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COVID19 IMPACT ON CORPORATE RELATED LAWS IN KENYA

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COVID19 IMPACT ON CORPORATE RELATED LAWS IN KENYA

In the advent of COVID19, not to mention its novelty, there was immense disruption towards society's legislative, social, political, religious, and economic structures. These shocks have seen massive disruption in how various entities operate to stay afloat with the new normal. It resulted in multiple adjustments in Kenya and pushed the government to appreciate "digital" practices.

COVID19 resulted in causing various government regulatory agencies and arms of government to take quick actions to address these challenges. For instance, multiple provisions of the Companies Act have been amended, the judiciary considered how Public Limited Companies (PLCs) might conduct some of their statutory meetings, the Capital Markets Authority enhanced the decision of the Court concerning statutory activities of PLCs, and Kenya Revenue Authority (KRA) made various statutory amendments on matters tax.

In this write-up, we highlight significant statutory changes/amendments and judicial decisions that have taken place to enable undertakings to operate smoothly.

COMPANIES ACT

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| Interpretation s 3 "general meeting" in relation to a company, means a general meeting which may be a physical, virtual or hybrid meeting of the company. | s 3 was amended (2021). | The definition introduced new models for conducting general meetings, which include physical, virtual, or hybrid. |
| Default application of model articles s 21 | s 21 was deleted (2020) | The Model Articles of Association (AoA) were applicable in default should the promoters of a company fail to provide one (there is a check box to select on this ground). Further, the deleted provision indicated that if a new AoA did not limit or decline the application of the Model AoA, the Model AoA would still apply to a certain extent. |
| Company contracts s 35 (1) (a) | s 35 (1) (a) was amended (2020) by deleting the words "under its common seal" | The deletion of the common seal is part of the process to ease business operation in Kenya. |

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| <p>Execution of documents: s 37. (1) A document is executed by a company— (a) by the affixing of its common seal (if any) and witnessed by a director; or (b) in accordance with subsection (2).</p> | <p>s 37 (1) was deleted (2020)</p> | <p>s 37 (1) required a corporate document needs to be affixed with its common seal (if any) and witnessed by a director.</p> <p>Currently, s 37 (2) only requires that two signatories sign; or a document is signed by a director in the presence of a witness who will attest.</p> |
| <p>Company may have a common seal for execution of documents s 38</p> | <p>s 38 was deleted (2020)</p> | <p>Initially, it was optional to have a common seal. However, the deletion of s 38 results in doing away with the discretionary option on whether to have or not have a common seal.</p> |
| <p>Official seal for use outside Kenya s 42</p> | <p>s 42 was deleted (2020)</p> | <p>Considering the option to have or not have a common seal was deleted, there is no need for the provision on the use of an official seal outside Kenya.</p> |
| <p>Official seal for share certificates etc. s 43</p> | <p>s 43 was deleted (2020)</p> | <p>Considering the option to have or not have a common seal was deleted, there is no need to provide an official seal for share certificates.</p> |
| <p>Publication of notice of general meeting on company's website s 283 (2) (ba) in the case of a hybrid or virtual meeting, specify the means of joining and participating in the meeting.</p> | <p>s 283 (2) (ba) was added (2021)</p> | <p>The provision incorporates the judicial order rendered in April 2020 and Circular Note by CMA on how Public/Listed undertakings need to handle a virtual general meeting.</p> |
| <p>Contents of notices of general meetings s 285 (ba) in the case of a hybrid or virtual meeting,</p> | <p>s 285 (ba) was added (2021)</p> | <p>The provision enhances notice compliance measures as per the judicial order rendered in April 2020 and</p> |

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| <p>specify the means of joining and participating in the meeting.</p> | | <p>Circular Note by CMA on how Public/Listed undertakings need to issue notices for general meetings.</p> |
| <p>Share certificate to be evidence of title s 495: A certificate under the common seal of the company specifying any shares held by a member is, in the absence of proof to the contrary, evidence of the member's title to the shares.</p> | <p>s 495 amended (2020) to read as follows: A certificate duly executed in accordance with section 37 specifying any shares held by a member is, in the absence of proof to the contrary, evidence of the member's title to the shares.</p> | <p>Refers to where two signatories sign; or a share certificate is signed by a director in the presence of a witness who will attest.</p> |
| <p>Company no longer authorised to issue share warrants after commencement of this section s 504 (3) – (9)</p> | <p>s 504 (3) – (9) was added (2020): [Important but not necessarily COVID19 related]</p> | <p>It enhances the practice of discontinuing the issuance of share warrants for fully paid-up shares to make the bearer of the share warrants have rights over the shares.</p> <p>Any bearer share must be converted to a registered share.</p> <p>A company that fails or refuses to comply with the provision in 3 months upon coming to effect will be committing an offence.</p> <p>A company and any of its officers acting contrary to the provision, on conviction, will be liable to a fine not exceeding KES. 500,000.</p> <p>A further lack of compliance results in a fine not exceeding KES. 50,000 for each offence.</p> |
| <p>“Squeeze in” and “Sell Out”</p> | <p>s 611 (2) (a) & (b) and (4) (a) & (b)</p> | <p>It applies when an offeror has accepted an offer, acquired, or unconditionally</p> |

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| <p>Right of offeror to buy out minority shareholder s 611 (2) (a) & (b) and (4) (a) & (b)</p> | <p>[Important but not necessarily COVID19 related]</p> | <p>contracted to acquire not less than 90% of the shares and relate to voting shares.</p> <p>Such a person may notify the holders of the other related and remaining shares indicating the intention to acquire the shares.</p> |
| <p>Sixth Schedule: Official seal of existing company Para. 11. If an existing company had an official seal immediately before the repeal of section 37 of the DDC, the seal continues to have effect as if it had been created by the company under section 42 of this Act.</p> | <p>Para. 11 of the Sixth Schedule is deleted (2021)</p> | <p>The amendments in 2020 had deleted most provisions touching on Common Seal. However, Para. 11 of the Sixth Schedule was retained, which meant that companies with a Common Seal still used the Common Seal.</p> <p>The deletion of Para 11 of the Sixth Schedule means that companies with Common Seal can abandon the use of the Common Seal.</p> <p>A company will also factor in its own AoA.</p> |

KENYA INFORMATION AND COMMUNICATIONS ACT

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| <p>Electronic Transactions 83B. (1) This Part shall not apply to any rule or law requiring writing or signatures in any of the following matters: ... (c) documents of title.</p> | <p>s 83B (1) (c) was deleted (2020)</p> | <p>The deletion of the restriction under the Act enhances the continuous adoption of electronic means of offering Government services touching on various government agencies/authorities: Land Office, Intellectual Property Offices like KECOBO, among others.</p> |
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LAW OF CONTRACT ACT

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| <p>Interpretation s 3 (6) sing means “...physically or by means of an advanced electronic signature”</p> | <p>s 3 (6) was amended (2020): introducing signing by electronic means.</p> | <p>Several laws have already factored in electronic signatures. However, for the Law of Contract Act, this was a key milestone.</p> <p>The "advanced electronic signature" is as per the Kenya Information and Communications Act, 1998.</p> |
| <p>Interpretation s 3 (6) (c) execution of the document in accordance with section 37 of the Companies Act, 2015, for body corporates incorporated under the Companies Act, 2015.</p> | <p>s 3 (6) was amended (2021): to factor the amendments in the Companies Act.</p> | <p>The provision enhances the use of electronic signatures in the corporate sector. As noted earlier in the write-up, s 37 (1) of s 37 of the Companies Act was deleted to omit the provisions that made it near impossible to effect an electronic signature.</p> |

CAPITAL MARKETS AUTHORITY

The Capital Markets Authority (CMA) on May 27, 2020, through Circular No. The CMA/MRT/005/2020 provided for "**Requirements for Convening and Conducting Virtual General Meetings by Issuers of Securities to the Public.**" In issuing the Circular, CMA relied on s 11 (3) (d) of the Capital Markets Act, s 280 of the Companies Act, and the High Court's Order under miscellaneous application E680.

CMA guidelines are limited in scope as it only factors the possibilities resulting from COVID19 to enable undertakings to conduct virtual/hybrid meetings contrary to the provisions of the undertakings Articles of Association (AoA) subject to a no-objection from CMA. The key concerns are towards the issuance of the notice for the general meeting as per the Companies Act; providing sufficient information to enable shareholders to make informed decisions; voting, registration, and the applicable voting procedures; and any other factor considered essential for purposes of compliance with the bare minimum of the law.

It is essential to note that regardless of the limitation under this circular concerning the adoption of virtual/hybrid meeting models due to COVID19, s 2, 283 & 285 of the Companies Act is amended to accommodate the use of hybrid/virtual meetings. Further, it is unclear whether introducing the hybrid/virtual meeting via the Companies Act negates the need to seek No Objection from CMA.

KENYA REVENUE AUTHORITY

Value Added Tax

Kenya Revenue Authority (KRA) is the primary government authority that addresses and handles all matters revenue collection. In the advent of COVID19, the government revised various applicable taxes to cushion natural and juridical persons. For instance, the Value Added Tax (VAT) was adjusted from 16% to 14%, which was later revised to 16% and the resident corporate tax was reduced from 30% to 25%, which was later revised to 30% - the reduction was effective as of April 2020 and reverted to the standard percentages on January 01, 2021.

Minimum Tax

Other proposed amendments did not sit well with certain businesses, resulting in initiating a Constitutional Petition against the application/implementation of the Minimum Tax. On September 20, 2021, the High Court delivered its decision rendering the Minimum Tax as unconstitutional and contrary to Article 201 (b) (i) of the Constitution and prohibiting KRA or whosoever from implementing it. KRA expressed its disagreement with the finding and intends to appeal the High Court decision.

KRA describes Minimum Tax as a base tax that every person must pay whether a person is making a profit or not. The tax, which was effective January 01, 2021, was 1% of the company's gross turnover.

Unified Tax Filing

KRA has withdrawn a tax loss computing model that waived the application of s 15 (7) of the Income Tax Act. The effective date of application of the notice is **October 01, 2021**. The pre-withdrawal of the Institute of Certified Public Accountants (ICPAK) letter dated February 07, 1979, made it possible for a person to file unified tax account regardless of having multiple sources of income.

The withdrawal of the waiver to apply s 15 (7) will require all persons to prepare separate accounts per source of income.

