

SHOULD FOREIGN COMPANIES CONDUCTING BUSINESS IN BOTSWANA BE REQUIRED TO ESTABLISH A PRESENCE IN BOTSWANA – *Tatenda Dumba (Senior Associate)*

This is a question we are regularly asked. In terms of Section 344 of the Companies Act Cap 42:01 (“Act”), a foreign company carrying out business (or having a place of business) in Botswana is required to register with the Registrar of Companies as an external company (branch) or alternatively can register a local incorporated company within one month of conducting such business.

What constitutes conducting business in Botswana is not expressly clear from the Companies Act (the “Act”) as the Act does not define it but rather defines it by negating what is considered not conducting business in Botswana.

Our Courts have at present not yet had the opportunity to pronounce on the meaning of Section 344 of the Act. As a consequence, we currently look to the New Zealand Companies Act and case law for guidance since it is based on the New Zealand Companies Act. Through numerous court pronouncements and challenges to the interpretation of Section 332, certain salient factors have been crystallised for consideration when dealing with this issue.

These factors include:

1. Does the foreign company employ any Botswana resident agents to act on its behalf or manage, administer or deal with property in Botswana?
2. Is any part of management of the business in Botswana?
3. Is the “brain power” in Botswana?
4. Does the company have a place of business, staff or infrastructure in Botswana?
5. Was the transaction an isolated occurrence?
6. Is there some degree of “permanence” in Botswana?
7. Will the contract be performed in Botswana?”

It is evident from the above, that the determination of whether a company is “conducting business” in Botswana or not, will be dependent on the specific facts and circumstances of each case/company. Furthermore in as much as the presence of the above factors may incline more to the fact that a company does indeed conduct business in Botswana, the mere presence of one or two of the above cannot be said to be conclusive in this regard.

Another common question is whether the foreign company should register as a local incorporated subsidiary or establish a branch office company, once it has been established that the foreign company is required to be registered? That issue also poses various considerations.

Differences to note are that a branch company in Botswana is deemed to be an extension of the company in the foreign country and there is no separate existence from the foreign head office. The shareholders, directors will be the same as the foreign head office except that there is a requirement to appoint an authorized agent (resident in Botswana) who has to accept on its behalf service of process and any notices required to be served on the company.

Furthermore, there is no exemption from any registration and licensing requirements (if applicable) and tax requirement. In fact the corporate tax rate for external companies has been increased from 25% to 30% in terms of the Income Tax Amendment Act 2011, unless an International Financial Services Certificate is granted. This means it is more tax efficient for foreign investors to operate in Botswana through a subsidiary (which is a flat tax rate of 22%) as opposed to a branch.

A subsidiary will isolate liability from its foreign company and will only require one resident director (not necessarily a Botswana national) and a company secretary responsible for the on-going filing requirements with the Registrar of Companies.