STARTING OR TRANSFERRING A BUSINESS

Introduction

The pandemic caused a worldwide reduction in business activity. Now that the State of Disaster has officially ended, should a business person start a new business or purchase an existing one? How would they do this and how long would it take?

There are several issues to consider. These include contract and labour law issues as well as what makes sense to your business from a legal and logistical point of view and, importantly, how you want to run it. So let's begin by looking at how to register a company in South Africa.

Registering A Company With The CIPC

The Companies and Intellectual Commission ("CIPC") is an agency of the Department of Trade and Industry that helps enforce commercial law rights like intellectual property and also handles the registration of Co-operatives and Companies. Companies in South Africa are registered as not-for-profit or for-profit. We'll focus on the latter, also known as private companies, with the suffix "(Pty) Ltd".

If you do not suggest a name when registering your private company, its registration number automatically becomes its name. This option skips the name reservation step with the CIPC and actually makes registration quicker. Alternatively, you can suggest up to four names with your application. The CIPC suggests performing a basic internet search and a free trademark search when deciding on your suggestions.

The main advantage of the private company is its legal nature. The law views the legal entity as distinct from the natural persons who work for it. This protects your personal property against the business' debt. In addition, the company can exist forever as it changes hands between shareholders.

Once the company is registered with the CIPC, you can begin trading under its name. You're required to provide an annual return to the CIPC each year, confirming the company continues to operate for profit.

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Transferring A Company

Rather than starting a new business outright, many choose to purchase a business as a going concern. This has the advantage of purchasing all its assets but also its relationships. Usually, supplier relationships, employees and the contracts that regulate these agreements are all well established and ready for you to take over when buying a business as a going concern.

The Labour Relations Act 66 of 1995, as amended, refers to this as a Section 197 transfer of a business. It allows you to record all the estimated benefits of a business in a sale agreement, scrutinise this against your due diligence, and then decide on a fair value price before transferring it to yourself. Specifically, section 197 helps you transfer the employment contracts of the first employer to yourself when you take ownership of the business.

This means you won't need to hire and possibly train a new workforce as one does with an entirely new business. During the transfer you can also acquire the business associated social media accounts, their database of potential and current customers, as well as lucrative supplier relationships. The key is to include these topics concretely in a written agreement.

Final Considerations

Whether you're purchasing a business as a going concern or transferring your business to someone, the general rule is to audit the business by documenting all of its elements, agreeing in writing on what you expect, and executing that written legal agreement. The business records must then be updated with the CIPC as the Directors' details would change.

Some other issues to consider are whether UIF and Compensation Fund payments are up to date, the taxes are fully paid and if the annual returns to the CIPC are in order.

As with all commercial prospects, it's important to follow the correct procedure and do the due diligence necessary to protect your rights. If you handle this process with care, you can offer yourself the best opportunity to start or run a successful business.

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