

LEGAL CONSIDERATIONS WHEN FORMING A BUSINESS

There are various legal structures to choose from when forming a business. These include sole proprietorship (single owner), partnership, close corporation (cc) or company. Each type of business entity is subject to particular laws.

It is essential for the entrepreneur to be familiar with the legal requirements of his/her proposed entity as these will determine how the business will operate. Particular types of businesses may have special requirements which need to be incorporated, i.e. financial organisations must comply with the Bank Act 94 of 1990. There are also certain legalities which apply to all business operations, however they may be constituted.

Liability

In a sole proprietorship the owner takes full personal risk for all business commitments. Partners are jointly and severally liable for the debts of a partnership. The members of a close corporation or directors of a company, on the other hand, are not personally liable for the debts of their entities unless they have signed sureties or infringe ever tightening legislative stipulations on the conduct of business.

Accounting requirements

Requirements relating to accounting and auditing vary, depending on the type of business involved. It is advisable to obtain specialised advice from an accountant.

Registration of a business

It is not an automatic prerequisite to register a business before you commence operations. The owner of a sole proprietorship simply begins operating, and a partnership is not registered but is constituted by a partnership agreement (which may be verbal, written or implied). Companies or close corporations must register with the Registrar of Companies or of Close Corporations prior to the commencement of a new business or the taking over of an established one.

Compulsory registrations:

- The South African Revenue Services (SARS) requires registration for:
 - income tax related to the business;
 - Pay As You Earn (PAYE) and Standard Income Tax on Employees (SITE) to be deducted from the income of employees and paid over to SARS;
 - Value Added Tax (VAT), including allocation of a VAT number, if the turnover of the business is large enough to necessitate this.
- The Department of Labour requires registration for payments of unemployment insurance and workmen's compensation.

Trading licence

A trading licence is required only for businesses or hawkers that sell or supply meals or perishable foods or provide certain types of health facilities or entertainment. A trading licence is obtained from the local municipal authority where the business operates.

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Other requirements

- Medical and provident / pension fund contributions for employees;
- Determination of acceptable rate for depreciating assets in the books of the business;
- Publicising the business – companies and close corporations require the following:
 - full name displayed outside the business premises;
 - full name used on order forms, delivery notes, invoices, receipts, letterheads, cheques, letters of credit and all notices or official publications.

Electronic trading

The Electronic Communications and Transactions Act 25 of 2002 requires detailed information about the supplier to be made available to consumers on the website where the goods or services are offered for sale, hire or exchange. (Refer to Section 8, Information Technology & Cyber Law for the requirements.)

Agreements that may be required

There are other useful documents you may need when you start a business, like an agreement of partnership, or a shareholder's agreement or an association agreement. These are lengthy and complicated documents.

- A **partnership agreement** is signed by all partners in the partnership, and a new agreement should be signed by all the partners each time a new partner joins the company. The agreement deals with assets, profits, and selling your interest in the partnership when you leave it. A basic guideline is provided in Form 9.7, but it is advisable to consult with your attorney before finalising it.
- A **shareholder's agreement** is concluded by the proprietors of a company during the formation of the company. The agreement covers issues such as the number of directors, their appointment and the number of votes each has. It also deals with the protection of minority shareholders and outlines mechanisms to resolve any deadlocks. It is an agreement that needs to be reviewed on a regular basis. An attorney should be consulted to prepare a shareholders' agreement.
- An **association agreement** is signed between a cc and its members. It is not compulsory but can be useful in maintaining clarity should there be more than one member. Issues dealt with include management policies as well as insurance policies on each member's life. Again it is advisable to consult an attorney when you are preparing an association agreement.

Black Economic Empowerment (BEE)

The Broad-Based Black Economic Empowerment Act 53 of 2003 is arguably the most significant piece of legislation affecting business today. Government is relying on big and small companies for the black economic empowerment transformation that it expects will grow and sustain the country's economy. Although compliance with the Act is not compulsory, the implications of the Act are extremely important. Non-compliance can limit business opportunities, particularly with government and public entities or companies that conduct business with such entities. For BEE-compliance guidelines refer to Forms 9.9, 9.10 and 9.11.

Labour / Employment

The business owner who disregards labour legislation does so at his/her peril. Only with a thorough knowledge of your rights and obligations can you hope to implement effective labour practices and be legally protected. Important matters include dispute resolution and prevention, dismissal, working conditions, employment equity and skills development. Guidelines on these and other employment matters will be found in Section 2, Labour / Employment. ■