ISEME, KAMAU & MAEMA ADVOCATES

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NEW LAW SOUNDS DEATH KNELL FOR FACELESS COMPANY OWNERS

Developments in the laws relating to business tend to go largely unnoticed by the general public despite their far – reaching implications on the economic life of society. The recent amendments to the Companies Act, 2015, published in August 2017, were no exception. Apart from the Attorney General taking the opportunity to assert his position as the minister responsible for all matters and laws relating to companies in Kenya, he also introduced a raft of other amendments to the Companies Act which the business community and commercial law practitioners have been yearning for since the Act came into force in June, 2016.

While the amendments do not fully address all the shortcomings and inconsistencies in the new law, they constitute a commendable starting point towards making the Act a realistic driver of economic development in Kenya. This article attempts to highlight some of the key amendments introduced through the Companies (Amendment) Act, 2017 and their practical implications.

In line with the global trend to unmask shadowy characters who conduct dubious businesses with untraceable personal identity, the law has introduced the requirement for the disclosure of the beneficial ownership of companies. Henceforth, all *natural* persons who *ultimately* own or control a company shall be disclosed in the register of members. It is worth noting that the requirement entails disclosing the identity of the *natural person(s)* rather than corporations that ultimately own or control any company incorporated in Kenya. With the stroke of a pen, therefore, the era of faceless company owners has ended. It is no longer lawful to hide under the usual impregnable layers of holding companies.

Since the members' registers is one of the mandatory documents under the law which must be filed with the Registrar of Companies, it follows that the identity of the beneficial owners of any company will be available for public inspection (unless, of course, the official file is deliberately kept under lock at key by the Registry staff).

This provision is a double-edged sword. On one hand, it is arguable that this level of transparency will make Kenya an unattractive investment destination for discreet investors. There are wealthy and honest individuals who for very valid and legitimate reasons prefer to invest under the veil of anonymity to avoid the weight of the public limelight. On the flip side, however, it is reasonable to argue that the challenges posed by modern day crimes such as money laundering, terrorism and corruption (especially by government officials), demand this level of probity. The jury is still out on this issue and the debate is likely to linger on for sometime in the near future.

Another amendment seeks to address the all too common practice by unscrupulous businessmen who register companies under names that are confusingly similar to those of existing companies or which constitute the trade marks of other businesses, particularly foreign companies which have no physical presence in Kenya. The sole intention of such entrepreneurs is simply to ride on the goodwill of established brands without incurring the cost of research and development in creating brand equity for a new name.

On these and other grounds set out in the statute, the Registrar of Companies is empowered to compel such company to change its name to any other which does not comprise the offending element. If the company fails to comply, the new amendment empowers the Registrar to strike it off the register within 14 days from the date of the order. Apart from its fairness, this amendment provides much needed succour to owners of established names and brands.

The Act initially contained a rather vexing requirement that all official company records including the register of members, register of debentures and minute books had to be kept at the registered office of the company. In practice, however, these documents are normally kept by the company secretary or in premises that are not necessary the registered office of the company. This anomaly has now been rectified by permitting copies of such records to be kept at any other office of the company where they are prepared or at the office of the officer who prepared them.

There is good news too for company secretaries of public companies. The initial requirement under the Act was that all companies must lodge with the Registrar an updated register of members whenever there was a change in the membership. This was an impractical obligation in respect of public companies whose shares are traded on the securities exchange where membership changes each trading day. Public companies have now been exempted from this requirement.

To promote good corporate governance, the boundaries of conflict of interest among directors have been expanded to capture not only the director's immediate family, but his siblings, the siblings of his spouse, his grandchildren and spouses of practically all his immediate relatives through birth or marriage. In all cases where any such "*connected person*" is involved in a deal about to be entered into with the company, a full disclosure is required. In addition, the approval of other directors who are not conflicted and, in certain cases, of the shareholders must also be obtained. In the case of public companies, the disclosure must be done within 72 hours.

While this amendment is well intentioned, the practical challenge will be in the implementation since the director in question may not reasonably be aware that one of the named relatives is involved in the contemplated transaction. One can only hope that this will be a valid defence against a claim of non disclosure.

The period for keeping minutes of board meetings has been reduced from 10 to 7 years in line with other provisions in the Act as well as the tax laws.

Pursuant to the amended law, the rights of any class of shareholders cannot be altered without their consent. Further, such shareholders are entitled to vote as a group on the variation of any rights attaching to their shares. While this provision applies to all shareholders, it will prove more beneficial to minority shareholders.

The concept of pre-emption rights has also been affected by the amendments. Generally, all new shares in a company are supposed to be issued to existing shareholders on a *pro rata* (proportional) basis. Only when a member is unable to take up his allocated portion can it be issued to a third party. As regards a private company, a shareholder is generally not allowed to transfer his shares to a third party without first offering them to the existing shareholders. In the absence of such restriction, a family company owned by husband and wife could very easily end up being owned by the wife and some strangers whom the husband does not necessarily approve of.

Prior to the recent amendments, private companies were allowed to exclude pre-emption rights from their articles of association with respect to the issue of new shares. This flexibility has now been removed except where the company resolves otherwise in relation to a specific allotment.

Auditors and accountants will now need to be aware that the accounting reference date of a company is no longer dictated by law. The power for each company to determine its own accounting reference date has been

restored to the shareholders who can either specify it in the articles or fix it by an ordinary resolution.

Other amendments are of a house-keeping nature-to align discordant provisions, correct grammar and generally streamline the Act and make it more palatable with a logical flow.

One key omission in the amendments is the failure to address the true character of companies limited by guarantee in Kenya. The Act is unclear on whether such entity is a private or public company or indeed what the minimum number of members is. For instance, since the Act allows for the formation of one-member companies, can a company limited by guarantee have only one member?

This is work in progress. The Act, borrowed almost word for word from the UK Companies Act, still contains a plethora of alien provisions which will need to be aligned or deleted over time. The overall architecture of this statute is very unique to Kenya and we should expect to see further amendments in the near future.

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