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Paycheck Politics: Decoding the Companies Amendment Bill and its impact on executive remuneration

In recent years, there has been a significant global focus on the remuneration of senior executives within companies. This heightened attention is especially pertinent in South Africa, a nation that has consistently ranked among the countries with the highest levels of income inequality in the world.

South Africa's Companies Amendment Bill (B27-2023) (Bill) (most recently amended on 1 March 2024) seeks to address this issue of income inequality by introducing measures aimed at fostering enhanced accountability and transparency in remuneration practices by amending the Companies Act 71 of 2008 (Companies Act).

The Bill proposes amendments which aim to address the vast differentials in pay, by improving disclosure of senior executive remuneration and suggesting reforms to increase policy transparency and corporate governance. The new provisions, particularly sections 30A and 30B, aim to facilitate transparency and provide shareholders with the necessary mechanisms to express their concerns and exercise oversight over the remuneration process.

Proposed Amendments

Under section 30A, public and state-owned companies are required prepare and present a **remuneration policy** for shareholder approval. This remuneration policy must be approved by ordinary resolution at the annual general meeting (AGM) and presented to the shareholders every three years thereafter, or whenever material changes are made. Material changes to the policy may only be implemented once the shareholders approve such changes. Should a remuneration policy not be approved, it must be presented at the next AGM, or a general meeting called for such purposes, until approval is obtained.

Section 30B introduces the **remuneration report** and mandates the preparation of a remuneration report by all public and state-owned companies in respect of the previous financial year. This remuneration report must be presented and approved at the AGM and consist of three key components including a **background statement**, a copy of the company's **remuneration policy**, and an **implementation report**. The implementation report must set out detail on the total remuneration received by each director and prescribed officer, the total remuneration for the employee with the highest and lowest total remuneration, the average and median total remuneration of all employees, and the remuneration gap between the total remuneration of the top 5% highest paid employees, and the total remuneration of the bottom 5% lowest paid employees of the company.

Furthermore, the Bill introduces amendments to section 30 of the Companies Act, requiring that directors or prescribed officers receiving remuneration and benefits must be named in the company's annual financial statements.

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When approval is not received

If the **remuneration report** fails to receive approval by ordinary resolution of the shareholders at an AGM, the remuneration committee is obliged, at the subsequent year's AGM, or a general meeting called for such purposes, (second AGM) to present an explanation of how the shareholders' concerns have been taken into account. Additionally, the directors who are not involved in the day-to-day management of the business of the company and who serve on the remuneration committee must stand for re-election as members of the remuneration committee at the second AGM.

If, at the second AGM, the remuneration report for the previous financial year fails once again to receive the required approval, the directors who are not involved in the day-to-day management of the business of the company and who serve on the remuneration committee may continue to serve as directors, provided that they successfully stand for re-election at the second AGM. However, they will not be eligible to serve on the remuneration committee for a period of two years thereafter. This two-year disqualification does not apply to members of the remuneration committee who, at the time of the second AGM, have served as members for a period of less than 12 months.

One of the apparent shortfalls in the drafting is that the Bill does not address what happens if the **remuneration policy** is not approved and what impact this has on executive pay. While the remuneration policy is approved in advance and is contemplated to be forward looking, what remains unclear, is the company's course of action when a vote on the remuneration policy fails.

International approach

South Africa is not the only country to legislate for increased transparency and shareholder oversight over remuneration. In response to concerns about excessive executive pay and the need for shareholder oversight, jurisdictions worldwide have adopted various approaches. The UK, for example, introduced 'say on pay' regulations, requiring shareholders to vote on executive remuneration every three years. In Australia, if the remuneration report is voted down twice, a 'spill' resolution is triggered in terms of a shareholders' vote on whether all persons, who were directors at the relevant annual general meetings (excluding directors who serve an indefinite term), should cease holding such office immediately.

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King IV

Closer to home, the King IV Report on Corporate Governance for South Africa 2016 (King IV), has also played a significant role in fostering transparency and accountability in remuneration practices. One of its key recommendations is the submission of the remuneration policy for a non-binding advisory vote by shareholders at every AGM. The Johannesburg Stock Exchange, as a regulatory body, has already incorporated King IV's 'say on pay' recommendations into its Listing Requirements, making non-binding advisory shareholder votes on remuneration mandatory for listed companies.

Future consequences

While the Bill aims to address issues of inequality and enhance transparency, there are several challenges and unintended consequences to consider. For instance, the Bill's requirement to disclose the gap between the highest and lowest paid employees may inadvertently encourage executives to seek opportunities in foreign jurisdictions with more favorable remuneration policies.

On the other hand, as companies aim to address the pay gap between their highest and lowest paid employees, they may seek to reduce the gap by workforce reduction or outsourcing, resulting in an unintended negative consequence for employment in South Africa. Lower-level employees, who are already struggling with comparatively low wages, may face job losses or reduced opportunities.

Additionally, the Bill has been criticized on the basis that comparing the top 5% of and bottom 5% of earners appears to be an arbitrary selection. Commentators have suggested using the Palma ratio instead, which compares the bottom 40% of earners with the top-paid 10% on the basis that it is a more effective method of describing pay inequality in developing economies.

The Bill represents a significant step towards enhancing accountability and transparency of executive remuneration. However, as with any significant legislative change, there may well be unintended consequences and challenges that arise from its implementation. At this stage the implementation date is unclear, and while it seems unlikely that there will be another opportunity for public comment on the Bill, the draft regulations may provide further clarity on the implementation of these principles in due course.

Vivien Chaplin and Haafizah Khota

The impact of the fluctuation of the Kenyan currency with regards to investment in Kenya

The Kenyan shilling dropped significantly in value (by approximately 22%) against the US dollar between March 2022 and January 2024. During this period there was a continuous drop in value with the lowest rate being KES 160.80 per dollar in January 2024. Various factors have been attributed to the depreciation of the shilling against the dollar, including the COVID-19 pandemic, which affected the global economy; rapid monetary policy tightening by the US Federal Reserve; the Russia-Ukraine war and the subsequent sanctions against Russia which disrupted supply chains; drought; and the Kenyan Government's heavy debt burden, which reduced Kenya's reserves below the required level of not less than the value of four months' worth of imports. In February 2024, the shilling gained against the dollar from KES 160 to KES 145 and, as at 6 March, the shilling stands at 142.8 against the dollar. It is not certain whether this upward trend will continue or if future declines/fluctuations are to be expected. In this article, we discuss the actions taken by the Government to mitigate this, look at the impact of fluctuation of the Kenyan currency on investments, and propose some solutions.

Mitigation measures by the Government

Rationing: In early 2022, the Central Bank of Kenya (CBK) directed commercial banks to ration the sale of dollars to manufacturers and importers, by imposing a daily cap of USD 50,000 in a bid to manage the forex allocations and reserves in the country. However, the Kenya Association of Manufactures (KAM) reported that the shortage made it difficult for manufacturers to fulfil their obligations to foreign suppliers. Consequently, the rationing of the dollar only contributed to further disruption in the market.

Government-to-Government (G2G) deal: In an effort to address the dollar shortage, in early 2023, the Government entered into a G2G deal for the supply of petroleum products with a six-month credit period, as opposed to settlement on delivery. Its aim was to ease frequent demand for the dollar, which would in turn increase circulation of the dollar in the country. Following the deal, the shilling strengthened slightly, however, this was short lived and the dollar continued to depreciate late into 2023. The Government recently announced its intention to exit the deal as the arrangement did not work as hoped.

Interbank currency market: The President, in early 2023, ordered the revival of the interbank foreign exchange market to promote a wholesale exchange market and curb hoarding and black market transactions.

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FX Code: Following the directive, the CBK developed the Kenya Foreign Exchange Code (FX Code). The FX Code aims to promote the effective functioning of the wholesale foreign exchange market. It applies to licensed banks that engage in the wholesale foreign exchange business in Kenya as part of their licensed business.

Increased interest rates: At the end of 2023, the CBK Monetary Policy Committee increased the central bank interest rate in an effort to address the existing pressure on the shilling and to mitigate inflation. Interest rates for infrastructure bonds have also increased significantly leading to shilling investments becoming more attractive.

US 1,5 billion Eurobond: The Kenyan Government sold a new USD 1,5 billion Eurobond, which it used to buy back a large portion of a USD 2 billion bond maturing in June this year. There had been scepticism about Kenya's ability to repay the USD 2 billion bond, but this early repayment appears to have raised confidence levels among investors. Additionally, two recent attractive local currency infrastructure bonds have led to increased confidence in shilling investments.

Some of these measures are short-term measures, which temporarily alleviated the depreciation and dollar shortage crisis, while others are more long term, and it will take time for their impact to be felt.

Impact of the fluctuation on investments in Kenya

Despite the mitigation measures put in place by the Government, currency fluctuations create uncertainty and instability in the investment space. Depreciation of the shilling over the last few years has led to investor uncertainty since the value of investments is destabilised. Dollar shortages have led to investors in capital markets losing confidence in listed companies' abilities to repatriate dividends in hard currency and this has led to reduced investment. Private equity/venture capital investments have continued to decline generally on the continent. Funds have struggled to overcome the lower risk of investing in their economies compared to the higher risk posed by currency depreciation and other risk factors. There has been notable sector transition by investors who have reduced their investments in fintech and tech-focused companies, which have traditionally been popular investment sectors. We have seen investors focusing more on sectors with dollar revenues, particularly those in the export sector, currently dominated by agriculture and tourism.

Options for investors

Hedging arrangements: While such arrangements protect foreign currency debt investors, they can be quite costly, and this may make the investment unattractive or unattainable for a local borrower.

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Local currency financing: Raising equity or debt denominated in the local currency can help mitigate against currency risk. According to an International Finance Corporation (IFC) report, local currency financing is a pivotal part of sustainable private sector investment, particularly in sectors that underpin development: infrastructure, housing, and small and medium enterprises. Most local currency investments are made by developmental finance institutions as they have patient capital which may overcome short-term currency fluctuation risk. The Kenyan Government should advocate for local currency financing by such organisations.

Local participation: Local investors should participate more in investment in the private sector in Kenya as they would be able to do so in local currency. Pension funds in Kenya manage approximately KES 1,7 trillion, 10% of which is authorised for investment in private equity. Pensions fund investments in private equity and venture capital are below 1%, according to 2023 reports, and it is unclear what is required to mobilise the balance. Investing in consortiums could help mitigate or share perceived risks. Angel investors and high-net-worth individuals should also participate in local investment in local currency instead of foreign currencies.

While currency fluctuations have had an adverse impact on investments in Kenya, the Government has continued to make efforts to address the issue and has been strategic when certain efforts did not work as desired. Ultimately, currency fluctuation is a risk that is to be expected in developing markets, thus investments are still possible with an understanding of this risk and adjustments on the investor's part.

Martha Mbugua and Amanda Maseno

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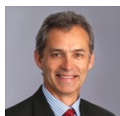

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BBBEE STATUS: LEVEL ONE CONTRIBUTOR
Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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