directors to make good the default within 14 days, failing which they may approach the court who may issue an order with costs specifying the deadline for compliance (S167).

Special notice required for appointment of an auditor other than retiring auditor, filling of a casual vacancy and removing an auditor (S174).

Any officer of the company giving false information to the auditor is liable to imprisonment or fine or both (S176).

Resignation of auditors not effective unless given in writing and contains a statement of

circumstances giving rise to the resignation (S177, 179).

There is a requirement for foreign companies operating in Tanzania to file accounts within 3 months after the date to which such accounts are made out (S438). In practice such a requirement is likely to prove too challenging.

Dividends

S180(3) provides that a dividend can be paid out of "(a) realised profits less ..realised losses, or (b) ... realised revenue profits less ...revenue losses, whether realised or unrealised, provided the directors reasonably believe that immediately after the dividend has been paid the company will be able to discharge its liabilities as they fall due, and the realisable value of the company's assets will not be less than the amount of its liabilities". Although the terms "realised" and "unrealised" are not defined in the Act, it would appear that the aim is not to move from an accrual basis of accounting but rather to exclude as appropriate the impact of valuation adjustments.

Annual return

Date of return de-linked from Annual General Meeting (AGM). The "return date" is now (a) the anniversary of the company's incorporation, or (b) if the previous return delivered was made up to a different date, then the anniversary of that date (S128). The filing deadline is 28 days from the return date.

Details of the principal activities of the company, name of the secretary and dates of birth of the directors to be given (S129).

A certified copy of the audited accounts together with auditor's report and directors' report to be

annexed to the return (even for private companies) (S132, 167).

Given the low threshold for exemption from audit, in practice all companies are in principle required to comply with this requirement. This does beg the question whether the Registrar will have the room to accommodate all this material. A number of private companies will also be concerned at the implication of public disclosure of confidential information. Note that any member of the public can carry out a company search for a nominal fee of Tshs 2,000 and obtain copies of any or all documents filed with the company registry.

Maintenance of company records

Statutory books and any other records required under the Act (including books of account) may now be maintained in a form other than bound books including in electronic form provided adequate precaution is taken against falsification and facility of retrieval and reproduction in paper form is available (S468-469).

Filing fees and penalties

Registration and filing fees have increased significantly in percentage terms, however absolute values are still relatively small. Registration fee is capped at Tshs 300,000 for companies with share capital of more than Tshs 30 million. The fee for filing a document is Tshs 15,000 and the late filing fee is Tshs 1,500 per month or part thereof. For foreign companies these fees are set at US\$150 and US\$15 respectively.

We understand that the Companies Act (Punishment of Offences) Regulations 2003 made

under S473 are still in draft, and do not quantify the fine or other punishment. In the absence of transitional provisions, it is not clear whether the fines and punishment under the predecessor legislation still apply.

Protection of investors in listed companies

Following provisions made to recognise and support the role of the Capital Markets and Securities Authority (CMSA) (S46-53):

- Detailed provisions made regarding offer documents and its contents and approval by CMSA;
- Fines and punishment for directors and professionals giving false information in an offer document made more severe;
- Memorandum and articles of an open-ended investment company now needs to be approved by CMSA (S14(5))
- Requirements for allotment pursuant to an offer document now to be prescribed by CMSA.

Protection of minority interests

Any member of a company can now make an application to the court for its intervention or for permission to start a derivative action on behalf of the company if the affairs of the company are being conducted in a manner which is unfairly prejudicial to the interests of the members in general or the minority in particular (S233, 234).

Protection of third parties

Third parties dealing with a company in good faith need not review the company's memorandum and articles or check on the powers of the directors. Doctrine of constructive notice and doctrine of ultra-vires no longer applicable in such cases (S35 – 38).



Monitoring company affairs

Much more extensive powers of investigation and mechanisms for monitoring the affairs of a company (S215 – 228). The power of inspectors has been extended to cover enquiries into: related companies (S219), the true ownership of a company (S225), foreign companies (S228). There are also provisions in relation to punishment for destruction of documentary evidence (S226) and to save advocates and banks from disclosing client/ customer confidential information (S227).

Companies in distress

New provisions introduced in relation to companies, which are insolvent or approaching insolvency as follows:

- Directors of an insolvent company may (i) enter into voluntary arrangements with its creditors for satisfaction of its debts (S240) or (ii) may apply to the court to make orders for its management (S247) to forestall a possible creditor petition for winding up.
- Affairs of an insolvent or impending insolvent company to be managed only by a qualified insolvency practitioner, administrator, liquidator or administrative receiver (S236).
- During the insolvency procedures the supply of utilities like gas, water, electricity may not be interrupted (S239).

Overall, the focus is to prioritise a rescue-based approach and make winding up a last resort.

Liquidation, winding up and dissolution

More detailed provisions made to regulate winding up and liquidation of companies.

Any director or the secretary of a dormant company may now request the Registrar to strike off the company (S 400).

Provisions for employees on cessation or transfer of business

A company is now empowered to make provision for the benefit of its employees in the event of cessation or transfer of its business (S464).

Regulation of banking and insurance companies, certain societies and partnerships

The Act applies to banking and insurance companies except to the extent modified or excluded by the Banking and Financial Institutions Act, 2006 (which replaced the 1991 Act) and the Insurance Act, 1996 or any statutory modification or enactment thereof (S460).

Insurance companies and deposit or benefit societies to file with the Registrar periodical statements in a prescribed form prior to commencement of business and subsequently twice a year on specified dates (S461). A copy of this statement to be exhibited at every office and place of business of the company. Every member and creditor of the company is entitled to receive a copy of this statement.

Prohibition on formation of a business partnership or association consisting of more than 20 persons. However, this provision will now not apply to the practising solicitors, accountants and members of the stock exchange (S463).

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