Contents

04 Introduction

06 Our Firm

07 Our Footprint in Africa

08 Key Differences Between King III and King IV

13 Key Contacts
Introduction

On 1 November 2016, the King Committee published the King IV Report on Corporate Governance for South Africa, 2016 (King IV).

King IV introduces various amendments and enhancements to its predecessor, the King III Report on Corporate Governance for South Africa, 2009 (King III). It constitutes a positive step in South African corporate governance which aims to embrace a more practical approach in the governance of “organisations” which King IV defines as “a company, retirement fund, non-profit organisation, state-owned entity, municipality, municipal entity, trust, voluntary association and any other juristic person regardless of its manner of incorporation”.

Some of the most notable changes are set out in this guide. Corporate governance is enhanced by these changes through, inter alia, the increased involvement of stakeholders, the requirements for the independence of directors, increased disclosures of information by companies and the alignment of the management of group companies.

Not all of the amendments introduced by King IV are clear at this stage. However, its provisions and their consequences will become clearer through practical implementation.

Robert Cohen
Partner
Our Firm

We help our clients overcome legal complexity and unlock opportunity in Africa.

Our track record of providing specialist legal services in the fields of corporate law, banking and finance law and dispute resolution, spans over a century.

With nine offices in seven African countries and over 400 specialist lawyers, we draw on our unique knowledge of the business and socio-political environment to advise clients on a wide range of legal issues.

Everywhere we work, we offer clients a service that uniquely blends expertise in the law, knowledge of the local market and an understanding of their businesses. Our aim is to assist them to achieve their objectives as smoothly and efficiently as possible while minimising the legal and regulatory risks.

Our clients include corporates, multinationals and state-owned enterprises across a range of industry sectors as well as financial institutions and governments.

Our expertise is frequently recognised by independent research organisations. We received awards in three out of four categories at the DealMakers East Africa Awards for 2019: top legal adviser in the M&A Category for both deal flow and deal value, and advised on the Deal of the Year. In the DealMakers South Africa Awards for 2019, we were placed third for deal value in the M&A Category and advised on both the Deal of the Year and the BEE Deal of the Year.

Our Footprint in Africa

We are present in seven countries in Africa: Kenya (Nairobi), Malawi (Lilongwe), Mauritius (Moka), South Africa (Cape Town, Durban, Johannesburg), Tanzania (Dar es Salaam), Uganda (Kampala) and Zambia (Lusaka).

We work closely with our alliance firms in Ethiopia (Aman Assefa & Associates Law Office) and Nigeria (Udo Udoma & Belo-Osagie). These are two of the leading corporate and commercial law firms in their jurisdictions.

We have developed a best friend relationship with one of Mozambique’s strongest law firms (Taciana Peão Lopes & Advogados Associados) and regularly work with leading law firms in other countries such as Angola, Botswana, Ghana, Ivory Coast, Namibia, Rwanda, South Sudan and Zimbabwe.

We have a comprehensive database of all the law firms we work with in the rest of Africa covering such countries as Algeria, Egypt, Morocco and French-speaking West Africa.

We are representatives of Lex Mundi, a global association with more than 160 independent law firms in all the major centres across the globe. Lex Mundi gives us the ability to connect our clients with the best law firms in each of the countries represented.
Key Differences Between King III and King IV

Fewer principles

The 75 principles contained in King III have been reduced to 17 principles under King IV. This reduction in principles has been achieved by the restructuring of the report. However, most of the substantive principles of King III have been retained, in some form, in King IV. It is assumed that the reduction in principles is aimed at facilitating an easier interpretation and application of King IV.

“Apply and explain”

King IV introduces a shift from the “apply or explain” approach contained in King III to the “apply and explain” approach contained in King IV.

Practically, this means that organisations will be required to implement the principles, that is, take measures to achieve the principles, but also to explain measures and their results. The “apply and explain” approach should facilitate meaningful stakeholder participation by giving stakeholders more information in respect of the corporate governance of organisations.

JSE listed companies are already under an obligation to comply with King IV, but this is still on a “comply or explain basis”. However, when the proposed amendments to the JSE Listings Requirements come into force, JSE listed companies will be required to apply and explain their compliance with King IV.

Introduction of sector supplements

Part 6 of King IV contains sector supplements applicable to municipalities, non-profit organisations, retirement funds, small and medium enterprises and state-owned entities. These supplements provide specific guidance to the aforementioned categories of organisations in their interpretation and implementation of King IV. These sector supplements are aimed at making it easier for organisations to achieve good corporate governance through the application of King IV.

Remuneration

While King III included provisions pertaining to the remuneration policies of organisations, King IV addresses the controversial issue in a more succinct manner by requiring that remuneration policies specifically include arrangements towards ensuring that the remuneration of executive management is fair and responsible in the context of overall employee remuneration in the organisation.

Furthermore, the governing body is required to disclose remuneration by means of a remuneration report in three parts (the minimum contents of which are set out in King IV), namely:

- a background statement;
- an overview of the main provisions of the remuneration policy; and
- an implementation report which contains details of all remuneration awarded to individual members of the governing body and executive management during the reporting period.

King IV also requires that the implementation report reflect, in addition to disclosures required in terms of the Companies Act:

- the remuneration of each member of executive management;
- an account of the performance measures used and the relative weighting of each, as a result of which awards under variable remuneration incentive schemes have been made, including:
  - the targets set for the performance measures and the corresponding value of the award opportunity; and
  - for each performance measure, how the organisation and executive managers, individually, performed against the set targets;
  - separate disclosure of, and reasons for, any payments made on termination of employment or office; and
  - a statement regarding compliance with and any deviations from, the remuneration policy.

The remuneration policy and the implementation report must be tabled annually for separate non-binding advisory votes by shareholders at the annual general meeting (AGM) and, in the event that either document is voted against by 25% or more of the voting rights exercised, the board is required to commit to take measures pertaining to:

- an engagement process to ascertain the reasons for the dissenting votes; and
- appropriately addressing legitimate and reasonable objections and concerns raised, which may include amending the remuneration policy, or clarifying or adjusting remuneration governance and/or processes.

The background statement of the remuneration report succeeding a dissenting vote of 25% in the remuneration policy and/or the implementation report must disclose:

- with whom the company engaged, and the manner and form of engagement to ascertain the reasons for dissenting votes; and
- the nature of steps taken to address legitimate and reasonable objections and concerns.

The increased level of disclosures regarding board remuneration will hopefully result in enhanced accountability and transparency within the organisation as well as encourage stakeholder participation/ activism. However, whether King IV’s board remuneration provisions will lead to a reduction in board remuneration remains to be seen.

Independence of directors

Whereas King III provided an exhaustive set of criteria in the classification of a person as “independent” non-executive directors, King IV has moved away from the position in King III and instead contains a list of “indicators” which the governing body should, holistically, and on a substance-over-form basis, consider when assessing the independence of a member of the governing body for purposes of categorisation.

Enhanced disclosure

The disclosure requirements introduced by King IV are broader than those contained in King III. These King IV requirements include, inter alia disclosures in relation to:

- each committee of the governing body, which include:
  - its overall role and associated responsibilities and functions;
  - its composition;
  - key areas of focus during the reporting period; and
  - whether the committee is satisfied that it has fulfilled its responsibilities in accordance with its terms of reference for the reporting period;
- the audit committee, which include:
  - whether the audit committee is satisfied that the external auditor is independent of the organisation;
  - significant matters that the audit committee has considered in relation to the annual financial statements and how these were addressed; and
  - the audit committee’s views on the effectiveness of (i) the chief audit executive, (ii) the arrangements for internal audit, and (iii) the CFO and the finance function;
- the evaluation of the performance of the governing body;
- the CEO (eg his or her notice period; contractual conditions related to termination of his or her employment; other professional commitments; whether succession planning is in place);
- risk management and governance;
- technology and information;
- arrangements for governing and monitoring stakeholder relationships;
- compliance; and
- the details of monitoring and compliance inspections by environmental regulators, findings of non-compliance with environmental laws, or criminal sanctions and prosecutions for such non-compliance.
The increased disclosure requirements introduced by King IV may result in enhanced transparency and therefore improved governance of the company. However, the disclosure of (for example) findings of non-compliance with environmental laws, or criminal sanctions and prosecutions for such non-compliance may constitute a “sensitive” matter for stakeholders and, accordingly, prove difficult for the company to disclose without receiving negative feedback from its stakeholders. This may result in increased tensions between stakeholders and the company.

Social and ethics committee

While King III recognised that certain categories of companies were required to establish a social and ethics committee in terms of the Companies Act, King IV goes further in that it encourages the establishment of a social and ethics committee, even in instances where an organisation is not legally required to do so in terms of the Companies Act.

While the Companies Regulation 43 of the Companies Regulations do not address the ethics role of the social and ethics committee, King IV attributes to the social and ethics committee the role of the oversight of, inter alia, an organisation’s ethics and the reporting thereon.

In terms of King IV, a majority of such a committee’s members should be non-executive directors in order to ensure the committee’s independence. This is in comparison to the Regulation 43 of the Companies Regulations’ requirement of only one independent non-executive director.

Group governance framework

While King III required that a governance framework be agreed between the group and its subsidiary boards, King IV goes further by placing a responsibility on the board of a holding company, to:

- assume responsibility for governance across the group by setting the direction for how the relationships and exercise of power within the group should be approached and conducted;
- ensure that the group governance framework does not conflict with the memoranda of incorporation, delegations of authority, shareholder agreements, board charters, board committee terms of reference, and related policies and agreements within the group; and
- ensure that the group governance framework recognises each subsidiary within the group as a separate and independent juristic person to whom its directors owe fiduciary duties.

The board of the holding company should also ensure that the group governance framework addresses governance matters as is appropriate for the group, including the following:

- delineation of the rights and role of the holding company;
- if applicable, delegation of certain responsibilities by the board of a subsidiary to a board committee of the holding company, without abdicating accountability, and subject to agreed reporting and information-sharing arrangements;
- the extent to which governance and operational policies of the holding company have been adopted by subsidiary companies in the group;
- engagement by the holding company with the board of a subsidiary company before the holding company exercises its rights to elect directors to the board of the subsidiary;
- arrangements to address the risk of breaching legal duty in relation to the use of information obtained while acting as director of one company in the group for the purposes of another company in the group; and
- the board of the holding company should ensure that the agreed group governance framework is implemented across the group.

On the face of it, King IV facilitates an increase in the consistency of the governance of group companies. The implementation of the agreed corporate governance framework by the board of the holding company may result in an increase in the number of shareholders in the holding company, who have an interest in the subsidiary companies, taking measures to hold the holding company accountable in this regard.

In addition, by placing the responsibility to ensure that the group governance framework does not conflict with, inter alia, the memoranda of incorporation, shareholder agreements, board charters, and related policies within the group, King IV creates a cleaner group management structure in which conflicting interpretations of the company’s policies are less likely to ensue.

Information and technology

Whereas, King III recognised the concept of information technology as one source of value creation, King IV separates information and technology, which may overlap in certain instances, into two distinct sources of value creation in terms of which separate risks and opportunities may exist.

King IV recognises the effects which the advances of technology and information may, separately, have on businesses. Accordingly, King IV requires that the governing body exercise ongoing oversight of the management of both, information and/ or technology, as the case may be, so as to ensure:

- the leveraging of information to sustain and enhance the organisation’s intellectual capital;
- an information architecture that supports confidentiality, integrity and availability of information and a technology architecture that enables the achievement of strategic and operational objectives;
- the protection of privacy of personal information; and
- the monitoring and appropriate responses to developments in technology, including the capturing of potential opportunities and the management of disruptive effects on the organisation and its business model.

Organisational ethics

King IV introduces the requirement that the governing body should ensure that the codes of conduct and ethics policies provide for arrangements that familiarise employees and other stakeholders with the organisation’s ethical standards, which arrangements should include, inter alia:

- publishing the organisation’s codes of conduct and policies on the organisation’s website, or on other platforms or through other media as is appropriate;
- the incorporation by reference, or otherwise, of the relevant codes of conduct and policies in supplier and employee contracts; and
- including the codes of conduct and ethics policies in employee induction and training programmes.

Stakeholders

Also introduced by King IV are the requirements that:

- a governing body should exercise ongoing oversight of stakeholder relationship management and in particular that it results in, inter alia, (i) methodologies for identifying stakeholders, (ii) formal mechanics for stakeholder engagement, and (iii) measurement of the quality of material stakeholder relationships and appropriate responses to outcomes; and
- the board of a company should oversee that the company encourages proactive engagement with shareholders, including engagement at the AGM of the company and that all directors should be available at the AGM to respond to shareholders’ queries on how the board executed its governance duties.

These amendments, as introduced by King IV, place an increased responsibility on the governing body to facilitate and ensure an increased level of engagement with stakeholders, in particular shareholders, and the company.

King IV also recognises the need for the ability of the board, which controls the company and has access to information which shareholders do not, to explain its decisions to the shareholders and engage with the shareholders regarding certain matters affecting the company at AGMs. In this regard King IV requires that all directors be available at AGMs to respond to shareholders’ queries on how the board executed its governance duties.
Responsible investing

In recognition of the rights and influences of institutional investors, King IV requires that the governing body of an institutional investor assumes responsibility for governing responsible investing by the institutional investor.

In this regard, the governing body should approve policy that articulates its direction on responsible investment and provide for the adoption of a recognised responsible investment code, principles and practices. The policy should be disclosed to stakeholders.

Key Contacts

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