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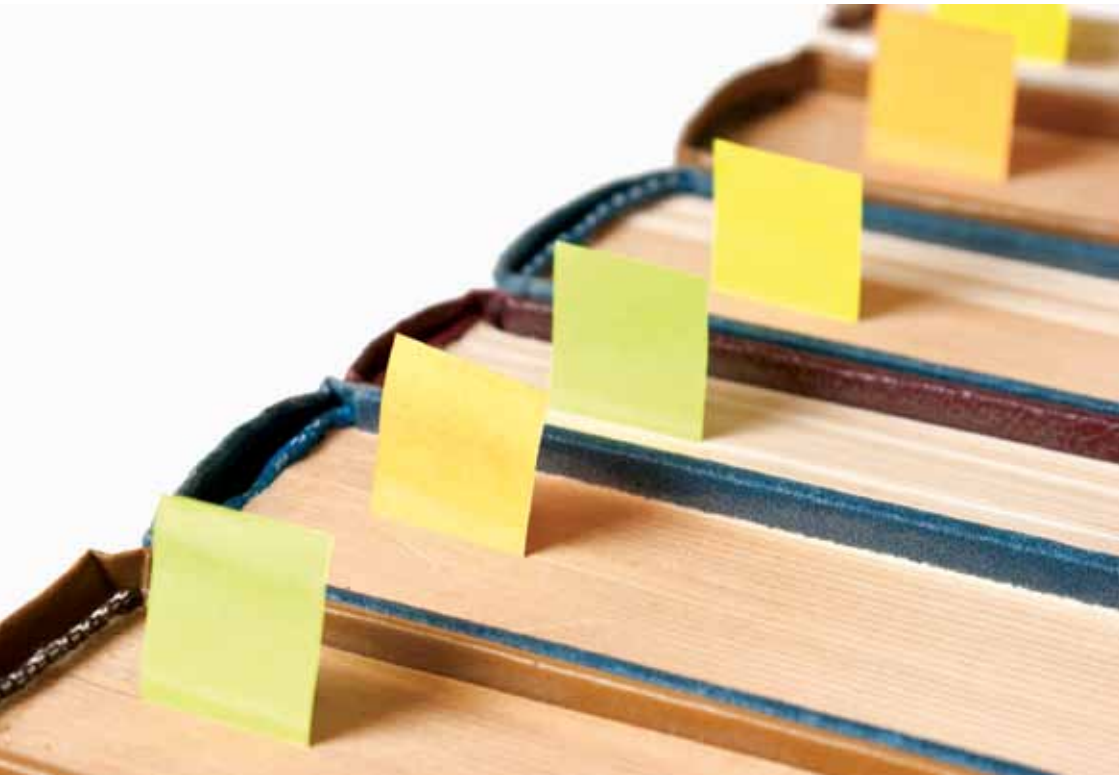
Companies Act, 2004
Summary of key changes



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Contact details:
Deloitte & Touche
Deloitte Building, Maerua Mall Complex,
Jan Jonker Road, Windhoek, Namibia
PO Box 47, Windhoek, Namibia
Tel Direct: +264 (0)61 285 5000
Fax: +264 (0)61 285 5050
www.deloitte.com/na

Introduction

The Namibian Companies Act, Act 28 of 2004 ("the Act") contains a number of provisions that will directly impact all companies, directors and officers. Most of the amendments made, however, relate to a modernisation of the Act with wording amendments, from South West Africa to Namibia, to remove gender bias, to include Namibian legislation like the Anti-Corruption Act of 2003, to standardise company secretarial documents to the official language and to update penalties and fees applicable. A summary of the more significant changes are highlighted below.

Effective date

The effective date of the Act is 1 November 2010. The amended Schedule 4 to the Act is applicable to companies with financial year ends commencing on or after 1 November 2010.

Definitions

A subsidiary is now defined by control and not a majority shareholding percentage.

Non-profit associations

An association may be incorporated as a company limited by guarantee. Section 21 companies in existence before 1 November 2010 are deemed to comply with the requirements of the new section 21 of the Act.

Apart from a name change, however, from *"Associations not for gain"* to *"Non-profit associations"*, the only other amendment is that the name of the company is to include the suffix *"Non-profit association incorporated under section 21"*. These entities are exempt from the name suffix requirement of *"Limited by Guarantee"* and do not have annual duties. An section 21 company established before 1 November 2010 may use the suffix *"Incorporated Association not for Gain"*.

Foreign branches and non-profit associations can register as section 21 companies, provided they comply with the requirements of section 21.

Associations or partnerships exceeding 20 members

Only public accountants and auditors, attorneys, notaries and conveyances, professional engineers, quantity surveyors, pharmacists and stockbrokers have been exempted from registering as a company where the members exceed 20. After 1 November 2010, application will have to be made to the Minister for new associations or partnerships (other than those exempted already) with members exceeding 20.

Conversions of companies

Notice of intention to convert a company is now 15 days, in the Gazette, before the date of the meeting, previously three days.

Formation, capacity, powers and objects

The principle of ultra vires, being that no act of a company will be void by reason that the company or directors acted without the necessary power, has been removed from the Act. It has been replaced with sections 40 and 41 of the Act which relate to dealings between a company and other persons as well as no constructive knowledge.

Section 40 deals with representations made to persons dealing with the company (about directors) while section 41 states that a person is not presumed to have knowledge of the contents of documents lodged with the Registrar, or available for inspection at the registered office, for example the memorandum of association.

A company now has the powers of a natural person of full capacity, in so far as possible for a juristic person, which was previously limited to the main object stated in its memorandum of association. The objects may be stated, but it is not required, and these would be seen as an internal restriction only. A non-profit association must state its objects in accordance with section 21.

Companies incorporated before 1 November 2010 may amend their memorandum by special resolution to remove objects if so desired.

Loans

Financial assistance may now be given (previously an offence) for the acquisition of shares in a company, or its holding company, if prior approval by special resolution is obtained and if the company will remain liquid and solvent after the acquisition.

If a company lends money to its holding company or a subsidiary of its holding company, but not to a subsidiary of itself, it must make disclosures of the loan and security in the annual financial statements.

This is not a new requirement given the existing IAS 24 Related Party disclosure requirements of International Financial Reporting Standards, but what is different is that the directors and officers (including past directors and officers) of the company will be guilty of an offence and liable to a fine or imprisonment if the disclosure is not made. The exception (to the requirements of the section) of obtaining the written consent of all members remains available in the new Act.

Names of companies

Sections relating to names and defensive names have been amended to ensure names are in the official language, that the period of registration or renewal of a defensive name is two years (previously one year) and that every company must display its registration number alongside its name in all notices, official publications, money orders and stationery used. The sections relating to undesirable names has been amended to give the Registrar more authority.

Memorandum of association

If the memorandum or articles of association of a company are not in English, the company has until 31 October 2012 to substitute them, by authority of special resolution, and no fee is payable for such substitution with the Registrar.

Share capital

Interest of up to 10% p.a. (previously 6% p.a.) may be charged on, and accounted for together with, shares issued for the purpose of raising money to offset the cost of construction of works, buildings or plant, which cannot be profitable for a lengthy period.

The most significant change to the Companies Act is the amendment of sections relating to the reduction of share capital. The only requirements are that a company may now reduce its own share capital, by special resolution if permitted by its memorandum and articles of association, and if after the reduction, the company will remain liquid and solvent. The special resolution may be in the form of a general approval that will be valid until the company's next annual general meeting. A general approval can be revoked at any general meeting before the annual general meeting. Shares repurchased must be cancelled.

A new section in the Act permits a subsidiary company, if authorised by its articles, to hold shares in its holding company to a maximum of 10% of the total number of issued shares of the holding company. This would be done by special resolution and the requirement of liquidity and solvency apply. No voting rights attach to these shares. If the subsidiary is a wholly-owned subsidiary, a special resolution is not required.

The directors of the company and its holding company are jointly and severally liable to restore the share capital of the company if the requirements of liquidity and solvency are not met.

The Act now includes provision for uncertificated securities, being those instruments on a Stock Exchange for example, which do not have a tangible certificate. These are to be maintained in an electronic register per class of security and certain rules around the inspection, maintenance and transfer thereof and fees applicable thereto have been listed.

Legislation to create a Central Securities Depositor is still however required in Namibia, effectively meaning that tangible share certificates are still to be issued for Namibian registered companies.

Redemption of preference shares

A share premium account can now be utilised in the redemption of preference shares, if in terms of the original issue and so authorised by its articles, that were issued before 1 November 2010.

Transfer of shares

Provision has now been made in the Act to allow registered and authorised banking institutions and the Namibian Stock Exchange, in addition to stock brokers, to prepare broker transfer forms for the transfer of securities.

Beneficial interest in securities

Where securities (listed) are registered in the name of a person who is not the holder of the beneficial interest in those securities, the registered shareholder must, by the 7th day of February, May, August and November of every year, disclose in writing to the company on whose behalf the security is held together with the number and class held.

A company has the power to question any registered shareholder as to who holds the beneficial interest in securities, going back as far as three years if needed. The registered shareholder is to submit the required information within 14 days of receipt of written notice.

A register of beneficial interest disclosures, where applicable, is to be maintained by a company, and disclosures of the beneficial holders and the extent held, are to be made in the annual financial statements of the company for any beneficial interest in excess of 5% of the total number of securities of that class. This register is to be open for inspection.

Offering of shares

A company may with the written approval of the Registrar, and subject to any conditions determined, exclude any category of members or debenture holders of a company who are not resident in Namibia from any rights offer.

It is sufficient evidence to prove an allotment of shares was made to the public if it is shown that the offer of sale was made within 18 months (previously 6 months) after the allotment or agreement to allot.

If a share offering is oversubscribed, the directors and officers of the company together with the company have 14 days to repay the money. If this is not done, they become jointly and severally liable to repay the money with interest (at 6% p.a.).

Annual returns and duties

More onerous disclosure requirements have been created for annual returns to be made by companies, which is required to be lodged with the Registrar within one month of a company's financial year end. The annual duty is also to be paid within one month of a company's financial year end.

The penalty for insider trading under the Act is N$500 000 and/or two years in prison.

Meetings of the company

A company is to hold an annual general meeting not more than 9 months (previously 6 months) after every financial year end, or not more than 15 months after the date of the last annual general meeting. A reduction in the extension period, on application to the Registrar, for the above periods has been made from a 6 months extension to 3 months.

Special resolutions

The 21 day notice period for the intention to pass a special resolution is not required if the written consent of all the members of a company is obtained.

Directors

Persons convicted of insider trading are now specifically disqualified as acting as directors, unless if permitted by the Court. The penalty for insider trading under the Act is N$500 000 and/or two years in prison.

The Court may now prohibit a person from acting as a director for a period of time if:

- That director or officer has persistently failed, without reasonable steps, to comply with the Act or repealed Act requiring any return or other document to be lodged.
- A person who, as director carried on the business of the company recklessly or with the intent to defraud creditors.

The Registrar will maintain a register of disqualification orders that are available for inspection under the normal inspection rules.

Loans given to directors and managers before 1 November 2010 by special resolution have to be ratified by all the members of the company. Details of all loans granted to directors and managers, even if repaid before year end, must be disclosed in the annual financial statements.

A directors register of interests in contracts maintained in a language other than English before 1 November 2010, does not need to be substituted in English. From 1 November 2010 onwards the register is to be maintained in English however, and the same condition applies to minutes of meetings held before 1 November 2010.

Auditors

The resignation of an auditor only becomes effective on the receipt of the written notification by the Registrar.

Directors, who are aware of a vacancy, and who fail to appoint an auditor within three months of receipt of written notification of resignation, will be jointly and severally liable for all debts incurred by the company during the existence of the vacancy.

An auditor must report to the members of a holding company where the directors of a holding company have not decided to make out consolidated annual financial statements.

The auditor of a company has a duty to report all dormant entities to the Registrar.

An external company does not require an auditor where its sole purpose is to establish a registration office of a share transfer office in Namibia.

Annual financial statements

There is no obligation for a private company to send the annual financial statements to the Registrar. If the private company does not, however, have its annual general meeting within 9 months of its year end, the Registrar, may on application by a member, require such a submission.

Accounting records

The date of any revaluation of assets and the revalued amounts are now required to be maintained in the register of fixed assets.

Companies now also have to maintain a record of the cession of book debts, in addition to a register of bonds and pledges. The register of debenture holders should now also include whether these are payable to the bearer or holder of the debenture.

Accounting records maintained in a language other and English before 1 November 2010 do not need to be substituted in English. As from 1 November 2010 onwards however, the accounting records are to be maintained in English.

Interim reporting

Interim and provisional reports are to be sent to members and holders of debentures in the same manner as applicable for the annual financial statements of a company. It is currently required that the annual financial statements must be sent to members and holders of debentures not less than 21 days before the date of the annual general meeting and the members and holders of debentures are permitted to indicate, in writing, the manner in which he or she receives the annual financial statements.

Refer to Schedule 4 below for an additional amendment.

Winding up and judicial management

There have been minor amendments in sections, mainly with the application of the repealed Act, the application of assets and costs of winding up, the power of the Court to hear applications, notice of winding up, dealing with offences in securing nomination as liquidator, confirmation of account, summoning and examination of persons as to affairs of company, examination by commissioner and to the section dealing with pre-judicial management creditors may consent to preference.

A company that has passed a special resolution to voluntarily wind up, must give notice, per Government Gazette within 28 days after the registration of such resolution.

After five years from the date of deregistration of a company, no responsibility will remain with any person responsible for the custody of the books and papers of the company.

The liabilities of every director, officer and member continues subsequent to deregistration and may be enforced as if the company had not been deregistered.

Schedule 4

Schedule 4 has been updated to the South African version of 1992.

Interim Reporting now requires not only comparative amounts (unaudited) of the preceding period to be disclosed, but also the audited amounts of the most recent financial period.

Provisional annual financial statements require audited comparative disclosures.

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