



## The proposed amendments to the South African Companies Act No. 71 of 2008 and its far reaching implications

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The Department of Trade, Industry and Competition (“**DTIC**”) recently held a briefing on the Draft Companies Amendment bill 2021 (“**Bill**”), which was published on 1 October 2021 for public comment, and follows the 2018 Draft Companies Amendment Bill.

The purpose of the proposed amendments are mainly to limit the high levels of inequality in South Africa, to improve the ease of doing business to increase corporate governance, to reduce certain of the onerous provisions contained in the Companies Act and to address anti-money laundering and finance of terrorism.

The Bill proposes various amendments to the Companies Act No. 71 of 2008 (“**Companies Act**”), *inter alia* the following:

- changing the definition of “*securities*”;
- providing for the definition of “*true owner*”;
- providing for the preparation, presentation and voting on companies’ remuneration policies and directors’ remuneration implementation reports;

- providing for the filing of annual financial statements and copies of companies' securities registers and registers of disclosure of beneficial ownership with the Companies and Intellectual Property Commission;
- differentiating where the right to gain access to companies' records may be limited;
- clarifying when a notice of amendment of a memorandum of incorporation takes effect;
- empowering the court to validate the irregular creation, allotment or issue of shares;
- clarifying certain aspects relating to partly paid shares;
- excluding subsidiary companies from certain of the requirements relating to inter-group financial assistance;
- providing for instances where a special resolution is required for the acquisition of shares by a company;
- extending the definition of an employee share scheme to include situations where there are purchases of shares of a company;
- providing for the circumstances under which a private company will be a regulated company in the context of affected transactions;
- providing for circumstances where a company is unable to identify the persons who hold a beneficial interest in its securities;
- dealing with the composition of the social and ethics committee and the publication of the application for exemption from the requirement to appoint a social and ethics committee;
- providing for the presentation and approval of the social and ethics committee report at the annual general meeting or other meetings of shareholders; and
- ensuring the differentiation of duties between the chairperson of the Companies Tribunal and its chief operation officer.

In this article, we turn our focus to the proposed amendments to Sections 26 and 30A of the Companies Act, which deals with access to company records and executive remuneration:

#### Proposed amendment to Section 26:

The proposed amendment to Section 26 of the Companies Act may cause potential issues for private companies, public liability companies and non-profit companies, as their financials and other confidential information would be made available to their competitors.

In the event that the suggested amendment to section 26 proceeds, this may result not only in allowing any person to inspect and copy certain records of the company (which excludes the application thereof to private companies, personal liability and non-profit companies that fall below a certain threshold), but also in members of the public requesting copies of the annual financial statements of companies, unless they fall within the below exempted categories:

1. the annual financial statement is prepared internally within the company and has a Public Interest Score of less than a 100; or
2. the annual financial statement is independently prepared in a company with a Public Interest Score of less than 350.

The proposed amendment to section 26 makes further provision for members of the public to inspect and copy a company's memorandum of incorporation and any amendments thereto, the records in respect of the company's directors, the annual financial statements, securities register, and the register of the disclosure of beneficial interests of the company.

Proposed amendment to Section 30A:

According to DTIC, the Bill arises from concerns around inequality in South Africa, and accordingly it aims at a more transparent approach, which will allow shareholders to have an overview on director remuneration.

If this proposed amendment is promulgated, it will become obligatory for public and state-owned companies to include details of directors and prescribed officer remuneration, including gaps between their highest paid and lowest paid employees, in their financial statements and reports. The alleged benefits of the disclosure of executive remuneration includes, amongst other things, allowing shareholders to provide input and respond to dissatisfaction of unequal remuneration and reducing boards of companies and senior management from awarding and receiving excessive remuneration.

This suggested amendment is quite complex and onerous in that it will require companies to put in place a remuneration policy (which sets out the remuneration of directors and prescribed officers), an implementation report (which details the remuneration and benefits received by each director and prescribed officer as stipulated in sections 30(4), (5) and (6) of the Companies Act) and a remuneration report (which consolidates the remuneration policy and implementation report).

Having regard to the unique socio-economic position that South Africa is in, one would expect that a more refined thought out and robust discussion about the unintended consequences of some of the detailed requirements of section 30A are warranted, so as not to disincentivise suitably qualified people from serving as directors or prescribed officers of public or state-owned companies, as this, in turn, may prejudice these companies, the shareholders, entry-level employees and prospective employees that section 30A seeks to protect.

Concluding remarks:

The question that remains is whether these proposed amendments will be to the benefit of companies in South Africa or rather to its prejudice?

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