

WHAT YOU SHOULD KNOW ABOUT THE NEW COMPANIES ACT: External Companies

The 2008 Companies Act has introduced some new articles with important implications for companies operating in South Africa. The IoD presents the first in a series highlighting these changes.

Many companies operating in South Africa today are in fact subsidiaries of international holding companies. As such, these were often excluded from any of the provisions of the old Companies Act. But now directors are asking: should these companies have a local Memorandum of Incorporation? And if they don't have one, what happens if their international articles conflict with South African law?

According to the new Act, 'profit companies' and 'non-profit companies' must be incorporated in terms of the 2008 Act. They must therefore adopt a Memorandum of Incorporation (MOI) and comply with the all sections relating to the incorporation of a company and the adoption of an MOI (e.g. sections 13, 15 and the other provisions under Part B of Chapter 2).

The 2008 Act also states that 'profit external companies' and 'non-profit external companies' must be registered. Companies that are incorporated in another jurisdiction outside the RSA must register as 'external profit companies' or 'external non-profit companies' in terms of the 2008 Act if they are 'carrying on/conducts business or non-profit activities within the RSA'.

The test for determining if they are 'carrying on/conducts business or non-profit activities within the RSA' (for the purposes of determining if s23(1) and the definition of 'external company' in s1 applies) is whether they have engaged in / are engaged in one or more of the activities listed in s23(2)(a) to (g).

The 2008 Act determines that the registers of external companies, as maintained by CIPRO, are continued as the register of external companies as required to be established in terms of this Act. Because the 2008 Act only states that CIPRO must maintain a register of external companies, enter the prescribed information concerning each external company in the register and because the existing register of external companies is to be continued, it could perhaps be safely assumed that the same documentation and information as was required in terms of the 1973 Act would be required from an external company, if initially applying for registration in terms of the 2008 Act.

It is unsure whether external companies registered under the 1973 Act would be required to register again under the 2008 Act as, on the one hand, the definition of registered external company only refers to those registered in terms of the 2008 Act, but on the other hand, the 2008 Act determines that the register of external companies under the 1973 Act would be continued.

For more information on the new Companies Act and you, please visit www.iodsa.co.za or call Natasha Bouwman Supervisor: Centre for Corporate Governance at the IoD on 011 430 9900

Additional information: *Extracts from the Companies Act 71 of 2008*

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1. Definition of 'Company' and 'External Company'

Section 1 of the Companies Act 71 of 2008 ('2008 Act') defines 'company' as meaning 'a *juristic person incorporated in terms of this Act*, or a juristic person that, immediately before the effective date:

(a) was registered in terms of the—

(i) Companies Act, 1973 (Act No. 61 of 1973), *other than as an external company as defined in that Act*; or

(ii) Close Corporations Act, 1984 (Act No. 69 of 1984), if it has subsequently been converted in terms of Schedule 2;

(b) was in existence and recognised as an 'existing company' in terms of the Companies Act, 1973 (Act No. 61 of 1973); or

(c) was deregistered in terms of the Companies Act, 1973 (Act No. 61 of 1973), and has subsequently been re-registered in terms of this Act'.

Section 1 also determines that 'Memorandum of Incorporation' means 'the document, as amended from time to time,

(a) that sets out rights, duties and responsibilities of shareholders, directors and others within and in relation to a company, and other matters as contemplated in section 15; and

(b) by which:

(i) the company was *incorporated in terms of this Act*, as contemplated in section 13; or

(ii) a pre-existing company¹ was structured and governed before the later of:

(aa) the effective date; or

(bb) the date it was converted to a company in terms of Schedule 2.'

Section 1 of the 2008 Act defines 'external company' as meaning 'a *foreign company* that is carrying on business, or non-profit activities, as the case may be, within the Republic, subject to section 23(2) and 'registered external company' as meaning 'an *external company* that has registered its office as required by section 23, and has been assigned a registration number in terms of that section'.

It is apparent from the above definitions that an 'external company' (registered or not) is not included in the definition of 'company' for the purposes of the 2008 Act.

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2. Provisions regulating registration of external companies and registered office - s23 of the 2008 Act

The following provisions in the 2008 Act regulate registration of external companies:

s23(1) An external company must *register* with the Commission within 20 business days after it first begins to conduct business, or non-profit activities, as the case may be, within the Republic:

- (a) as an 'external non-profit company' if, within the jurisdiction in which it was incorporated, it meets legislative or definitional requirements that are comparable to the legislative or definitional requirements of a non-profit company incorporated under this Act; or
- (b) as an 'external profit company' if, within the jurisdiction in which it was incorporated, it meets legislative or definitional requirements that are comparable to the legislative or definitional requirements of a profit company incorporated under this Act.

s23(2) For the purposes of section 23 (1), and the definition of 'external company' as set out in section 1, a foreign company is **not to be regarded as 'conducting business, or non-profit activities, as the case may be, within the Republic', unless** that foreign company is engaged in, or has engaged in, one or more of the following activities within the Republic:

- (a) holding a meeting or meetings of the shareholders or board of the foreign company, or otherwise conducting the internal affairs of the company;
- (b) establishing or maintaining any bank or other financial accounts;
- (c) establishing or maintaining offices or agencies for the transfer, exchange or registration of the foreign company's own securities;
- (d) creating or acquiring any debts, mortgages or security interests in any property;
- (e) securing or collecting any debt, or enforcing any mortgage or security interest;
- (f) acquiring any interest in any property; and
- (g) entering into contracts of employment.

s23(3) Each company or external company must:

- (a) continuously maintain at least one office in the Republic; and
- (b) register the address of its office, or its principal office if it has more than one office:
 - (i) initially in the case of:
 - (aa) a company, by providing the required information on its Notice of Incorporation; or
 - (bb) an external company, by providing the required information when filing its registration in terms of subsection (1); and
 - (ii) subsequently, by filing a notice of change of registered office, together with the prescribed fee.

s23(4) A change contemplated in section 23 (2)(b)(ii) takes effect as from the later of—

- (a) the date, if any, stated in the notice; or
- (b) five business days after the date on which the notice was filed.

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S23(5) The Commission must—

- (a) assign a unique registration number to each external company that has registered in accordance with subsection (1);
- (b) maintain a register of external companies;
- (c) enter the prescribed information concerning each external company in the register; and
- (d) in the case of an external company whose name is a foreign registration number but does not indicate the name of the foreign jurisdiction in which it was incorporated, append to its name on the registry the name of that jurisdiction in a manner comparable to that required for a company under section 11(3)(a).

s23(6) If an external company has failed to register in terms of subsection (1) within 12 months after commencing its activities within the Republic, the Commission may issue a compliance notice to that external company requiring it to—

- (a) register as required by subsection (1) within 20 business days after receiving the notice; or
- (b) if it fails to register within the time allowed in paragraph (a), to cease carrying on its business or activities within the Republic.

3. Provisions regulating external companies under the 2008 Act

The Companies Act no 61 of 1973 ('1973 Act') contained detailed provisions regulating external companies in Chapter XIII (ss 322-336), which dealt with the registration of memorandum of external company, the effect of registration of memorandum of external company, the power of external company to own immovable property in Republic, administrative and other duties of external companies (including for example, deregistration of external company and registration of external companies as companies in the Republic).

Regarding the registration requirements and process as well as other requirements applicable to external companies, the 2008 Act simply states that:

- an external company must register within 20 business days after it first begins to conduct business or non-profit activities within the Republic and it should maintain and register an office or principle office in the Republic;
- The Commission, whose express objectives are to register companies and external companies in terms of the 2008 Act, must assign a unique registration number to each external company, maintain a register of external companies, enter the prescribed information concerning each external company in the register; and append the name of certain external companies' jurisdictions to their name ;

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- An external company must provide its full registered name or registration number to any person on demand and must not misstate its name or registration number in a manner likely to mislead or deceive any person. Contravention is an offence;
- External companies must file an annual return in the prescribed form with the prescribed fee, and within the prescribed period after the anniversary of the date on which it was registered.