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KEY FEATURES OF BOTSWANA CORPORATE LAW

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A. PRESENTATION OUTLINE

The purpose of this presentation is to give a brief overview of the law in Botswana as it pertains to corporations and its relevance to those seeking to invest in the country

- Background to Corporate Law
- Forms of Business Organisations
- The Companies Act
- Broader Financial Regulatory Environment

B. BACKGROUND TO CORPORATE LAW

I. Historical and Legislative Background

- Origins in Roman Dutch law, but not codified – akin to English common law, based on precedents laid down by the Courts over time

I. Historical and Legislative Background

- To persons from an Anglo common law system, there are a few significant differences in our Roman Dutch legal system which are pertinent to note for potential investors:
- No equivalent of the English Statute of Frauds. Oral agreements, regardless of the value of the contract or the length of time it is intended to be in force, are enforceable. Whilst in South Africa the common law position has been amended by statute, in Botswana oral agreements for the sale and purchase of land are permissible as a matter of law

I. Historical and Legislative Background

- Consideration is not required in order to found a contract. An offer made in good faith which is duly accepted is sufficient to ground an agreement
- Legislature has not sought greatly to impinge upon freedom of contract. We have no equivalent of the English Unfair Contract Terms Act and parties, subject to certain exceptions, are free to make their own terms which will be enforced by the courts if asked to do so

I. Historical and Legislative Background

- In relation to the corporate world, the principal underpinning legislation at work is the Companies Act, 2003 (Act No 32 of 2004) (the “**CA**”)
- There are however a number of related pieces of legislation which companies need to take into account in the event that they wish to operate in the broader financial arena. These include:
 - the Banking Act [Cap 46:04]
 - the Collective Investment Undertakings Act [Cap 56:09]

I. Historical and Legislative Background

- International Financial Services Centre legislation, contained in the Income Tax Act [Cap 52:01]
- the Botswana Stock Exchange Act [56:08]
- Insurance Industry Act [Cap 46:01]
- Non-Bank Financial Institutions Regulatory Authority Act, 2006

II. Administration of Justice

- Hierarchical court system:
 - Magistrates Court, High Court and the Court of Appeal
 - Court of Appeal – sits twice a year, but the Court can be convened to hear emergency appeals
 - Industrial Court structure in parallel to deal with employment disputes

II. Administration of Justice

- The Court system is transparent and works. An area of concern may be the length of time it takes to ventilate a dispute in the High Court. New rules have however just been introduced to streamline the process
- Alternative dispute resolution mechanisms and arbitrations are now increasingly popular. The Botswana Institute of Arbitrators has some 50 members, and has a detailed set of procedural rules

II. Administration of Justice

- An award granted by an arbitrator may be made an order of the High Court and is enforceable by way of such court order
- Botswana permits choice of proper law of contract and choice of jurisdiction provisions are wholly enforceable. Thus, for example, if a contract stipulates New York as the proper law of contract and that the New York Commercial Court as having jurisdiction, Botswana Courts will have no jurisdiction to hear any dispute arising from such contract

C. FORMS OF BUSINESS ORGANISATIONS

- A business may be carried on in Botswana by a sole proprietorship, partnership, trust or limited liability company
- Common law governs the operation of partnerships and trusts
- For purposes of this presentation, the focus will be on companies, but note the following:

C. FORMS OF BUSINESS ORGANISATIONS

- Partnerships have the classic joint and several liability structure and do not have a legal personality separate to the partners
- Trusts may be registered, may hold property and may sue and be sued in their own name. In relation to the CA, these are becoming increasingly important where a company issues debentures
- Joint Ventures: both in partnership and incorporated form are possible

D. THE COMPANIES ACT

- The new CA has radically altered the corporate landscape in Botswana
- Principal features:
 - Constitutional and structural changes
 - Innovative aspects
 - Accountability aspects

I. Constitutional and Structural Changes

- Old form of memorandum and articles of association discarded in favour of a single foundational document – the Constitution
- Companies may be formed without a Constitution, in which case relevant provisions of the CA will comprise the default position – Section 38
- Company has full capacity to carry on or undertake any business or activity, do any act which it may by law do, or enter into any transaction – this effectively does away with the old English *ultra vires* rule – Section 25

I. Constitutional and Structural Changes

- Types of Companies:
 - Private company limited by shares
 - Public company limited by shares
 - Companies limited by guarantee
 - Close companies
 - External companies - requirement to have a place of business or to carry on business in Botswana, with attendant registration requirements

I. Constitutional and Structural Changes

- In relation to shares, a key aspect is the concept of no par value shares – previously, shares would be issued with a nominal value – Section 47
- No limitation on the number of shares that may be issued – effectively discarding the concept of the authorised share capital of a company

I. Constitutional and Structural Changes

- New concept of stated capital – which is the whole of the company's called up issued share capital and its premium account – Section 47 (5)
- Different classes of shares – Section 46 (1):
 - Redeemable
 - Preferential or limited rights to distributions of capital or income
 - Conferring special, limited or conditional voting rights or no voting rights

I. Constitutional and Structural Changes

- No residency or citizenship requirements or restrictions as to who may own a share in a private or public company in Botswana, except in relation to certain business operations, of the nature of supermarkets, filling stations and security service operations, and certain types of land tenure
- Company may now have a single shareholder – Section 19 (1) (b)
- No citizenship requirement as to directorships

I. Constitutional and Structural Changes

- A public company shall have at least 2 directors and a private company other than a close company shall have 1 director - Section 145
- In each case, the minimum number of directors must be ordinarily resident in Botswana

II. Innovative Aspects

- Purchase by a company of its own shares
- Financial Assistance

1) Purchase by a company of its own Shares – Section 100

- Company may with the approval of the board and of an ordinary resolution of shareholders purchase or otherwise acquire its own shares
- This gives the company flexibility in the context of a reduction of capital, with additional flexibility in relation to the company holding its own shares and re-issuing such shares under specified conditions

2) Flexibility in relation to a company giving Financial Assistance for the purpose of the acquisition of its own Shares – Sections 76 and 77

- Previous security conundrum
- Now, possible, if giving the assistance is in the interests of the company, the terms and conditions of the assistance are fair and reasonable to the company and to shareholders not receiving such assistance and, immediately after giving the assistance, the company satisfies a solvency test

III. Accountability Aspects

- Directors duties
- Financial accountability
- Shareholder rights

1. Directors Duties

- Transformative provisions
- CA codifies the primary duties and responsibilities of directors. In a statute, for the first time, the new CA sets out extensively the fiduciary duties of directors, ranging from the duty to act in good faith in the best interests of the company to avoiding conflicts of interests

1. Directors Duties

- De facto director, shadow director, alternate director
- Executive and non executive directors - No distinction in relation to liabilities and obligations
- Codified duties:
 - Section 130 – duty of directors to act in good faith and in the best interests of the company

1. Directors Duties

- Section 132 – use of information and advice – duty of care and skill
- Sections 133, 134, 136, 137, 138, 139 – conflicts of interest and disclosures
- Section 140 – prohibition of use of confidential information for personal gain or other unauthorised purpose

1. Directors Duties

- Section 158 – places personal civil liability on a director for the following breaches:
- Failing to act honestly, in good faith and in the best interests of the company
- Failure to exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances
- Section 158 (2) – requires an executive director of a public company to exercise that degree of care, diligence and skill which a reasonably prudent and competent executive in that position would exercise

1. Directors Duties

- Section 158 (3) – personal liability to compensate his company for any loss suffered, personal liability to account for any profit; any contract or transaction entered into by the director may be rescinded
- Section 159 – prohibits the company from directly and indirectly effecting any insurance for an officer for liability for negligence, default, breach of duty or breach of trust

1. Directors Duties

- Any indemnity given in breach of the section is void (officer being defined in the CA as a director, secretary or manager)
- Section 160 – directors are personally liable to creditors for wrongful trading when they are knowingly a party to contracting a debt by the company where at the time there was no reasonable or probable expectation that the company would be able to pay the debt

2. Financial Accountability

- More stringent standards
- Public company (5 months after balance sheet date) and private company (7 months after balance sheet date) must produce financial statements that give a true and fair view of the state of affairs of the company as at the balance sheet date, the profit and loss or income and expenditure, as the case may be, of the company for the accounting period ending on that balance sheet date – Section 206

2. Financial Accountability

- In the case of public companies and non-exempt private companies, the financial statements must be prepared in accordance with and comply with International Financial Reporting Standards
- In the case of exempt private companies, the financial statements are to be prepared in accordance with generally accepted accounting principles

2. Financial Accountability

- Public company (5 months after balance sheet date) and private company (7 months after balance sheet date) must prepare an annual report on the affairs of the company during the accounting period ending on that date, a copy of which report must, unless the shareholders have elected to waive receipt of such a report, be sent to every shareholder of the company not less than 20 working days before the date fixed for holding a AGM of that company – Section 213

3. Shareholder Rights

- Enhanced shareholder protections
- Management review by shareholders – Section 97. Proposals relating to matters to be discussed or resolved at the next general meeting of the shareholders
- Provisions relating to derivative actions, actions by shareholders against directors – Sections 166, 170 and 171

3. Shareholder Rights

- Revised minority protection provisions in relation to the affairs of a company being conducted in an oppressive, unfairly discriminatory or prejudicial manner to a shareholder or former shareholder – Section 174
- Concept of “major transaction”- Special Resolution (75% threshold) prior to entering into a transaction pegged at half the value of the companies assets whether in relation to an acquisition or a disposal

E. BROADER FINANCIAL REGULATORY ENVIRONMENT

- Strong and effective regulation in relation to
 - Banking
 - Botswana Stock Exchange
 - CIUs
 - IFSC

E. BROADER FINANCIAL REGULATORY ENVIRONMENT

- Enhanced present role of the Bank of Botswana (beyond that of a traditional central banker) so as to regulate CIUs and IFSC entities
- Specialised structures:
 - CIUs
 - IFSC Companies

1. CIUs

- The Bank of Botswana is obligated in terms of the CIU Act to:
 - Approve management companies, trust deeds, credit institutions, the publication of advertisements, the replacement of management companies and trustees, the appointed to the office of director of a management company, the alteration of the name, trust deed or constitution of an investment company

1. CIUs

- Satisfy itself as to the good repute, competence and experience of the directors of management companies, investment companies and of trustee
- Estimate the sufficiency of the financial resources that a unit trust has at its disposal or the paid up share capital of a unit trust to enable such trust to conduct its business effectively and meet its liabilities

1. CIUs

- Require the suspension of the purchase of units of a collective investment undertaking in the interest of the participants or the public; and
- Analyse all financial returns submitted to it by virtue of the Collective Investment Undertakings Act
- It is important to note that it is not just funds which are resident in Botswana which are subject to regulation:
 - If a non resident fund is intended to be marketed in Botswana then it must be registered with the Bank

1. CIUs

- Two categories of CIU are extant for the purposes of the Income Tax Act. The first is defined as “Specified Collective Investments Undertakings” and are CIUs in which all units are held by non-residents (apart from the units which are held by the undertaking itself, by a international financial services centre company or by another CIU). Specified Collective Investments Undertakings are exempt from taxation – Section 2 and Second Schedule – Income Tax Act

1. CIUs

- CIUs which are not managed by an international financial services centre company or in which units are held by Botswana residents are not exempt from taxation, but, provided that the CIU does not retain any funds, profits will be taxed in the hands of the fund holders – Section 22 – Income Tax Act

2. International Financial Services Centre

- The Bank of Botswana has also been infused with broad supervisory powers in respect of entities which have been granted a tax certificate in terms of the Income Tax Act authorising the entity to operate as an international financial services centre company
- The Income Tax Amendment Act 1999 introduced legislation for the establishment of an International Financial Services Centre for Botswana and for companies to register and operate as international financial services centre companies in Botswana – Part XVI – Income Tax Act

2. International Financial Services Centre

- A successful applicant will be issued a tax certificate certifying that the activities of the company as specified in the certificate are approved financial operations. The certificate will be issued to a person against the person's undertaking to the Bank that he shall comply with the reporting requirements stipulated in the Bank of Botswana Act or on the basis that the person is exempted from such reporting requirements

2. International Financial Services Centre

- The following are approved financial operations that may be the subject of a tax certificate:
 - Banking and finance operations transacted in foreign currency
 - Broking and trading of securities denominated in foreign currency
 - Investment advice

2. International Financial Services Centre

- Management and custodial functions in relation to collective investment schemes
- Insurance and related activities
- Registrar and transfer agency services
- Exploitation of intellectual property
- Development and supply of computer software for use in the provisions of services described above
- Accounting and financial administration
- Other, Ministerially approved operations

2. International Financial Services Centre

- Approved international financial services centre companies may not carry on business with persons resident in Botswana who are not themselves international financial services centre companies, but may invest in Botswana resident companies
- International Financial Services Centre Companies are taxed at a flat rate of 15 percent with no additional company tax component. In addition the payments by an international financial services centre company to non-residents of interest, commercial royalty, management or consultancy fees and dividends (including dividends to an international financial services centre company or a CIU) are not subject to withholding tax

3. Botswana Stock Exchange

- BSE provides facilities for the listings of the securities of companies (domestic or foreign) and provides its users with an orderly market place for trading in such securities
- Formal and tested regulations and procedures
- Currently, the subject of a comprehensive regulatory review – expected to be completed in 2009
- Central securities depository – uncertificated holding of securities

4. Non-Bank Financial Institutions Regulatory Authority

- Umbrella Regulatory Authority to deal with the licensing, operation and supervision of non-bank financial institutions
- Framework legislation

The information contained in this presentation is for general guidance purposes only. It does not constitute, nor should it in any way be deemed or construed as constituting, specific transactional advice, for which detailed consultation will be required

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