FAIRBRIDGES WERTHEIM BECKER

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Navigating the New Amendments to the Companies Act

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16 April 2025

Who we are...

Fairbridges Wertheim Becker is the amalgamation of two longstanding, respected law firms, the first being Fairbridges, established in 1812 in Cape Town, and the second Wertheim Becker, founded in 1904 in Johannesburg. This merger makes Fairbridges Wertheim Becker the oldest law firm in Africa.

Today, we are made up of 30 directors who operate across many different areas of the law including corporate and commercial law, competition law, property law and conveyancing, labour law, intellectual property law, insurance and medical malpractice, public law, deceased estates, and dispute resolution.

The FWB commercial team specialises in a range of commercial, corporate, and competition law matters including, in particular, acquisitions, take-overs and mergers, corporate structuring, corporate and structured finance arrangements, the drafting of complex commercial contracts, advising on cross-border and exchange control issues, undertaking due diligence audits, and providing general corporate law advice and guidance on issues of corporate governance.

FWB is a member of TerraLex, a leading global network of law firms committed to cross-border collaboration. The 130+ member firms dedicated primarily to commercial law are spread across 200+ jurisdictions in 120+ countries, facilitating a unified, tailored approach to cross-border legal challenges for clients worldwide. Our German partners include SKW Schwarz Rechtsanwälte (Berlin, Frankfurt, Hamburg, Munich), Thümmel, Schütze & Partner (Berlin, Dresden, Stuttgart), and Loschelder (Cologne).

Overview of South African Company Law:

South Africa's company law is primarily governed by the Companies Act 71 of 2008, which came into effect on 1 May 2011.

The Act modernised and replaced the Companies Act 61 of 1973, introducing a more business-friendly and flexible regime aligned with global best practices.

Oversight and enforcement are handled by the Companies and Intellectual Property Commission (CIPC) and, where applicable, the Companies Tribunal.

There has been an overhaul of the corporate and company law regime in South Africa recently with the introduction of the following:

- Companies Amendment Act 16 of 2024 (some sections effective since 27 December 2024, whilst other sections are not yet in force);
- Companies Second Amendment Act 17 of 2024 (wef 27 December 2024); and
- Draft King V Code on Corporate Governance for South Africa.

The intention of this presentation is to provide an overview of some of the key developments, explain how they may impact businesses in South Africa and discuss any compliance requirements or effective governance practices that can be implemented as a result.

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Stated Aims and Objectives:

Overall, these changes that have been proposed and/or implemented are aimed at enhancing transparency, accountability and corporate governance, as well as reducing red tape to promote investment confidence in the corporate sector, and advance the ease of doing business.

Specifically, the Presidency upon signing the amendments into law, gave the following overview of the intended objectives:

- To promote the ease of doing business and impose greater corporate transparency on the earnings gap between the highest and lowest paid persons in a company;
- To make the conduct of business less burdensome;
- To tighten the pursuit of delinquent directors or prescribed officers for wrongdoing, including as it relates to State Capture;
- To streamline company law to be clear and user-friendly;
- To promote the efficient and effective conduct of the domestic economy as well as the attraction of foreign investment; and
- To prevent unethical, reckless and criminal conduct in businesses that impact negatively on shareholders, workers, clients and customers, and the economy as a whole.

Section 40: Shares issued for future consideration

Before a company can issue any shares, the board must determine the consideration for which, and the terms on which, those shares will be issued.

The board therefore determines the value that the company receives for its shares, which value can be realised in the form of cash or assets other than cash. The consideration for the shares can also be received in the future or in terms of an agreement for future services or benefits.

According to the amended Companies Act, where shares are issued for future consideration, the shares are issued to the subscriber and their name of the shareholder is entered on the company's share register, but the issued shares are transferred to an independent third-party "stakeholder", to be held in terms of a "stakeholder agreement", and then later transferred to the subscriber in accordance with that agreement.

Unless the stakeholder agreement provides otherwise the voting rights, and appraisal rights, linked to the issued shares, cannot be exercised, pre-emptive rights and entitlements to dividends are limited, and cannot be transferred unless the company has expressly consented to the transfer in advance.

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Section 45: Financial Assistance

For purposes of this section "financial assistance" includes the lending of money (other than in the ordinary course of the company's business), guaranteeing of a loan or other obligation, and securing any debt or obligation, but does not include the provision of financial assistance for purpose of the subscription of securities which is governed by section 44 and remains unchanged.

In terms of section 45, the board can authorise a company to provide direct or indirect financial assistance to a director or prescribed officer of the company (or related / inter-related company), or to a person related to that company, director or prescribed officer.

However, the board may only do so pursuant to a special resolution of the shareholders (within the last two years), and once the board is satisfied that the company would meet the solvency and liquidity test in the Companies Act immediately after providing such financial assistance, and that the terms under which the financial assistance is given are fair and reasonable to the company. Where necessary, any conditions included in the company's Memorandum of Incorporation must also be complied with.

Importantly, the requirements that need to be met before a company can give financial assistance to a related or inter-related company no longer apply where the financial assistance is given by a holding company to a South African subsidiary.

Section 48 [and 114, 115, 164]: Share Buy Backs

A share buy-back is an acquisition by a company of its own shares.

A board of a company may determine that the company will acquire a number of its own shares held by a shareholder, but can never decide to purchase all shares that are in issue resulting in there being no shares left.

In a significant change to the Companies Act, this decision by the board now requires the approval by shareholders by way of a special resolution, except where the repurchase occurs in terms of a *pro rata* offer to all shareholders, or are undertaken by a listed company on a stock exchange.

Previously, a repurchase by a company of more than 5% of a class of its shares, in a single transaction or integrated series of transactions, was subject to the requirements of sections 114 and 115.

These sections introduced a level of complexity into the transactions given that the share repurchase was deemed to be a scheme of arrangements and subjected to the general approval requirements for fundamental transactions. The consequence of this transaction being considered as a scheme of arrangement is that the takeover regulations would apply in the event of a regulated company being involved, which creates another level of regulation.

The transaction would then also trigger the appraisal rights in terms of section 164.

These repurchases also required the board to obtain an expert report prior to a share buy-back taking place.

The amendments have clarified that the repurchase of shares will not be considered a scheme of arrangement, will not trigger approaisal rights, and further, will not require an expert's report.

Section 72: Social and Ethics Committee

A Social and Ethics Committee is a mandatory governance committee for selected companies.

This is a committee which can be appointed by the board, with certain board functions delegated to that committee. The committee then makes recommendations and decisions in accordance with the authority that has been given to it.

The SEC's role is to oversee and monitor a company's social, economic and ethical performance, including its compliance with legal requirements and best practices.

Previously, all companies which were required to have an SEC were treated in the same manner, in that the board appointed the SEC, the SEC had to comprise of at least three directors or prescribed officers of the company, at least one of whom would be a non-executive director who had not been involved in the company's day-to-day operations for the last three financial years.

The amendment now draws a distinction between state-owned companies and public companies, and other companies with an SEC requirement.

The SEC of a state-owned company or public company must comprise of three members, the majority of whom must be non-executive directors, and must be appointed by the board and then elected by the shareholders at each annual general meeting.

Section 77: Time Bar for Pursuing Directors for Breach

Section 77 provide for the personal liability of a director.

This entitled a company to recover loss, damages or costs sustained by the company from the director under the following circumstances (not a closed list):

- In terms of the common law for a breach of a fiduciary duty;
- In accordance with the common law relating to delict for a breach of the duty to act with the required degree of care, skill and diligence, or any provision of the Companies Act not specifically referred to in section 77;
- Where the director acted in the name of the company in the knowledge that they did not have the requisite authority to do so;
- Where the director knowing carried on the business of the company knowing that it was being conducted recklessly or fraudulently;
- Where the director is a party to an act or omission by the company despite knowing that the act or omission was calculated to defraud a creditor, employee or shareholder of the company, or had another fraudulent purpose;
- Where the director allowed the publication of any materially false or misleading financial statements;
- Where the director failed to vote against the issue of unauthorized shares despite knowing that they were unauthorised;

The prescription period of three years which previously applied in section 77 can now be extended by a court on good cause shown.

The prescription period of two years which previously applied to delinquency or probation applications in section 162 is extended to five years, and can be extended further by a court on good cause shown.

These amendments will be retrospective.

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Sections not yet in force:

- Section 26: Access to Company Records
  - Provides public access to annual financial statements, including those of certain categories of private companies;

- Section 30A and 30B: Remuneration Reports
  - Public companies and state-owned companies will be required to publish remuneration policies and reports for shareholder approval, including a "two strike" rule in instances where the report fails to be approved;

- Section 38A: Validation Applications
  - Creates a mechanism for an interested party to apply to court to retrospectively regularize irregular share creations, issues or allotments. Currently, if there is an irregularity, the retrospective remedies are limited to a ratification of share issues in excess of the authorised share capital by shareholders within 60 business days of the issuance. If this is not done, then the excessive share issue is deemed a nullity and the value received by the company (plus interest) must be returned to the subscriber;

- Section 118: Regulated Companies
  - The current definition for "regulated companies" continues to apply, so there is no change as to which companies the takeover regulations apply to. A private company is a regulated company if more than 10% of its shares have been transferred within the previous 24 months (other than between related persons) or if MOI provides that the takeover regulations apply. The amendment provides that a private company will be a regulated company if it has 10 or more shareholders with a direct or indirect shareholding in the company and meets the financial threshold of annual turnover or asset value to be set by the Minister;

Draft King V Code on Corporate Governance

WHAT IS THE KING CODE?
The King Code is a set of guiding principles on South African corporate governance compiled by the King Committee, a selection of members who govern the King Code drafting process and ultimately approve the publication of the King Code, in collaboration with the Institute of Directors in South Africa (IoDSA), which sets out best practices for organisations to achieve good governance, ethical leadership and decision-making, and achieving sustainable economic, social and environmental performance.

Corporate governance is seen by the King Committee as a critical tool for strengthening public and private institutions to the benefit of the entire economy, and the Draft King Code V is designed to present an updated, relevant and effective guiding standard.

There have been four iterations of the King Code since 1994, with the Draft King Code V, being published for comment on 24 February 2025, with the opportunity for comments lapsing on 4 April 2025.

Ansie Ramalho (Chair of the King Committee): “King V considers both local and global developments since King IV was launched in 2016, and incorporates critical shifts such as the recent amendments to the Companies Act, evolving practices in remuneration governance, global developments in sustainability reporting, and the rapidly advancing technological landscape”.

Importantly, the King Code is not law which carries sanctions in the event of breaches or transgressions. Instead, it is a voluntary code that organisations are encouraged to implement into their policies and practices in the belief and desire that this then achieves a higher standard of governance. The “apply and explain” approach included in the King Code requires the governing body to apply its mind in achieving the stated principles, rather than blindly following a set of rules.

As company law develops, the principles enshrined in the King Code are being adopted into legislation and are incorporated into court judgments which results in the incorporation into our common law.

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WHAT IS MEANT BY "CORPORATE GOVERNANCE"?

Corporate Governance is the "exercise of ethical and effective leadership by the governing body towards the achievement of the following governance outcomes for the organisation:

1. Ethical Culture: The shared values, beliefs and practices within the organization that promote ethical behaviour and decision-making;
2. Performance: The organisation creating value within its economic, social and environmental context in a sustainable manner;
3. Conformance: Effectiveness, consistency and discipline with respect to adherence by the organisation to laws, regulations and adopted standards as well as the establishment and monitoring of the system and internal controls;
4. Legitimacy: The organization having a good reputation and being trusted as a result of responsible corporate citizenship and strong stakeholder relationships."

Ethical leadership is exemplified by the governing body cultivating the characteristics of integrity, competence, responsibility, accountability, fairness and transparency.

Effective leadership is results-orientated and entails the governing body directing the organisation's performance and value creation in its economic, social and environmental context.

Draft King V Code on Corporate Governance

WHAT ARE THE FUNDAMENTAL CONCEPTS AND PHILOSPOHIES?

- Integrated Thinking
- Ubuntu, corporate citizenship and stakeholder inclusivity
- Sustainable development

WHAT PRACTICES MUST BE ADOPTED TO IMPLEMENT THE PRINCIPLES?

The organisation's governing body undertakes a series of four key responsibilities:

1. Steering the organisation and setting its strategic direction;
2. Approving policy and planning that give effect to the direction provided;
3. Overseeing and monitoring of implementation and execution by management;
4. Ensuring accountability for organisational performance by means of, among others, reporting and disclosure to stakeholders.

WHAT ARE THE PRINCIPLES IN THE DRAFT KING CODE V AND WHAT PRACTICES CAN BE ADOPTED TO IMPLEMENT THESE?

1. The governing body leads ethically and effectively as the focal point of corporate governance in the organisation;

2. The governing body governs the ethics of the organisation in a way that fosters an ethical organisational culture and promotes responsible corporate citizenship;

3. The governing body ensures that the organisation's purpose, business model and strategy result in sustainable value creation within its economic, social and environmental context;

Draft King V Code on Corporate Governance

4. The governing body ensures that reports issued by the organisation enable stakeholders to make informed and holistic assessments of how the organisation creates sustainable value within its economic, social and environmental context.;

5. The composition of the governing body is balanced with respect to the mix of competencies, diversity and independence that enables it to discharge its governance role and responsibilities objectively and effectively;

6. The governing body ensures that arrangements for delegation to its committees and individuals within its own structures support the objective and effective discharge of its governance responsibilities;

7. The governing body ensures that the appointment of and delegation to management result in operational effectiveness and clarity on authority and responsibilities;

8. The governing body governs risk and compliance to enable the organisation to expand its opportunities, and set and achieve its strategic objectives;

9. The governing body governs information and its deployment through technologies to enable the organisation to expand its opportunities and set and achieve its strategic objectives;

10. The governing body ensures that the organisation remunerates fairly, responsibly and transparently to promote sustainable value creation within its economic, social and environmental context;

Draft King V Code on Corporate Governance

11. The governing body ensures that assurance services and functions enable an effective control environment and safeguard the integrity of information used for decision making and disclosure by the organisation; and

12. The governing body, in acting in the best interests of the organisation over time, adopts a stakeholder-inclusive approach which takes into account material stakeholders' interests.

Practical Discussion Point:

Are these changes truly improving corporate governance in South Africa and setting higher standards for the conduct of companies and individuals in the corporate environment, or are they simply political cover designed to create the appearance of progress without driving meaningful change beyond a superficial tick-box exercise?

THANK YOU

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