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ING./INC. ■ GEREGISTREERDE GEOKTROOIEERDE REKENMEESTERS & OUDITEURS ■ REGISTERED CHARTERED ACCOUNTANTS & AUDITORS (SA)

NEWSLETTER

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A new era for Corporate Legislation

On 8 April 2009 the President signed the new Companies Act. Despite the fact that it was gazetted at the same time, the implementation date is, at the time of writing, still unknown. The Department of Trade and Industry published a notice on 28 September that implementation was deferred to 1 April 2010, at which date the (current) 1973 Companies Act will be replaced by the Companies Act, 71 of 2008 ("the Act").

In accordance with the objectives of simplification, flexibility, corporate efficiency, transparency and predictable regulation the following is a summary of some of the main changes in the Act:

- A more flexible regime is implemented for companies whose total share capital is owned by related persons and all their shareholders are directors.
- The requirements for incorporation are reduced, maximising flexibility as regards design and structure and restricting the regulatory oversight. The Memorandum of Incorporation serves as the sole governing document of a company and should therefore meet requirements in terms of content, as imposed by the Act. A standard form of a Memorandum of Incorporation is provided and any amendments thereto must be consistent with the spirit of the Act.
- Name reservations are no longer a requirement and a company name may only be restricted where such restriction is necessary to protect the public from misleading names, to protect the interests of owners of names and to protect society from names that could be characterised as hateful or negative.
- The annual financial statements of a public company and certain defined companies must be audited whilst that of other companies may be audited, subject to an independent review, or completely exempt.
- A capital maintenance regime based on solvency and

liquidity is created, thereby abolishing the concept of par value shares and nominal value.

- Corporate Governance matters are addressed, introducing flexibility, minimum standards and provisions for removal of directors from office. The duties of directors are codified and directors may now either be declared delinquent or placed under prohibition by a court. The Act also touches on the concepts of conflict of interest, director liability, indemnity and insurance.
- In the cases of takeovers and fundamental transactions the Act provides remedies such as appraisal rights for dissenting minority shareholders, and compulsory acquisition of minority shareholding. Provision is also made for a court to approve fundamental transactions where a significant minority is opposed to the transaction or on the basis of procedural irregularity or manifest unfairness.
- A new concept of business rescue replaces judicial management of companies to recognise the interests of shareholders, creditors and employees.

The Act contains many references to matters that could be, or must be, determined in regulations to be promulgated by the Minister of Trade and Industry. The first draft of these regulations was released in December 2009 for public comment. The comment period closed in March 2010 but indications are that a second draft of the regulations will still be published for comment before the final promulgation of the

regulations.

As far as the Act itself is concerned, a number of inconsistencies, errors and deficiencies were noted and these are to be corrected by an amendment Act even before the Act

becomes effective. This Amendment Bill was released by Parliament in November 2010. The next draft of the regulations is expected shortly.

Categories of Companies

The new Companies Act identifies two types of companies to be incorporated: A company can either be a profit company or a non-profit company. A profit company is defined as a company incorporated for the purpose of financial gain for its shareholders. A non-profit company is incorporated for public benefit and the income and property are not distributable to its incorporators. A non-profit company may be regarded as a successor to the previous Section 21 companies in the current act.

Profit companies can be:

1. A **state-owned company (SOC Ltd)** if it falls within the meaning of "state-owned enterprise" in terms of the Public Finance Management Act (PFMA), or is owned by a municipality. Provisions that apply to public companies also applied to state-owned companies unless the minister has granted an exemption.
2. A **private company (Proprietary Limited)** if it is not state-owned and the Memorandum of Incorporation ("MOI") prohibits it from offering its securities to the public and restricts the transferability of its securities. These are similar to private companies under the 1973 Act, however, they are no longer limited to 50 members as is currently the case.
3. A **personal liability company (Incorporated)** if it meets the criteria for a private company and the MOI states that it is a personal liability company. These are similar to the companies established under section 53(b) of the 1973 Act – the directors and past directors of such companies are jointly and severally liable together with the company, for any debts and liabilities that were contracted during their periods of office.
4. A **public company (Limited)**. These are comparable to public companies under the 1973 Act although only 1 member is required under the Act (compared to the minimum of 7 members as is currently the position).

If a company is not a state-owned company or a personal liability company or its MOI does not satisfy both criteria for a private company (outlined above), then it is a public company.

The "widely held" and "closely held" differences between companies, which were imposed by the Corporate Laws Amendment Act, will no longer apply.

Non-Profit Companies ("NPC")

An NPC can be incorporated by 3 or more persons, which may include juristic persons. It must have at least one object, each of which constitutes a "public benefit" object; or relates to one or more cultural or social activities, or communal or group interests.

Foreign and External Companies

A new concept of a "foreign company" is introduced by the Act. A company incorporated outside of South Africa irrespective of whether it carries on business or non-profit activities here, is referred to as a "foreign" company. Provisions of the Act relating to offers to the public of securities in South Africa will apply to the securities of a foreign company, whether or not it carries on activities here.

External companies are defined as a foreign company that is carrying on a business, or non-profit activities in South Africa, where carrying on a business is defined by the Act, although certain amendments were proposed to these definitions by the Companies Amendment Bill, 2010.

Close Corporations

Close Corporations (CCs) can still be incorporated until the Act comes into operation, after which no new CCs will be incorporated. Current CCs can choose to either convert to a company or continue to exist until deregistration or dissolution in

terms of the Close Corporations Act. No automatic conversion or dissolution is provided for. CCs that continue to exist will have to compile financial statements as is currently the case, but are included in some of the audit, review and other requirements of the Act.

Categories of Companies

	Non-profit companies	Profit companies						Close Corporations
		Private companies			Personal liability companies	Public companies	State-owned companies	
		Sole shareholder and director	All shareholders are directors	Other				
Name	NPC	(Pty) Ltd	(Pty) Ltd	(Pty) Ltd	Inc	Ltd	SOC	CC
1973 Act equivalent	Section 21 companies	Private companies	Private companies	Private companies	Section 53 Company limited by guarantee	Public companies	New	Close Corporation
Number of shareholders	Minimum 3	Unlimited (currently limited to 50)	Unlimited (currently limited to 50)	Unlimited (currently limited to 50)	Unlimited	Minimum 1 (currently 7)	Minimum 1 (currently 7)**	Maximum 10 members
Number of directors	Minimum 3	Minimum 1	Minimum 1	Minimum 1	Minimum 1	Minimum 3 (currently 2)	Minimum 3 (currently 2)**	Not applicable
Annual General Meeting		No	No	No	No	Yes	No	No
Annual Financial Statements	Yes	Yes	Yes	Yes	Yes	Yes	Yes**	Yes
Accounting framework	IFRS or IFRS for SMEs	Framework for non-public entities*	Framework for non-public entities*	IFRS or IFRS for SMEs	Framework for non-public entities*	IFRS	GRAP	Gaap appropriate to the business
Audit / Review / Exempt	Review***	Exempt***	Exempt***	Review***	Review***	Audit	Audit**	Accounting officer's report

* Still subject to approval by the Accounting Practices Board or FRSC

** All provisions that apply to public companies also apply to state-owned companies unless the Minister has granted an exemption.

*** If it's in the public interest according to regulations still to be promulgated an audit may be required.

Financial Statement under the new Companies Act

Sections 29 and 30 contain the requirements with respect to financial statements and annual financial statements. In terms of these sections, financial statements:

- Must comply with financial reporting standards;
- Should fairly present the state of affairs of the business of the company;
- Must be prepared within 6 months of the end of the financial year (previously 9 months). (This deadline will now also apply to Close Corporations);

Any person who is party to the preparation of false or misleading statements is guilty of an offence (section 29(6)).

Therefore, it can be assumed that certain private companies will need to have their annual financial statements audited, whilst some will fall outside the public interest and will not have to be audited, but only reviewed or can even be exempt from audit and review.

Requirement for Audit

Annual financial statements for a public company must be audited and in the case of any other company must be audited if required to by regulations still to be made by the Minister (section 30). The regulations will take into account whether the company is operating in a space that can be defined as having public interest, as indicated by:

- Turnover;
- Number of employees; or
- Nature and extent of activities.

Certain private companies are completely exempt if:

- one person holds or has all the beneficial interest in all the securities issued by the company; or
- every person who is a holder or has beneficial interest in securities issued by the company is also a director of the company;

except if the company has only one director and that director is a disqualified person.