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MoneyTalk

Audits - A thing of the Past

Audits a thing of the past for owner managed businesses under the new Companies Act.

The new Companies Act is now visible on the horizon, but exactly how and when it will hit the shoreline is still far from clear.

The minister of trade and industry says the law and its regulations, which look set to exempt the vast majority of registered companies from an annual audit, will come into effect in the third quarter of this year, but in the sceptical business world the estimate is early next year.

The long-awaited overhaul of the almost four-decade-old Companies Act has been plagued by a good deal of chaos, which some observers put down to the scale of the project. Others blame the Department of Trade and Industry for clumsy, even sloppy drafting of the law that was passed as far back as 2008.

Worth the wait ?

The business community had to wait almost two years for the regulations that would give meaning to the act. These were finally issued in draft form three days before Christmas last year, together with a vague announcement that a "rectification law" would have to be passed by parliament this year to correct mistakes.

The confusing combination of a mistake-riddled, 400-page act, a rectification bill, and 200 pages of regulations, elicited deeply unhappy responses during the period for public comment, which closed on March 1.

All of this makes it very difficult to predict what the final regulations will look like. But whatever the outcome, the reforms will be so momentous that business owners would do well to familiarise themselves with the broad thinking reflected in the draft regulations and the act.

Here are some of the most relevant features for owner-managed businesses:
By far the majority of companies will not have to have their books audited annually, which at present is the biggest drawback to having your business registered as a company.

Only listed and state-owned companies have to be audited, as well as those that hold money from the public, such as banks. This appears to include any business that offers lay-by facilities, irrespective of its size.

The regulations introduce to the Companies Act the concept of an "independent review" of a company's books. This differs from an audit in that a professional accountant as opposed to an auditor can do it. An independent review is also a quicker, lighter and less expensive process of checking the accuracy of a company's books than an audit.

But few companies will have to submit to independent review.

First there is a size exemption. Companies with assets of less than R50-million and a turnover of less than R20-million a year must have annual financial statements compiled independently, but will not have to be independently reviewed. This is quite similar to the reporting requirements of close corporations.

Then the regulations provide for an ownership exemption. No independent review is necessary if the shareholders of a company, irrespective of its size, are also its directors.

Business part-owned by family trusts and other juristic persons are therefore one step closer to annual independent review, but the R20-million turnover threshold is so high that the vast majority of companies are exempt.

Moving from close corporation to PTY (LTD)

It seems that the act will render the difference between close corporations and the new form of private company so insignificant that you may as well convert your CC into a company, and benefit from the added weight that the Pty (Ltd) suffix gives to the name.

Observers point out that any remaining differences will soon be obliterated by proposed amendments to the

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CC Act. No new close corporations will be allowed to register once the new Companies Act is in force, but existing CCs will be allowed to continue indefinitely.
It remains to be seen whether the cut-off will lead to a mass registration of CCs in the next few months.

Professor Tshepo Mongalo of the commercial law faculty at the University of Cape Town says that if for any reason CCs ended up being more desirable than the new company structure, dormant CCs would probably still be available for sale.

The new Companies Act brings the law closer to reality by allowing company boards to take important decisions without necessarily calling a meeting, but merely through the circulation of written resolutions.

Navin Lalsab, acting technical and standards executive of the South African Institute of Professional Accountants (Saipa), points to an aspect of the act that may have an important effect on the relationship between business owners and their accountants. The act says that preparers of financial statements, whether they are employed by a business or hired from outside, will be personally liable for inaccuracies, and can be fined or even jailed. Accountants can therefore be expected to show more resistance to business owners who lean on them to cook the books.

In fact, says Leonard Brehm, national chairman of consultancy Grant Thornton, any individual will be held personally liable for harm done due to failure to abide by the new act. Company directors will therefore take their obligations more seriously than ever before, and companies will be under pressure to take seriously complaints against them from clients, creditors, employees or the public at large.

Existing companies will have a two-year transitional period to adopt a new memorandum of incorporation to replace their existing memorandum and articles of association.

In terms of the new act, shareholders' agreements may no longer be inconsistent with the company's memorandum of incorporation (as was the practice in terms of the old act), and, accordingly, shareholders will have to amend their shareholders' agreements to align with this new principle.

Andre de Lange, a director at legal firm Cliff Dekker Hofmeyr, says there are concerns that the transitional arrangements would not adequately deal with the status of an existing company's shareholders' agreement during the two-year transitional period.
André points out that the conversion will require the consent of shareholders, which could lead to the reopening of negotiations between shareholders where one or more of them have grown dissatisfied with their existing agreement.

Business owners "must not be casual or flippant about this", he says. "You must get out your shareholders' agreement and start considering whether there is likely to be any disagreement. Don't leave it to the last minute."

A Companies and Intellectual Property Commission will replace the Companies and Intellectual Property Registration Office (Cipro).

Like Cipro, it will exact an annual tax of R450 from each company. This "annual return" may turn out to be the defining difference between a company and a CC, which currently only pays R100 per year, although the cost of a CC's annual return may well be pushed up.

"The proposed commission is going to be self-funded to a large extent, and the annual return is one way in which it is going to make a lot of its revenue. It is unlikely that it would ever be done away with," says Tshepo.

The new law lays out the process by which a company must buy out a minority shareholder at fair value if that shareholder does not agree with a major transaction such as a merger or the sale of most of its assets - the so-called "appraisal right".

This is nice for minority shareholders, says André, but will make decisions about major deals more difficult for companies. They would have to think long and hard before proposing such transactions.

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