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Kenya has overhauled its legal system in an attempt to modernise the country's legal landscape and provide more favourable conditions to locals and foreign investors doing business in East Africa's business hub.

Kenya has long been the preferred entry point for investors looking for deals in the East African region. The country facilitates access to the common market that includes Burundi, Rwanda, Tanzania, and Uganda and also provides easier access to Ethiopia, the Democratic Republic of Congo and South Sudan. In the past few years, Kenya has seen an increase in investment activity and deal interest from Europe, most notably the United Kingdom and the United States. There has also been an increase in investment activity from India, China and the Middle East. South African firms are also growing more aggressive in their expansion plans into the continent.

In this regard, several recent legislative enactments have changed Kenya's business landscape. They were introduced with the aim of encouraging further investment and streamlining business processes in the country. They include the Companies Act, the Insolvency Act, the Special Economic Zones Act, the Business Registration Service Act, the Companies and Insolvency Legislation (Consequential Amendments) Act 2015 and Finance Act Amendments 2015.

NEW COMPANIES ACT

A new Companies Act was recently enacted with the aim of bringing the law into the reality of current business practices. There are several provisions that have been introduced that show a marked movement from the previous regime.

The process of incorporation has been eased to a large extent. There are less documentation requirements under the new act. In addition, the abolition of the requirement for an objects clause in the process of incorporation is notable. This means that companies can engage in a wide variety of business activities without having to provide for any and every conceivable object in their incorporation documents. The act provides that objects of a company are unrestricted unless the articles of the company expressly restrict the objects of the company.

Under the new regime, it is now possible for a company to have one member as opposed to the previous minimum membership of two. This is possible for both public and private companies and does away with the need for nominee members holding shares in trust.

The new act recognises the growing young Kenyan population and hence lowers the minimum age for directorship from 21 to 18 years of age. There is also no need to engage professionals in the incorporation process as one can pursue incorporation individually.

It is notable that the new Companies Act entails fewer compliance requirements than the previous act, as it provides that there is no need for private companies to appoint auditors or provide audited financials. They are only required to file annual returns on the anniversary date of incorporation. There is also no requirement for private companies to hold AGMs.

The new act recognizes that the wide use of electronic communication in the conduct of business and allows companies to make its public announcements and send notices to its shareholders through company websites.

THE INSOLVENCY ACT

The Insolvency Act 2015 was assented into law on 11 September 2015. It consolidates procedures relating to bankruptcy of natural persons and corporate insolvency matters, bringing them together under one act.

The act adopts a rehabilitation approach in dealing with insolvency. Unlike previous legislations, the act seeks to redeem insolvent companies through administration as opposed to subjecting them to liquidation. The act focuses more on assisting insolvent natural persons, unincorporated entities and insolvent corporate bodies, whose financial position is redeemable. This is so that they may continue to operate as going concerns and meet their financial obligations to the satisfaction of their creditors.

In the case of bankruptcy of natural persons, the act provides for alternatives to bankruptcy. This is in line with the purport of the act to rehabilitate debtors in dire financial conditions.

The new act is of great significance to investors who have been in operation in the country and may want to close down their Kenyan subsidiaries. The Insolvency Act also grants the force of law to the UNCITRAL Model Law on Cross-Border Insolvency, as set out in the fifth schedule to the act. The model law is designed to

assist states to equip their insolvency laws with a modern, harmonized and fair framework to address instances of cross-border insolvency.

The act creates the Office of Insolvency Practitioners regulated and approved to work as such by an Insolvency Practitioners Board. This seeks to ensure adherence to certain minimum standards and thus prevent the abuse of the profession. The regulation of the profession and the institution of a code of conduct under the act are also informed by the need to ensure that insolvency practitioners do not overcharge for their services.

The amounts in the act have also been amended to reflect prevailing economic conditions. Previously one could be deemed unable to pay one's debts if a one failed to pay an amount of KES 1,000. The no asset procedure provided for in section 14 of the act means to ensure that a business is not dissolved owing to some small debts and adopts the debt forgiveness concept.

SPECIAL ECONOMIC ZONES ACT

The Special Economic Zones (SEZ) Act was assented into law in September 2015 and came into force in December 2015. The new act defines a special economic zone as a designated geographical area where business enabling policies, integrated land uses and sector-appropriate on-site and offsite infrastructure and utilities shall be provided. Alternatively, it could be a geographic area which has the potential to be developed, whether on a public, private or public-private partnership basis, where any goods introduced and specified services provided are regarded, in so far as import duties and taxes are concerned, as being outside the customs territory and wherein the benefits provided under the SEZ Act apply.

While under the Export Processing Zones Act (EPZ Act) the activities of EPZ enterprises are limited to manufacturing, commercial and service activities, the SEZ Act provides a long non-exhaustive list of activities.

As was the case with EPZs, SEZs are considered to be outside Kenya for taxation. Goods taken out of the country into the SEZ are deemed to have been exported from Kenya and the same is true of services. Conversely, goods taken out of the SEZ into Kenya are deemed to be imported.

The benefits enjoyed by SEZs as listed under Part IV of the Act include extensive provisions protecting the interests of foreign investors such as full protection of property rights against all risks of nationalization or expropriation and the right to fully repatriate all capital and profits, without any foreign exchange impediments.

In addition, all licensed SEZ entities are exempt from all taxes and duties payable under the Excise Duty Act, the Income Tax Act, the EAC Customs Management Act and the VAT Act as well as Stamp Duty on the execution of any instrument relating to the business activities of special economic zone enterprises, developers and operators.

Under the Income Tax Act as amended by the Finance Act 2015, SEZs will be corporate tax-free for the first 10 years following commencement of operation. Both

EPZs and SEZs are subject to the non-resident withholding tax rates on payments they receive, but SEZs are specifically exempt from taxes on their dividend income.

The SEZ Authority is established under the SEZ Act and is the body granted with the mandate to license SEZ developers, operators and enterprises. The SEZ Authority is required to render a decision on an application for a licence to be an SEZ entity within one month following submission of an application and accompanying documentation.

BUSINESS REGISTRATION SERVICE ACT

The Business Registration Service Act was enacted to ensure effective administration of the laws relating to the incorporation, registration, operation and management of companies, partnerships and firms. To this effect it establishes the Business Registration Service (BRS). The service conducts the registrations under the act; and maintains registers, data and records on registrations carried out among other functions. The BRS will be based in Nairobi but will have established branches in every county for easy access. The BRS would be headed by the Registrar-General who will be responsible for the overall operations of the service and its staff.

THE PUBLIC PROCUREMENT AND ASSET DISPOSAL ACT

The Public Procurement and Asset Disposal Act 2015 was assented on 18 December 2015 and came into force on 7 January 2016. The Act was passed to give effect to Article 227 of the Kenyan Constitution (2010), which makes provision for the manner in which a state organ or a public entity should contract for goods, that is, in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.

The new act repealed the Public Procurement and Disposal Act of 2005. While several provisions in the old act were retained, the new act makes several additional provisions. The application of the act does not extend to asset disposals under any bilateral or multilateral agreements between the government of Kenya and any other foreign government, agency or entity or multilateral agency.

The Public Procurement Regulatory Authority (PPRA or Authority) is established under the act and has prescribed functions that include investigating and acting on complaints received on procurement and asset disposal proceedings from procuring entities, tenderers, contractors or the general public that are not subject of administrative review.

The National Treasury is also granted mandate under the act with respect to oversight and public procurement that concerns the development of a public procurement and asset disposal policy. The National Treasury functions are devolved to County Treasury to ensure the monitoring and compliance of the public procurement system at county level.

Where a candidate or a tenderer claims to have suffered or risks suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this act or the regulations, the act provides that they may seek administrative review. A review board is set up for this purpose.

These various new laws have already begun streamlining investment and business processes in Kenya and it is foreseeable that they will continue to improve Kenya's economic landscape going forward.

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