DOING BUSINESS IN SOUTH AFRICA, ZAMBIA, TANZANIA, KENYA AND UGANDA

Introduction

As more and more companies worldwide consider ways to grow their businesses, a number are exploring how best to exploit the untapped markets found in Africa. Often they will consider setting up a new company or joint venture as a vehicle to establish a legal presence and to do business in a particular jurisdiction. This, however, can be fairly daunting without the help of experienced experts particularly when considering a somewhat unknown continent such as Africa.

Legal status of companies

In South Africa, Zambia, Tanzania, Kenya and Uganda, from the date and time that the incorporation of a company is registered the company is a juristic person which exists continuously until its name is removed from the companies register.

In South Africa and Zambia, once registered, the company has all the legal powers and capacity of an individual, except to the extent it is incapable of exercising any such power or having such capacity or the company’s Memorandum of Incorporation provides otherwise. A Zambian company is proscribed from carrying on any business or exercising any power that it is restricted by its articles to do. In Kenya, Tanzania and Uganda once a company is registered, it becomes a body corporate with perpetual succession with legal powers and the capacity to do all it requires to achieve its objects. The objects and constitution of the company are set out in its memorandum and articles of association. In Tanzania, however, any act done outside the scope of the memorandum remains binding on the company. In Uganda, any activities not expressly or impliedly authorised by the articles or the memorandum are ultra vires or beyond the powers of the company.

Legal nature of shares

In South Africa, Zambia, Tanzania, Kenya and Uganda, a share issued by a company is considered movable property, transferable in any manner provided for or recognised by law. In South Africa, a share does not have a nominal or par value whereas in Zambia, Tanzania, Kenya and Uganda, companies having a share capital must assign a nominal or par value to each share.
Restrictions on shares being held by foreign residents

There are generally no restrictions applicable to foreign residents holding shares in South Africa, Zambia, Kenya, or Tanzania.

In South Africa, in terms of the Exchange Control Rules, no person is entitled to transfer South African shares from or into the name of a non-resident without exchange control approval which is referred to as a “non-resident endorsement”. The endorsement effectively ensures that dividend payments, or the payment of sale proceeds in respect of the shares, will be freely remittable to shareholders offshore, without the need for exchange control approval having to be sought and obtained at a later stage.

In Tanzania, one has to look at the specific statute regulating the nature of business that the company intends to engage in, to ascertain whether there are any restrictions imposed on foreign investment or foreign ownership of shares or businesses. The registration processes are usually expedited when at least one of the directors and shareholders is a Tanzanian national and/or resident. There are no exchange control restrictions in Tanzania therefore the repatriation of profits and dividends by foreign investors is not prohibited, subject to compliance with tax obligations and the policies laid down by the Bank of Tanzania, such as, conducting foreign exchange business through a licensed institution and notifying the Bank of the purpose of payments above certain limits. However, a foreign investor has to consider the legislation governing the sector in which he is investing in to confirm whether any local ownership requirements apply.

There is no exchange control legislation in Kenya; therefore, the repatriation of profits and dividends by foreign investors is not prohibited, subject to compliance with tax obligations and certain rules from the Central Bank of Kenya (“CBK”), such as, conducting foreign exchange business through a licensed institution and notifying the CBK of the purpose of payments above certain limits. However, as with Tanzania, a foreign investor has to consider the legislation governing the sector in which he is investing in to confirm whether any local ownership requirements apply.

Similarly, there are no restrictions on foreign ownership of shares and no exchange controls under Zambian law. The key issues a foreign investor would therefore have to consider are those imposed by tax legislation, for example, the rules around withholding tax on dividends and property transfer tax on a transfer of shares, and the regulations that may be imposed by the central bank (the Bank of Zambia or BOZ) from time to time, for example, rules relating to daily limits on over the counter foreign exchange transactions).
The above notwithstanding, certain incentives under statutes like the Zambia Development Agency Act, No. 6 of 2006 (the ZDA Act) may only apply to entities with a particular shareholding structure. It would therefore be prudent for a foreign investor wanting to obtain certain incentives to investigate the relationship between how shareholding and statutory incentives operate. It is also worth noting that shareholding structure is pertinent in issues of ownership of land under Zambian law. The Lands Act, Chapter 184 of the Laws of Zambia contains restrictions on ownership of land; companies whose shareholding does not meet the threshold prescribed thereunder (that is, 75 per cent or more of the shares being held by Zambians) cannot hold land unless they qualify to do so under a different provision of that Act (for instance if they hold an investment license under the ZDA Act).

Ugandan law does not impose exchange control restrictions on foreign ownership of shares. However, tax implications arise in respect of declarations of dividends paid to persons not resident in Uganda under the Income Tax Act Cap 340. This means, a withholding tax, that is, 15 percent of the sum paid out as dividend, may be imposed on such declarations of dividend by virtue of the provisions of the aforementioned law. It would therefore be advisable for a foreign investor wanting to acquire shares to investigate whether there is a Double Taxation Agreement in force between the resident country and Uganda to appropriately determine his/her tax liability. Furthermore, as in Zambia, shareholding structure has a bearing on issues of ownership of land under the Land Act Cap 227 as amended. Companies whose control vests with non nationals of Uganda cannot acquire Freehold and Mailo tenure of land but instead only Leasehold land for period of 49 years although renewable upon application from the Lessor.

**Sole shareholding**

South African company law permits companies to have a sole shareholder while the Kenya Companies Act requires a minimum of two shareholders for private companies and a minimum of seven shareholders for public companies. Similarly, the Zambian Companies Act requires a minimum of two shareholders and a maximum of fifty shareholders for any company incorporated thereunder. In Tanzania up until 2012, the Companies Act required a minimum of two shareholders, however, the amendment of the Companies Act in 2012 now allows for a single shareholder company. Where a single shareholder company contravenes any provision of the Companies Act, this single shareholder is, however, personally liable and can be sued personally and in his own name. This is a new concept in the Tanzanian Companies Act that has been introduced by the Business Laws (Miscellaneous Amendments) Act, 2012. Ugandan Law under the Companies Act Cap 110 requires a
minimum of two shareholders for a private company and maximum of fifty shareholders. In the case of a public company, there is a minimum of seven shareholders upon incorporation. However, the new Companies Act 2012, which is yet to be enacted, authorises sole shareholding. The commencement date of this Act is uncertain as the Minister of Justice has not provided a specific time frame.

Minimum capital requirements at incorporation

In South Africa and Zambia there are no minimum capital requirements on incorporation. In Tanzania, the minimum capital requirements stipulated under the Tanzania Companies Act is Tanzania Shillings Twenty Thousand (TZS 20,000.00). However, some regulated sectors such as insurance and banking have minimum paid up capital requirements stipulated within the specific regulations. Foreign investors intending to invest a minimum of US$300,000 in Tanzania may obtain a Certificate of Incentives issued by the Tanzania Investment Centre under the Tanzania Investment Centre Act, Cap. 38 [R.E] 2002. Incentives can be broadly categorised into fiscal incentives (import duty and VAT exemption on project/capital goods) and non-fiscal incentives. For projects over USD 20 million offering specific beneficial impacts to the society or economy, investors can negotiate special incentives from the Tanzanian Government.

There are no minimum capital requirements on incorporation in Kenya; however, it is common for most companies to start out with an authorised share capital of one hundred thousand Kenya Shillings (KES 100,000). Some regulated sectors such as insurance, banking, capital markets, and so on, have minimum paid up capital requirements that must be adhered to. Stamp duty of 1% is payable on the authorised capital. Save for a few regulated sectors, like the financial institutions and insurance sector, Uganda has no statutory minimum share capital requirement. A company is therefore free to determine the amount of its nominal share capital.

Minimum number of directors and residency requirements for directors of local companies

In South Africa, it is possible for a company to only have one (1) director and it is not a requirement that the directors be resident in South Africa or that they be South African citizens. The Zambian Companies Act requires a company to have at least two directors and at least half of the directors of a company, including the managing director if the company has a managing director and at least one executive director (if any), are to reside in Zambia. In Tanzania, although there are no stringent requirements for directors or shareholders of
local companies to be resident in Tanzania, the process of setting up a local company usually demands that at least one director or shareholder is resident. This is particularly the case when the company seeks to secure a business licence as well as open a bank account with any of the local banks. As part of the banks’ KYC processes, most banks will demand to be provided with a copy of the residence permit of the directors where it is established that all the directors are non-citizens. In Kenya, every company other than a private company must have at least two directors and private companies must have at least one director. There is no requirement that a director be a resident or citizen of Kenya. Tanzanian law requires all companies to have a minimum of two directors unless the company is a single shareholder company in which case a single director is allowed. Similarly, Ugandan legislation states that every company other than a private company must have at least two directors and private companies must have at least one director. There is also no requirement for a director to be a citizen or resident of Uganda.

Appointment of auditors, company secretary or a representative of the company for tax purposes

In South Africa, every public company and state owned company, as well as private companies who are required in terms of the regulations to have their annual financial statements audited, must appoint an auditor, however, only a public or state owned company needs to appoint a company secretary. In Zambia, a company is required to appoint auditors within three months of its registration and these auditors hold office until the close of that company’s first annual general meeting. A company is also required to appoint a company secretary who may be a body corporate and is required to be resident in Zambia.

Every company in Kenya must have a company secretary, who should be a member of the Kenya Institute of Certified Public Secretaries. The company secretary is appointed at the time of incorporation of the company. Every company is also required, at each annual general meeting, to appoint an auditor or auditors to hold office from the conclusion of that annual meeting until the conclusion of the next annual general meeting.

In Tanzania, every company incorporated must have a company secretary who has the requisite knowledge and experience to discharge the functions of a company secretary and, as with Kenya, they are required to appoint an auditor or auditors to hold office from the conclusion of each general meeting until the conclusion of the next general meeting.

The law necessitates every company in Uganda to appoint its first auditors before the first annual general meeting who may be retained or reappointed after that meeting, but must
subsequently have an auditor hold office until the next annual general meeting. The Auditor could be a person or body corporate but must either be a member of, or have its partners as members of, in the case of a body corporate, the Institute of Certified Public Accountants of Uganda. It is also mandatory for a company in Uganda to have a secretary who at the same time must not be its sole director and anything required to be executed by a director and the secretary cannot be done by the same person acting in both capacities.

In South Africa, every company carrying on business or having an office in the Republic must at all times be represented by an individual residing in the Republic. The public officer is responsible for administration of the company's tax affairs in South Africa, as required in terms of South African tax legislation, and his or her appointment must be approved by the South African Revenue Services (SARS). The Zambian Companies Act does not, however, contain a similar requirement. Whereas there are no residency requirements for directors or officers of companies in Kenya, foreign companies that establish a place of business in Kenya are required to submit the name and postal addresses of one or more persons resident in Kenya authorised to accept, on behalf of the company, service of process and any notices required to be served on the company.

In Tanzania there are no residency requirements for directors or officers of companies although foreign companies that establish a place of business in Tanzania under the Companies Act 2012 (RE) are required to submit the name and postal addresses of one or more persons resident in Tanzania authorised to accept, on behalf of the company, service of process and any notices required to be served on the company.

Whereas there is no express requirement for residency for the directors or secretaries or other officers of the company in Uganda, a tax obligation arises if it is incorporated in Uganda and has its management, control and undertakes a majority of its operations in Uganda, notwithstanding the residency of the directors or officers of the Company.

**Constitutional documents**

In South Africa, until 1 May 2011, the constitutional documents of the company comprised of a memorandum of association and articles of association. The South African Companies Act has replaced these 2 documents with the Memorandum of Incorporation (“MOI”). The MOI and the details of the directors of the company are publicly available, that is, they are available to inspection by the public at a central registry. Any shareholders agreement concluded concerning any matter relating to the company must be consistent with the South
African Companies Act and the company's MOI and any provision that is inconsistent with the South African Companies Act or the company's MOI is void to the extent of the inconsistency. In Tanzania and Uganda, the articles and memorandum and the details of the directors and shareholders of the company are publicly available. In Tanzania, provided it is expressly stated, the provisions of the shareholders agreement prevail over the articles and memorandum in the event of a conflict between the provisions of the shareholders agreement and the articles and memorandum.

In Uganda, if the conflict is in respect to the shareholders, the provision of the shareholders agreement would supersede the provisions of the Memorandum and Articles of Association since the relationship of the shareholders is primarily governed by the shareholders agreement. **Insert legal position in Zambia, Kenya.**

**Incorporating a new company versus purchasing a shelf company**

In South Africa and Kenya, you can either form a new company or purchase a shelf company, however, Zambian law does not make provision for the acquisition of these and the concept of shelf companies is not very common in Tanzania or Uganda. This is largely due to cost implications and liabilities that arise from maintaining dormant companies and it's therefore advisable to incorporate a new company instead as it is not very onerous.

**Are companies required to apply for a business licence before conducting business?**

In South Africa, the Licensing of Businesses Bill, which was published on 18 March 2013 by the Minister of Trade & Industry for public comment, is currently under consideration. The Bill proposes to repeal the Businesses Act, 1991 in terms of which certain types of businesses that may impact on public health are required to be licensed by the municipality in which they are situated. The types of businesses that currently require licences include restaurants, businesses selling perishable foodstuffs, cinemas and theatres, night clubs, and businesses providing massage or infra-red treatments.

In Kenya, every person conducting a business or trade within the area of a county (formerly a local authority) is required to obtain a business permit in respect of each of the premises from which the person conducts the business or trade. A business permit may either be single (allows a class of business activities to be carried out) or consolidated (issued in respect of one or more business activities, each of which would otherwise require a separate permit), with the county determining the appropriate permit to issue depending on the activity to be carried out by the applicant. The fee payable is dependent on the nature of the
business, number of employees and the size of the business and it takes approximately five (5) working days to obtain a business permit.

While there is no single piece of legislation providing for the grant of permits or certificates for particular businesses, a company intending on conducting specific business(es) should ensure that it investigates and, where applicable, obtains the permits and approvals required for that kind of undertaking. There currently is legislation in place which provides for permits or licenses to be obtained for certain types of undertakings in sectors such as tourism, mining, financial services, transport, energy, health, education, telecommunications and forestry.

In Tanzania, every person conducting a business or trade within the area of a district is required to obtain a business permit from the local authority in that district where they will determine the appropriate permit to issue depending on the activity to be carried out by the applicant. The fee payable is dependent on the nature of the business. It takes approximately seven (7) working days to obtain a business permit.

There are certain sectors that require specific licenses in Uganda such as mining, air transport, banking, forestry, health care, insurance and many others. All other businesses would only require local authority permission in form of a business permit for the premises of carrying out the business. However, it is also advisable for foreign companies to acquire an investment license from the Uganda Investment Authority with a minimum capital requirement of US$ 100,000. This is very crucial for foreign investors in Uganda as it is the instrument that legalizes their investments in Uganda and qualifies them for a number of incentives availed by the Government such as tax breaks and waivers amongst many others.

The differing requirements between these African countries and the many idiosyncrasies relating to each, means it is important to acquire expert help to guide companies through what can sometimes be a difficult process when trying to establish a presence on this vibrant continent.