24 MARCH 2021

CORPORATE & COMMERCIAL ALERT

IN THIS ISSUE

Time to shelve “*shelf companies*”?

Historically, shelf companies served as a time saving measure whenever a company was required for the establishment of a business, as a vehicle to implement a transaction or to take advantage of a tender opportunity. It allowed a person to simply “*purchase*” a shelf company to fulfil the required purpose in a relatively quick and efficient manner in comparison to incorporating a company from scratch, which could take several weeks.

CLIFFE DEKKER HOFMEYR

CLICK HERE

For more insight into our expertise and services

Time to shelve "*shelf companies*"?

Has time and technology, however, finally caught up with shelf companies? Before addressing this question, let's consider some of the disadvantages often encountered when making use of a shelf company.

Historically, shelf companies served as a time saving measure whenever a company was required for the establishment of a business, as a vehicle to implement a transaction or to take advantage of a tender opportunity. It allowed a person to simply "*purchase*" a shelf company to fulfil the required purpose in a relatively quick and efficient manner in comparison to incorporating a company from scratch, which could take several weeks.

Incorporating shelf companies became a business in itself, whereby a person (who we shall refer to as the "*seller*") would incorporate companies with no assets or liabilities en masse with the sole purpose of transferring or issuing shares in the company to anyone who requires the immediate use of a company. These newly incorporated companies would then sit on the metaphorical shelf until they are purchased by someone who requires a company (who we shall refer to as the "*purchaser*") and reformatted according to the purchaser's requirements.

Has time and technology, however, finally caught up with shelf companies? Before addressing this question, let's consider some of the disadvantages often encountered when making use of a shelf company.

While the shelf company would have never traded previously and remained dormant, it would still have been incorporated with a certain set of details including persons appointed as directors and a registered address – most, if not all, would not be suitable to the purchaser. A process would then need to be undertaken to reformat the shelf company to meet the purchaser's requirements, and while this process is in general relatively straightforward, this is not necessarily the case. For example, the co-operation and assistance of the existing appointed directors is required, which could be problematic if any of the directors are no longer in the employ of the seller of the shelf company. Furthermore, this process is not instantaneous and the Companies and Intellectual Property Commission (CIPC), requires a certain review period before finalising such reformatting amendments.

Often, as part of the incorporation of a shelf company, shares are issued and then held by the seller in anticipation of transferring them to a purchaser who requires a company. In the instance of a private company, the seemingly innocuous act of transferring the shares would often lead to the unintended consequence of transforming the private company into a "*regulated company*". A private company becomes a "*regulated company*" when

CLIFFE DEKKER HOFMEYR

Time to shelve *"shelf companies"*?

...continued

Historically a new company would be incorporated by completing and physically submitting the relevant documents to the CIPC, after which an employee of the CIPC would manually review the documents to ensure that all relevant requirements were met.

shares in excess of 10% of the issued share capital of the company is transferred to an unrelated person with the consequence that for the next two years the takeover regulations of the Companies Act would need to be complied with in relation to fundamental transactions involving the company, thereby introducing potentially unintended complexity and compliance hurdles in relation to the implementation of any such transactions.

International investors are also generally unfamiliar with the concept of a shelf company and would often view the use of one with scepticism, given that it would be purchasing a company that would have been in existence for some time on the premise that it has never before traded and has no assets or liabilities. Such investors are usually more comfortable with the incorporation of a company from scratch but do not have the luxury of time to wait for such process to be completed.

Acquiring a shelf company would also require the purchaser to rely on the seller for having incorporated the company properly and in compliance with all legal requirements. For example, a shelf company with shares already in issue would had to have received adequate consideration for the issue of those shares for them to have been validly issued. As a shelf company would be incorporated with no assets, the payment of, at the very least, a nominal consideration for the issue of such shares would sometimes be overlooked, only to be uncovered as an invalid issue of shares during a due diligence of the company several years later.

With the disadvantages of purchasing a shelf company in mind, let's now consider the process of incorporating a new company from scratch.

Historically a new company would be incorporated by completing and physically submitting the relevant documents to the CIPC, after which an employee of the CIPC would manually review the documents to ensure that all relevant requirements were met. This process could take several weeks and was largely dependent on the capacity of the CIPC as well as the efficiency of the CIPC employees reviewing the documents.

Alongside the new Companies Act coming

CLIFFE DEKKER HOFMEYR

Time to shelve "*shelf companies*"?

...continued

It seems that technology and the need to increase the ease of doing business has caught up with shelf companies, suggesting perhaps that the time has come to shelve shelf companies.

into effect in 2011, the CIPC launched its own website with the aim of automating some of the services it offered as well as allowing for electronic delivery and filing of certain documents. This meant that time could be saved by removing the need to physically deliver any incorporation documents to the CIPC, however, an employee of the CIPC would still need to manually review the incorporation documents, a process which could still take several weeks.

Over time the CIPC gradually implemented and improved the automation and efficiency of its online services allowing companies to be incorporated in a much more efficient manner, as quick as approximately three business days after the online submission of the relevant documents.

The CIPC has with effect from 1 March 2021, taken a further leap in improving the automation and efficiency of its online services by establishing a new automated company incorporation portal which utilises the resources and verification processes of the Department of Home Affairs. This effectively means that a new company utilising a standard short form memorandum of incorporation with South African directors can be incorporated almost instantaneously without the need to submit any supporting documents for physical review.

This would allow for the immediate incorporation of the company on the basis that further changes such as a change to directors or the adoption of a more comprehensive and tailored memorandum of incorporation could be actioned at a later stage.

When considering whether it is best to purchase a shelf company as opposed to incorporating a new company it would appear that the CIPC's new company incorporation portal turns the tide in favour of incorporating a new company from scratch, especially when one considers the fact that it can now be done in as little as a day without any additional cost.

It seems that technology and the need to increase the ease of doing business has caught up with shelf companies, suggesting perhaps that the time has come to shelve shelf companies.

Quintin Honey and Merrick Steenkamp

CDH partners with clients to efficiently and seamlessly assist with the incorporation of companies and all company secretarial tasks which are necessary to ensure that their business and transaction needs are met.

CLIFFE DEKKER HOFMEYR

TOP RANKED
Chambers
Global
2021
Cliffe Dekker Hofmeyr
BAND 1
Corporate/M&A

TOP RANKED
Chambers
Global
2021
Cliffe Dekker Hofmeyr
BAND 2
Capital Markets: Equity

The LEGAL 500
EMEA
2012-2020
TIER 1
Corporate, Commercial/M&A

IFLR 1000
2021
TOP TIER FIRM
FINANCIAL AND CORPORATE

PRIVATE EQUITY AFRICA Awards 2020
WINNER
CDH wins Single Deal Local Legal Advisor of the Year award for the OMPE & Footgear deal in the 9th annual Private Equity Africa awards

CDH's Corporate, Commercial and M&A practice is ranked as a Top-Tier firm in THE LEGAL 500 EMEA 2020.
David Pinnock is ranked as a Leading Individual in Corporate, Commercial and M&A in THE LEGAL 500 EMEA 2020.
Willem Jacobs is ranked as a Leading Individual in Corporate, Commercial and M&A in THE LEGAL 500 EMEA 2020.
David Thompson is recommended in Corporate, Commercial and M&A in THE LEGAL 500 EMEA 2020.
Johan Green is recommended in Corporate, Commercial and M&A in THE LEGAL 500 EMEA 2020.
Johan Latsky is recommended in Corporate, Commercial and M&A in THE LEGAL 500 EMEA 2020.
Peter Hesseling is recommended in Corporate, Commercial and M&A in THE LEGAL 500 EMEA 2020.
Justine Krige is ranked as a Next Generation Partner in Corporate, Commercial and M&A in THE LEGAL 500 EMEA 2020.
CDH's Investment Funds practice is ranked in Tier 3 in THE LEGAL 500 EMEA 2020.
John Gillmer is recommended in Investment Funds in THE LEGAL 500 EMEA 2020.
Wayne Murray is ranked as a Rising Star in Investment Funds in THE LEGAL 500 EMEA 2020.

The LEGAL 500
EMEA

CLIFFE DEKKER HOFMEYR

OUR TEAM

For more information about our Corporate & Commercial practice and services, please contact:

Willem Jacobs
National Practice Head
Director
Corporate & Commercial
T +27 (0)11 562 1555
M +27 (0)83 326 8971
E willem.jacobs@cdhlegal.com

David Thompson
Regional Practice Head
Director
Corporate & Commercial
T +27 (0)21 481 6335
M +27 (0)82 882 5655
E david.thompson@cdhlegal.com

Mmatiki Aphiri
Director
T +27 (0)11 562 1087
M +27 (0)83 497 3718
E mmatiki.aphiri@cdhlegal.com

Roelof Bonnet
Director
T +27 (0)11 562 1226
M +27 (0)83 325 2185
E roelof.bonnet@cdhlegal.com

Tessa Brewis
Director
T +27 (0)21 481 6324
M +27 (0)83 717 9360
E tessa.brewis@cdhlegal.com

Etta Chang
Director
T +27 (0)11 562 1432
M +27 (0)72 879 1281
E etta.chang@cdhlegal.com

Vivien Chaplin
Director
T +27 (0)11 562 1556
M +27 (0)82 411 1305
E vivien.chaplin@cdhlegal.com

Clem Daniel
Director
T +27 (0)11 562 1073
M +27 (0)82 418 5924
E clem.daniel@cdhlegal.com

Jenni Darling
Director
T +27 (0)11 562 1878
M +27 (0)82 826 9055
E jenni.darling@cdhlegal.com

André de Lange
Sector head
Director
Agriculture, Aquaculture
& Fishing Sector
T +27 (0)21 405 6165
M +27 (0)82 781 5858
E andre.delange@cdhlegal.com

Werner de Waal
Director
T +27 (0)21 481 6435
M +27 (0)82 466 4443
E werner.dewaal@cdhlegal.com

John Gillmer
Joint Sector head
Director
Private Equity
T +27 (0)21 405 6004
M +27 (0)82 330 4902
E john.gillmer@cdhlegal.com

Jay Govender
Sector Head
Director
Projects & Energy
T +27 (0)11 562 1387
M +27 (0)82 467 7981
E jay.govender@cdhlegal.com

Johan Green
Director
T +27 (0)21 405 6200
M +27 (0)73 304 6663
E johan.green@cdhlegal.com

Ian Hayes
Director
T +27 (0)11 562 1593
M +27 (0)83 326 4826
E ian.hayes@cdhlegal.com

Peter Hesseling
Director
T +27 (0)21 405 6009
M +27 (0)82 883 3131
E peter.hesseling@cdhlegal.com

Quintin Honey
Director
T +27 (0)11 562 1166
M +27 (0)83 652 0151
E quintin.honey@cdhlegal.com

Brian Jennings
Director
T +27 (0)11 562 1866
M +27 (0)82 787 9497
E brian.jennings@cdhlegal.com

Rachel Kelly
Director
T +27 (0)11 562 1165
M +27 (0)82 788 0367
E rachel.kelly@cdhlegal.com

Yaniv Kleitman
Director
T +27 (0)11 562 1219
M +27 (0)72 279 1260
E yaniv.kleitman@cdhlegal.com

Justine Krige
Director
T +27 (0)21 481 6379
M +27 (0)82 479 8552
E justine.krige@cdhlegal.com

Johan Latsky
Executive Consultant
T +27 (0)11 562 1149
M +27 (0)82 554 1003
E johan.latsky@cdhlegal.com

Nkcubeko Mbambisa
Director
T +27 (0)21 481 6352
M +27 (0)82 058 4268
E nkcubeko.mbambisa@cdhlegal.com

Nonhla Mchunu
Director
T +27 (0)11 562 1228
M +27 (0)82 314 4297
E nonhla.mchunu@cdhlegal.com

Ayanda Mhlongo
Director
T +27 (0)21 481 6436
M +27 (0)82 787 9543
E ayanda.mhlongo@cdhlegal.com

William Midgley
Director
T +27 (0)11 562 1390
M +27 (0)82 904 1772
E william.midgley@cdhlegal.com

Tessmerica Moodley
Director
T +27 (0)21 481 6397
M +27 (0)73 401 2488
E tessmerica.moodley@cdhlegal.com

CLIFFE DEKKER HOFMEYR

OUR TEAM

For more information about our Corporate & Commercial practice and services, please contact:

Anita Moolman
Director
T +27 (0)11 562 1376
M +27 (0)72 252 1079
E anita.moolman@cdhlegal.com

Jerain Naidoo
Director
T +27 (0)11 562 1214
M +27 (0)82 788 5533
E jerain.naidoo@cdhlegal.com

Francis Newham
Executive Consultant
T +27 (0)21 481 6326
M +27 (0)82 458 7728
E francis.newham@cdhlegal.com

Gasant Orrie
Cape Managing Partner
Director
T +27 (0)21 405 6044
M +27 (0)83 282 4550
E gasant.orrie@cdhlegal.com

Verushca Pillay
Director
T +27 (0)11 562 1800
M +27 (0)82 579 5678
E verushca.pillay@cdhlegal.com

David Pinnock
Joint Sector head
Director
Private Equity
T +27 (0)11 562 1400
M +27 (0)83 675 2110
E david.pinnock@cdhlegal.com

Allan Reid
Sector head
Director
Mining & Minerals
T +27 (0)11 562 1222
M +27 (0)82 854 9687
E allan.reid@cdhlegal.com

Megan Rodgers
Sector Head
Director
Oil & Gas
T +27 (0)21 481 6429
M +27 (0)79 877 8870
E megan.rodgers@cdhlegal.com

Ludwig Smith
Director
T +27 (0)11 562 1500
M +27 (0)79 877 2891
E ludwig.smith@cdhlegal.com

Ben Strauss
Director
T +27 (0)21 405 6063
M +27 (0)72 190 9071
E ben.strauss@cdhlegal.com

Tamarin Tosen
Director
T +27 (0)11 562 1310
M +27 (0)72 026 3806
E tamarin.tosen@cdhlegal.com

Roxanna Valayathum
Director
T +27 (0)11 562 1122
M +27 (0)72 464 0515
E roxanna.valayathum@cdhlegal.com

Roux van der Merwe
Director
T +27 (0)11 562 1199
M +27 (0)82 559 6406
E roux.vandermerwe@cdhlegal.com

Charl Williams
Director
T +27 (0)21 405 6037
M +27 (0)82 829 4175
E charl.williams@cdhlegal.com

BBBEE STATUS: LEVEL TWO 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.

JOHANNESBURG
1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa. Dx 154 Randburg and Dx 42 Johannesburg.
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN
11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

STELLENBOSCH
14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.
T +27 (0)21 481 6400 E cdhstellenbosch@cdhlegal.com

CLIFFE DEKKER HOFMEYR