

CORPORATE & COMMERCIAL ALERT

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INCORPORATING
KIETI LAW LLP, KENYA

IN THIS ISSUE

Registering an LLP in South Africa as an External Company

South African law does not provide for limited liability partnerships (LLP) formed under statute, such as in other countries. Partnerships in South Africa are merely contracts under common law and are not regulated by specific pieces of legislation in the same way that close corporations, companies and trusts are. Partnerships are also not regarded as legal or juristic persons. A question then arises: can and should an LLP incorporated in a foreign country be registered as an external company in South Africa where it undertakes activities in South Africa?



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Registering an LLP in South Africa as an External Company

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To answer this question, one would have to consider the definition of "external company" as provided for in the Companies Act 71 of 2008 (Companies Act). External companies are provided for in section 23 of the Companies Act. In terms of section 1 of the Companies Act, an external company is a foreign company that is carrying on business or non-profit activities within South Africa. A foreign company in terms of section 1 of the Companies Act is an entity incorporated outside South Africa, irrespective of whether it is a profit or non-profit entity carrying on business or non-profit activities within South Africa.

If one considers the definition of "foreign company", it refers to an "entity" that is "incorporated" in a foreign country. Therefore, a foreign company for purposes of section 23 would have to be a juristic person or body corporate (i.e. an entity

that is recognised as a person in the jurisdiction in which it is registered). It follows then that if an LLP is like a common law partnership in South Africa, with no separate legal identity from its partners, then the LLP will not fall within the definition of "foreign company" in terms of the Companies Act.

By way of illustration, the concept of an LLP was introduced in the UK in terms of the Limited Liability Partnerships Act 2000 (LLP Act). In terms of the LLP Act, an LLP is a body corporate (with a legal personality separate from that of its members) which is formed and incorporated under the LLP Act. Since an LLP (in terms of the laws of the UK) is a legal entity with its own personality (i.e. it can sue and be sued in its own name), it would therefore fall within the definition of "foreign company" in terms of the South African Companies Act and must be registered as an

external company if it conducts business here. In other jurisdictions, such as in Queensland, Australia, LLPs are not bestowed a legal personality of their own as certain partners are liable for the liabilities of the LLP and, accordingly, they would not be "entities".

An LLP falling within the definition of "foreign company" would be required to register as an external company with the Companies and Intellectual Property Commission if it intends to conduct business or within 20 business days of first beginning to conduct business in South Africa. Section 23 of the Companies Act lists the following activities which will not, on their own, be regarded as conducting a business in South Africa:

- holding a meeting or meetings of the shareholders or board of the foreign company, or otherwise conducting the internal affairs of the company;

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- establishing or maintaining any bank or other financial accounts;
- establishing or maintaining offices or agencies for the transfer, exchange or registration of the foreign company's own securities;
- creating or acquiring any debts, mortgages or security interests in any property;
- securing or collecting any debt, or enforcing any mortgage or security interest; and
- acquiring any interest in any property.

However, if a number of the activities listed above are conducted in South Africa, one may need to consider if the LLP would need to register as an external company. On the other hand, the mere entering into contracts of employment in South Africa requires that an entity register as an external company.

It is important to note that the branch of an LLP that is registered as an external company will not be considered a separate legal entity but an extension of the LLP in South Africa. The LLP would remain one and the same legal entity registered in South Africa and in its place of incorporation. It would not have a Companies Act-regulated board of directors in South Africa, nor would the LLP have a separate existence from its foreign operations. Should the LLP registered as an external company be sued in South Africa, the LLP in its place of incorporation itself would be sued. Similarly, should the LLP be deregistered in its place of incorporation, the branch in South Africa would be deregistered too.

**CYPRIAN MTHEMBU,
PHATHUTSHEDZO NEKHAVHAMBE
AND ETTA CHANG**

2022 RESULTS

CHAMBERS GLOBAL 2021 - 2022

ranked our Corporate & Commercial practice in Band 1: corporate M&A and in Band 2 capital markets: Debt and capital markets: equity.

Ian Hayes ranked by **CHAMBERS GLOBAL 2022** in Band 1: corporate M&A.

David Pinnock ranked by **CHAMBERS GLOBAL 2022** in Band 1: corporate M&A: private equity.

Johan Latsky ranked by **CHAMBERS GLOBAL 2022** as a Senior Statesperson for capital markets: equity.

Jackie King ranked by **CHAMBERS GLOBAL 2022** in Band 2: capital markets: debt.

Peter Hesseling ranked by **CHAMBERS GLOBAL 2022** in Band 2: corporate M&A.

Willem Jacobs ranked by **CHAMBERS GLOBAL 2022** in Band 2: corporate/M&A and in Band 3: corporate/M&A: Private equity.

Sammy Ndolo ranked by **CHAMBERS GLOBAL 2022** in Band 4: corporate/M&A, Kenya.

David Thompson ranked by **CHAMBERS GLOBAL 2022** in Band 4: corporate/M&A.



Cliffe Dekker Hofmeyr

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BBBEE STATUS: LEVEL ONE CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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