

# Chapter 17

## Legal aspects

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# Entrepreneurship & NEW VENTURE MANAGEMENT



## Learning outcomes

- Identify and discuss the legal requirements when establishing a business venture, registration and name
- Discuss the legal requirements for establishing a partnership and a company
- Identify the procedures involved in calculating and paying income tax on income derived from ventures
- Discuss the principles of value-added tax (VAT) and the calculation thereof
- Discuss the procedures involved in registering as an employer for tax purposes

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## Learning outcomes

- Identify and discuss the aspects of a binding and legally enforceable contract
- Identify and discuss the aspects to consider regarding the Consumer Protection Act
- Identify the various legal requirements that should be adhered to when dealing with employees
- Identify and discuss the various insurance policies available to an entrepreneur

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## Establishing a venture

### The following is important:

- Registration of the business venture
- The name of the venture
- Registering a trademark
- Publicising the venture
- Sole proprietorships and partnerships
- Companies

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## Registration of the business venture

Type of ownership determines the type of registration needed before one can start a business:

- **Company:** registration the Companies and Intellectual Property Commission (CIPC)
- **Partnership:** not registered but established in terms of a partnership agreement drawn up by partners before start-up
- **Sole ownership:** only form of venture free from any formalities before it can start to operate

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## Registration of business

All businesses must be registered with following institutions:

- **SARS:** income tax, PAYE and SITE and VAT
- **Department of Labour:** unemployment insurance and workmen's compensation
- **Local authorities:** licensing for trading in food/perishables, ownership of property and payment of appropriate levies
- **The local greater metropolitan substructures**

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## Name of business venture

- Reserve a name for your business venture before it is established by applying to the Companies and Intellectual Property Commission (CIPC) to reserve a name on form CoR 9.1 - known as a defensive name
- May list up to four alternative names, which will be considered for reservation in listed order
- Only one name will be reserved
- Applying to reserve a name will prevent someone else from registering the same name
- Registered company's name is reserved - may not be used by any other company

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## Registered trademark

- Trade Mark is a brand name, a slogan or a logo and identifies the services or goods of one person and distinguishes it from the goods and services of another

Examples include:

- **Brand name:** Coca Cola, Aquafresh
- **Slogan:** *Everything keeps going right, Toyota*
- **Logo:** Wimpy hamburger, Woolworths
- **Specific shape:** the Coca Cola bottle, Toblerone chocolates



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## Registered trademark

- When registered nobody else can use this trade mark or one that is confusingly similar
- Apply with CIPC to register a trade mark
- Registered trade mark can be protected forever – renewed every ten years upon payment of a renewal fee

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## Publicising a business venture

- The full name of the business venture must be displayed outside each office or the premises where the business is operating
- The full name must be displayed on all notices or official publications, cheques, order forms, letterheads, delivery notes, invoices, receipts, and credit notes
- Before you can register your business, you need to decide on type of entity

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## Sole proprietorships and partnerships

- It's not necessary to register a sole proprietorship or partnership but you will need to obtain a bank account
- Sole proprietorships are also subject to the same tax regulations, VAT and levy as other legal entities.
- A legal partnership agreement is a prerequisite for the establishment of a partnership

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## Companies: Memorandum of Association

- The name of the company – applied for prior to registration on Form CM5 at the CIPC
- Description of the main purpose/ objective of the business
- Amount of the initial registered share capital
- Any powers or authority legally entitled to that need to be excluded/qualified

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## Companies: Memorandum of Association

- Any powers or authority legally entitled to that need to be excluded/qualified
- Adoption/ratification of any pre-incorporated contracts
- Special terms and conditions regarding operation of the company
- Association clause stating the wish to form a company and agreement to take up shares

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## Companies: Articles of Association

- Concerned with the internal management of the company - deal with aspects such as shares, lending powers, meeting procedures, voting rights, and the powers of directors
- Must be set out on a prescribed form

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## Companies: Required documents

- Form CM5, stating the approved and reserved name and, if necessary, its translated and (or) abbreviated name.
- The physical office and postal address of the company on Form CM22.
- A proxy from each founding member, authorizing another person to sign the Memorandum and Articles if he or she is not going to sign them personally.

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## Companies: Required documents

### **CIPC will issue certificate to operate after receiving:**

- An application for the Certificate to Commence Business (on Form CM46)
- A statement by the directors testifying that the issued share capital of the company is sufficient to conduct its business (on Form CM47)
- The particulars of the directors and other officers of the company (on Form CM29)
- Consent from an auditor to be the official auditor of the company (on Form CM31).



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## South African Revenue Service (SARS)

### Deals with the following:

- Income tax on income derived from operating a business
- Value added tax (VAT)
- Capital gains tax
- Registration as employer for pay as you earn (PAYE)
- Registration for skills levy
- Small business tax amnesty

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## Income tax

- Income tax is payable **by every individual** (sole proprietor, each partner in a partnership and each member of all forms of company and existing close corporations) **that derives a taxable income** (profit, share or salary)
- Requires individuals to pay tax at a progressively increasing rate until the maximum of 40 per cent is reached, while companies and close corporations pay a rate of 28 per cent
- Rates change from time to time – obtain the most up-to-date information related to income tax

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## Deductible expenses

- Depreciation or wear and tear allowance on vehicles, equipment, and articles used in the business
- A proportion of the private home expenses if part of your home is used for business purposes, including rent, rates, telephone, and cleaning costs
- Revenue expenditure on scientific research done during and for the development of the business
- Travelling expenses incurred on behalf of the business

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## Deductible expenses (cont.)

- The cost of developing, purchasing or registering a patent, design, trademark or copyright to be used in the business
- Rental of land, buildings, plant or machinery, and royalties for films, patents, designs and trademarks used in the production of your income
- Manufacturers may deduct depreciation or wear and tear of 20 per cent annum on a straight-line basis on plant and equipment
- An allowance equal to 50 per cent of the cost of building housing for employees (not more than R6 000 p.a.)
- Interest paid on loans used for the production of income

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## Deductable expenses (cont.)

- Any expenditure in respect of repair and pest control in buildings used for business
- A 10 per cent initial allowance and a two per cent annual allowance on the cost of erecting buildings
- Any expenditure accrued from improving land or buildings which are rented for the purposes of business
- Trade debts that cannot be recovered
- Twenty-five per cent of the total amount of debtors who are regarded as doubtful

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## Deductible expenses (cont.)

- A percentage reserve of any instalment sale debtor amount outstanding on the last day of the tax year
- Any compensation paid to Transnet resulting from losses incurred by operating a railway line
- Annual insurance premiums paid to cover the assets and loss of profit of the business
- Legal expenses paid in the course of operating the business - not of a capital nature
- The repair costs of tools, equipment and plant used in the business in the year in which the repairs occur
- Annual subscriptions to trade and professional associations

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## Deductible expenses (continued)

- The cost price of trading stock - includes fixed and variable production overheads
- Finance charges relating to the assets used in a business
- Levy payments to the greater metropolitan structures.
- The following expenses cannot be deducted from taxable income:
  - Private, personal or domestic expenditure
  - Expenditure that can be recovered from third party, such as an insurance claim
  - Income tax and interest or penalties on this amount
  - Capital expenditure

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## Value added tax

- Calculated on consumption, presently at 14 per cent
- Business ventures with annual turnover in excess of R150 000 must register for VAT – optional for those with annual turnover less than R150 000.
- VAT relates to the person from whom SARS collects the tax
- In principle, the amount of VAT on an appliance sold by a retailer for R2 000 is R280. The VAT-inclusive price is thus R2 280
- Each business in the distribution chain pays VAT to SARS in proportion to the value added by that particular business



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## Value added tax

- VAT should be calculated on a regular basis and returns submitted to SARS on a standardized form. A retailer who has received the amount of R2 280 for the appliance would calculate the amount of VAT payable to SARS as follows:
  - VAT charged to customers: R280
  - Less VAT paid to suppliers:
    - (wholesaler R56)
    - (producer R140)      R196
  - VAT due to SARS: R84

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## Capital gains tax

- **‘Capital gain or loss’** is the difference between the base cost of a specific asset and the consideration realised upon disposal of such an asset
- Net capital gain should be included in the entrepreneur’s income for the year of assessment

Inclusion rates to be used depend on the status of the entrepreneur, namely:

- Individuals and special trusts: 0 – 10 per cent
- Companies: 14 per cent
- Small business corporations: 14 per cent
- Trusts: 20 per cent

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## Registration as employer for PAYE

- IRP2 forms – completed by all staff members giving full personal particulars
- IRP4 forms – to cover the monthly return of deducted employees' tax
- IRP5 forms – to reflect the annual earnings, pension, PAYE, UIF, medical aid, etc., deductions of each employee for the year ending at the end of February
- IRP5(6) forms – to reconcile the stock of books of IRP5 certificates on hand
- IRP10 forms – tax-deduction tables annually sent to all employees to calculate the PAYE deductions of employees

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## Registration for skills levy

- Businesses are required to register with their Sector Education and Training Authority (SETA) for the skills development levy
- The skills levy amounts to 1% on the total amount paid in salaries to employees (including overtime payments, leave pay, bonuses, commissions and lump sum payments) when the payroll is more than R500 000 a year.
- Must register with SARS and pay the levy each month
- SARS will supply the correct forms to fill in (SDL 201 return form); a levy must be paid to SARS not later than seven days after the end of every month

To qualify for a Skills Development Grant you must have paid Skills Development levies, have a Skills Development Facilitator, and follow all the rules and regulations in the Act.

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## Small business tax amnesty

- Provide for the voluntary disclosure by entrepreneurs of their failure to comply with tax legislation 25 February 2007 to 31 March 2007
- This Act empowers the Tax Commissioner to approve applications for tax amnesty in respect of applicants who apply for tax amnesty
- Applicants who receive tax amnesty are obliged to pay tax-amnesty levies – these are paid for the benefit of the National Revenue Fund

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## Contracts

Any agreement between two or more persons and is binding by law

Aspects present in a binding contract:

- **Consensus:** conscious agreement on terms and conditions
- **Contractual capacity:** each party must have the capacity to act
- **Physical possibility:** terms and conditions must be realistic
- **Legality:** must be legally possible
- **Formalities:** formalities are prescribed for the formation of the contract

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## Defective contracts

- **Void contract:** one of the requirements is absent or no contract concluded
- **Voidable contract:** a contract was concluded can be set aside due to a defect that existed at the time of conclusion
- **Unenforceable contract:** contract has been concluded but creates a natural obligation recognised but not enforced by law

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## Entrepreneurs and National Credit Act

- Entrepreneurs who supply goods or services under a discount transaction or credit agreement, who advance money or credit under a pawn transaction, or who extend credit under a credit facility or any other person who acquires the rights of a credit provider under a credit agreement need to be registered as credit providers
- An entrepreneur should register as a credit provider if he or she is the credit provider under at least 100 credit agreements.



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## Entrepreneurs and National Credit Act (cont.)

- Credit providers may not entice prospective debtors in any way. The Act provides strict regulations regarding the way in which credit providers may provide credit
- The Act also provides consumers with a range of rights should they be unable to repay their debts

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## Entrepreneurs and National Credit Act (cont.)

Applications of prospective credit providers are considered by National Credit Regulator and evaluated based on:

- The appropriateness of registering the applicant based on specific criteria, including those set by the Broad-Based Black Economic Empowerment Act
- The commitments made by the applicant in combating over-indebtedness
- Whether the applicant is registered with SARS.

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## Entrepreneurs and Consumer Protection Act

Consumers in terms of the Act: natural person, including small businesses and franchisees; any juristic person whose asset value or annual turnover is less than R2 mil

- Applies to sale of goods and provision of services

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## Entrepreneurs and Consumer Protection Act (cont.)

Aspects to keep in mind:

- Customers have the right to cancel any pre-booking without being penalised
- Fixed-term agreements cannot be automatically renewed
- Customers can cancel a fixed-term agreement at any time with 20 days notice

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## Entrepreneurs and Consumer Protection Act (cont.)

- Businesses must give an quote before work is done
- Consumer may return unsafe or defective goods within 6 months of purchase
- Mandatory 3 month warranty on installed repair work
- No obligation to pay for unrequested goods
- Customers have 5 days to rescind direct marketing offer
- Goods may not be promoted in a deceptive, misleading or fraudulent manner
- All agreements must be in plain language
- Franchise agreement aspects

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## Personnel

### Legal aspects to adhere to:

- Compensation for Occupational Injuries and Diseases Act
- Unemployment Insurance Fund
- Registering with bargaining councils
- Labour Relations Act
- Basic Conditions of Employment Act
- Wage Act
- Broad-based Black Economic Empowerment Act

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## Compensation for Occupational Injuries and Diseases Act (COIDA)

- Provides a system of no-fault compensation for employees who are injured in the course of their employment
- Compensated irrespective injuries were result of own negligence or that of the employer/any other person
- Employee may not institute a claim for damages against an employer or any other person

**Three categories of disablement are addressed:** temporary disablement, permanent disablement, and death of the employee (benefits are paid to the dependents)

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## Unemployment Insurance Fund

- Complete and submit a UIF form - available from the Department of Labour - covers employees presently earning up to R76 752 per annum

Once the venture has been registered, the UIF offices will send the following:

- A UIF3 form - monthly return for the UIF premiums payable
- A UIF5 form - registering new employees.
- A UI-19 information form - completed for every existing UIF member - submitted to the Commissioner by the seventh day of each month



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## Bargaining council

- Deals with collective agreements, solve labour disputes, establish various schemes and make proposals on labour policies and laws
- Levies payable by every business operating within industries and trades
- Establish whether or not the venture needs to be registered – if it has employees it is obliged to register with the council for the industry in which it operates
- Levies apply to: holiday pay, health funds, sickness benefits, and pension/provident fund contributions

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## Labour Relations Act

- Deals with employment relationships and collective bargaining in South Africa
- Purpose: advancement of economic development, social justice, labour peace, and the democratisation of the workplace
- Primary objectives: providing a framework for and promoting collective bargaining
- Employees have the right to form/join a trade union and participate in the activities of or hold office in trade
- Entrepreneur have the right to form/join employers' organization and participate in activities or hold office in such an organisation
- Rights of both the employee and employer may not be interfered with by any party
- Deals with strikes, lockouts, workplace forums and alternative dispute resolution
- Establishes the CCMA, Labour Court and Labour Appeal Court

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## Basic Conditions of Employment Act

- **Working hours:** ordinary hours of work, overtime, meal intervals, rest periods
- Remuneration for overtime and work on Sundays, public holidays, night shifts, exclusions and emergency work
- **Leave:** annual leave, sick leave, maternity leave, family-responsibility leave and exclusions
- Remuneration, deductions, and notice of termination

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## Basic Conditions of Employment Act (cont.)

- **Administrative obligations:** information on remuneration, keeping records, informing the employees of their rights, certificate of service, and exclusions
- Prohibition of employment of children and forced labour
- Variations and sectoral determinations
- Composition and functioning of employment conditions commission

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## Wage Act

- Establish Wage Board, which may be used in establishing minimum wages and other conditions of employment

Applies to:

- Areas and industries where the employers and employees have not been organised into organisations or unions
- Where agreements regulating relationships have been reached by means of negotiation
- Those areas not regulated in Labour Relations Act

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## BBBEE

- Government initiative to promote economic transformation in order to ensure meaningful participation in the economy by black people – includes Indian, African, and coloured South African citizens
- No legal requirement for private sector businesses to comply
- Assessment done according to Codes of Good Practice

### Categorisation of companies:

- Exempted Micro Enterprises (EMEs): turnover < R5mil
- Qualifying Small Enterprise(QSE): R5 mil < turnover < 35 mil
- Generic Enterprise: turnover > R35mil

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## Insurance

- Personal accident and life insurance
- Fire and general property insurance
- Burglary insurance
- Plate-glass insurance
- Goods in transit
- Money in transit
- Vehicle insurance
- Public-liability insurance
- Business-interruption insurance
- Product-liability insurance
- Bad-debt insurance
- Fidelity insurance
- Employer's liability insurance

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## Patents, designs, copyright

- **Patent:** an exclusive right granted for an invention, which is a product or a process that provides a new way of doing something, or offers a new technical solution to a problem
- **Designs:** Designs Act of 1993 caters for registration
- **Copyrights:** protection of various output of entrepreneurs including literary, artistic or musical works, films, sound recordings, published editions or computer programs.
- Patent provides protection for the owner for a limited period of 20 years
- Individuals may file their own provisional patent applications



# Entrepreneurship & NEW VENTURE MANAGEMENT



## Patents, designs, copyright (cont.)

Entrepreneur can register any new invention which involves an inventive step and that is capable of being used or applied in trade and industry or agriculture.

Following **not** regarded as inventions:

- A discovery, scientific theory or mathematical method
- Literary, dramatic, musical or artistic or any other aesthetic creation
- A scheme, rule or method for performing a mental act, playing a game or doing business
- A program for a computer
- The presentation of information