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Company law reforms in Tanzania: The Companies Act 2002

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Prior to March 1 2006, the main legislation relating to companies in Tanzania was the Companies Act, Cap 212 which was enacted in 1929. This legislation regulated trading companies and other associations including the imposition tax on nominal capital, regulation of dividends and surpluses, and related matters. This legislation was in force for over 77 years – covering not only the tail end of the colonial period but also the period of state-planned economy through to liberalization in the 1990s. Clearly it was time for reform to cover an increasingly sophisticated market and the dramatic changes to the Tanzanian economy.

The new reforms are contained in the Companies Act 2002 (the CA 2002), an act on the shelf for almost three years, which came into force on March 1 2006.

The CA 2002 introduced significant reforms to Tanzanian company law. Its full title alone imparts some of the significance of the act, stating that it is an act to repeal and replace law relating to companies and other associations, to provide for more comprehensive provisions for regulation and control of companies, associations and related matters. The question then is how far reaching are these reforms, and how difficult compliance? The short answer is that the new legislation introduces substantial changes but is intended primarily to clarify existing legislation regarded by many as unclear. Given the intention of the new legislation is simply clarification, compliance should be relatively straightforward.

ward. The key reforms brought in by the CA 2002 are as follows:

Directors

The CA 2002 was drafted and enacted in order to take into consideration developments in corporate governance and directors' duties. Directors previously had various common law duties which have now been enshrined in the CA 2002, and are now statutory duties. These duties include a duty to act in good faith and in the best interests of the company. Given that these were previously common law duties, the practical impact on directors will be minimal, though courts will have a greater degree of guidance from the CA 2002 in determining whether directors have breached any of their duties.

In addition, the CA 2002 imposes a new duty to have regard to the interests of employees, a duty to exercise powers for proper purpose, a duty of care, and a minimum age of 21 years for appointment as a director coupled with a duty to disclose one's age. A director may also find himself personally liable for a company's debt if he is disqualified from being a director. The CA 2002 also introduces certain prohibitions, including on the making of tax-free payments to directors and/or loans to directors of the company, its holdings company or any connected persons. Lastly, the CA 2002 introduced a statutory procedure for the removal of a director and the requirement that directors' service contracts be made available for inspection at the company's registered office.

Capacity of the company to act

The capacity of a company to act is governed by its memorandum. Previously a company could claim an act was invalid if *ultra vires* (i.e. outside its authority as stated in its memorandum) and thus would not be liable for such an act. The CA 2002 stipulates that it shall no longer be a defence that an act is invalid by

reason of limitation of capacity by its memorandum, and this concept is rolled out to acts of directors, i.e. a company will be unable to disclaim liability by reason of a director's act being *ultra vires*. Further protection is offered to persons dealing with the company in that they need not enquire into the capacity of the company or authority of its directors and the company would nevertheless be bound by its action. This new legal aspect is aimed at defeating the unscrupulous directors who dealt with the interests of the company at the expense of *bona fide* third parties. Further, there is new development in the protection under the CA 2002 for those dealing with companies, as any person dealing with the company has no duty to enquire as to the capacity of company or authority of directors in a certain transaction.

Investigation into a company's affairs

The Registrar of companies has the power to call for information from the company further to which the company has the duty to furnish to the Registrar all the information required by him. On application by its members or the company itself, or on recommendation by a Minister, under the CA 2002 a court may order the investigation of a company if it appears that the company's affairs have been mismanaged or the law has not been complied with in full. This applies equally to local and foreign registered companies. The investigation would be conducted by court-appointed inspectors and can potentially be far-reaching, depending on the grounds for the order.

Arrangements, compromise, reconstruction and amalgamation

The CA 2002 introduces the concept of arrangements and reconstruction, which allows a company and its creditors or the company and its members to apply to the court for an arrangement, compromise or

reconstruction and amalgamation. In the latter case the new law also provides for how to deal with shares of shareholders dissenting from a scheme approved by the majority.

Minority shareholders

Minority shareholders are granted additional new protections under the CA 2002, including procedures for orders in cases of unfair prejudice and the institution of derivative actions (i.e. the right of a person to apply to court to prosecute, defend or bring an action in the name of and on behalf of the company or any of its subsidiaries).

Insolvency

Prior to the CA 2002, when a company became insolvent it went directly to the Court for winding-up proceedings. There were three grounds for a winding-up order: voluntary winding-up, winding-up by the court and winding-up under the supervision of the court. Under the CA 2002 there are only two grounds for winding-up: voluntary winding-up and winding-up by the Court. Further, under the CA 2002, in the event a company becomes insolvent, it will be able to seek shelter under the new protective insolvency provisions which speak to the proceedings related to company voluntary arrangements with creditors (a rescue-based approach empowering directors to make proposals), putting a company into administration (court-appointed administrators manage the affairs of the company as an alternative to liquidation) and receivership (managing the liquidation of a company). The crux of the CA 2002 in this respect is that it affords an orderly and fair process for insolvent companies and their creditors.

The key changes introduced under the CA 2002 for companies operating in Tanzania are indeed largely driven by a recognized need to clarify the existing law. The act is a fully modern piece of legislation, and offers a clear regulatory framework on which investors may rely.

Financial and corporate

Recommended firms

Tier 1

Mkono & Co

Tier 2

FK Law Chambers

Ishengoma Karume Masha & Magai

Advocates

Rex Attorneys

Ringo & Associates

Tier 3

Abenry & Company

The Dar es Salaam Stock Exchange was established in September 1998, less than a decade ago, and has been having some teething troubles. This immaturity shines through from time to time and lawyers in the region are frustrated at the exchange's lack of experience.

Some have expressed concern about the exchange's criteria for rejecting listings. One lawyer recalled the case of a listed company that wanted to spin off part of its business and was blocked by the stock exchange. "The problem is that they're scared of making mistakes," said the lawyer. But by being cautious the exchange is often making the situation worse.

The twin tantrums of the exchange and the country's financial lawyers are not deterring interested parties in Tanzania and the wider region. Jubilee Holdings cross-listed on to the Dar es Salaam market in November 2006 and National Microfinance Bank is planning an initial public offering (IPO) in the near future.

Telecoms, mining and infrastructure projects are also booming in the region as the sectors expand and consolidate. The discovery of gas off the coast of Tanzania will encourage more sophisticated investment in the country and increase the likelihood of further listings. The stock exchange will need to grow up fast.

Mkono & Co

Mkono & Co is the most established firm in Tanzania with 30 years of experience in corporate and commercial law. The firm has traditionally received the legal business of the Tanzanian government but has expanded beyond this to offer services to a variety of clients, including banks and corporates.

And these clients are impressed with the standard of work they receive. One said: "They are extremely professional in the sense that you really get what you want for any service, on both timeframe – sometimes things are urgent and their responsiveness is very, very good – and in terms of content."

This year the firm led an international team of law firms in Tanzania, Uganda, Kenya and Mauritius advising Gulf Africa Petroleum Corporation (Gapco) on the receivership proceedings launched against it by Standard Chartered Bank and Barclays Bank. Steven De Backer led this case, successfully restraining the receivership action in March 2007.

De Backer was highlighted by rivals and clients as one of the star lawyers at Mkono & Co. One peer commented: "Steven De Backer retains a European legal acumen from the time he spent working in Belgium." For clients, De Backer was a personable lawyer with whom they could do business: "The main point is trust. We already know him and

he already knows us. It is much simpler when each knows the other's role. He is very friendly."

But Mkono & Co is not dominated by one personality. Named partner Nimrod Mkono still takes an active role in the firm's work. This year he counselled Bank of Tanzania on the privatization of The People's Bank of Zanzibar. And Wilbert Kapinga is also a well respected practitioner. One rival singled out Kapinga and De Backer for praise "because of their exposure and the quality of their work, put together with their response times. They don't pick points to argue over for the sake of it; they are pragmatic and that's important."

In April 2007 Kapinga represented Denton Wilde Sapte, with which the firm has an alliance, Citibank Tanzania and Citigroup on a loan to Millicom, a telecoms infrastructure company.

Mkono & Co is, as one rival said, "definitely still perceived as number one and does more top-end work" but such a reputation has a price. One client commented: "They are generally good but extremely expensive, so we don't use them unless it is a very special issue."

Leading lawyers

Steven De Backer

Wilbert Kapinga

Nimrod Mkono

FK Law Chambers

"The service by Krista's team is head and shoulders above any other law firm in Tanzania," said one client. "Krista's background, having worked at Linklaters, means she is on the same wavelength as us so she is easy to work with."

Krista Bates-van Winkelhof arrived from Linklaters in January 2006 and has spent the past 18 months shaking up FK Law Chambers and earning it a steadily building reputation as a financial and corporate firm. One peer said: "With her English experience she knows what she's doing, she's good at it and she gets on with it."

FK Law Chambers still has a residual reputation among some of its competitors as a niche tax and employment firm, but international clients are experiencing something different. This year clients from overseas used the firm for their deals in Tanzania and in the wider region.

In October 2006 the firm assisted CDC Group, a British government-owned fund of funds, on its investment in the Equatoria Teak Company in Sudan, which operates the world's largest sustainable teak forest, and in March 2007 the firm assisted Standard Bank

on its intended merger with CFC Bank, Kenya's sixth-largest bank.

In the Tanzanian market, Bates-van Winkelhof guided Gateway Communications through the establishment of GTV Tanzania. This service will cost a third of the price that current operators charge and aims to change television from the preserve of the rich into a resource available to all. The firm was also engaged by Kagera Sugar and its holding company to help it obtain a \$90 million syndicated loan and on subsequent restructuring matters.

Leading lawyers

Krista Bates-van Winkelhof
Florens Luoga
Kibuta Ongwamuhana

Ishengoma Karume Masha & Magai Advocates

Ishengoma Karume Masha & Magai Advocates (IMMMA) clings on to a spot in tier one following a difficult year in which one of its key partners, Aloysius Mujulizi, left the firm to become a High Court judge. One rival said: "They lost their rainmaker partner and lost a lot of transaction work as a result." But the firm seems to be coping well with the change, and in May 2007 merged with Karume & Co, adding an extra partner and associate to the team and prompting a name change.

This year named partner Sadock Magai has been busy in the banking sector. Over the course of the year he has been assisting the government on the sale of its shares in National Microfinance Bank in order to float the bank on the Tanzanian stock exchange, as well as assisting a consortium of banks on a TSh300 million (\$238,000) syndicated loan to Tanzania Electric Supply Company.

The firm also has a good reputation for its work when these deals fail. New partner Fatma Karume represented a consortium of banks in litigation against Kagera Sugar resulting from a syndicated loan, while Protase Ishengoma advised Barclays Bank and Standard Chartered on enforcing a repayment after Gapco defaulted on its syndicated loan facility.

The firm is part of the DLA Piper group and will be hoping that with its help, and the addition of new lawyers in May, IMMMA can recover its former strength.

Leading lawyers

Protase Ishengoma
Sadock Magai

Rex Attorneys

A partner loss also put a damper on Rex Attorneys's year when one of its founding members and leading lawyers Mwanaidi Maajar was appointed the Tanzanian High Commissioner to the UK. Although still officially part of the firm, Maajar is based in Britain and competitors have noticed a shift in the firm.

But the firm has never been reliant on one partner's talent. Charles Rwechungura is particularly well regarded by other lawyers. One peer described him as "a very good friend and a brilliant lawyer". Hawa Sinare was also singled out as a particularly effective lawyer.

But the next year will prove crucial if the firm is to convince clients that it still has the expertise to pull off big transactions. One client said: "Rex Attorneys is very good but you have to get the right people. Not all are of the same calibre."

Leading lawyers

Charles Rwechungura
Hawa Sinare

Ringo & Associates

Ringo & Associates was described by one client as "one of the up-and-coming firms" in Tanzania. Leading lawyer Mustafa Tharoo has an excellent reputation with peers and is particularly well regarded for his work in banking.

In June 2006 Tharoo advised Standard Chartered Bank on a \$70 million syndicated medium-term loan for Celtel Tanzania, a mobile telecoms operator, and in 2007 he has been helping International Finance Corporation on a \$9 million loan to Advanced Bio-Extracts.

Competitors commend him for his "excellent sharp brain, very good exposure and the very big transactions he's done". One of the big transactions Tharoo was involved in this year was the global joint venture of Siemens and Nokia on which he guided Siemens. He also assisted Jubilee Holdings on its cross-listing on the Dar es Salaam Stock Exchange in November 2006 – a first for Tanzania. The firm's corporate practice was praised by a client who said: "We use them quite frequently due to their strength in corporate law."

The same client also outlined his reasons for consulting Ringo & Associates: "Number one, their understanding is great as we don't have a good range of corporate law in Tanzania; number two, their service is excellent; and thirdly, their partners are fine people."

Rivals have also noticed the satisfaction emanating from Tharoo's customers. One lawyer said: "He provides a good service for

his clients and he's a dream to work with and have on the other side because he's a very sensible bloke and he's very commercial." With such praise, Ringo & Associates looks set to attract more and more work in Tanzania.

Leading lawyers

Mustafa Tharoo

Other notable firms

Abenry & Company enters the *IFLR1000* rankings for the first time this year following market comments that the firm was "getting more of a presence". The firm was formed in 2006 by two ex-Mkono partners, Lucy Sondo and Pauline Kasonda, and has since gained two more partners and two associates. The firm has particular expertise in the mining sector.