New Entrepreneurial Law

Piet Delport

LexisNexis®

NEW ENTREPRENEURIAL LAW

NEW ENTREPRENEURIAL LAW

PIET DELPORT
LLB LLD (Pret) H Dip Tax Law (Wits)

LexisNexis®

Members of the LexisNexis Group worldwide

South Africa	LexisNexis (Pty) Ltd
DURBAN	215 Peter Mokaba Road (North Ridge Road), Morningside, Durban, 4001
JOHANNESBURG	Building No. 9, Harrowdene Office Park, 124 Western Service Road, Woodmead, 2191
CAPE TOWN	Office Floor 2, North Lobby, Boulevard Place, Heron Close, Century City, 7441
	www.lexisnexis.co.za
Australia	LexisNexis, CHATSWOOD, New South Wales
Austria	LexisNexis Verlag ARD Orac, VIENNA
Benelux	LexisNexis Benelux, AMSTERDAM
Canada	LexisNexis Canada, MARKHAM, Ontario
China	LexisNexis, BEIJING
France	LexisNexis, PARIS
Germany	LexisNexis Germany, MÜNSTER
Hong Kong	LexisNexis, HONG KONG
India	LexisNexis, NEW DELHI
Italy	Giuffrè Editore, MILAN
Japan	LexisNexis, TOKYO
Korea	LexisNexis, SEOUL
Malaysia	LexisNexis, KUALA LUMPUR
New Zealand	LexisNexis, WELLINGTON
Poland	LexisNexis Poland, WARSAW
Singapore	LexisNexis, SINGAPORE
United Kingdom	LexisNexis, LONDON
USA	LexisNexis, DAYTON, Ohio

ISBN 978 0 409 11817 9

E-Book ISBN 978 0 409 12226 8

Editor: Marjorie Guy

Technical Editors: Maggie Talanda and Luella Nicholls

Printed in South Africa by Interpak Books Pietermaritzburg

Preface

New Entrepreneurial Law is the successor to *Cilliers & Benade Entrepreneurial Law* and to the *New Companies Act Manual*. It is intended to be an aid to *Henochsberg on the Companies Act 71 of 2008*, and as companion to Nagel (ed) *Commercial Law* (2011).

The chapters on close corporations and partnerships that originally appeared in *Cilliers & Benade Entrepreneurial Law* and authored by Professor JJ Henning were updated and a new chapter on trusts was added.

For various reasons it was '. . . a deep and dark December . . .' as quoted by Bruce Welling, and therefore I must even more so thank Marjorie Guy and Kerri Dixon for their support.

In recognition of Hendrik Cilliers and Marius Benade.

PIET DELPORT
December 2014

Contents

Abbreviations

1973 Act/1973 Companies Act	Companies Act 61 of 1973
2011 CAA	Companies Amendment Act 3 of 2011
AC	Audit committee
ADR	Alternative Dispute Resolution
AFS	Annual financial statements
AGM	Annual general meeting
CC	Close Corporation
CIPC	Companies and Intellectual Property Commission
CC Act	Close Corporations Act 69 of 1984
CoR	Company forms
dti	Department of Trade and Industry
FRSC	Financial Reporting Standards Council
IFRS	International Financial Reporting Standards
Insolvency Act	Insolvency Act 24 of 1936
IPO	Initial public offering
IRBA	Independent Regulatory Board for Auditors
MOI	Memorandum of Incorporation
NOI	Notice of Incorporation
NPC	Non-profit company
PIS	Public Interest Score
Regulations	R351 in *Government Gazette* 34239 of 26 April 2011
SEC	Social and ethics committee
SOC	State-owned company
the Act/2008 Act/2008 Companies Act	Companies Act 71 of 2008
TRP	Takeover Regulation Panel

Chapter 1 Introduction and background

1 Introduction

The Department of Trade and Industry (dti) published a policy paper named 'South African Company law for the 21st century – Guidelines for Corporate Law Reform'[1] which envisaged the development of a 'clear, facilitating, predictable and consistently enforced law' to provide 'a protective and fertile environment for economic activity'. Bill 61D of 2008 was assented to by the National Assembly on 19 November 2008 and the Companies Act[2] was signed by the President on 8 April 2009. Implementation, however, would be by proclamation as determined in section 225. The Act contained numerous mistakes and on 22 December 2009, a so-called 'rectification' notice was published,[3] listing the mistakes to be addressed. The proposed regulations were also published[4] and comments were invited. A proposed Companies Amendment Bill was published (electronically only, on the then Companies and Intellectual Property Registration Office (CIPRO) and dti websites) on 27 July 2010, correcting 297 mistakes. The Companies Amendment Bill 40 of 2010 was published in *Government Gazette* 33695 of 27 October 2010 and Bill 40B of 2010 was

1 *Government Gazette* 26493 of 23 June 2004.
2 Act 71 of 2008 (the Act/2008 Act).
3 N 1663 *Government Gazette* 32832 of 22 December 2009.
4 N 1664 *Government Gazette* 32832 of 22 December 2009.

published 15 March 2011 respectively. The Companies Amendment Act[5] was eventually signed into law on 20 April 2011, and published as N 370 in *Government Gazette* 34243 of 20 April 2011. The regulations and forms under the Act were published electronically on the CIPRO website on 20 April 2011 and published on 26 April 2011 (R351 in *Government Gazette* 34239).[6] Everything came into operation on 1 May 2011 (R 32 in *Government Gazette* 34239 of 26 April 2011).[7] The Act repeals the Companies Act of 1973,[8] except for Chapter XIV, which will remain in force until repealed by the future Bankruptcy Act.[9]

The **vision** stated by the policy paper was 'that company law should promote the competitiveness and development of the South African economy' by –

- encouraging entrepreneurship and enterprise development, and consequently, employment opportunities by –
  - simplifying the procedures for forming companies; and
  - reducing costs associated with the formalities of forming a company and maintaining its existence;
- promoting innovation and investment in South African markets and companies by providing for –
  - flexibility in the design and organisation of companies; and
  - a predictable and effective regulatory environment;
- promoting the efficiency of companies and their management;
- encouraging transparency and high standards of corporate governance;

---

5 Act 3 of 2011 (2011 CAA).

6 The 'regulations'. The regulations were amended with retrospective effect from 1 May 2011 by GN R619 in *Government Gazette* 36759 of 20 August 2013.

7 It actually came into operation on 3 May 2011 – the first official day as 1 May was a public holiday that fell on a Sunday, which made the first official day 3 May 2011.

8 Act 61 of 1973 (1973 Act).

9 See ch 13.

- making company law compatible and harmonious with best practice jurisdictions internationally.

The **mission** was then stated as the following:

- *Simplification*
  - The law should provide for a company structure that reflects the characteristics of close corporations as one of the available options.
  - The law should establish a simple and easily maintained regime for non-profit companies (NPCs).
  - Co-operatives and partnerships should not be addressed in the reformed company law.
- *Flexibility*
  - Company law should provide for 'an appropriate diversity of corporate structures'.
  - The distinction between listed and unlisted companies should be retained.
- *Corporate efficiency*
  - Company law should shift from a capital maintenance regime based on par value, to one based on solvency and liquidity.
  - There should be clarification of board structures and director responsibilities, duties and liabilities.
  - There should be a remedy to avoid locking minority shareholders into inefficient companies.
  - The mergers and takeovers regime should be reformed so that the law facilitates the creation of business combinations.
  - The judicial management system for dealing with failing companies should be replaced by a more effective business rescue system.
- *Transparency*
  - Company law should ensure the proper recognition of director accountability and appropriate participation of other stakeholders.

  - Public announcements, information and prospectuses should be subject to similar standards for the sake of truth and accuracy.
  - The law should protect shareholder rights, advance shareholder activism, and provide enhanced protections for minority shareholders.
  - Minimum accounting standards should be required for annual reports.
- *Predictable regulation*
  - Company law sanctions should be decriminalised where possible.
  - Company law should be enforced through appropriate bodies and mechanisms, either existing or newly introduced.
  - Company law should strike a careful balance between adequate disclosure in the interests of transparency and over-regulation.

2 Purpose of the Companies Act

The purpose of the Act is then to –

- promote compliance with the Bill of Rights as provided for in the Constitution,[10] in the application of company law;
- promote the development of the South African economy by –
  - encouraging entrepreneurship and enterprise efficiency;
  - creating flexibility and simplicity in the formation and maintenance of companies;
  - encouraging transparency and high standards of corporate governance as appropriate, given the significant role of enterprises within the social and economic life of the nation;
  - promote innovation and investment in the South African markets;
  - re-affirm the concept of the company as a means of achieving economic and social benefits;
  - continue to provide for the creation and use of companies in a manner that enhances the economic welfare of South Africa as a partner within the global economy;

10 Constitution of the Republic of South Africa, 1996.

- promote the development of companies within all sectors of the economy, and encourage active participation in economic organisation, management and productivity;
- create optimum conditions for the aggregation of capital for productive purposes and for the investment of that capital in enterprises and the spreading of economic risk;
- provide for the formation, operation and accountability of NPCs in a manner designed to promote, support and enhance the capacity of such companies to perform their functions;
- balance the rights and obligations of shareholders and directors within companies;
- encourage the efficient and responsible management of companies;
- provide for the efficient rescue and recovery of financially-distressed companies, in a manner that balances the rights and interests of all relevant stakeholders; and
- provide a predictable and effective environment for the efficient regulation of companies.[11]

The courts (and any institution administering the Act)[12] must promote the spirit, purpose and objects of the Act and if any provision of the Act, or other document in terms of the Act, read in its context, can be reasonably construed to have more than one meaning, must prefer the meaning that best promotes the spirit and purpose of this Act, and will best improve the realisation and enjoyment of rights.[13]

---

11 S 7. These principles are to be applied in determining any matter brought before a court, the CIPC, the Takeover Regulation Panel (TRP) or the Companies Tribunal (s 158). See s 1 'Commission' and ss 185–192 for the establishment, powers and functions of the CIPC.

12 See ch 11.

13 Ss 5(1) and 158(1)(b).

3 Application and interpretation

There are three possibilities if there are conflicts with other legislation:

- If there is an inconsistency between any provision of the Act and any other national legislation, the provisions of both Acts apply concurrently to the extent that it is possible to apply and comply with one of the inconsistent provisions without contravening the second provision.
- If there is an inconsistency between the Act and any of the following legislation, the latter will apply (except as provided for in sections 30(8) and 49(4) of the Act) –
  - Auditing Profession Act 26 of 2005;
  - Labour Relations Act 66 of 1995;
  - Promotion of Access to Information Act 2 of 2000;
  - Promotion of Administrative Justice Act 3 of 2000;
  - Public Finance Management Act 1 of 1999;
  - Securities Services Act 36 of 2004 (substituted by the Financial Markets Act 19 of 2012);
  - Banks Act 94 of 1990;
  - Local Government: Municipal Finance Management Act 56 of 2003; and
  - section 8 of the National Payment System Act 78 of 1998.[14]

In all other instances, the Companies Act will apply.[15]

4 New concepts

The Act introduces several new concepts and principles that may be of importance when applying some of the provisions. This is not a definitive or

---

14 Ss 1 and 5(4)(i).

15 S 5(4)(ii). Except for s 118(4) in respect of takeovers regulation as well as a conflict between the Public Service Act, 1994 and Ch 8 of the Companies Act, when the former will apply. See also ch 2 in respect of conflicts between content required in the MOI by public regulations and/or listings requirements and provisions of the Act.

exhaustive list, but awareness of these principles will enhance the understanding of the ambit of the Act. The most important of these concepts are: 'related', 'control', 'juristic person', 'knowing', 'file' and 'notice'.

Section 2 provides that –

'(1) (a) an individual is related to another individual if they –

(i) are married, or live together in a relationship similar to marriage; or

(ii) are separated by no more than 2 degrees of natural or adopted consanguinity or affinity;

(b) an individual is related to a juristic person if the individual directly or indirectly controls the juristic person, as determined in accordance with subsection (2);

(c) a juristic person is related to another juristic person if –

(i) either of them directly or indirectly controls the other, or the business of the other, as determined in accordance with subsection (2);

(ii) either is a subsidiary of the other; or

(iii) a person directly or indirectly controls each of them, or the business of each of them, as determined in accordance with subsection (2).

(2) For the purpose of subsection (1), a person controls a juristic person, or its business, if –

(a) in the case of a juristic person that is a company –

(i) that juristic person is a subsidiary of that first person, as determined in accordance with section 3(1)(a);[16]

(ii) that first person together with any related or inter-related person, is –

(aa) directly or indirectly able to exercise or control the exercise of a majority of the voting rights associated with securities of that company, whether pursuant to a shareholder agreement or otherwise;

(bb) has the right to appoint or elect, or control the appointment or election of, directors of that company who control a majority of the votes at a meeting of the board;

16 See ch 8.

(b) in the case of a juristic person that is a close corporation, that first person owns the majority of the members' interest, or controls directly, or has the right to control, the majority of members' votes in the close corporation;

(c) in the case of a juristic person that is a trust, that first person has the ability to control the majority of the votes of the trustees or to appoint the majority of the trustees, or to appoint or change the majority of the beneficiaries of the trust; or

(d) that first person has the ability to materially influence the policy of the juristic person in a manner comparable to a person who, in ordinary commercial practice, can exercise an element of control referred to in paragraph (a), (b) or (c).'

'Inter-related', when used in respect of three or more persons, means –

> 'persons who are related to one another in a linked series of relationships, such that two of the persons are related in a manner contemplated in section 2(1), and one of them is related to the third in any such manner, and so forth in an unbroken series'.[17]

This definition is extended further in section 75(1)(b).[18]

A 'juristic person' *includes* –

'(a) a foreign company; and

(b) a trust, irrespective of whether or not it was established within or outside the Republic'.[19]

The effect of the definition of juristic person, especially in respect of holding/subsidiary relationships, is extensive, especially because a trust is included.[20]

'Knowing', 'knowingly' or 'knows', when used with respect to a person, and in relation to a particular matter, means that the person either –

(a) had actual knowledge of that matter;

(b) was in a position in which the person reasonably ought to have –

(i) had actual knowledge;

(ii) investigated the matter to an extent that would have provided the person with actual knowledge; or

---

17 S 1.

18 See ch 7.

19 S 1.

20 See chs 8 and 14.

(iii) taken other measures which, if taken, would reasonably be expected to have provided the person with actual knowledge of the matter.'[21]

The management duties and related obligations in respect of the company are also extended beyond the directors of the company, due to the introduction of the 'prescribed office' by section 66(10). It is defined as follows –

'Despite not being a director of a particular company, a person is a "prescribed officer" of the company for all purposes of the Act if that person –

'(a) exercises general executive control over and management of the whole, or a significant portion, of the business and activities of the company; or

(b) regularly participates to a material degree in the exercise of general executive control over and management of the whole, or a significant portion, of the business and activities of the company.

(2) This regulation applies to a person contemplated in subregulation (1) irrespective of any particular title given by the company to –

(a) an office held by the person in the company; or

(b) a function performed by the person for the company.'[22]

'File' means the delivery of a document to the Companies and Intellectual Property Commission (CIPC) in a manner and form, if any, prescribed for that document.[23] The documents must, however, be accepted by the CIPC for 'filing' to be complete.[24]

Notice must, in the case of shareholders or members, be as determined in the Memorandum of Incorporation (MOI). In other cases section 220 applies, which requires that the notice must be delivered to the person or sent by registered mail. Table CR3 of Annexure 3 of the regulations provides for types (and periods) of notices, or for the court to determine the manner of notice.[25]

---

21 S 1. This definition seems to extend the common law meaning of 'knowledge'.

22 Reg 38. A 'person' could include a juristic person and although the reference to 'office' may exclude such a position for a juristic person, such person could clearly perform a 'function . . . for the company'.

23 S 1.

24 See Non-Binding Opinion of the CIPC of 1 July 2011 in terms of s 188(2)(b). Other rules apply in respect of business rescue: see Practice Note 3 of 2014.

25 Reg 7 and see s 6 about substantial compliance.

Some of the provisions in the 2008 Act may appear to be similar to those of the 1973 Act, but the ambit and effect of this Act differs substantially because of these additional concepts and principles.

5 New entities

The Act will be administered and enforced by various new and reconstituted entities.[26] The most important of these entities are –

- the Companies and Intellectual Property Commission (CIPC) established by section 185;[27]
- the Companies Tribunal established in terms of section 193;
- the Takeover Regulation Panel (TRP) established by section 196;[28] and
- the Financial Reporting Standards Council (FRSC) established under section 203.[29]

---

26 See also item 12 of Sch 5.

27 See ch 12.

28 See ch 10.

29 The functions of the FRSC are prescribed in s 204. It is not actually a new entity, as it was established in terms of the Corporate Laws Amendment Act 24 of 2006, but not put into effect.

Chapter 2 Legal personality and registration of companies

1 Legal personality

1.1 General

The law determines who are legal subjects and who can be the bearer of rights and duties. A natural person is a legal subject (subject to certain qualifications, such as age, etc.) who has certain rights in respect of a legal object (that which forms the object of a right). Rights of legal subjects can be divided into real rights (the right to a corporeal – such as ownership), personal rights (the right to claim something from another legal subject on the basis of a contract or delict), intellectual property rights (the right in the physical embodiment of the intellect of a legal subject, such as a copyright) and personality rights (the right to privacy, dignity or fame).[1] The natural person has the capacity and power to do everything allowed by the law. If the natural person acts outside this capacity or power, the act is *ultra vires* and therefore usually void.

Apart from the natural person, the law also allows certain other entities to become legal subjects (that is, a legal (juristic) person). A legal person comes into existence by various means. A legal person has the same capacity and powers as a natural person, except for those things that it cannot do, because it is not a natural person, such as getting married. However, the capacity and powers of a legal person can be restricted further, either by the documents creating the legal person, or by the Act that bestows legal personality. Acts performed outside this capacity or power are *ultra vires*, but they are not necessarily void – the enabling Act can provide that those actions are valid under certain circumstances.

1.2 Legal personality: specific Act

Certain Acts expressly provide that the entity formed in terms of the Act has legal personality. For example, the University of Pretoria (Private Act)[2] provides that the University is a legal person with certain restrictions on its capacity and powers.

---

1 Nagel (ed) *Commercial Law* (2011) 6–8.

2 Act 13 of 1930.

1.3 Legal personality: general enabling Act

Certain Acts do not give legal personality to a specific entity, but to all entities that comply with the requirements of that Act. There are various examples of such Acts, the most important being the Companies Act[3] and, previously, the Close Corporations Act.[4]

1.4 Legal personality: conduct

The common law allows people to obtain legal personality as a result of their conduct. In effect, if they conduct themselves like a legal person, the common law recognises the association of persons as a legal person. This is only possible if a particular Act does not preclude such an effect, such as, *inter alia*, section 8(3) of the Act.

In general, it can be said that the following are required in order to acquire legal personality by conduct:

- The property of the members and that of the legal person must be kept apart.
- The legal person must have the capacity to incur obligations and to have rights.
- A legal person must be capable of having *locus standi* to sue in its own name and to be sued in that name.[5]

These elements will usually appear in the agreement (whether express or implied) between the legal subjects.

There are a number of Acts that preclude the acquisition of legal personality under certain circumstances. Section 8(3) of the Act provides that an association of persons formed after 31 December 1939 for the purpose of carrying on any *business* that has for its object the acquisition of *gain* by the association or its individual members is or may only be a body corporate if it is registered as a company in terms of the Act, or is formed pursuant to another law, or was

---

3 Act 71 of 2008 (the Act/2008 Act).

4 Act 69 of 1984 (CC Act).

5 See *Ahmadiyya Anjuman Ishaati-Islam Lahore (South Africa) v Muslim Judicial Council (Cape)* 1983 (4) SA 855 (C).

formed pursuant to Letters Patent or Royal Charter before 31 May 1962.[6] Therefore, common law legal personality is only possible if it falls outside of this provision. In *Mitchell's Plain Town Centre v McLeod*,[7] 'business' was defined as 'an occupation or duty which requires attention', and 'gain' as 'a commercial or material benefit or advantage, not necessarily a pecuniary profit', even if it is indirect or only one of the objects of the association.[8] There is no equivalent of section 30 of the 1973 Act[9] that restricted the members or the association or partners to 20, with the effect that the number of persons in the association or partners in a partnership is unlimited.

1.5 Effect of legal personality

The effect of legal personality is illustrated in *Salomon v Salomon and Co Ltd*,[10] where the judge said:

> 'It seems to me impossible to dispute that once the company is legally incorporated it must be treated like any other independent person with its rights and liabilities appropriate to itself, and that the motives of those who took part in the promotion of the company are absolutely irrelevant in discussing what those rights and liabilities are.'

The company is therefore a separate legal subject, independent of its constituent shareholder/s. It should be remembered that upon incorporation, a natural person who is a sole shareholder actually creates a second legal subject, apart from the natural person. It is easy to confuse the natural person (who can be a shareholder in the company, its director, or even also a creditor of that company) with the legal person, but the company remains a separate legal subject.

The consequences of legal personality are the following:

- Separate existence (irrespective of whether the entity has constituent 'members' or exists without 'members'). This means that the characteristics of the members cannot be attributed to the legal entity; thus a company

---

6 The King conferred (the equivalent of) legal personality by Charter.

7 1996 (4) SA 159 (A).

8 See also *Cuninghame v First Ready Development 249 (Association incorporated in terms of section 21)* [2010] 1 All SA 473 (SCA).

9 Companies Act 61 of 1973 (1973 Act).

10 [1897] AC 22 (HL).

cannot be said to be a South African company merely because all the members are South Africans.[11]

- Perpetual existence in the sense that a change in 'members' does not affect the legal person.
- The entity is a legal subject, and can have all the rights of a legal subject, including –
  - rights of privacy, dignity and fame;
  - being the owner of assets;
  - being liable for debts/obligations;
  - having profits/losses, which are the 'property' of the legal person; and
  - suing and being sued in its own name.
- The entity cannot act in its own name; acts performed in its capacity as a legal subject must be effected through duly appointed (usually natural) persons as agents – mere 'membership' does not entitle a person to act as agent.[12]
- The entity is bound by and entitled to the Bill of Rights in terms of section 8(2) of the Constitution.[13]

1.6 'Sanctity' of legal personality

1.6.1 *General*

Legal personality is not absolute and can be ignored (by 'piercing' or 'lifting' the corporate veil) under certain circumstances.

1.6.2 *Common law*

Policy considerations may require that the corporate entity be ignored. The circumstances will depend on the facts, but the following are some indicators of when a corporate entity will not be ignored:

- 'Misuse' to perpetrate a fraud, or for a dishonest or improper purpose.[14]

---

11 See *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530.

12 See ch 15 about partners and ch 16 about members of a close corporation.

13 Constitution of the Republic of South Africa, 1996. See, however, *Standard Bank v Hunky-Dory Investments (No 1)* 2010 (1) SA 411 (C).

14 *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd* 1995 (4) SA 790 (A).

- 'Unconscionable injustice' in the sense that the action of the company is 'improper' and there is no other remedy available,[15] although 'piercing of the corporate veil should [not] necessarily be precluded if another remedy exists'.[16]
- The actions of the 'directing mind and will' of the company will be that of the company for criminal and delictual liability as well as for determining the intention of the company for income tax purposes (for example).[17]
- Discrimination against a company in respect of the race of its members.[18]

1.6.3 *Statutory law*

There are many instances where an Act provides that the legal entity may be ignored and the underlying constituents (members or others) deemed to be the entity. Some examples are:

- Doing business recklessly, with gross negligence, with intent to defraud any person or for any fraudulent purpose will result in the personal liability of directors and others.[19]
- In terms of section 20(9) of the Act, the court can declare, if it finds on application by an *interested person*, or in any proceedings in which a company is involved, that the incorporation of the company (or use thereof), or any *abuse* of that company, constitutes an *unconscionable abuse*[20] of the juristic personality of the company as a separate entity, that the company is to be *deemed* not to be a juristic person in respect of the rights, obligations or liabilities of the company, or of a member or another person specified in

---

15 *Botha v Van Niekerk* 1983 (3) SA 513 (W).

16 *Cape Pacific Ltd supra*.

17 *Consolidated News Agencies (Pty) Ltd (in liquidation) v Mobile Telephone Networks (Pty) Ltd* [2010] 2 All SA 9 (SCA).

18 *Manong & Associates v City of Cape Town* 2009 (1) SA 644 (EqC).

19 Ss 22 and 218 of the 2008 Act and s 424 of the 1973 Act.

20 S 20(9) does not exclude the common law grounds.

the declaration. The court may give any order as it may deem fit to give effect to such declaration.[21]

The Act apparently provides for stages of abuse. Only when the abuse is unconscionable will it be a basis for an application in terms of section 20(9).[22] The provision brings about that a remedy can be provided whenever the illegitimate use of the concept of juristic personality adversely affects a third party in a way that reasonably should not be countenanced.[23] Illegitimacy on its own should be a ground for the application of section 20(9) as it is *per se* both abuse and unconscionable, and also the basis for the common law remedy of piercing the corporate veil,[24] and the effect on a third party should be irrelevant. An 'interested person' will be any person with an 'actual and existing interest' and 'unconscionable abuse' would imply that the remedy must be used as last resort, but the inclusion of section 20(9) in the Act, that would apply in addition to and not to the exclusion of the common law, apparently implies that it is not the case.[25]

- Section 34 of the National Environmental Management Act[26] for example provides for the personal liability of directors for offences and penalties under NEMA.

---

21 S 20(9). 'Unconscionable injustice' was used as a basis in *Botha v Van Niekerk* 1983 (3) SA 513 (W), but expressly dissented from in *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd* 1995 (4) SA 790 (A). See s 65 of the CC Act that applies if there was 'gross abuse'. This again indicates the level of abuse, not the effect thereof: *Ex parte application of Gore NO* 2013 JOL 30155 (WCC).

22 *Hülse-Reutter v Gödde* 2001 (4) SA 1336 (SCA) however accepted a piercing of the corporate veil if there was a *misuse* or *abuse*, not necessarily unconscionable, of the distinction of corporate personality, which results in an unfair advantage, which looks at the result being unconscionable, not the act.

23 *Ex parte application of Gore NO* 2013 JOL 30155 (WCC).

24 *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd* 1995 (4) SA 790 (A).

25 *Ex parte application of Gore NO* 2013 JOL 30155 (WCC).

26 Act 107 of 1998 (NEMA).

2 Types of companies

2.1 Profit companies

2.1.1 *General*

The Act[27] provides for the formation and incorporation[28] of two types of companies, namely profit companies,[29] and non-profit companies.[30] A 'profit company' means a company incorporated for the purpose of financial gain for its shareholders.[31]

Profit companies can be categorised as –

- state owned companies (SOCs);
- private companies;
- personal liability companies; or
- public companies.

2.1.2 *Private company*

A private company must not be a SOC, and its Memorandum of Incorporation (MOI) prohibits it from offering any of its securities to the public *and* restricts the transferability of its securities.[32] The abbreviation '(Pty) Ltd' or 'Proprietary Limited' must be added to the name.[33] The prohibition in respect of the offer to the public must be in respect of any (and all) securities.[34] Such a restriction in respect of *shares*, but not *securities*, will therefore not comply with the requirement. The provisions proposed in the standard MOI for a private company in CoR 15.1A do not comply with these requirements, *inter alia*, as only *shares* are subject to these restrictions. The word 'public' is defined in Chapter 4 of the Act, but only for the purpose of that chapter. Therefore, 'public' in this context

---

27 S 8.

28 Other companies, such as domesticated companies and external companies, are not formed and incorporated under the Act.

29 S 1.

30 See *Cuninghame v First Ready Development 249 (Association incorporated in terms of section 21)* [2010] 1 All SA 473 (SCA) in respect of s 21 of the 1973 Act.

31 S 1.

32 S 1.

33 S 11(3)(c)(ii).

34 The word 'any' in s 8(2) is not in the Afrikaans translation.

must be understood and interpreted in its ordinary meaning.[35] Transferability of securities[36] can be restricted in many ways, such as the requirement that if the holder desires to alienate the securities, it must first be offered to existing securities holders or that the directors have the discretion to refuse to register the transfer.[37]

2.1.3 *Personal liability company*

A personal liability company is a profit company that meets the criteria in section 8(2)(c).[38] The abbreviation 'Inc' or 'Incorporated' must be added to the name.[39] Section 8(2)(c) then contains the circuitous provision that a company is a personal liability company if it meets the criteria for a private company and its MOI states that it is a personal liability company. The mystery is eventually solved by the non-referenced section 19(3), which provides that if a company is a personal liability company, the directors and past directors are jointly and severally liable, together with the company, for any debts and liabilities of the company as are or were contracted during their respective periods of office.[40] The necessity of this as a separate type of company in company law remains a mystery as the same effect can be achieved by a simple (unalterable) provision in the MOI of any type of company. The doctrine of constructive notice applies to these companies, under the conditions set out in section 19(5).

In terms of the (statutory) doctrine of constructive notice a person is regarded as having notice and knowledge of the effect of personal liability as discussed above.[41] An amendment to the MOI which will have the effect that a

---

35 See ch 3.

36 See ch 3 on transfer of shares and securities.

37 Such a power will be subject to the fiduciary duties of the directors: *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd and Others* 2014 (5) SA 179 (WCC).

38 S 1.

39 S 11(3)(c)(i).

40 The proposed provision in form CoR 15.1B however only provides for liability of the directors and not of the company.

41 S 19(5)(b). This is an unnecessary provision as it does not give any additional protection to the third party. See also par 4.2 for the doctrine of constructive notice.

personal liability company is changed into another type of company must be notified to persons who may be adversely affected or who may reasonably be considered to have acted in reliance on the joint and several liability of directors, namely, just about everybody who did business with the company as clients (professional or otherwise). Any professional or industry regulatory authority that has jurisdiction over the business activities of that company must also be notified.[42] This requirement is curious, as this obligation should be imposed by that entity, which usually also require this type of company.

2.1.4 *Public company*

A public company[43] is a profit company that is not an SOC, a private company or a personal liability company[44] and the abbreviation 'Ltd' must be added to the name.[45]

2.1.5 *State-owned company*

An SOC is a company that is registered in terms of the Act as a company, and is either listed as a public entity in Schedule 2 or 3 of the Public Finance Management Act,[46] or is owned by a municipality, as contemplated in the Municipal Systems Act[47] and is otherwise similar to an entity in Schedule 2 or 3 of the Public Finance Management Act.[48] All the shares in these companies are owned by those entities or a combination of them.[49] The abbreviation 'SOC Ltd' must be added to the name.[50]

---

42 S 16(10) and (11).

43 It is very curious that the word 'public' was translated into Afrikaans as 'openbare' and not 'publieke' as was used for many decades.

44 S 1.

45 S 11(3)(c)(iii).

46 Act 1 of 1999.

47 Act 32 of 2000.

48 S 1. The whole Act, subject to the exceptions in s 9, applies to SOCs.

49 Examples are ARMSCOR, ACSA. See *Minister of Defence and Military Veterans v Motau and Others* 2014 (5) SA 69 (CC) for an example.

50 S 11(3)(c)(iv).

2.2 Non-profit companies

A non-profit company (NPC) means a company that is incorporated for a public benefit or other object as required by item 1(1) of Schedule 1, and the income and property of which are not distributable to its incorporators, members, directors, officers or persons related to any of them except as reasonable compensation for services rendered.[51] The abbreviation 'NPC' must be added to the name.[52] Item 1(1) provides that the MOI of a NPC must set out at least one object of the company, and each such object must be either a public benefit object (not defined) *or* an object relating to one or more cultural or social activities or communal or group interests.[53] These objects must also be consistent with item 1(2) to (9) of Schedule 1. The object relating to one or more cultural or social activities or communal or group interests is not qualified by the public benefit object as was required in terms of section 21 of the 1973 Act.[54]

NPCs without any members can also be incorporated.[55] A profit company does not have 'members'. A 'member' is defined in section 1, when used in reference to a close corporation, as having the meaning set out in section 1 of

---

51 S 1.

52 S 11(3)(c)(v). The whole Act, subject to the exceptions in s 10(2), applies to NPCs. These are: Part D of Ch 2 – Capitalisation of profit companies; Part E of Ch 2 – Securities registration and transfer; s 68(8) and (9) in respect of remuneration of directors; Parts B and D of Ch 3 – Company secretary, auditor or AC, except if the MOI requires it (s 34(2)) or if required by regulation in terms of s 30(7) (see ch 9); Ch 4 and Sch 3 – Public offerings of company securities; Ch 5 – Takeovers, offers and fundamental transactions (see, however, item 2 of Sch 1); ss 146(d) and 152(3)(c) – Rights of shareholders to approve a business rescue plan, except to the extent that the NPC is itself a shareholder of a profit company engaged in business rescue proceedings, and s 164 – Dissenting shareholders' appraisal rights, except to the extent that the NPC is itself a shareholder of a profit company. Ss 58–65 (shareholders' rights), read with the changes required by the context, apply to a NPC only if the company has voting members, and when applied to a NPC, they are subject to the provisions of item 4 of Sch 1 (members of NPCs) (s 10(3)).

53 Item 1(1) of Sch 1.

54 See *Cuninghame and Another v First Ready Development 249 (Association incorporated in terms of section 21)* [2010] 1 All SA 473 (SCA).

55 Item 4(1) of Sch 1.

the CC Act;[56] or a person who holds membership in, and specified rights in respect of, a NPC or in respect of any other entity, means a person who is a constituent part of that entity. 'Entity' is not defined.

Incorporation as a NPC, or registration as an external NPC in terms of the Act does not necessarily qualify that NPC, or external NPC, for any particular status, category, classification or treatment in terms of the Income Tax Act[57] or any other legislation, except to the extent that any such legislation provides otherwise.[58]

An NPC –

- must apply all of its assets and income, however derived, to advance its stated objects, as set out in its MOI; and
- subject to the above point, may –
  - acquire and hold securities issued by a profit company; or
  - directly or indirectly, alone or with any other person, carry on any business, trade or undertaking consistent with or ancillary to its stated objects.[59]

Upon the winding-up or dissolution of an NPC –

- no past or present member or director of that company, or person appointing a director of that company, is entitled to any part of the net value of the company after its obligations and liabilities have been satisfied; and
- the entire net value of the company must be distributed to one or more NPCs, external NPCs carrying on activities within the Republic, voluntary associations or non-profit trusts –
  - having objects similar to its main object; and
  - as determined –
    * by or in terms of the company's MOI; or

56 Act 69 of 1984 (CC Act).
57 Act 58 of 1962.
58 Item 1(6) of Sch 1.
59 Item 1(2) of Sch 1.

* by its members, if any, or its directors, at or immediately before the time of its dissolution; or
* by the court, if the MOI, the members or directors fail to make such a determination.[60]

Each voting member of an NPC has at least one vote and the vote of each member of a NPC is of equal value to the vote of each other voting member on any matter to be determined by vote of the members, except to the extent that the company's MOI provides otherwise.[61]

Weighted voting (more than one vote per member or even a veto right of one particular member) is therefore possible, but whether there can be voteless members is uncertain, because of the words 'at least one vote', however, item 4(2)(d) of Schedule 1 provides that the NPC can have a maximum of two classes of membership, that is voting and non-voting.[62]

2.3 External companies

An external company is a foreign company that carries on business or non-profit activities (as the case may be) within the Republic.[63] A 'foreign company' means an entity incorporated outside the Republic, irrespective of: (a) whether it is a profit or non-profit entity; or (b) whether it is *carrying on business* or non-profit activities, as the case may be, within the Republic. A foreign company will be regarded as conducting business if it is party to *at least one employment contract* within the Republic *or* is engaging in or has engaged in a course or pattern of activities within the Republic over a period of at least six months, such *as would lead a person to reasonably conclude* that the company intended

---

60 Item 1(4) of Sch 1. If the NPC has no remaining members or directors and has failed to make a determination as contemplated in item (4)(b)(ii)(bb) or to apply to the court for such a determination, the CIPC may apply to the court (item 1(5) of Sch 1).

61 Item 1(7)–(8) of Sch 1. The NPC must also maintain a membership register (item 1(9) of Sch 1). If an NPC has voting members, a reference to 'a shareholder', 'the holders of a company's securities', 'holders of issued securities of that company' or 'a holder of voting rights entitled to be voted' is a reference to the voting members of the NPC (s 10(4)).

62 See also s 10(4) which recognises 'voteless' members.

63 S 1. The registration requirements are set out in reg 20 (see CoR 20.1 and 20.2). Note that an external company is not included in the definition of 'company' in s 1, and therefore only the particular provisions, and not the Act in general, are applicable to external companies.

to continually engage in business or non-profit activities within the Republic. However, it is not to be regarded as conducting business, or non-profit activities, as the case may be, within the Republic, merely because it is or has engaged in one or more of the following activities within the Republic –

- holding a meeting or meetings of the shareholders or board of the foreign company, or otherwise conducting the internal affairs of the company;
- establishing or maintaining any bank or other financial accounts;
- establishing or maintaining offices or agencies for the transfer, exchange or registration of the foreign company's own securities;
- creating or acquiring any debts, or mortgages, or security interests in any property;
- securing or collecting any debt, or enforcing any mortgage or security interest;
- acquiring any interest in any property.

A foreign company obviously includes a company in the ordinary sense of the word, but also includes any other entity incorporated outside the Republic, like a business trust, if it is incorporated. 'Incorporate' should imply some formal process to bring the entity into existence or to recognise such entity.

An external company must register with the CIPC within 20 business days after it first begins to conduct activities within the Republic as an external NPC or as an external profit company (if it meets legislative or definitional requirements comparable to a non-profit or profit company incorporated under the Act).[64] The CIPC must assign a unique registration number to each external company that has been registered. In the case of an external company whose name is a foreign registration number that does not indicate the name of the foreign jurisdiction in which it was incorporated, the CIPC must append the name of that jurisdiction to the company's name in the registry.[65]

64 S 1. Note that it is already an 'external company', it just needs to register as such.

65 S 23(1) and (5).

If an external company has failed to register within three months after commencing its activities within the Republic, the CIPC may issue a compliance notice to the company requiring it to register as required within 20 business days after receiving the notice, or, if it fails to register within this time, to cease carrying on its business or activities within the Republic.[66]

2.4 Domesticated companies[67]

A foreign company may apply in the prescribed manner and form,[68] accompanied by the prescribed application fee, to transfer its registration to the Republic from the foreign jurisdiction in which it is registered, and thereafter exists as a company in terms of the Act as if it had been originally so incorporated and registered.

A foreign company may transfer its registration[69] if –

- the law of the jurisdiction in which the company is registered permits such a transfer, and the company has complied with those requirements in relation to the transfer; and
- the transfer has been approved by the company's shareholders in accordance with the law of the jurisdiction in which the company is registered, if that law imposes such a requirement, or otherwise by the equivalent of a special resolution[70] in terms of this Act; and

---

66 S 23(6). See also ch 12 in respect of compliance notices.

67 A foreign company whose registration has been transferred to the Republic in terms of s 13(5)–(11) (s 1). These companies are, however, included in the definition of 'companies' in s 1. Therefore, unless expressly excluded, all the provisions of the Act apply to these companies.

68 On CoR 20.1.

69 Companies under receivership, in liquidation of business rescue (or equivalents) are excluded (s 13(7)).

70 See the definition of 'special resolution' in s 1 which states that in the case of any other juristic person, a decision by the owner or owners of that person, or by another authorised person requires the highest level of support in order to be adopted, in terms of the relevant law under which that juristic person was incorporated.

- the whole or greater part of its assets *and* undertaking are within the Republic, other than the assets and undertaking of any subsidiary that is incorporated outside the Republic; and
- the majority of its shareholders are resident in the Republic; and
- the majority of its directors are or will be South African citizens; and
- immediately following the transfer of registration, the company –
  - will satisfy the solvency and liquidity test; and
  - will no longer be registered in another jurisdiction.

3 Registration

Registration is effected by the completion and the signing of the MOI by the requisite number of 'persons' or an organ of state and by filing the prescribed Notice of Incorporation (NOI).[71]

A company is deemed to be a juristic person from the date and time that its incorporation is registered.[72]

Reservation of a name prior to registration is allowed, but is not compulsory. Company name reservation is done in terms of section 12 (for six months) and may be transferred. Persons whom the CIPC believes to have an interest in a reserved name.[73] Such persons may apply to the Companies Tribunal for a determination in terms of section 160. The reserved name will be indicated on the NOI and the company will be registered with that name. Alternatively the chosen names can be indicated in order of preference. The company will be registered with the first name that will comply with the Act.

Names must not be the same as or confusingly similar to existing names or trade marks, or falsely imply or suggest or be such as would reasonably mislead a person to believe incorrectly that a company is part of or associated with

---

71 S 13(1). The NOI is on CoR 14.1 and see s 6(8)–(11) as well as discussion hereunder for 'substantial compliance'. See Appendix A for some standard MOI forms.

72 S 19(1).

73 S 12(3).

another company or entity or with a particular person.[74] If the name[75] in the NOI is the same as that of a registered company (also of a domestic or external company), or a reserved name, or a registered trademark,[76] or the names in particular categories,[77] the CIPC may use the registration number as name in the interim.[78]

Apparently, if the company does not respond, the registration number becomes the company name.

If the CIPC has reasonable grounds to believe that the proposed name is confusingly similar to existing names or trade marks, or falsely implies or suggests or be such as would reasonably mislead a person to believe incorrectly that a company is part of or associated with another company or entity or with a particular person, the company may be required to serve a copy of the application on the relevant person.[79] If the name is deemed to be 'offensive',[80] the company can be required to serve the notice on the Human Rights Commission.[81]

After receipt of the NOI, the CIPC must assign a registration number to the company and issue a Certificate of Registration (with the date and time of the

---

74 S 11(2).

75 S 11. See s 11(1)(a)(ii) and (iii) in respect of symbols to be used in conjunction with names, which can come into operation from three years after the commencement of the Act (s 225(2)).

76 S 11(2)(a). Names registered under the Business Names Act 27 of 1960, or marks, etc., protected under the Merchandise Marks Act 17 of 1941, are included (repealed by the Consumer Protection Act 68 of 2008 with effect from 1 April 2011). See also ch 15 for the regulation of business names under the Consumer Protection Act.

77 S 11(2)(a).

78 S 14(2)(b). I.e., the registration number followed by 'South Africa' (s 11(3)(a)). The CIPC only has the discretion to register the company under its registration number if the proposed name is the same as that of an existing company. If there are 'reasonable grounds for considering' that the name is inconsistent with s 11(2)(a) or (b), then the notification process must be followed after registration. The person notified may seek a determination from the Companies Tribunal (s 160). If a company wants to trade under a different (business) name, that name must be registered under the Consumer Protection Act (ss 79–81) which will be administered by the CIPC.

79 S 14(3).

80 As provided for in s 11(2)(c), i.e. propaganda for war, incitement of imminent violence or advocacy of hatred based on race, gender, etc.

81 Ss 12(3) and 14(3).

issue of the certificate or the date as stated by the incorporators).[82] The certificate is conclusive evidence that the requirements for incorporation are complied with and that the company is incorporated.[83] A company can change its name by special resolution.[84]

The company name and registration number must be provided to any person on demand, and must appear on all notices and official publications of the company, including those in electronic format, and in all bills of exchange, promissory notes, cheques and orders for money or goods, and in all letters, delivery notes, invoices, receipts and letters of credit of the company. Non-compliance is an offence.[85]

The Act does not expressly regulate conversions between different types of companies and, with the exception of NPCs[86] and personal liability companies (Inc.) (and possibly SOCs), 'conversion' would be by way of amendment to the MOI. Section 16(6) provides that if a profit company amends its MOI in such a manner that it no longer meets the criteria for its particular category of profit company, the company must amend its name at the same time by altering the ending expression as appropriate to reflect the category of profit company into which it now falls.[87] This process does not provide for the transfer of rights (for example in immovable property) and obligations to the new company.

4 The Memorandum of Incorporation and company rules

4.1 Alterable and non-alterable provisions

The MOI can be in the prescribed form or any other form unique to the company,[88] may deal with anything not addressed by the Act and may alter an

---

82 S 14(1).

83 S 14(4).

84 S 16.

85 Ss 32 and 216(b). See s 218(2) and ch 12 for civil liability.

86 Which cannot amalgamate or merge with, or convert to, a profit company (item 2(1) of Sch 1).

87 Conversion of an 'Inc' company to another type of company is subject to the requirements of s 16(10). See par 2.1.

88 S 13(1). See Appendix A for examples of standard forms of an MOI. See also CoR 15.1A–CoR 15.1E. Note, however, the comments under par 2.1 in respect of CoR 15.1A.

alterable provision.[89] It must not include any provision that negates, restricts, limits, qualifies, extends or otherwise alters the substance or effect of an unalterable provision of the Act, but can nevertheless impose on the company a higher standard, greater restriction, longer period of time or any similarly more onerous requirement, than would otherwise apply to the company in terms of an unalterable provision of the Act.[90] Each provision of a company's MOI must be consistent with the Act and is void to the extent that it contravenes, or is inconsistent with, the Act.[91] The Companies Tribunal can however give exemptions, which could validate an invalid provision.[92] If a company is required by applicable public regulation, or by the listing requirements of an exchange, to have a provision in the MOI with specific content, or to have a particular effect, and that provision has the effect of negating, restricting, limiting, qualifying, extending or otherwise altering the substance or effect of an unalterable provision of the Act, the provision must not be construed as being contrary to section 15(1)(a).[93] Every company must keep a copy of its MOI at its registered office.[94]

4.2 Constructive notice

A person is not be regarded as having received notice or knowledge of the contents of any document relating to a company, such as an MOI, merely because the document has been filed or is accessible for inspection at an office of the company.[95] This is an abolishment of the common law doctrine of constructive notice, with retention of a statutory equivalent in section 19(5) in

89 S 15(2)(d). See Appendix B for a list of the more important alterable provisions.

90 S 15(2)(a)(iii).

91 S 15(1), except if the 'inconsistency' complies with s 15(2)(a)(iii). See s 218(1) and par 8.

92 S 6(2) and par 5.

93 S 6(15).

94 S 24(3).

95 S 19(4). See par 2.1. Item 7(10) of Sch 5 provides that s 19(4) applies to any provision of the MOI of a pre-existing company that is comparable to a provision contemplated in s 15(2), from the time that the company files a notice of that provision. However, 'pre-existing' companies do not have an MOI, but see definition of 'memorandum' and 'MOI' in s 1. There is no definition of this notice in s 13(3), 15(2) or 19(4).

respect of companies with restrictive conditions (RF companies) and personal liability companies. Any person may however inspect a document filed under the Act.[96]

4.3 Restrictive conditions

The MOI can incorporate any 'restrictive conditions applicable to the company' and any requirement for the amendment of such condition in addition to any requirement for the amendment of the MOI. It may also contain provisions that prohibit the amendment of any particular provision of the MOI,[97] in which case the NOI *must*[98] clearly point this out and also indicate the location of the prohibition in the MOI.[99] If this is the case, the name of the company must have ('RF') immediately following its name.[100]

The Act does not define a 'restrictive condition'. There can, conceivably, be two interpretations. First, 'restrictive conditions' apply only to the amendment of the MOI. Second, the ordinary meaning, which means *any* 'restrictive conditions', must be used. The express inclusion of '. . . , and any requirement for the amendment of any such condition in addition to the requirements set out in section 16' implies that the first, narrow interpretation, is not correct. 'Restrictive condition' can therefore include any condition that alters an alterable provision or increases the burden of an unalterable provision that is not contrary to the Act or the law.[101] Mere inclusion therefore of a 'restrictive condition' does not however, as indicated above, necessitate the inclusion of 'RF' in the name.[102]

4.4 Rules

The board of a company can make *necessary* or *incidental* rules in respect of the governance of a company relating to matters not covered in the Act or MOI

---

96 S 187(5), on payment of the prescribed fee.

97 S 15(2)(b) and (c).

98 The peremptory 'must' is important. Non-compliance could, at the least, lead to liability in terms of s 218(2).

99 S 13(3).

100 S 11(3)(b). 'Ring fencing' as described in CoR 15.1B. The doctrine of constructive notice applies to these companies, under the conditions as set out in s 19(5). See ch 5.

101 See CIPC Non-binding Opinion of 12 December 2011.

102 The CIPC, however, somehow interprets it that every 'restrictive condition' necessitates the inclusion of 'RF': See Non-binding Opinion of 12 December 2011.

and not inconsistent with the MOI or Act, unless the MOI provides otherwise.[103] The rules must be published to the shareholders[104] (and filed like the MOI), and come into effect either ten business days after filing or on a later date as stated in the rules; however, the rules are only binding on an interim basis until they are ratified by a general meeting of shareholders.[105] If not ratified, a 12-month period must elapse before the board can make a 'substantially similar' rule.[106] The ratification must take place at the next general meeting of shareholders.[107] The company must file a notice stating whether the rules have been ratified or not in the prescribed manner and form within five business days of the ratification or non-ratification vote, as the case may be.[108] Note that only a public company must hold an (annual) general meeting of shareholders. In the case of other companies, the interim application of rules may therefore apply for a substantial period.[109]

4.5 The legal status of the Memorandum of Incorporation and rules

The MOI and rules are binding –

- between the company and each shareholder; and
- between or among the shareholders of the company; and
- between the company and –
  - each director or prescribed officer of the company; or
  - other person serving the company as a member of the audit committee (AC), or as a member of a committee of the board, *in the exercise of their respective functions* within the company.[110]

---

103 S 15(3). Binding provisions, under whatever style or title, comparable in purpose and effect to the rules in terms of s 15(3) will, for two years after the effective date of the Act, prevail over the Act if there is a conflict (item 4(4)(a) of Sch 5). See ch 14.

104 As determined in the MOI or the rules and filed with the CIPC on CoR 16.1 in terms of reg 16.

105 S 15(3)–(6).

106 S 15(5).

107 S 15(4).

108 S 15(5)(a). Filing is on CoR 16.2 in terms of reg 16.

109 See ch 6 in respect of meetings.

110 S 15(6).

The Act does not indicate what the legal status of this relationship is, but based on the principles of the common law,[111] the relationship will be contractual.[112]

4.6 The amendment of the Memorandum of Incorporation

The board (or 10% of the holders of voting shares) can propose a resolution to amend the MOI. The amendments must be made by formal or informal special resolution (unless the amendment to the name is by court order, in which case a board resolution would suffice).[113] The MOI can provide for other requirements regarding proposals for amendments.[114] A notice of amendment must also be filed[115] and the change takes effect upon acceptance of the notice by the CIPC or the later date, if any, mentioned in the notice, and on the issue of the amended registration certificate in the case of a name change.[116] Patent errors in the MOI can be rectified by a notice of the alteration as prescribed by the MOI and the filing of a Notice of Alteration, without a special resolution.[117] This is, however, not an amendment of the MOI.

---

111 *Gohlke and Schneider v Westies Minerale (Edms) Bpk* 1970 (2) SA 685 (A).

112 The CIPC, the TRP, the Companies Tribunal or a court must promote the spirit, purpose and objects of the Act, and if any provision of the Act, or other document in terms of this Act, such as the MOI, read in its context, can be reasonably construed to have more than one meaning, the meaning that best promotes the spirit and purpose of the Act and will best improve the realisation and enjoyment of rights must be preferred (s 158(b)). Whether this provision supports the principle of a contractual nature is not clear. See also ch 7 for the effect on directors' duties.

113 S 16(3). See also amendments by the board in terms of s 36(2).

114 S 16(1) – apparently more or less – see ch 6 in respect of majority for resolutions. An amendment to the MOI by a profit company which entails non-compliance with the requirements of the particular company will necessitate a name change as well (s 16(6)).

115 S 16(7).

116 S 16(9).

117 On CoR 15.3: s 17(1).

4.7 The Memorandum of Incorporation and shareholders' agreements

The shareholders of a company[118] may enter into any agreement with one another[119] concerning any matter relating to the company,[120] but any such agreement must be consistent with the Act and the company's MOI. It is uncertain if it must be between all the shareholders. Some shareholders can conclude a contract, but it will not necessarily be a shareholders' agreement. Any provision of such an agreement that is inconsistent with the Act or the company's MOI is void to the extent of the inconsistency.[121] This is trite law, and restating the obvious, but it is also supported by an 'anti-avoidance' provision as discussed hereunder. If, before the Act came into operation, the shareholders of a pre-existing company had adopted any agreement between or among themselves, under whatever style or title, comparable in purpose and effect to an agreement in terms of section 15(7), any such agreement continued to have the same force and effect for a period of two years from the general effective date or until changed by the shareholders who were parties to the agreement, and after the two-year period only to the extent that the agreement is consistent with the Act and the company's MOI. If there was a conflict between a provision of this shareholders' agreement and the Act during the two-year period, the provision of the agreement prevailed, except to the extent that the agreement, or the MOI, provided otherwise.[122]

---

118 A 'shareholder', subject to s 57(1), which states that a shareholder is anybody who can exercise a vote (for purposes of Part F of Ch 2 – corporate governance by shareholders), means the holder of a share issued by a company and who is entered as such in the certificated or uncertificated securities register (s 1). This definition equates a shareholder with the meaning of 'member' in the 1973 Act. NPC members who can vote are also 'shareholders' (s 10(4)).

119 Apparently the company cannot be party to this contract.

120 The requirement 'relating to the company' is uncertain, as an agreement between shareholders as to (e.g.) the determination of the purchase price of securities, or a right of first refusal, may not be 'relating to the company' as it only applies to the shareholders *inter se* and therefore not a shareholder's agreement.

121 S 15(7). See also s 218(1).

122 Item 4(3A) of Sch 5. See ch 14. If the shareholders' agreement is changed, the exception ceases.

5 Anti-avoidance

A court, on application by the CIPC or Takeover Regulation Panel (TRP), may declare any agreement, transaction, scheme, resolution or provision of a company's MOI or rules to be primarily or substantially intended to defeat or reduce the effect of a prohibition or requirement established by or in terms of an unalterable provision of the Act, and can void it to the extent that it defeats or reduces the effect of a prohibition or requirement established by or in terms of an unalterable provision of the Act.[123] A person may, however, apply to the Companies Tribunal for an administrative order exempting such an agreement, transaction, scheme, resolution or provision of a company's MOI or rules from any prohibition or requirement established by or in terms of an unalterable provision of the Act.[124] It is not clear whether such an order can be made retrospectively.

6 Substantial compliance

If a form of document, record, statement or notice or a manner of delivery is prescribed, it is sufficient if it is in a form or delivered in a manner that satisfies all of the substantive requirements. Any deviation from the design, content or manner of delivery will only invalidate the action if it –

- negatively and materially affects the substance; or
- would reasonably mislead a person reading the document or to whom the document is delivered.[125]

A notice can also be transmitted electronically directly to a person in such a manner and form that it can conveniently be printed by the recipient within a reasonable time and at a reasonable cost.[126] It should be noted that these provisions do not apply in respect of prescribed notice periods.

---

123 S 6(1).

124 S 6(2).

125 S 6(8). *EB Steam Company (Pty) Ltd v Eskom Holdings Soc Ltd* [2014] 1 All SA 294 (SCA); *Afgri Bedryfs Beperk v Gribnitz* 61152/2012 3 April 2014 (GP).

126 S 6(9). See also reg 7 and Table CR 3 of the regulations.

Record retention will be complied with if an electronic original or reproduction is retained in terms of section 15 of the Electronic Communications and Transactions Act.[127] Documents can also be published, provided or delivered by electronic communication in a manner and form which enables them to be conveniently printed by the recipient within a reasonable time and at a reasonable cost or by giving notice (for example, via a web link) of its availability, a summary thereof, and instructions for receiving the complete document.[128]

7 Pre-incorporation contracts

7.1 General

It may be necessary from a business perspective for a person (promoter) to conclude a contract for a company that is not in existence yet. Under common law, it is impossible to conclude such a contract as agent for a principal, as the agency/principal relationship (the authority) is a contract that cannot exist if there is no principal (as other contracting party).[129] There are, however, a number of alternatives in the common law and in terms of the Act.

7.2 Common law

7.2.1 *Cession and delegation*

This method will entail that the promoter concludes a contract in his own name, and after the company is registered, cedes the rights and delegates the obligations to the company. The risks involved in this construction are that although cession of rights can be effected without concurrence of the debtor, the creditor must agree to any or all of the obligations being delegated. In addition, the cession and delegation is subject to agreement with the company. If the company refuses any or all of the rights/obligations, they will remain with the promoter and he will be liable under the contract, unless there is an agreement to the contrary.

---

127 Act 25 of 2002.

128 S 6(10) and (11) of the Act. See also Table CR3 of the regulations.

129 Nagel (ed) *Commercial Law* (2011) 157.

7.2.2 *Nomination*

The promoter concludes the contract, subject to a particular term that she will have the option to nominate a third party in her place, usually within a specified period. The company, if registered, may refuse to accept the nomination. This also presents some risks for the other contracting party, as he will have to ascertain that the person (company) nominated will be able to comply with, at least, the obligations in terms of the contract.[130] The promoter will only be liable in terms of the original contract if liability is expressly agreed to by the contracting parties.

7.2.3 *Contract for the benefit of a third party* (stipulatio alteri)

The promoter (*stipulans*) concludes a contract with the other (ultimate) contracting party (*promittens*) in terms of which the latter will offer certain benefits to the company to be formed (third party). If the company is registered, the offer is made, and the company can then accept or decline it. The risk for the other contracting party is that it is uncertain whether the company will come into existence, and if it does, whether it will accept the offer. If the company does not accept the offer, the promoter will only be liable under the first contract if liability is provided for in that contract.[131]

7.2.4 *Option contract*

As a general rule, an offer is not transferable. Therefore, if a third party makes an offer to the promoter, the latter cannot 'renounce' it in favour of the company (to be formed). One exception to this rule is an option whereby the third party (the option grantor) undertakes to keep an offer (the substantive offer) which he made to the promoter (option holder) open for a period of time. If the promoter accepts the option offer, an option contract exists between the third party and the promoter. The substantive offer, which is the object of the option contract, can be transferred by the option holder, unless the option agreement provides otherwise. The promoter can therefore transfer the offer to the company when it comes into existence. It can then decide whether to accept the offer. Upon acceptance, the contract comes into existence between

130 *Botha v Van Niekerk* 1983 (3) SA 513 (W).

131 *McCullogh v Fernwood Estate Ltd* 1920 AD 204.

the company and the third party. If the company does not accept the offer, the promoter will only be liable if liability is provided for in the option contract.[132]

7.3 Companies Act

A person may enter into a written agreement *in the name of*, *or purport to act in the name of*, or on behalf of, an entity that is contemplated or proposed to be incorporated but does not yet exist at the time of the agreement with the intention or understanding that the proposed company will be incorporated and will thereafter be bound by the contract.[133] It would appear from the wording that the intention is to, at least, create a statutory principal/agency contract. The 'person' *may* give notice to the company of this contract in the prescribed manner.[134] If the company takes a decision on the contract, it must file a notice of this decision with the CIPC[135] and notify each party to the contract who will be materially affected.[136] Acting in his/her own name obviously excludes the application of section 21 and one of the common law alternatives could apply, depending on the intention of the parties.

Within three months after the date on which a company was incorporated, the board of that company may completely, partially, or conditionally ratify or reject any pre-incorporation contract or other action purported to have been made or done in its name or on its behalf.[137]

If the board has neither ratified nor rejected a particular pre-incorporation contract or other action purported to have been made or done in the name of the company within three months after the date on which the company was incorporated, the company will be regarded as having ratified that agreement or action (this constitutes 'deemed ratification').[138]

---

132 Nagel (ed) *Commercial Law* (2011) 60.
133 S 21(1) and 'pre-incorporation contract' in s 1.
134 CoR 35.1.
135 CoR 35.2.
136 Reg 35.
137 S 21(4).
138 S 21(5).

To the extent that a pre-incorporation contract or action has been ratified (actually or deemed) the agreement (but not the action)[139] is as enforceable against the company as if the company had been a party to the agreement when it was made[140] and the liability of the promoter is discharged to the extent that it is so ratified.[141]

A promoter is jointly and severally liable with any *other such person*[142] for liabilities in the pre-incorporation contract if the company is not incorporated, or if, after being incorporated, the company rejects any part of an agreement or action.[143]

If a promoter is liable for total or partial rejection of a contract, he may claim against the company for any benefit it has received, or is entitled to receive, in terms of the agreement or action.[144] The *quantum* of the claim is apparently not limited to the liability of the promoter.

The common law is not excluded by section 21 of the Act; therefore the alternatives of a contract for the benefit of a third party and/or trust and/or cession and delegation and/or nomination would still be possible. Since there are no formal requirements for the section 21 contract (other than that it must be in writing), it will be difficult to determine which construction has been used if the wording of the contract is ambiguous. This could be important, as personal liability for a promoter under the common law does not automatically follow, as in section 21.

8 Registered office and records

Every company (and external company) must have a registered office as indicated in its NOI. The address of its registered office and its registered office must apparently be the same in terms of the Act,[145] but for purposes of jurisdiction in terms of section 21 of the Superior Courts Act[146] there can be a place

---

139 No mention is made of an action.

140 The contract is ratified retrospectively from its conclusion.

141 S 21(6).

142 It is presumed that 'such person' will be the person repudiating the contract, i.e. the company and/or its director/s.

143 S 21(2).

144 S 21(7).

145 *Sibakhulu Construction (Pty) Ltd v Wedgewood Village Golf Country Estate (Pty) Ltd* 2013 (1) SA 191 (WCC).

146 Act 10 of 2013.

of business and its registered address. Any change of the office (subject to the MOI) must be notified by filing a Notice of Change of Registered Office.[147]

The company must keep records in written or electronic form as required in section 24 of the Act at its registered office or other South African location. If records are not kept at the registered office, a Notice of Location of Records must be filed.[148]

A person who holds or has a *beneficial interest*[149] in any securities issued by a company, or who is a member of an NPC, has a right to certain information contained in the records of the company and to any other information to the extent granted by the MOI.[150] These rights may be exercised by direct request to the company in the prescribed manner[151] for a reasonable period during business hours *or* in accordance with the Promotion of Access to Information Act.[152] If there is an inconsistency between the Act and the PAIA, the latter will apply.[153]

Any other person has the right to inspect the register of shareholders (or members in respect of an NPC) in respect only of the information that is required to be held in terms of the Act and to the register of directors.[154]

---

147 S 23.

148 S 25. Notice is on CoR 22 in terms of reg 22.

149 A 'beneficial interest' means the right or entitlement of a person, through ownership, agreement, relationship or otherwise, alone or together with another person, to receive or participate in any distribution in respect of the company's securities, to exercise or cause to be exercised, in the ordinary course, any or all of the rights attaching to the company's securities *or* to dispose or direct the disposition of the company's securities, or any part of a distribution in respect of the securities (s 1). More than one person can therefore have a 'beneficial interest' in the same share/security.

150 The information and records as set out in s 26(1)(a)–(e). See ch 9 for access to annual financial statements.

151 On CoR 24 in terms of reg 24.

152 Act 2 of 2000 (PAIA). See s 26.

153 S 5(4)(i). This is presently the *de facto* position and *Clutchco (Pty) Ltd v Davis* 2005 (3) SA 486 (SCA) should still apply.

154 S 26(2). See the principles stated in *La Lucia Sands Share Block Ltd v Barkhan* [2011] 2 All SA 26 (SCA).

There is no doctrine of constructive notice,[155] but all the documents required to be lodged with the CIPC (such as the MOI etc.) are open for inspection by anybody.[156]

9 Validity of acts contrary to the Act

The provisions pertaining to anti-avoidance and substantial compliance apply to the whole of the Act. The same is true in respect of the provisions regulating the validity of acts in contravention of the Act. Subject to any provision specifically declaring an agreement, resolution or provision of an agreement, MOI, or rules of a company void, nothing in the Act renders void any other agreement, resolution or provision of an agreement, MOI or rules of a company that is prohibited, voidable or that may be declared unlawful in terms of this Act, unless a court has made a 'declaration' to that effect regarding that agreement, resolution or provision.[157] This means that if the Act declares an action void, it is void. However, something that is prohibited is only void or voidable if it is declared to have that effect by the court.[158]

Any act that does not fall within this ambit[159] will, therefore, be regulated by the general principles of common law. Under certain circumstances the doctrine of notice will therefore no longer apply and *mala fide* third parties will be protected. This will exclude the possibility that a contract in breach of the (now statutory) fiduciary duties of a director is void as against a *mala fide* third party.[160] Liability for these actions will, however, follow.[161] Any remedy that a person may otherwise have is also retained.[162]

---

155 See par 4.2.

156 S 187(5), subject to the payment of a fee.

157 S 218(1). Therefore if it is declared 'void', it is void – everything else must be declared void or voidable by the court.

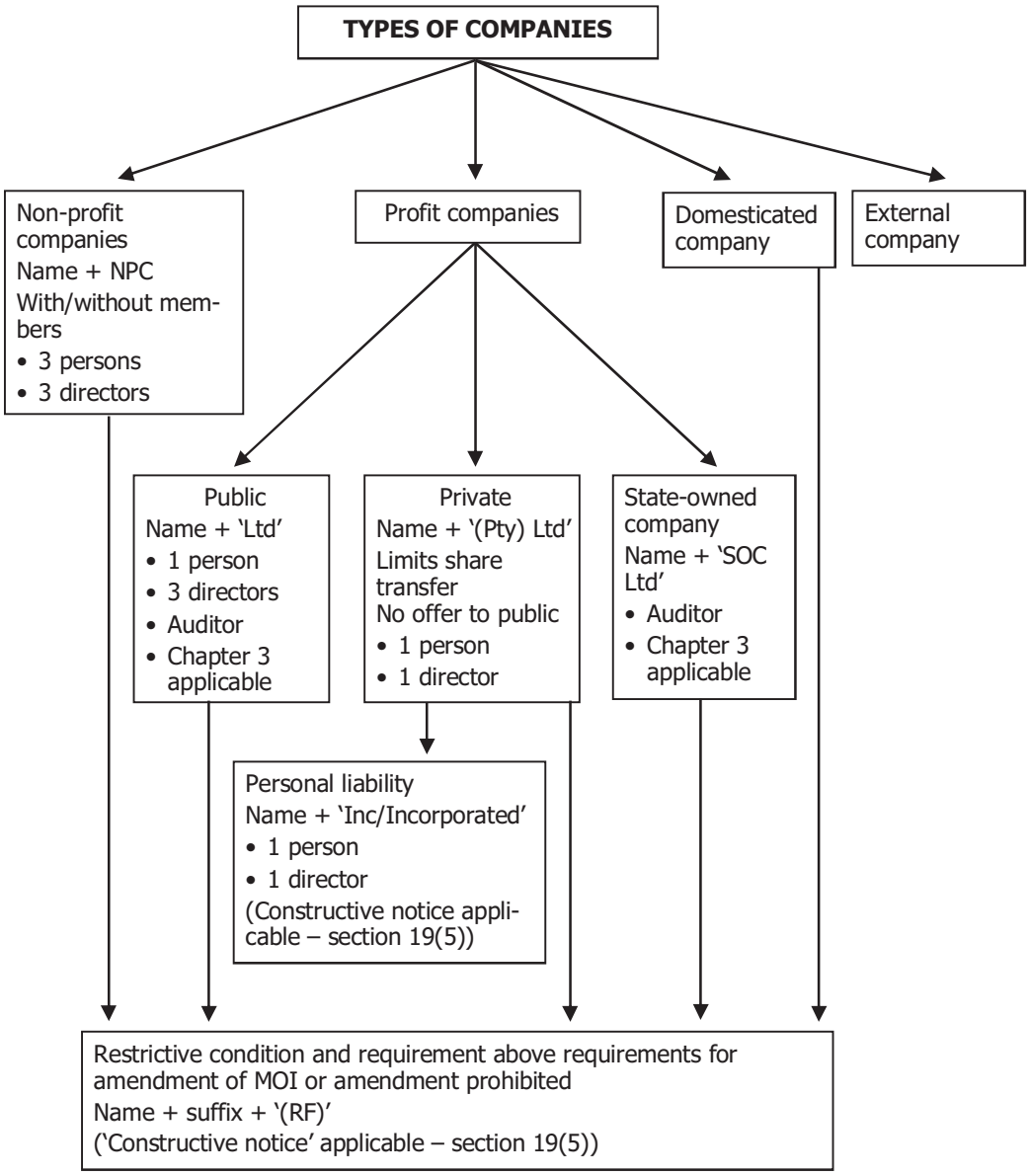
158 If the particular provision (e.g. s 15(7)) expressly states that the action is void, then it is void *ab initio*. If it is prohibited or unlawful, the order by the court would declare it either void *ab initio* or voidable (from a specific later date).

159 I.e., an agreement etc. not declared void, unlawful or prohibited by the Act.

160 See *Letseng Diamonds v JCI Ltd* 2007 (5) SA 564 (W). See also ch 7.

161 See ch 12 in respect of s 218(2).

162 S 218(3).



Note: The minimum number of directors is the number in addition to the minimum number of directors that the company must have to satisfy any requirement, whether in terms of the Act or its MOI, to appoint an audit committee and/or a social and ethics committee (section 66(1) and (12)).

Chapter 3 Corporate finance

1 Shares

Shares are movable property, transferable in a manner provided for or recognised in the Companies Act[1] or other legislation.[2] No mention is made of the Memorandum of Incorporation (MOI) and its effect on the 'transfer' of shares. Only the Act or other legislation applies, which apparently excludes the common law. The provisions also only apply in respect of 'shares' and not 'securities'. A 'share' is defined in section 1 as one of the units in which the

1 Act 71 of 2008 (the Act/2008 Act).
2 S 35(1) and see par 3.1.

proprietary interest in a profit company is divided. 'Securities' is defined in section 1 as any shares, debentures or other instruments, irrespective of their form or title, issued or authorised to be issued by a profit company. The distinction is important, as 'securities' includes 'shares' but 'shares' does not include 'securities', and in respect of 'securities' *authorised* but *unissued*, securities are included, while in respect of 'shares' only *issued* shares are included. Section 35(1) refers to shares and not securities and therefore, for example, debentures are not included.[3]

A share will not have a nominal or par value.[4] A pre-existing company[5] may not authorise (create) any new PV shares after the Act comes into operation. If such a company has authorised but unissued PV shares,[6] it may not issue those shares until the shares are converted to no PV shares.[7]

If a (pre-existing) company has any issued shares of one or more classes of PV shares immediately before the effective date, it cannot increase the number of authorised shares, but it may issue further authorised but unissued shares until it has published a proposal to shareholders in terms of regulation 31(6) to convert that class of shares.[8]

A regulation 31(6) conversion of *issued* PV shares into no PV shares is proposed by the board and must be approved by a special resolution adopted by the holders of shares of each such class of shares and a subsequent special

---

3 See par 4 for the definition of debentures.

4 S 35(2). Existing par value (PV) shares remain, but the minister must make regulations in respect of the conversion of these shares, as well as transitional arrangements (item 6 of Sch 5). See reg 31. The par value is (was) merely an indicator of (usually) the minimum value that the company would get upon issue of the shares and is not to be confused with the market value, i.e. the price at which it would be bought or sold after issue. This could be higher or lower than the par value.

5 A company that was registered under the Companies Act 61 of 1973 (1973 Act). See definition of 'company' and 'pre-existing company' in s 1.

6 Or the shares were issued but subsequently acquired by the company.

7 Reg 31(3). Conversion is by a board resolution and filing of a notice on CoR 31 with the Companies and Intellectual Property Commission (CIPC). There is no fee for the conversion (reg 31(3)(b)).

8 Reg 31(5). It is uncertain what legal rules will govern PV shares as the statutory provisions of the 1973 Act, such as s 76, has been repealed.

resolution adopted by a meeting of all the company's shareholders. This conversion must not be designed substantially or predominantly to evade the requirements of any applicable tax legislation.[9]

The board must cause a report to be prepared in respect of a proposed resolution and it must, at a minimum, state all the information that may influence the value of the securities[10] affected by the proposed conversion, identify the class of holders of the company's securities affected by the proposed conversion and also describe the material effects that the proposed conversion will have on the rights of the holders of the company's securities affected by the proposed conversion. It must, in addition, evaluate any material adverse effects of the proposed arrangement against the compensation that any of those persons will receive in terms of the 'arrangement'.[11]

This report must be published, together with the resolution 'contemplated' under regulation 31(6)[12] to the shareholders[13] before the meeting at which the resolution will be considered and a copy of the proposed resolution (no form is prescribed) must be filed with the CIPC and the South African Revenue Service (SARS). Publication must be with at least the notice required for a special resolution.[14] Thereafter, if there is no action (as contemplated below), the formal notice of the resolution must be sent to the shareholders.[15]

At any time before a shareholders' meeting to consider the conversion proposal, the company may, at the option of the company, apply to a court for a declaratory order that the proposal satisfies the requirements of the Act. A shareholder affected by the proposal, who believes that the proposal does not adequately protect the rights of shareholders, or if it otherwise fails to satisfy the requirements of the Act, may also apply to the court for an order. The CIPC

---

9 Reg 31(6).

10 The reference to 'securities' and not 'shares' is strange.

11 Reg 31(7).

12 Reg 31(6) actually refers to multiple resolutions.

13 The regulation does not state whether the publication must be to all the shareholders or only the shareholders whose shares will be converted. The latter will have an interest in the report, while the former may not.

14 See ch 6.

15 Reg 31(8).

or the SARS may apply to the court for a declaratory order under section 6(1) of the Act, on the grounds that the proposal is substantially or predominantly designed to evade the requirements of any applicable tax legislation.[16] If there are any court applications, including appeal and/or review, the resolution cannot be put to the vote.[17]

If on any of the applications the court determines that the proposed resolution complies with the Act, the proposal can be put to the vote and the court finding does not limit the right of a shareholder to nevertheless vote against the resolution. If the proposal is adopted, the company can file an amendment to the MOI to effect a conversion into no PV shares.[18] If the court determines that the proposal does not comply with the Act, the company cannot put the proposal to the vote, except to the extent that the court order provided otherwise.[19]

1.1 Class rights

A company's MOI must set out the classes of shares and the number of shares that it is authorised to issue (authorised share capital)[20] and the rights, limitations and other terms of those shares.[21] The MOI can also authorise a stated number of 'unclassified' shares which the board can classify.[22] A 'class' of shares may also be set out without specifying rights, limitations and other terms of the shares, which will be determined by the board before issue.[23] A distinguishing designation must also be given to the different classes of shares.[24] The board can be empowered, subject to express limits, to increase

16 Reg 31(9).
17 Reg 31(10).
18 Reg 31(5)(c). No fee is payable for the filing of the amendment to the MOI.
19 Reg 31(11).
20 S 36(1).
21 S 36(1)(b). This is a curious requirement as s 35(4) states that authorised shares have no rights associated with them until they have been issued. This can become a circuitous argument as a right (as against the company) only exists if it can be exercised – i.e. when the share is issued.
22 S 36(1)(c) and (3)(c).
23 S 36(1)(d) and (3)(d). The phrase 'a class of shares without rights' is tautologous, as the rights are used to determine the class.
24 S 36(1)(b).

or decrease the authorised shares, to classify unclassified authorised but unissued shares, or to reclassify unissued authorised shares.[25] The classification of shares (whether issued or unissued) can also be done in terms of an amendment of the MOI by special resolution.[26] The provision that the amendment can be made by the board or by the shareholders by special resolution, creates the impression that these organs have concurrent jurisdiction, also because the powers of the board are an alterable provision.

Every share, irrespective of its class, has 'associated with it' one general voting right[27] subject, however, to the provisions of the Act and the MOI.[28] The MOI can determine the 'preferences, rights and limitations', which could be interpreted to mean that a voting right can be limited but not excluded. A right to vote only under certain circumstances may therefore be a limited voting right, but the exclusion to vote under all circumstances may not be a 'limitation'.[29]

These preferences, rights and limitations are subject to specific provisions in the Act.

These specific provisions are:

- If there is only one class of shares, those shares must have voting rights in respect of all voting matters and must be entitled to the surplus at liquidation.[30]
- If there is more than one class of share, the MOI must provide that at least one class must have voting rights in respect of all voting matters, and a class (not necessarily the voting class) must be entitled to the surplus at liquidation.[31]

---

25 S 36(3). If the board increases the authorised capital or classifies or reclassifies shares, a Notice of Amendment of the MOI must be filed (s 36(4)) on CoR 15.1 in terms of reg 15.

26 S 36(2)(a).

27 S 37(2). A minimum of one vote is required, which allows weighted voting rights. General voting rights means voting rights that can be exercised generally at a general meeting (s 1).

28 S 37(2).

29 S 37(3)–(4).

30 S 37(3)(b).

31 S 37(4).

- Shares with limited voting rights will, irrespective of the MOI's provisions, nevertheless have voting rights 'on any proposal to amend the rights associated with that share'.[32]
- Shares of a particular class must have the same preferences, rights, limitations and other terms.[33]

The MOI can also provide for preferences, rights, limitations or other terms that can vary in response to objectively ascertainable external facts.[34] 'Facts' are defined as an event or any action or agreement, also if the company is a party to the agreement. An objectively ascertainable external fact will include an action by the board or in terms of an agreement to which the company is a party. It is not clear how this can be an 'external' fact.

1.2 Classes of shares

The 'rights' in respect of shares are used to classify the shares into different classes, which are usually given distinguishing names. These names are, however, usually only a general indication of the rights attached to the shares and should not be relied upon without ascertaining the actual rights as contained in the company's MOI or the resolution (by the directors or members, as the case may be) creating those rights. In addition, many of the classes were established under the system of capital maintenance in terms of the 1973 Act. The 2008 Act no longer recognises this principle, which will also influence the creation and rights of share classes.

The 'rights'[35] that are used in the classification of shares are –

- control rights, that is, the voting rights at meetings; and
- financial rights, namely the right to dividends (distributions in terms of section 46 of the Act – all dividends are distributions but not all distributions

---

32 S 37(3)(a). This is a much narrower requirement compared to s 194 of the 1973 Act.

33 S 37(1). This is a confirmation of the common law doctrine of equality. There cannot be differential rights within a 'class', e.g. shares 1–50 have certain distribution rights while shares 51–100 have different distribution rights.

34 S 37(6)–(7).

35 Under certain circumstances, these are not rights in the true sense of the legal definition; e.g. as a general rule, unless otherwise provided in the MOI and/or issue conditions, a shareholder does not have a right to a distribution.

are dividends, therefore the term 'dividend' will be used here) and the right to any excess upon liquidation.

The permutations of these rights are endless and the only restriction, other than that contained in the MOI, is that the rights conferred on a share must obviously not be against the law.

The 'typical' shares under the 1973 Act and the common law do not exist anymore, as any share can have restricted voting rights etc. An 'ordinary share' can therefore have restricted voting rights and have a preference in respect of surplus upon liquidation. The names can therefore be very misleading and should, for purposes of clarity, not be used in the MOI. The more common classes of shares are:

1.2.1 *Ordinary shares*

These shares *usually* have voting rights but the right to a dividend is not fixed and depends on the discretion of the directors (subject to the MOI). These shares can, however, also have a fixed (guaranteed) dividend. The right to excess upon liquidation is usually not limited.

1.2.2 *Preference shares*

1.2.2.1 General

The MOI can also provide for dividends, and that the dividends have preference over other shares. In addition, it can provide for the manner in which the distributions will be calculated.[36] The MOI can also provide that there are no preferences, but can state that the board can determine such preferences *and* that the shares cannot be issued before the board has made the determination.[37] As the name implies, these shares generally have a preference in respect of (usually) a dividend. This means that if a dividend is paid, these shares will have preference (that is, the dividend on them will be paid first). The preference calculation is usually a percentage of the issue price of the shares, for example, a 10% R1 preference share. This means that if a dividend is paid, these shares will get 10c per share. The mere fact that the preference share

36 S 37(5)(c)–(d).

37 S 36(1)(d).

has preference in respect of dividends does not mean that it also has preference in respect of excess upon liquidation. If an ordinary share also has a fixed dividend, the only difference will be that the preference share gets preference.

1.2.2.2 Term/period of shares

Preference shares (or any shares) can be issued for a specific term, which can either be fixed or subject to a condition, either objectively determinable or determined by, for instance, a board resolution. When the end of the term is reached or the condition is fulfilled, the share can then either be repurchased or converted into, for example, a share of a different class or some other security.[38] The share can therefore be a *convertible* preference share, for example to be converted into an ordinary share at the time when the dividend on the ordinary share is equal to or higher than the preference dividend. The MOI can provide for *redeemable* shares,[39] or convertible shares in terms of the terms and conditions of the Act or the MOI.[40] A redeemable share can for instance be redeemed at the discretion of the board, or at a fixed date, or if the shareholder requires the company to redeem/repurchase it. The tax implications of a redeemable share should be considered, because it will, under certain circumstances, be deemed to have elements of debt and will not be treated as share capital. It should be noted that the Act excludes 'redeemable securities' from repurchase in terms of section 48.[41]

---

38 'Convertible securities' is defined in s 1 as follows –
'When used in relation to any securities of a company [convertible securities] means securities that may, by their terms, be converted into other securities of the company, including –
(a) any non-voting securities issued by the company and which will become voting securities –
(i) on the happening of a designated event; or
(ii) if the holder of those securities so elects at some time after acquiring them; and
(b) options to acquire securities to be issued by the company, irrespective of whether those securities may be voting securities, or non-voting securities contemplated in paragraph (a).'

39 Subject to ss 46 and 48 of the Act.

40 S 37(5)(b).

41 But a share is also a security as defined in s 1. The effect of the exclusion is that redeemable shares and debentures are excluded from s 48. S 37(5) however makes s 48 applicable in respect of redeemable shares. See also ch 4.

Redeemable (preference) shares however still fall within the definition of 'distribution' in section 1 and section 46 will be applicable.[42]

1.2.2.3 Income

Apart from the undetermined income (usually in the case of the ordinary share where the amount, if any, of the dividend will only be determined at the end of the financial year) or the fixed income (usually in the case of the preference share), it is also possible to have combinations. The MOI could therefore determine that a share will receive a fixed income and, after that has been deducted from the profit available for distribution, the share will also participate in the remainder of the profit with the other classes of shares. This share can thus be called a participating preference share.

1.2.2.4 Cumulativeness

The general principle (subject to many exceptions) is that in contrast to interest on a loan, a dividend does not accumulate if it is not declared. Therefore, if the company does not declare a dividend in one financial year, it does not have to take the 'arrears' dividend into account when it declares a dividend in the next financial year. This principle applies unless the share is a cumulative share, in which case the arrears dividend, or a minimum dividend as may be determined in the MOI, must be added in the year subsequent to the non-payment of the first dividend.

Shares are cumulative if the MOI or resolution creating them expressly states so. However, in common law there is a presumption in respect of cumulativeness in the case of (dividend) preference shares, unless the context indicates otherwise (for example, dividends will only be declared in a particular year if there is profit available).

Although the principles in respect of term, income and cumulativeness are discussed in respect of preference shares, nothing prevents these principles to be made applicable (whether by the MOI or the resolution creating the shares) to ordinary shares also.

1.2.2.5 Excess upon liquidation

If the company is wound up, certain claims (such as liquidation costs and creditors' claims) are satisfied from the proceeds of the sale of the assets. If there is

---

42 See ch 4.

any excess, it is distributed to the shareholders as the 'secondary' providers of capital. This excess will be distributed between the different classes of shares in accordance with the par value or subscription price of the shares. If there is not enough money to pay back these amounts, the distribution will be *pro rata* (based on the par value or subscription price). If any amount is left after these claims have been settled, it will be distributed *pro rata* amongst all the shares. If a share has a preference to excess on liquidation, that share will first get the full par value or subscription price, if there are sufficient funds. If the claims of those shares and the other shares are satisfied, with an excess remaining, that excess will only be shared by the non-preferent shareholders.

1.2.3 *Amendment of class rights*

If the MOI is amended, resulting in the preferences, rights, limitations or other terms of the class being 'materially and adversely' affected, the shareholder is entitled to relief in terms of section 164 if he notified the company in advance of his opposition to the amendment and was present at the meeting and voted against the resolution.[43] The amendment must therefore be both material[44] and adverse. It is suggested that the test in both instances is objective and that it must be in respect of the preferences, rights, limitations or other terms of the class, and not in respect of the exercise and enjoyment of those rights, such as a lower voting percentage due to the issue of new shares. The shareholder must be notified of this right in terms of section 164 in the notice of the proposed amendment.[45]

1.3 Issue of shares

A company may only issue shares up to the number authorised in the MOI or as decided by the board (if the power to increase authorised capital has been given to the board).[46] If the board or shareholders must authorise an issue and

---

43 S 37(8).

44 See s 1 for the definition of 'material'.

45 See ch 12 on dissenting shareholder's appraisal rights.

46 S 36(3).

the authorisation was not given, the issue can be retroactively ratified by the board or shareholders as applicable.[47] Ratification must be within 60 business days of the issue. If the board has the power to increase authorised capital, it can authorise the issue.[48] If the issue of unauthorised shares is not ratified, the issue is 'a nullity' to the extent that it exceeds the authorisation; the consideration must therefore be repaid and the share certificate and entry in the securities register is made null and void.[49]

The contract whereby the company 'creates'[50] shares is referred to as a subscription contract, and the shares are issued. It is called a subscription contract (and not a contract for purchase and sale) because the share, as incorporeal and consisting of rights against the company, is not in existence before issue; therefore it cannot be sold by the company.[51] There is nothing complicated about this type of contract; it follows the basic principles of invitation, offer and acceptance.[52] The company therefore invites offers from prospective shareholders. These offerors then make an offer to the company, usually for a fixed number of shares or a lesser number as the company may determine, to provide for an over subscription, that is if there are offers for more shares than the company has available. Otherwise, in this situation, the company cannot accept the offer and there would be a new offer required by the prospective shareholder or the company would have to make a counter offer for the number of shares available. The company then allots the shares to the offeror (the allotment). This is a unilateral internal act of the company and is actually the acceptance of the offer. As with ordinary principles, a contract only comes into existence if the offeror hears (takes cognisance) of the acceptance.[53] Thus, if

---

47 S 38(2).

48 S 36(3)–(4), otherwise this can be done by an amendment to the MOI (s 36(2)–(3)).

49 S 38(3). With personal liability for the director/s in terms of ss 74 and 77 (s 38(3)(d) and see ch 7). See s 218(1) and ch 2 in respect of the provision that the issue is a 'nullity' (void).

50 S 35(4).

51 *Pretorius v Natal South Sea Investment Trust Ltd* 1965 (3) SA 410 (W); *Bavasah v Stirton and Another* [2014] 2 All SA 51 (WCC).

52 Nagel (ed) *Commercial Law* (2006) 42.

53 If the offeror expressly or impliedly renounces the right to be informed, the contract will come into existence upon acceptance, i.e. at allotment.

the company informs the offeror of the acceptance, the shares are issued (that is, they would have come into existence in terms of the common law, as at that stage the offeror can exercise rights against the company). The issue of a proof of existence of the shares and the entering of a name in a register *were* usually not a requirement for the share to come into existence.[54] However, in terms of section 37(9)(a), a person will only now acquire the rights associated with shares (securities) if that person's name is entered into the securities register. Therefore, until that action, the shareholder cannot exercise any rights in respect of the shares and only has a right against the company to make the required entry in the securities register.

The board usually has the power to issue shares.[55] However, such a share issue[56] must be approved[57] by a special resolution if the issue is to a director or prescribed officer (or a person related to[58] or inter-related with[59] the director, prescribed officer or the company) or to a future[60] director or prescribed officer.[61] The authorisation is not required if the shares are issued in terms of an underwriting contract; a pre-emptive right in terms of section 39; in proportion to existing shareholding, and on the same terms and conditions to all the shareholders or the shareholders of a particular class; an employee share scheme in terms of section 97, or offered to members of the public in terms of section 95(1)(h).[62]

---

54 See, however, s 37(9) as discussed hereunder.

55 S 38(1). Ss 38 and 40 do not apply in a business rescue scheme where the practitioner can issue shares and determine the consideration (s 152(6)).

56 Including securities convertible into shares or rights exercisable for shares (s 41(1)).

57 Apparently it cannot be ratified. Non-compliance results in liability of the director (s 77(3)).

58 S 2.

59 As defined in s 1.

60 I.e. a person who becomes a director or prescribed officer less than six months after the acquisition of the right (s 41(6)). Related or inter-related parties to the future director or prescribed officer are not included.

61 S 41(1).

62 S 41(2). Personal liability of directors in terms of s 77(3)(e)(ii) follows upon non-compliance, but the contract is not void (s 218(1)).

The issue as a result of a transaction or series of integrated transactions must also be approved by special resolution if the shares issued amount to more than 30% of the voting power of the shareholders of that class before the transaction/s. Therefore, if the company has 1000 authorised shares of one class of which 600 are issued, any new issue of more that 180 shares will have to be authorised in this manner. The voting power of the shares is determined as the greater of the voting power of shares to be issued or that voting power after conversion of convertible shares/securities and the exercise of rights (presumably to shares) to be issued.[63] Transactions will constitute a series of integrated transactions if one transaction is made contingent on other transaction/s, or the transactions are completed within 12 months, or the same parties (or related persons) are involved, or the transactions are in respect of one asset or company and will lead to a substantial involvement in a business activity that did not previously form part of the company's principal activity.[64]

A company can also issue options for the *allotment* of[65] or *subscription* of authorised shares or securities. The 'decision' to issue these instruments is subject to the same requirements as the issue of the underlying instruments.[66]

1.4 *Pro rata* offer

Every shareholder in a private company (and a personal liability company) has a right to be offered and to subscribe (within a reasonable time) to a percentage of any shares issued or proposed to be issued equal to that person's general voting power in the company before the issue.[67] This right does not

---

63 S 41(3). Non-compliance with the requirements for issuing shares under these circumstances will not result in the transaction being void (s 218(1)).

64 S 41(4)(b). Non-compliance results in personal liability in terms of s 77(3)(e)(ii) of directors and officers as defined in s 77(1) (s 41(5)).

65 S 42. How an option can be issued for an allotment is unclear. Allotment is the unilateral act of an entity, usually the board, to accept the offer made by the prospective shareholder (in full or partially).

66 Personal liability of directors in terms of s 77(3)(e)(ii) follows upon unauthorised issue of options in the sense that the shares have not been authorised in terms of s 36.

67 S 39.

apply to shares issued in terms of options or conversion rights,[68] or as contemplated in section 40(5) to (7),[69] or to capitalisation shares in terms of section 47,[70] or during a business rescue scheme.[71] General voting rights can be restricted, with the effect that the particular shareholder will not be able to participate in the offer.[72] Shares in respect of the offer that are not taken up, can only be offered to other persons (non-shareholders) as provided for in the MOI. Therefore, if the MOI does not provide for such an offer, those shares will have to be offered to existing shareholders again, or otherwise the original offer lapses. The MOI can limit, negate or restrict this right.[73] Non-compliance with the pre-emption requirements will not void the issue.[74] Ironically the issue is not void, but a transfer *after* issue in contravention of a right of pre-emption in the MOI is void, even in respect of a *bona fide* third party.[75]

2 Consideration for shares

Shares[76] may only be issued as capitalisation shares,[77] or for *consideration* or for other benefit to the company that is *adequate*, or in terms of conversion rights.[78] The board must determine the consideration or other benefit. 'Consideration', means anything of value given and accepted in exchange for any

---

68 The options should have been issued under the pre-emptive right (s 42).

69 The exceptions in s 40(5)–(7) refer to shares issued for an instrument such that the value cannot be realised by the company until a date after the time when the shares are to be issued, or for an agreement for future services or consideration and which, until and to the extent that the consideration is received, is held in trust.

70 S 39. The shareholder may also subscribe for fewer than the entitled shares. Any shares not subscribed for within a reasonable time may be offered to any other person (i.e. also non-shareholders) (s 39(4)).

71 S 152(6).

72 See par 1.1 in respect of voting rights.

73 S 39(3).

74 S 218(1).

75 *Smuts v Booyens*; *Markplaas (Edms) Bpk v Booyens* [2001] 3 All SA 536 (SCA) and par 3.1.

76 Not securities.

77 S 47. Issue of capitalisation shares is therefore not subject to the 'adequate consideration' requirement of s 40. The sources of funds to pay for the capitalisation shares are not clear. A capitalisation share is apparently also not a 'distribution' under s 46. See ch 4.

78 S 40(1). S 40 does not apply during a business rescue scheme (s 152(6)).

property, service, act, omission or forbearance or any other thing of value, including –

- any money, property, negotiable instrument, securities, investment credit facility, token or ticket;
- any labour, barter or similar exchange of one thing for another; or
- any other thing, undertaking, promise, agreement or assurance, irrespective of its apparent or intrinsic value, or whether it is transferred directly or indirectly.[79]

Whether this determination constitutes *adequate* consideration cannot be challenged except in terms of sections 76 and 77(2) (standards of director's conduct) and the transaction is clearly not void.[80] When the company has received the consideration, the shares are issued as fully paid.[81] If the consideration for shares is in the form of an instrument such that the value cannot be realised by the company until a date after the time when the shares are to be issued or by future services[82] or benefits (or future payment), the consideration is regarded as having been received (that is, the shares are fully paid) only when the value of the consideration has been realised and the subscribing party has fulfilled her obligation in terms of the contract.[83] However, if the company received the instrument or enters into this agreement, the shares must be issued immediately and transferred to a third party to be held in trust.[84] There is an issue *and* a transfer. It is accepted that the issue is to the subscribing party, from which it is transferred, because a share cannot be issued *in vacuo*. The tax implications (transfer tax as well as capital gains tax) on the transfer to the trust and the re-transfer back to the subscribing party should be considered.

Subject to the provisions of the trust deed,[85] shares held in trust do not have voting or appraisal rights[86] and pre-emptive rights associated with those shares may be exercised only to the extent that the 'instrument has become

---

79 S 1.
80 Ss 40(3) and 218(1). See ch 7 in respect of duties of directors.
81 S 40(4).
82 Called 'sweat capital'.
83 S 40(5).
84 S 40(5)(b). It is suggested that the Trust Property Control Act 57 of 1988 could apply to the trustee.
85 S 40(6).
86 S 164.

negotiable'[87] by the company, or the subscribing party has fulfilled its obligations in terms of the agreement. The trust deed can change any or all of these provisions, and also, it is submitted, provide that the voting rights be exercised as directed by the company.

A distribution with respect to the trust shares must be paid or credited by the company to the subscribing party to the extent that the 'instrument has become negotiable' by the company, or the subscribing party has fulfilled its obligations in terms of the agreement and may be credited against the remaining value at that time of any services still to be performed by the subscribing party, any future payment remaining due, or the benefits still to be received by the company.

Shares that have been issued but are held in trust may not be transferred by or at the direction of the subscribing party unless the company has expressly consented to the transfer in advance, and must be transferred to the subscribing party to the extent that the instrument has become negotiable by the company, or the subscribing party complies with his obligations in terms of the agreement.

Shares held in trust must, on demand by the company, be returned to the company and cancelled to the extent that the instrument is dishonoured after becoming negotiable, or the subscribing party has failed to fulfil its obligations under the agreement.

3 Ownership of securities

3.1 General

The (nature of a) share is defined as 'movable property, transferable in a manner provided for or recognised in the Act or other legislation'.[88] In addition,

---

87 Note that the instrument must be negotiated by the company. If it is negotiable (e.g. on the date of a post-dated cheque) but the company fails to negotiate it, the consideration has not been received. Whether an instrument that 'has become negotiable' refers to an 'instrument such that the value cannot be realised until a date after the time the shares are to be issued' as used in s 40(5), is uncertain. An instrument that has become negotiable and one whose value can be realised may clearly not be the same under all circumstances. The positions as to the issue of the shares and the status of the shares as held in trust may therefore differ.

88 S 35(1). The importance of this provision for the purposes of transfer of ownership is that the rules as to the transfer of ownership in movables apply, except to the extent amended by an Act. See also par 1 above.

a share itself can be defined as '. . . a bundle, or conglomerate, of personal rights[89] entitling the holder thereof to a certain interest in the company, its assets and dividends'.[90] Basically, as personal rights, 'ownership' passes through cession. Mere consensus is sufficient to establish a cession. Cession takes place by means of an agreement of cession (agreement to transfer) concurrently with, or preceded by, a *iusta causa*, which can be an obligatory agreement.[91] The word 'transfer' has a wide meaning, and '[i]n regard to shares, the word "transfer", in its full and technical sense, is not a single act but consists of a series of steps, namely an agreement to transfer, the execution of a deed of transfer and, finally, the registration of the transfer'.[92] Passing of ownership is therefore an element in the transfer chain, but (registration of) transfer of the shares is usually[93] not a requirement for the passing of ownership. Therefore, if the shares are transferred in ownership from A to B, but the transfer is not registered, B is the beneficial (true) owner of the shares (and rights in the shares), while A is the registered shareholder (or nominee or 'agent' of B).[94] This position in respect of ownership of securities is, however, subject to the provisions of section 37(9), which provides:

A person –

- acquires the rights associated with any particular securities of a company –
  - '(i) when that person's name is entered in the company's certificated securities register; or
  - (ii) as determined in accordance with rules of the Central Securities Depository, in the case of uncertificated securities; and'

89 The 'class rights'.

90 *Standard Bank of South Africa Ltd v Ocean Commodities Inc* 1983 (1) SA 276 (A).

91 *Botha v Fick* 1995 (2) SA 750 (A); *Gaffoor and Another NNO v Vangates Investments (Pty) Ltd and Others* 2012 (4) SA 281 (SCA).

92 *Inland Property Development Corporation (Pty) Ltd v Cilliers* 1973 (3) SA 245 (A).

93 See however s 37(9).

94 Some of the rights can also be ceded, e.g. the voting right or dividend 'right'.

- ceases to have the rights associated with any particular securities of a company –
  - '(i) when the transfer to another person, re-acquisition by the company, or surrender to the company has been entered in the company's certificated securities register; or
  - (ii) as determined in accordance with rules of the Central Securities Depository, in the case of uncertificated securities.'

The logical explanation for section 37(9) could be that a share is equated, as far as ownership and transfer is concerned, with immovable property, as the section clearly provides that acquisition of rights (for instance, by a beneficial shareholder) in contrast to the exercise of the rights (for example, by the registered shareholder) is subject to 'registration' in the securities register to be held in terms of section 50.

If the MOI (or for that matter any agreement between the shareholders) provides that the disposition of shares (or securities) is subject to a right of first refusal (erroneously also called a pre-emption right), this obligation is a *pactum de non cedendo* and is inherent in the shares. Purported transfer (cession) of the share in conflict with this obligation would be void, even in respect of *bona fide* third parties.[95]

3.2 Nominee/beneficial holdings

Except to the extent that the MOI provides otherwise, the company's issued securities can be held by, and registered in the name of, one person for the benefit of another person.[96]

If *securities* in a public company are held by a person as nominee, the registered holder[97] must disclose the identity of the person on whose behalf that security is held and the identity of each person with a beneficial interest[98] in the securities so held, the number and class of securities held for each such

---

95 *Smuts v Booyens*; *Markplaas (Edms) Bpk v Booyens* [2001] 3 All SA 536 (SCA); *Born Free Investments 264 (Pty) Ltd v Firstrand Bank Ltd* [2014] 2 All SA 127 (SCA).

96 S 56(1).

97 Ss 37(9), 51 and 52.

98 The disclosure must be in respect of a '. . . person on whose behalf that security is held and the identity of each person with a beneficial interest'. The distinction between these two categories is unclear. See the definition of 'beneficial interest' in s 1 which provides that –

(*continued*)

person with a beneficial interest, and the extent of each such beneficial interest.[99] A public company can also require a nominee shareholder to provide particulars of the beneficial shareholders.[100] If the company is a regulated company,[101] it must also maintain a register of disclosures and, if required to publish annual financial statements, disclose holdings of more than 5% of the issued number of securities.[102]

A person who holds a beneficial interest in any security[103] may vote in a matter at a meeting of shareholders only to the extent that the beneficial interest includes the right to vote on the matter and the person's name is on the company's register of disclosures as the holder of a beneficial interest, or the

---

'. . . when used in relation to a company's securities, means the right or entitlement of a person, through ownership, agreement, relationship or otherwise, alone or together with another person to –

(a) receive or participate in any distribution in respect of the company's securities;
(b) exercise or cause to be exercised, in the ordinary course, any or all of the rights attaching to the company's securities; or
(c) dispose or direct the disposition of the company's securities, or any part of a distribution in respect of the securities,

but does not include any interest held by a person in a unit trust or collective investment scheme in terms of the Collective Investment Schemes Act [*sic*] No. 45 of 2002'.

There can be more than one beneficial shareholder – see also ch 2. It is unclear whether there is a distinction between a 'shareholder' and a 'holder of shares' as used in s 46. See also s 56(2) in respect of beneficial interest in securities in a public company.

99 Disclosure must be within five business days after the end of every month and a prescribed fee can be charged by the registered shareholder (s 56(3)). See also the additional disclosure duty in s 122 (ch 10).

100 S 56(3)–(4). In the case of nominee shareholding, where the nominee is not the beneficial shareholder of all the shares, the registered shareholder must disclose the information in respect of the beneficial shareholders as required by s 56(3)–(4). Under certain circumstances, as set out in s 56(2), a person is 'regarded' as a beneficial shareholder.

101 As defined in s 117(1)(g), which is a company to which the Takeover Regulations and Part B of Ch 5 apply.

102 S 56(7).

103 These provisions (s 56(9)–(11)) do not apply in respect of securities that are subject to the rules of a central securities depository (s 56(8)).

person holds a proxy appointment in respect to that matter from the registered holder of those securities.[104]

The registered holder of any securities, in which any (other) person has a beneficial interest, must deliver to each such person a notice of any meeting of a company at which those securities may be voted within two business days after receiving such a notice from the company. The registered holder must also provide a proxy appointment to the extent of that person's beneficial interest, if the person demands it.[105] A person who has a beneficial interest in any securities that are entitled to be voted on a matter at a meeting of company's shareholders, may demand a proxy appointment from the registered holder of those securities, to the extent of that person's beneficial interest, by delivering such a demand in writing to the registered holder, or as required by the applicable requirements of a central securities depository.[106]

4 'Debentures'

Part D of Chapter 2 contains provisions for the issue of 'securities other than shares'.[107]

A 'debt instrument' is defined as including any 'securities' other than the shares of a company,[108] irrespective of whether they are issued in terms of a security document such as a trust deed. However, promissory notes and loans, whether constituting an encumbrance on the assets of the company or not, are

104 S 56(9).

105 S 56(10).

106 S 56(11) and CoR 36.3 in terms of reg 36. The reference to a 'central securities depository' is strange, as s 56(8) expressly excludes securities held by a central securities depository.

107 S 43. As with the 1973 Act, the interrelationship with the Banks Act 94 of 1990 in respect of 'deposits', and the regulation of property syndication schemes has been ignored. Especially the latter, now regulated in terms of the Consumer Protection Act 68 of 2008, should have been included in the definition of 'securities', as there is no logical explanation for the separate regulation.

108 'Securities' is defined in s 1 as '. . . any shares, debentures or other instruments, irrespective of their form or title, issued or authorised to be issued by a profit company.' See par 1.

excluded.[109] This definition creates uncertainty as it is not clear whether a debenture can be classified as a debt instrument as the basis of the debenture is actually a loan (which forms the basis of the debenture).[110] A debenture is, as defined in the common law, therefore basically 'an acknowledgment of debt in favour of the holder as a creditor of the company for the specified amount with a right to interest therein as stipulated . . . "[111] Therefore the definition of debt instrument includes a debenture (by incorporating 'securities' as defined in section 1), but then again excludes debentures by implication due to the exclusion of loans.

The Act provides that the board of a company may authorise the company to issue debt instruments except to the extent provided otherwise in the company's MOI.[112] The concept of a board authorising the company to perform certain acts is a confirmation of the principle in section 66(1), that is, that the ultimate management and control are with the board.[113]

Holders of debt instruments can be given special privileges

> 'regarding attending and voting at general meetings and [the] appointment of directors, allotment of securities, redemption by the company [not third parties], or substitution [capitalisation] of the debt instrument for shares of the company provided that the securities to be allotted or substituted in terms of any such privilege, are authorised by or in terms of the company's MOI . . .'[114]

unless the MOI provides otherwise.[115]

4.1 Debt instrument terms and trustees

A security document, which is also the document by which a debt instrument is offered, embodying the terms and conditions of the debt instrument (including the trust deed or certificate)[116] must indicate on the first page

---

109 S 43(1).

110 *Coetzee v Rand Sporting Club* 1918 WLD 74.

111 *Randfontein Estates Gold Mining Co Ltd v Custodian of Enemy Property* 1923 AD 576 580.

112 S 43(2).

113 See ch 7.

114 'Shares' and 'securities' are used here as synonyms. See, however, par 1.

115 S 43(3). The rights, etc. of shareholders are not addressed.

116 Definition of 'security document' in s 43(1)(b).

whether the debt instrument is secured or unsecured.[117]

A company may appoint any person, including a juristic person, as trustee for the holders of the company's debt instruments, as long as that person is not a director or prescribed officer of the company, or a person related or inter-related to the company, or a director or a prescribed officer, who has any interest in or relationship with the company that might conflict with the duties of a trustee. The board must be satisfied that the person has the requisite knowledge and experience to carry out the duties of a trustee.[118]

A new trustee must also satisfy these requirements, and must be approved by the holders of at least 75% by value of debt instruments present at a meeting called for that purpose,[119] before appointment by the board.

Any provision contained in a trust deed for securing any debt instruments, or in any agreement with the holders of any debt instruments secured by a trust deed, is void to the extent that it would exempt a trustee from, or indemnify a trustee against, liability for breach of trust, or failure to exercise the degree of care and diligence required of the prudent and careful person, having regard to the provisions of the trust deed respecting the powers, authorities or discretions of the trustee.[120]

5 Securities register and transfer of shares (securities)

Securities issued must either be evidenced by a certificate (that is, certificated) or uncertificated. Section 51 applies to certificated securities in respect of

---

117 S 43(4).

118 S 43(5).

119 S 43(6).

120 S 43(7). The trustee would therefore be liable for 'ordinary' (other than gross) negligence. A release can be given with the consent of a majority of not less than 75% in value of the holders of debt instruments present and voting at a meeting called for the purpose, and with respect to a specific act (s 43(8)). It is suggested that the Trust Property Control Act will apply.

registration of the security and transfer, while sections 52 to 55 apply to uncertificated securities.[121]

The company must issue a certificate evidencing securities which must contain the prescribed information and must be signed by two persons authorised by the board.[122] Upon transfer of the *shares*, the certificate must be endorsed with a number in order to identify the preceding holder of the shares. Any transfer must be entered into the register with the prescribed information.[123] This entry can only be made if the transfer is evidenced by a proper instrument of transfer (which is not defined), or by operation of law.[124] It is suggested that the instrument of transfer, which should be incorporated in the MOI must at least include the transferor and transferee (with full name, identity/registration number), description of the securities, as well as the *causa* for the transfer (sale, donation, exchange etc.).

A company must establish a register of issued securities (including debt instruments), which must contain the information prescribed in section 50(2) of

---

121 The provisions of the 1973 Act are followed in respect of uncertificated securities and will not be repeated here – see e.g. Cilliers *et al Cilliers & Benade Corporate Law* (2000) 286 *et seq*. Certificated securities can be converted to uncertificated securities, and *vice versa* (s 49(5)–(6)). The difference is merely that a certificated security is evidenced by a physical certificate while an uncertificated security has none. The absence of physical certificates reduces the possibility of fraud and facilitates transfers. The transfer of the certificated security must only be made if evidenced by a proper instrument of transfer delivered to the company or is effected by operation of law. Surrender of the securities certificate is apparently not required (s 51). If this is required by the MOI, it is not a requirement for a valid transfer (see s 35(1) which requires that the transfer is made only as required by the Act or other legislation).

122 S 51(1). If there is only one director, a second person must be appointed. If there are any restrictions on the transfer of the securities, the certificate must state them (s 51(1)). There is no time limit within which the certificate must be issued.

123 S 51(4).

124 S 51(6). It should be noted that no time period within which share/securities certificates are to be issued is prescribed, and that the words 'share' and 'securities' are being used interchangeably, apparently arbitrarily.

the Act.[125] The shares need not be distinguished by a numbering system if all the shares of the company rank equally for all purposes (this will happen only if there is only one class of shares).[126] The information to be entered should include the names and addresses of the holders of securities. In the case of section 43 securities ('debt' securities), the number outstanding as well as the registered and beneficial holders of the securities must be indicated. If identity numbers and e-mail addresses are entered into the register, they may be regarded as confidential.[127] The information contained in the register as prescribed by the Act is available for inspection by any person.[128] This right to inspection is, however, only in respect of the prescribed information and not the additional information that the company enters into the register.

6 Security offers

The system in terms of the 1973 Act has been retained in essence in the 2008 Act, except that the secondary and primary markets are now regulated in the same chapter.[129]

The basic manner in which to protect investors in securities is disclosure (by way of a prospectus or written statement). The philosophy is that if an incorporeal is 'sold', the 'buyer' cannot determine, as in the sale of a corporeal, whether the consideration is fair and what the value of the incorporeal is. To make these valuations and decisions, the buyer is dependent on the information that is in the possession of the seller. The law therefore provides that the seller must give this information to the buyer and also ensures the relevance and integrity of this information. If a company issues securities to investors, the 'sale' takes place on the primary market (because it is the first time the securities are 'sold'). If the investor later decides to sell any or all of the securities, the sale occurs on the 'secondary market'. The secondary market can be formal (that is, there is a 'place' where certain securities that comply with certain

---

125 The additional requirement in respect of beneficial holders in respect of debt securities does not make sense.

126 S 50(5). These requirements are only for shares; other 'securities' are excluded.

127 Reg 32.

128 S 26(3) and upon payment of R100 for each inspection.

129 Ch 4 of the Act. This combination of the primary and secondary market regulation was not successful, *inter alia*, due the confusion between the prospectus and the written statement in respect of content, non-compliance and liability.

requirements are listed and then bought and sold, such as the JSE Ltd, which is regulated by, for instance, the Financial Markets Act[130]), or informal (that is, a private transaction between a buyer and seller). There is disclosure in both markets, but the level differs.

Three principles are usually used to determine whether there must be disclosure. The principles are that –

- there must be an offer;
- the offer is of securities; and
- the offer is made to the public.[131]

An offer is, under common law and in terms of the Companies Act, aimed at concluding a particular contract. An 'offer', in relation to securities, means an offer made *in any way* [132] by any person with respect to the acquisition[133] of any securities in a company for a consideration.[134]

6.1 Primary market

There are different types of contracts that can come into existence through the offer. A person must not make a *primary offering* to the public (excluding an initial public offering (IPO)) of any listed securities of a company unless that offer is in accordance with the requirements of the relevant exchange, or make a primary offering of unlisted securities of a company unless the offering is

130 Act 19 of 2012.

131 See also Cilliers *et al Cilliers & Benade Corporate Law* (2000) 257.

132 It therefore includes any offer, whether oral or in writing (also electronic). See par 6.1.2 below for advertisements. If the offer is for 'debt instruments', the 'security document' must contain the information as required by s 43(1)(b). No provision is made if the offer is not in writing.

133 'Acquisition' is not defined and should include both an issue as well as sale unless clearly indicated otherwise, as in the definition of 'primary offering'. The use of the words 'with respect to' instead of 'for' would indicate that acquisition refers to the offeror as well as the addressee.

134 S 95(1)(g). Note that a barter (exchange for something other than money) is now included. However, an invitation to make an offer is not included.

accompanied by a prospectus[135] that satisfies the requirements of section 100.[136] A person must not offer to the public any securities[137] of any person unless that second person is a company or foreign company.[138]

'Primary offering' means an offer to the public, made by or on behalf of a company, of securities to be *issued* by that company, or another company within a group of companies of which the first company is a member, or with whom the first company proposes to merge, or into which the first company proposes to be amalgamated.[139]

A person must not make an IPO unless that offering is accompanied by a prospectus that satisfies the requirements of the Act and has been filed.[140]

An IPO is an offering to the public of any securities of a company if no securities of that company have previously been the subject of an offer to the public, or if all of the securities of that company that had previously been the subject of an offering to the public have subsequently been re-acquired by the company.[141]

---

135 The word 'prospectus' is consistently used in Ch 4, e.g. in ss 102–104 *et seq*. There is no definition of 'prospectus', only for 'registered prospectus' in s 95. These two concepts are not the same, as the former also has a common law meaning. It is correctly used in but one provision where it is stated: 'A prospectus may not be registered unless the requirements of this Act have been complied with and it has been filed for registration . . .' (s 99(9)).

136 S 99(3)(a). All IPOs will be primary offerings, but not all primary offerings will be IPOs.

137 See par 1.

138 S 99(1). 'Company' is as defined in s 95(1)(a) and includes a company as defined in s 1. A foreign company is an entity incorporated outside the Republic, irrespective of whether it is a profit or non-profit entity, or whether it is carrying on business or non-profit activities, as the case may be, within the Republic (s 1). The enforcement of the Act extra-territorially may prove to be difficult, i.e. if a foreign company issues securities without complying with the prospectus requirements.

139 S 95(1)(h).

140 S 99(2). Contravention of s 99(1)–(9) is an offence and liability follows for any losses sustained as a consequence of that contravention (s 214(4)).

141 S 95(1)(e).

If an IPO of listed securities is made, it must, in addition to the exchange requirements, be accompanied by a prospectus.[142] Conversely, if it is not an IPO, only the exchange requirements must be complied with. All IPOs are therefore primary offers, but not all primary offers are IPOs and the IPO is only relevant in respect of listed securities. An IPO in respect of listed shares is actually a misnomer, as a security must always be issued first before it can be traded.[143]

'Securities' includes shares and debentures and various other instruments.[144]

An offer 'to the public' includes an offer of securities to be *issued by* a company, its subsidiary or a third company to any section of the public, whether selected –

- as security holders of the company concerned;
- as clients of the person issuing the prospectus concerned;[145]
- as the holders of any particular class of property; or
- in any other manner,

but does not include an offer made in any of the circumstances contemplated in section 96 or a secondary offer 'through' an exchange.[146] This definition is so wide, because of the use of the phrase 'in any other manner' that its effect would have been that all offers would have required a prospectus. However, it is accepted that not everybody requires the information contained in the prospectus (for instance because they already have that information, or can readily acquire it). Therefore the Act provides that although certain persons will fall

---

142 S 100(1). The pre-listing statement in terms of ch 11 of the JSE Listings requirements must then also comply with the prospectus requirements of the Act and the pre-listing statement then becomes a prospectus with all the resultant regulations, like liability for untrue statements.

143 See par 1.3.

144 See par 1.

145 This phrase is tautologous, as the offer to the public determines whether a prospectus must be issued.

146 S 95(1)(h). This definition does not include 'an offer to the public' but merely adds categories that would be included in the common law definition. The effect is that *Gold Fields Ltd v Harmony Gold Mining Co Ltd* 2005 (2) SA 506 (SCA) where a 'non-public' category was erroneously created under the word of the 1973 Act, would now be correct. The definition in s 95(2) is superfluous and confusing and was obviously transferred from s 141 of the 1973 Act, which had a totally different definition, due to the difference in the ambit of regulation.

within the definition of an offer to the public, they will not be considered to be 'public'. It should, however be noted that the categories where the definition of offer is extended only apply in respect of the subscription and issue of securities, with the effect that it will not apply to a secondary offering.

Section 96 provides that an offer is not to the public if –

- the offer is made to no persons (or a combination) other than[147] –
  - persons whose ordinary business, or part of whose ordinary business, is to deal in shares, whether as principals or agents; or
  - the Public Investments Corporation; or
  - a person or entity regulated by the Reserve Bank of South Africa; or
  - an authorised financial services provider, as defined in the Financial Advisory and Intermediary Services Act;[148] or
  - a financial institution, as defined in the Financial Services Board Act;[149] or
  - a wholly-owned subsidiary of a person in the previous three categories acting as agent in the capacity of an authorised portfolio manager for a pension fund registered in terms of the Pension Funds Act,[150] or as manager for a collective investment scheme registered in terms of the Collective Investment Schemes Control Act;[151] or
- the total intended acquisition cost of the securities, for any single addressee acting as principal, is equal to or greater than the prescribed amount;[152] or
- it is a non-renounceable offer made only to existing security holders, or persons related to existing security holders, of the company;[153] or

147 S 96(1)(a).
148 Act 37 of 2002.
149 Act 97 of 1990.
150 Act 24 of 1956.
151 Act 45 of 2002.
152 S 96(1)(b), as determined by the minister in the *Government Gazette* (s 96(2)). The prescribed maximum is R1 million (reg 45).
153 S 96(1)(c). The principle was always that this category of persons has the information of the company and a prospectus will be superfluous. See s 31 in respect of access to annual financial statements.

- it is a rights offer[154] that satisfies the prescribed requirements, and an exchange has granted or has agreed to grant a listing for the securities that are the subject of the offer, and the rights offer complies with any relevant requirements of that exchange at the time the offer is made;[155] or
- the offer is made only to a director of the company, or a person related to the director, unless the offer is renounceable in favour of a person who is not a director of the company or a person related to the director;[156] or
- it pertains to an employee share scheme that satisfies the requirements of section 97;[157] or
- it is an offer, or one of a series of offers, for subscription, made in writing; and –
  - no offer in the series is accompanied by or made by means of an advertisement, and no selling expenses are incurred in connection with any offer in the series;
  - the issue of the shares under any one offer in the series is finalised within six months after the date that offer was first made;
  - the offer, or series of offers in aggregate, is or are accepted by a maximum of 50 persons acting as principals;

---

154 Defined in s 95(1)(l) as '. . . an offer, with or without a right to renounce in favour of other persons, made to any holders of a company's securities for subscription of any securities of that company, or any other company within the same group of companies'. It will therefore only be a non-public offer if the securities are listed. A similar offer in respect of unlisted securities as the statutory provisions will have to comply with s 96(1)(c).

155 S 96(1)(d). The JSE, however, requires the rights offer to be in respect of the issuer (see however s 95(1)(l)) and it must be renounceable (see definition of 'rights offer' *JSE Listings Requirements* (2009) 12). The letter of allocation for unlisted securities must be filed with the CIPC on CoR 46 (reg 49). The problem is that a letter of allocation is defined in s 95(1)(f) as the document which confers a right to subscribe for shares (not securities) in terms of a rights offer.

156 S 96(1)(e).

157 S 96(1)(f).

– the subscription price, including any premium, of the shares issued in respect of the series of offers, does not exceed, in aggregate, the prescribed amount;[158] and

– no similar offer, or offer in a series of offers, has been made by the company within the prescribed period[159] immediately before the offer, or first of a series of offers, as the case may be.

If the offer is made to people outside these categories, but only accepted by those within the categories, it would appear to be to the public, as the test is not who accepts the offer but to whom the offer is made.

6.1.1 *Offer and acceptance*

Any application form for securities must be attached to a prospectus or a written statement, unless the offer is not to the public or it is in connection with an underwriting agreement.[160] An allotment of securities must only be made on the application form attached to the prospectus, unless it can be shown that the applicant was in possession of the prospectus or was aware of its contents.[161] The application form for securities can also not be distributed unless it is accompanied by a registered prospectus.[162]

A prospectus cannot be issued more than three months after date of registration.[163] Offers can only be accepted (or allotments made) within four months of 'filing' of the prospectus.[164] Allotments may not be made until the beginning of

158 S 96(1)(f) and prescribed at R1 million (reg 45).

159 By the minister in the *Government Gazette* (s 96(2)). Prescribed at 12 months (reg 45). Since this offer does not have to be 'registered', it will not be possible to determine whether there have been previous offers. A minimum period is prescribed, which makes a multitude of offers possible.

160 S 99(5)–(6).

161 S 108(1).

162 S 99(5). The date when the prospectus was filed (not registered) must be indicated on the face of the form.

163 S 99(11).

164 S 107. There may be a significant time period between 'filing' and registration and the former date is operative in respect of the life of the prospectus.

the third day after the issue of the prospectus.[165] Allotments subject to a minimum subscription and a stock exchange listing are regulated in sections 108 and 111. Only an allotment in contravention of section 108(2) (minimum subscription) is voidable.[166]

6.1.2 *Advertisements and the 'tombstone' prospectus*

An offer includes an advertisement that satisfies all of the requirements of the Act with respect to a registered prospectus and is also subject to 'every provision of this Act relating to the making of a prospectus'.[167]

After a prospectus has been published, an advertisement can draw the attention of the public to such a prospectus, but that advertisement must include a statement clearly stating that it is not a prospectus and indicating where and how a person may obtain a copy of the full registered prospectus relating to that offer (a 'tombstone' prospectus).[168]

The advertisement must not contain any untrue statement.[169] It may also not, by express statement, omission or reasonable implication, *reasonably mislead* a person into reading the advertisement as if it were a prospectus, or mislead the reader about any material particular addressed in the prospectus relating to that offer.

The advertisement is subject the following sections of the Act[170] –

- section 102 – Consent to use of name in prospectus;
- section 103 – Variation of agreement mentioned in prospectus;
- section 104 – Liability for untrue statements in prospectus;

---

165 S 110.

166 S 109. Other contraventions are subject to s 218(1). They are only void if a court declares them to be so. Civil liability will result in terms of s 218(2). See ch 12.

167 S 98(1). It is not clear what is meant by 'making of a prospectus'. It would appear that the prospectus as the offer and the prospectus as document that must accompany the offer are confused (see e.g. s 99(2)). A 'registered prospectus' is defined in s 95(1)(m), but the word 'prospectus' is not defined. It is significant to note that, due to the express reference only to 'prospectus', the requirements for an advertisement do not apply to secondary offers in terms of s 101.

168 S 98(2)(a).

169 As defined in s 95(1)(p), (3) and (4).

170 S 98(2). Only the logic of the application of ss 102 and 104–106 is clear.

- section 105 – Liability of experts and others;
- section 106 – Responsibility for untrue statements in prospectus;
- section 107 – Time limit as to allotment or acceptance;
- section 108 – Restrictions on allotment;
- section 109 – Voidable allotment;
- section 110 – Minimum interval before allotment or acceptance; and
- section 111 – Conditional allotment if prospectus states securities to be listed.

The advertisement is not required to be filed (with the CIPC) to be effective, but if a statement clearly states that it is not a prospectus, as well as where and how a person may obtain a copy of the full registered prospectus relating to that offer is not included, the advertisement will be regarded as having been intended to be a prospectus issued by the person responsible for publishing or disseminating the advertisement.[171]

6.1.3 *Prospectus content and liability*

A prospectus may not be registered by the CIPC unless the requirements of the Act have been complied with and it has been filed for registration, together with any prescribed documents, within ten business days after the date of that prospectus.[172]

Section 100 requires a prospectus to contain the following –

- the prescribed 'specifications';[173] and

171 S 98(3)(b). The medium carrying the advertisement may therefore also be responsible. However, the provisions of s 98(3)(b) are not logical, as the person responsible for the prospectus is the person (whether directly or indirectly) making the offer of securities to the public. The prospectus is the document accompanying the offer, and if there is nobody offering, there is no prospectus. Non-compliance is not an offence; it is only an offence if the 'deemed' prospectus contains an untrue statement (s 214(1)(d)).

172 S 99(9). The CIPC must then notify the person who submitted the prospectus for registration (s 99(10)). A prospectus may not be issued more than three months after the date of its registration, and if a prospectus is so issued, it is regarded to be unregistered (s 99(11)).

173 Part C of Ch 4 of the regulations.

- all the information that an investor may reasonably require to assess the assets and liabilities, financial position, profits and losses, cash flow and prospects of the company in which a right or interest is to be acquired and to assess the securities being offered and the rights attached to them.[174]

It should be noted that the test is not based on 'the reasonable investor'; it is based on what an investor would reasonably require, which makes the test more subjective than objective. The 'prescribed' information depends on whether the offer is limited or general. It is presumably a general offer if it is not a limited offer, and the information for a general offer is as required in regulation 56.

A limited offer is when a prospectus offers unlisted securities of a company that are in all respects uniform with previously issued securities of the same company and the offer is being made only to existing holders of that company's securities, irrespective of whether the offer includes a right to renounce in favour of other persons.[175] The prospectus must include all of the material information concerning the offer, as provided for in regulation 55.

All prospectuses must include all material information[176] relating to the securities being offered, including, but not limited to, the information specifically required in Part C of Chapter 4 of the regulations, and must also include a narrative statement setting out the extent to which, and manner in which, the company has applied the principles of the King Report and Code and the reasons for any instance of not applying the recommended principles in the King Report and Code.[177]

As long as an IPO or other primary offering to the public of unlisted securities remains open, the person responsible for information in the prospectus must,

---

174 S 100(2).

175 If the offer is not renounceable it is obviously not an offer to the public: s 96(1)(c).

176 'Material' as defined in s 1 of the Act, when used as an adjective, means significant in the circumstances of a particular matter, to a degree that is of consequence in determining the matter or might reasonably affect a person's judgement or decision-making in the matter. This clearly differs from the substantive requirement in s 100 that the information that an investor may reasonably require must be provided in addition to the prescribed information.

177 Reg 54(1). If the proceeds of the issue are to be used to acquire a business undertaking or a property, the prospectus must disclose the information as stated in reg 54(2).

when that person becomes aware of it, correct any error, report on any new matter and report on any change of a matter included in the prospectus, provided they are relevant or material in terms of Chapter 4.[178]

Prospectus liability (for untrue statements)[179] follows the structure of the 1973 Act.[180] An 'untrue statement' includes a statement that is misleading in the form and context in which it is made[181] and is also an omission from a prospectus or written statement of any matter that, in the context, is calculated (likely) to mislead by omission, constitutes the making of an untrue statement in that prospectus or written statement, irrespective of whether this Act requires that matter to be included in the prospectus or written statement.[182]

Persons who authorised the issue of the prospectus (not the company) are liable to pay compensation for any loss or damage sustained by any person who acquired securities on the strength of the prospectus as a result of any untrue statement in the prospectus, or any report or memorandum appearing on the face of, issued with, or incorporated by reference into, the prospectus.[183]

This liability is in addition to any other liability under 'public regulation' or the common law.[184]

Delictual liability under common law for the director/s and/or experts and/or the company therefore remains, and the innocent party can claim rescission (if the misrepresentation is material) and/or damages from the director/s and/or experts and/or the company.[185] However, whether the innocent party can retain the shares (securities) and claim damages is uncertain, due to the *dicta*

178 S 100(11).
179 It is also an offence and the penalty is ten years (s 216(a) read with s 214(1)(d)(ii)).
180 E.g. Cilliers *et al Cilliers & Benade Corporate Law* (2000) 274 *et seq.*
181 S 95(1)(p).
182 S 95(4).
183 Ss 104 and 106. A director is, in addition, also liable in terms of s 77(3)(d)(ii) (s 104(2)).
184 S 95(6).
185 Nagel (ed) *Commercial Law* (2011) 27.

in *Houldsworth v City of Glasgow Bank*[186] and *In re Addlestone Linoleum Co*.[187] These *dicta*, based on the repealed principles of capital maintenance, should have been excluded by the Act.

6.2 Secondary market

A person must not make a *secondary offer* (to the public) of any securities of a company, or its subsidiary, unless the offer satisfies the requirements of section 101 of the Act.[188] A 'secondary offering' is an offer to the public of any securities of a company or its subsidiary, made by or on behalf of a person other than that company or its subsidiary.[189] The question is whether the exclusions in section 96 apply to the secondary market as well. Given the definition of 'offer to the public' in section 95(1)(h), which refers to 'securities to be issued', it would appear not. Therefore only section 95(2) would apply. The inclusion of the words 'a subsidiary' is strange, as a subsidiary is, for the purposes of the secondary market, a separate entity. In addition, as the company is not involved in the secondary market, it will also not have any influence on the trading of shares in its subsidiary. 'Offers not to the public' in section 96 also applies to the secondary market, but given the difference in the type of contract, only some of the exclusions will apply.[190] In addition, certain of the exclusions that can be used in the secondary market are suited only for the primary market.[191]

A person making a secondary offer must attach to it either the registered prospectus that accompanied the primary offering of those securities, plus any revisions required to address changes in any material matter since the date of registration of the prospectus, or a written statement that satisfies the requirements of section 101(4) to (6).[192] The prospectus becomes 'stale' four

---

186 (1880) 5 App Cas 317 (HL).

187 (1887) 37 Ch 191 (CA).

188 S 99(3)(b).

189 S 95(1)(m).

190 E.g. s 96(1)(g) – 'seed capital'.

191 S 96(1)(b) – 'sophisticated investor'.

192 S 101(2). There is no requirement for the registration of these changes, which means that any omissions or misrepresentations are actionable only under common law. The written statement or prospectus must accompany the offer; thus, if an oral offer is made, these documents must accompany such an offer. However, if the offer is made telephonically, it may be difficult to accompany the offer with a written document. The written statement

(*continued*)

months after 'filing'.[193] This would mean that if a subsequent secondary offer is made within the four months, the prospectus must accompany the offer. After that, the written statement is required. The provisions in respect of a prospectus obviously apply only if there has been a prospectus. If the primary offering was not to the public, and a prospectus was not required, the offer must be accompanied by the written statement.

The written statement must be filed for registration and it becomes stale three months after registration.[194] The information to be included in this 'prospectus lite' is set out in section 101(6). The reasons why this information is much less than that required by a prospectus are obvious, namely that the seller in the secondary market does not have all the information that the company has (in the primary market).[195]

The prospectus or written statement is not required if the offer is made by a person acting in the capacity of an executor or administrator of a deceased estate, or a trustee of an insolvent estate, or a liquidator or trustee referred to in the Administration of Estates Act,[196] or for the purpose of a sale in execution, or by public auction or by public tender.[197] The whole of section 101 is not applicable if the securities are listed on an exchange.[198]

---

must not contain any information other than that required in s 101, and must not be in letters smaller than the written offer or any document that accompanies the statement (s 101(5)).

193 S 107.

194 S 101(4).

195 What is less obvious is the requirement that it must state '. . . if any securities were issued by the company as partly paid-up shares under the Companies Act, 1973 (Act No. 61 of 1973), to what extent they are paid up'. Partly paid-up shares were never possible under the 1973 Act.

196 Act 66 of 1965.

197 It is not clear why a public auction and public tender are still excluded, as the potential for abuse was clearly shown under the 1973 Act.

198 S 101(1). Non-compliance does not make the offer void or voidable. Apart from personal liability in terms of s 218(2), the transaction will only be void if a court declares it void (s 218(1)).

If a written statement (as in the case of a prospectus) is issued and it contains an 'untrue statement',[199] it is an offence.[200] It is, however, interesting to note that there is no statutory criminal liability if a written statement is required in terms of section 101 but it is not issued.[201] However, such an 'untrue statement' will not attract statutory civil liability in terms of the prospectus provisions as section 104 only refers to liability for untrue statements in a prospectus and the liability of, amongst others, directors in section 104 cannot apply to a written statement. Liability will therefore only be under common law for the delict of misrepresentation.[202]

It is accepted that the common law principles in *Vlakspruit Landgoed (Edms) Bpk v J Mentz (Edms) Bpk*[203] would continue to apply. These principles are that the intention of the legislature with section 141 of the 1973 Act was to regulate the 'hawking' of shares[204] and not to interfere with transactions where the intentions of the parties in the sale of the shares are to merely place the control of the assets of the company in different hands. Therefore an offer to sell shares in a company whose only asset is, for example, a house, should not fall under section 101. These principles would obviously not apply if the 'securities' are not shares.

---

199 As defined in s 95(1)(p) and (4).

200 S 216(a) read with s 214(1)(d)(ii) and the penalty is ten years.

201 It would ironically therefore be better not to issue a s 101 statement rather than issuing one containing an untrue statement.

202 See Nagel (ed) *Commercial Law* (2011) 27.

203 1977 (1) SA 780 (T) 786.

204 As also described in the short title of s 80*bis* of the Companies Act 46 of 1926, the predecessor of s 141 of the 1973 Act.

Chapter 4 Corporate capital

1 Background

The Companies Act[1] is wholly based on solvency and liquidity and any remnant of the capital maintenance system on which the Companies Act of 1973[2] was based is now removed.

1 Act 71 of 2008 (the Act/2008 Act).
2 Act 61 of 1973 (1973 Act).

A company satisfies the solvency and liquidity test at a particular time if, considering all reasonably foreseeable financial circumstances of the company at that time –

- the assets of the company[3] are equal to or exceed the liabilities of the company as fairly valued; *and*
- it appears that the company will be able to pay its debts as they become due in the course of business for a period of 12 months after the date on which the test is considered.[4]

In applying the solvency and liquidity test –

- only accounting records[5] according to section 28 and financial statements according to section 29; and
- any fair valuation of the company's assets and liabilities, or other valuation that is reasonable in the circumstances.

are used in the computation.[6]

It should be noted that the test in this regard is objective (in respect of solvency) as well as subjective in that it appears that it will remain liquid (liquidity for the following 12 months).[7]

2 Financial assistance

The board may, except to the extent that the Memorandum of Incorporation (MOI) provides otherwise, authorise the company to provide *financial assistance* by way of a loan, guarantee, the provision of security or otherwise, to any person *for the purpose of, or in connection with*, the subscription of any option, or any *securities* issued or to be issued by the company or a related or inter-related company, or for the *purchase* of any securities of the company or

3 The original solvency and liquidity test in respect of companies as a group has fortunately been abandoned (see s 4 before amendments by the Companies Amendment Act 3 of 2011).
4 Which is the time the decision is taken by the board.
5 As defined in s 1.
6 S 4(1)–(2). See also Van der Linde 2009 *TSAR* 224.
7 See the different requirements for 'distributions' in par 4.

a related or inter-related company if doing so is in accordance with any conditions or requirements of the MOI, and the financial assistance is either –

- pursuant to an employee share scheme under section 97; or
- pursuant to a special resolution of the shareholders, adopted within the previous two years, which approved such assistance either for the specific recipient, or generally for a category of potential recipients, and the specific recipient falls within that category, *and*
- the board is satisfied that –
  - immediately after giving the financial assistance, the company would satisfy the solvency and liquidity test; and
  - the terms under which the assistance is proposed to be given are fair and reasonable to the company.[8]

It is not clear how the board (as 'agents') can authorise the company (represented by the board) to provide financial assistance. The correct construction should have been that the company authorises the board (as agents of the company) because the contracting party, with the rights and obligations, remains the company. See however section 66(1), which appears to change this common law position as the board is now the ultimate organ in the company.[9] Financial assistance is now the norm, unless the MOI excludes or limits it. If the MOI is silent, the company/board therefore has the power to provide financial assistance. The 'authorisation' must obviously be by board resolution.

It should be noted that the test in this regard is a subjective and objective test in the sense that the board must be satisfied that the company will satisfy the solvency and liquidity test immediately after giving the financial assistance. If the company becomes insolvent or illiquid (otherwise than 'immediately after' the transaction) after the board 'has been satisfied', it will not affect the transaction or the liability of the directors.

What 'fair and reasonable' is, will depend on the facts. If the board misdirects itself, also in respect of the test that the financial assistance must be 'fair and

---

8 S 44(3).

9 See ch 7.

reasonable' to the company, section 44 is not complied with, and the resolution and financial assistance could be void and it could be a breach of fiduciary duties with liability as in terms of section 77.[10] The requirement is that the 'terms' of the financial assistance must be fair and reasonable to the company, as opposed to the 'transaction' which could be for the benefit of the company. This distinction is obviously very important as a loan with terms that are not fair and reasonable could have the effect that the *result* of the loan, for example to get a shareholder with capital, is fair and reasonable. The following factors should be taken into account to determine whether the financial assistance was 'fair and reasonable' –

- whether, in view of the financial position of the parties, the financial assistance should have been provided at all;
- in the case of a loan, whether security has been or should have been provided and whether such security is adequate;
- the consideration for the loan or security, including interest or other benefit;
- the term of the loan or security;
- the manner of repayment of the loan or discharge of the security.[11]

2.1 'Financial assistance'

'Financial assistance' does not include the lending of money in the ordinary course of business by a company whose primary business is the lending of money[12] but includes a loan, guarantee, the provision of security *or otherwise*. The Act does not define what financial assistance is; therefore the common law definitions in terms of previous legislation must still be used to determine whether there was financial assistance.

The basic test is to determine whether the company was impoverished.[13] This will entail that the 'financial' status before and after the transaction is evaluated (impoverishment in the narrow sense). If the company is in a worse financial

---

10 See ch 7.

11 Based on s 37 of the 1973 Act.

12 S 44(1).

13 The 'impoverishment test' as formulated in *Gradwell v Rostra Printers* 1959 (4) SA 419 (A).

position after the transaction, it is impoverished. This will happen, for example, if the company registers a bond over its property to secure a bank loan made by the buyer of the shares,[14] or if the company creates a fictitious debt (not based on a *bona fide* transaction) in favour of the seller.[15] These cases also illustrate that financial assistance can be given to the buyer as well as the seller.

If there is impoverishment, it can be accepted that there is financial assistance. However, if the company is not impoverished in a financial sense as illustrated above, there may still be financial assistance if it is worse off in a commercial sense. So, for example, if a company has cash which it lends to a person to buy shares, it is not impoverished in the financial sense of the word, as its assets will be the same – instead of the cash it now has a claim against the third party. However, it is impoverished because commercially it is in a less favourable position. Instead of the cash, which is certain, it now has a loan which is uncertain as to repayment, as the borrower may not be able to repay it and the company will not have the cash to utilise (impoverishment in the wide sense).[16]

A correct application of the impoverishment test will also indicate that a mere reorganisation of the liabilities of a company will not constitute impoverishment (at least in the narrow sense). If a shareholder has a loan account against the company (the company owes the shareholder money) and upon selling his shares insists that the company secures the debt by way of a bond over the company's property and that the loan account be paid in instalments over a period, the company's liabilities remain the same. There is also no impoverishment in the wide sense, because the company is now certain as to the repayment conditions and the term over which repayments will be made, compared to a loan account which is, usually, payable on demand.[17]

---

14 *Karroo Auctions v Hersman* 1951 (2) SA 33 (E).

15 *Albert v Papenfus* 1964 (2) SA 713 (E).

16 *Jacobson v Liquidator of M Bulkin & Co* 1976 (3) SA 781 (T).

17 *Karnovsky v Hyams* 1961 (2) SA 368 (W); *Bay Loan Investment v Bay View* 1972 (2) SA 313 (C) 317.

2.2 'For the purpose of, or in connection with'

If the (sole or main) purpose of the transaction is to give financial assistance, then section 44 will be activated. The question is however what the ambit of 'in connection with' is and whether the causal link is indefinite. The words 'in connection with' appear to have been inserted in order to cover a situation where, although the actual purpose of the company in giving financial assistance might not have been established, its conduct nevertheless stood in such close relationship to, for example, the purchase of its shares that, substantially if not precisely, its conduct was similar to that of a company which gave the forbidden assistance with the purpose described in the section. If both parties knew that the '. . . ultimate intention [of the transaction was] regarding the purchase of shares in the company. . .' it would be 'in connection with'.[18]

Section 44 applies not only to sideways transactions (that is, assistance given in order to acquire securities in the company) and upwards transactions (that is, assistance given in order to acquire securities in the holding company) but also downwards (that is, to a subsidiary of the company, as that would be a 'related company' in respect of the company). Therefore financial assistance can be given to acquire shares in a company in which the first company holds 50% of the votes. However, as soon as the votes exceed 50%, it becomes a related company and section 44 will apply in respect of future transactions. [19]

2.3 'Securities'

The term 'securities' includes shares but is much wider, and also includes, *inter alia*, '. . . debentures or other instruments . . . as well as options to subscribe for securities'.[20] The ambit of the term is very wide and careful consideration should be given if options are granted to acquire unissued shares at a price below market value or if guaranteed debentures are issued.

---

18 *Lipschitz v UDC Bank Ltd* 1979 (1) SA 789 (A).

19 See the definition of 'related' in s 2 and 'inter-related' in s 1.

20 S 1. See also ch 3.

2.4 Liability and validity of contract

A resolution by the board to provide financial assistance, or an agreement with respect to the provision of any such assistance, is void to the extent that the provision of that assistance is inconsistent with section 44 or with a provision of the MOI. An accessory indivisible contract would also be void.[21] The disjunctive 'or' is not logical, as it implies that either the resolution or the agreement will be void. Directors[22] who were present and did not vote against the resolution can be held liable only for any loss, damage or costs sustained by the company.[23] Liability in respect of third parties will be in terms of section 218(2).[24]

If the board of a company has acted in contravention of section 44, the company, or any director who is, or may be, liable, may apply to a court for an order setting aside the decision of the board. The court can order that the decision is set aside in whole or in part, absolutely or conditionally, and make any further order that is just and equitable, including an order to rectify the decision, reverse any transaction, or restore any consideration paid or benefit received by any person in terms of the decision of the board. The court can also order the company to indemnify any director who is or may be liable for liability or costs.[25]

3 Company (insider) loans

3.1 General

The board may, except to the extent that the MOI provides otherwise, and subject to specific conditions therein, authorise the company[26] to grant a loan to, or secure a debt or obligation of, or otherwise provide direct or indirect

---

21 S 44(5).

22 'Directors' here has the extended meaning, as in s 77(1), which includes members of board committees, and not the meaning as in s 1.

23 Ss 44(6) and 77(3)(e)(iv).

24 See ch 12.

25 S 77(5). Liability is joint and several with any other person who is or may be held liable for the same act (s 77(6) and see ch 7).

26 See par 2.

financial 'assistance' to a director of the company or of a related or inter-related company or corporation, if the board is satisfied that –

- immediately after giving the assistance, the company would be in compliance with the solvency and liquidity test; and
- the terms under which the assistance is proposed to be given are fair and reasonable to the company.[27]

It should be noted that the test in this regard is a subjective and objective test in the sense that the board must be satisfied that the company will satisfy the solvency and liquidity test immediately after giving the financial assistance. If the company becomes insolvent or illiquid (otherwise than 'immediately after' the transaction) after the board 'has been satisfied', it will not affect the transaction or the liability of the directors.

'Financial assistance' includes lending money, guaranteeing a loan or other obligation, and securing any debt or obligation, but does not include lending money in the ordinary course of business by a company whose primary business is the lending of money or an amount to defray the person's expenses for removal at the company's request. An accountable advance to meet legal expenses in relation to a matter concerning the company or for anticipated expenses to be incurred by the person on behalf of the company is also excluded.[28]

The financial assistance must be pursuant to –

- an employee share scheme (section 97); *or*
- a special resolution of the shareholders within the previous two years that had approved such assistance, either for the specific recipient, or generally for a category of potential recipients, and the specific recipient falls within that category.[29]

A resolution by the board to provide financial assistance, or an agreement with respect to the provision of any such assistance, is void to the extent that the provision of that assistance is inconsistent with section 45 or with a provision of the MOI.[30]

---

27 See par 2.4 in respect of consequences and liability and par 2 in respect of 'fair and reasonable'.

28 S 45(1).

29 S 45(3).

30 S 45(6). Non-compliance will result in director's civil liability under s 77(3)(e)(v).

A company satisfies the solvency and liquidity test at a particular time if, considering all reasonably foreseeable financial circumstances of the company at that time –

- the company's total assets equal or exceed its total liabilities; and
- it appears that the company will be able to pay its debts as they became due in the course of business for a period of 12 months after the date on which the test is considered.[31]

The board must give written notice of that resolution to all shareholders, unless every shareholder is also a director of the company, and to any trade union representing its employees, within ten business days after the resolution, if the total value of all loans, debts, obligations or assistance contemplated in that resolution, together with any previous such resolution during the financial year, exceeds one-tenth of 1% of the company's net worth at the time of the resolution, or within 30 business days after the end of the financial year, in any other case.[32] Giving notice to shareholders is odd as they will be required to pass the special resolution. [33]

Frequent 'cash sweeps' between companies in a group will obviously require multiple board resolutions. This is when excess cash is transferred from one company to another company that needs the cash. The only way that this can be done is by loans. Delegation of the powers of the board in terms of sections 66(1) and 72(1) may be necessary to ensure compliance. Such delegations obviously do not exonerate directors from their responsibilities.

3.2 Liability and validity of contract

A resolution by the board to provide financial assistance, or an agreement with respect to the provision of any such assistance, is void to the extent that the provision of that assistance is inconsistent with section 45 or with a provision of

---

31 S 4(1). See also ch 4.

32 S 45(5).

33 Non-compliance will not make the resolution or agreement void in terms of s 45(6), as it is an action as a result of the resolution.

the MOI. An accessory indivisible contract would also be void.[34] The disjunctive 'or' is not logical, as it implies that either the resolution or the agreement will be void. Directors[35] who were present and did not vote against the resolution can be held liable only for any loss, damage or costs sustained by the company.[36] Liability in respect of third parties will be in terms of section 218(2).[37]

4 Company distributions

4.1 General

A 'distribution'[38] is defined in section 1 and is –

> 'a direct or indirect –
>
> (a) transfer by a company of money or other property of the company, other than its own shares, to or for the benefit of one or more holders of any of the shares, or to the holder of a beneficial interest in any such shares, of that company or of another company within the same group of companies, whether –
>
> (i) in the form of a dividend;
>
> (ii) as a payment in lieu of a capitalisation share as contemplated in section 47;
>
> (iii) as consideration for the acquisition –
>
> (aa) by the company of any of its shares as contemplated in section 48; or
>
> (bb) by any company within the same group of companies, of any shares of a company within that group of companies; or
>
> (iv) otherwise . . . of another company within the same group of companies, subject to section 164(19);
>
> . . .
>
> (c) forgiveness or waiver by a company of a debt or other obligation . . . by one or more holders of any of the shares or of . . . another company within the same group of companies.

---

34 S 45(6).

35 'Directors' here has the extended meaning, as in s 77(1), which includes members of board committees, and not the meaning as in s 1.

36 Ss 45(7) and 77(3)(e)(iv).

37 See ch 12.

38 Colloquially referred to as a 'dividend'.

The distributions are therefore –

- dividends (in cash or in kind);
- payment in cash instead of capitalisation shares;[39]
- the repurchase of shares by the company;
- a debt incurred to or for the benefit of a holder of any of the shares; or
- cancellation or waiver of debt owed to the company in respect of a holder of any of the shares.[40]

It should however be noted that if a holding company buys shares in an existing subsidiary or writes off a debt of that subsidiary that is unrelated to a share transaction, it is also a distribution. Why such a transaction must comply with, *inter alia*, the solvency and liquidity requirements of the Act, is not clear.[41]

A company must only make any 'proposed distribution' if –

- the distribution is pursuant to an existing legal obligation of the company,[42] or a court order; or
- the distribution is authorised by the board of the company by resolution;

and

- it reasonably appears that the company will satisfy the solvency and liquidity test immediately after the distribution; and
- the board resolution acknowledges that the board has applied the solvency and liquidity test and reasonably concluded that the company will satisfy

---

39 Capitalisation shares appear to be excluded from s 46 due to the words '. . . transfer, by a company of money or other property of the company, other than its own shares . . .'

40 It is unclear whether there is a distinction between a 'shareholder' as defined in s 1 and a 'holder of shares', as in common law a person can be the owner or have rights over a share without being the 'registered' holder (see also ch 3).

41 'A direct or indirect . . . transfer . . . of money . . . as consideration for the acquisition . . . by any company within the same group of companies of any shares of a company within that group of companies . . .' (definition of 'distribution' in s 1). See s 45 in respect of 'cancellation' of loans in a 'group'.

42 E.g. in terms of the 'righs' in respect of shares.

that test immediately after completing the proposed distribution (acknowledgement).[43]

The distribution must then be fully carried out.[44] If the distribution is not complete within 120 business days after acknowledgement by the board, the board must make a new acknowledgement in respect of the remaining distribution.[45]

The distribution is made by board resolution. The model MOI (CoR 15.1A and B) does not contain any provision as to control by the shareholders as was the case under the 1973 Act, where the board only proposed the dividend (distribution) and the shareholders approved it. The payment of, for example a dividend and the source of the payment, is therefore now at the exclusive discretion of the board unless the MOI provides otherwise. Section 46 is an unalterable provision and if a requirement is added that the directors propose the dividend but that it must be approved by the shareholders, it will have to comply with section 15(2)(a) in respect of altering unalterable provisions.[46] The same principles should apply if the MOI were to include a provision as to the source of the distributions (such as only out of profits for the particular year) or how the calculation must be made (such as that losses of the previous year must be taken into account).

4.2 Liability and validity of contract

A distribution prohibited by section 46 is not void, unless a court declares it void.[47] Directors[48] can be held liable only for any loss, damage or costs sustained by the company.[49]

A director of a company who was present and did not vote against the resolution despite knowing the distribution is contrary to section 46, may be held

---

43 S 46.

44 S 46(2).

45 S46(3).

46 See ch 2.

47 S 218(1) provides that an action that is 'prohibited' will only be void or voidable if declared as such by the Court.

48 'Directors' here has the extended meaning as in s 77(1), which includes members of board committees, and not the meaning as in s 1.

49 S 46.

liable in accordance with the principles of the common law relating to delict for any loss, damages or costs sustained by the company as a consequence.[50]

The liability of a director in terms of section 77(3)(e)(vi) as a consequence of the director having failed to vote against a distribution in contravention of section 46 arises only if, immediately after making all of the distributions, the company does not satisfy the solvency and liquidity test, and if it was unreasonable at the time of the decision to conclude that the company would satisfy that test after making the distributions. The *quantum* of the liability is the maximum of the difference between the value by which the distribution exceeded the amount that could have been distributed without causing the company to fail to satisfy the solvency and liquidity test and the amount, if any, recovered by the company from the persons to whom the distribution was made.[51] Liability in respect of third parties will be in terms of section 218(2).[52]

5 Acquisition of shares

5.1 General

The acquisition by a company of its own shares is a distribution which must comply with the requirements set out above and is effected, usually, by a board decision.[53] An acquisition in terms of a shareholder's dissenting rights is not subject to the requirements of section 48,[54] nor is a redemption by the company of any redeemable *securities* in accordance with the terms and conditions of those securities.[55] Section 37(5)(b) provides expressly that redeemable shares are subject to section 48. Redemption of securities other than shares (for example debentures) should not be covered by section 48 as it is not a capital issue. The exclusion of redeemable shares (as *species* of 'securities') seems unnecessary as it is a distribution and is regulated under section 46.

---

50 S 77(3)(e)(vi). Unlike s 44, the resolution or transaction does not have to be declared void for the liability to follow. See ch 7.

51 S 77(4).

52 See ch 12.

53 S 48(2). See also ch 3 and Van der Linde 2010 *TSAR* 288.

54 See ch 12

55 S 48(1).

If the shares are to be acquired from a director or prescribed officer of the company or a person related to that director or prescribed officer, the board decision must be approved by a special resolution of shareholders.[56] If the acquisition (alone or together with other transactions in an integrated series[57] of transactions) has the effect that more than 5% of the shares of a particular class is acquired, the acquisition must be done by way of section 114 (scheme of arrangement) and section 115 (fundamental transaction).[58]

A subsidiary (or subsidiaries) can, by board decision of the subsidiary/ies also acquire shares in the holding company, but the aggregate number of shares held by or on behalf of the subsidiary (or subsidiaries) may not exceed 10% of the number of any class of shares. As long as such subsidiaries remain subsidiaries, no voting rights attached to those shares may be exercised in respect of the shares so held. This has an effect on the percentage shareholding of other shareholders, but it is not addressed in this section. For example, if A holds 10 shares out of 100 issued shares and a subsidiary acquires 10 of the remaining shares, A will now have 11% of the votes (10 out of 90) instead of the previous 10%.

The existing problem with the subsidiary acquiring its own shares other than in terms of the Act, by, for example, a dividend *in specie* declared by the holding company, is also not addressed. This can happen if the holding company for example declares a dividend in specie of shares held by it (which would include shares held in the subsidiary). In this manner the subsidiary, as shareholder in the holding company, would then acquire shares in itself.

It can also happen that a company (S) holds more than 10% of the shares in (H). Through an acquisition of shares in F by H, F now becomes a subsidiary and the maximum shareholding is exceeded. There is no indication, other than perhaps in section 218, what the effect of this is.

---

56 S 48(8)(a). This is a potential *Turquand* and/or s 20(7) situation as 'related parties' are not included in the express exclusions in s 20(7). See ch 5.

57 Transactions will be part of a series or integrated as defined in s 41(4)(b) (s 1). See ch 3.

58 S 48(8)(b). Therefore a special resolution is also required in addition to the board resolution. See also ch 10.

The company may not acquire its own shares, and a subsidiary of a company may not acquire shares of the holding company, if, as a result of that acquisition, the only issued shares would be shares held by one or more subsidiaries of the company, or convertible or redeemable shares.[59] Why convertible or redeemable shares are singled out is uncertain. The exception in respect of shares held by subsidiaries is superfluous, given the general restriction that the aggregate of shares acquired by subsidiaries must not exceed 10%.

The acquisition in terms of section 48 will be by way of an offer made by the company to the shareholders, which offer the shareholders can accept[60] or reject. There is no requirement that the offer must be made to all the shareholders or that *pro rata* offers and/or acceptances, based on existing interests in the company, must be made. The possibility for abuse is therefore clear, and remedies may be limited to relief based on oppressive or prejudicial conduct.[61]

5.2 Liability and validity of contract

A contract with a company providing for the acquisition by the company of shares issued by it is enforceable against the company (the burden of proof lies on the company), except if the company cannot execute the contract without being in breach of section 48(2) to (3).[62] Whether the whole contract or only that which is in breach of the provisions is 'unenforceable' is unclear.

If a company acquires any shares contrary to section 46 or 48,[63] it may apply to a court for an order reversing the acquisition. The court may order the person from whom the shares were acquired to return the amount paid by the company, or order the company to issue to that person an equivalent number of shares of the same class as those acquired.[64] Application must be made not more than two years after the acquisition (presumably the last transaction if

---

59 S 48(3).

60 Partial acceptance of the offer will depend on the terms of the offer.

61 S 163. See ch 12.

62 S 48(4).

63 Not in the case where the subsidiary acquires shares in its holding company.

64 S 48(6). See ch 5.

there is a series of transactions not completed at the same time). The *bona fide* third party whose shares are acquired could be prejudiced by this 'reversal' if he does not have the capital to pay back. Apart from ascertaining whether there are restrictions in the MOI, the third party (even as shareholder) cannot ascertain whether the other requirements, such as solvency and liquidity under section 46, have been complied with. Due to the fact that he is a shareholder, internal requirements could not be covered under the modified *Turquand* rule and/or section 20(7) to (8).[65]

If a director is present at a meeting, or participates in the making of a decision in terms of section 74 and fails to vote against it, despite knowing that the acquisition is in contravention of section 46 or 48, that director is liable for any loss, damages or costs sustained by the company as a direct or indirect consequence thereof.[66] Liability in respect of third parties will be in terms of section 218(2).[67]

6 Capitalisation shares

A company can issue capitalisation shares to shareholders for no consideration on a *pro rata* basis, unless the MOI provides otherwise. Capitalisation shares may be issued across class, unless the MOI provides otherwise.[68] The board can also decide that the receiver is entitled, at his discretion, to receive cash in lieu of the shares, but subject to the fact that such payment, if accepted by all the offerees, would comply with the solvency and liquidity test in terms of section 46 (Distributions).[69] The sources for the payment of capitalisation shares are not stipulated, and apparently the solvency and liquidity requirements do not apply, unless there is a cash alternative.

---

65 See ch 5.
66 S 77(3)(e)(vii). See ch 7.
67 See ch 12.
68 S 47(1).
69 S 47(2).

Chapter 5 Capacity and representation

1 Capacity of a company

From the date and time that the incorporation of a company is registered, as stated in its Registration Certificate, the company is a juristic person. It exists continuously until its name is removed from the Companies Register in accordance with the Companies Act.[1] It has all the legal powers and capacity of an individual, except to the extent that a juristic person is incapable of exercising such powers, or having such capacity, or to the extent that the Memorandum of Incorporation (MOI) limits, restricts or qualifies the purposes, powers or activities of the company.[2] Limitations by the Act are not mentioned.[3]

2 Doctrine of constructive notice

A person is not deemed to have notice or knowledge of the contents of any document relating to a company (*inter alia* the MOI) merely because the document has been filed or is accessible for inspection at an office of the

1 Act 71 of 2008 (the Act/2008 Act).
2 Ss 19(1) and 20(1).
3 See e.g. s 112.

company.[4] However, a person is deemed to have notice and knowledge of any provision of a company's MOI under section 15(2)(b) and (c) ('RF'-company),[5] if the company's Notice of Incorporation or a Notice of Amendment has drawn attention to the provision, as contemplated in section 13(3).[6] That person is also deemed to have knowledge of the effect of section 19(3) on a personal liability company.[7]

3 Validity of company actions: '*ultra vires*'

An act of a company is not void solely because –

- the company did not have the capacity to perform the act because the MOI limits, restricts or qualifies the purposes, powers or activities of the company; or
- the directors did not, as a consequence of a limitation, restriction or qualification, have the authority to perform that act on behalf of the company.[8]

No person may rely on a limitation, restriction or qualification in any legal proceedings to claim that the company's action is void, except proceedings –

- between a company and its shareholders, directors or prescribed officers; or
- between the shareholders and directors or prescribed officers.[9]

'No person' here could even include a *mala fide* person, that is somebody who had actual knowledge that the act was beyond the capacity of the company because she was for example a shareholder of the company. If the company's

---

4 S 19(4).
5 Restrictive or procedural requirements in addition to the general requirement for amendment of the MOI, as well as a prohibition on amendments. See ch 2.
6 S 19(5). The company with restrictive conditions ('RF' company). See ch 2.
7 S 19(5)–(6). S 19(3) provides that directors and past directors are jointly and severally liable, with the company, for any debts and liabilities of the company as are or were contracted during their respective periods of office.
8 S 20(1)(a).
9 S 20(1)(b).

capacity is restricted and it is marked as an 'RF' company, imputed knowledge of the restrictions should likewise not void the contract.[10]

If a company's MOI limits, restricts or qualifies the purposes, powers, or activities of the company, the shareholders may ratify any action by the company that is inconsistent with these limits, restrictions or qualifications (except for an act in contravention of any provision of the Act) by a special resolution.[11] This ratification will only have an effect 'internally'[12] as the contract is valid (not void) under all circumstances in respect of 'third' parties, to the outside, irrespective if that third party is also an 'insider'.

One or more shareholders, directors or other interested persons may apply to the High Court for an appropriate order to restrain the *company* from doing anything inconsistent with any of these limits, restrictions or qualifications, without prejudice to any rights to damages of a third party who –

- obtained those rights in good faith; and
- did not have actual knowledge of the limit, restriction or qualification.[13]

Good faith would obviously imply an absence of knowledge; therefore the conjunctive 'and' in respect of actual knowledge is confusing.

A third party who obtained rights in good faith and did not have actual knowledge of the limit, restriction or qualification 'retains rights'. It is uncertain how the *bona fide* third party will obtain 'rights' if the action is restrained (for example, before the contract is concluded). If it is accepted that there is a contract, the contract is valid until declared void or voidable by a court.[14] A contract with an insider, such as a shareholder who obviously knows about limits, restrictions or qualifications, can still be restrained, but that person cannot be *bona fide* and assert that he did not have knowledge of the limit,

---

10 See e.g. s 36 of the Companies Act 61 of 1973 (1973 Act) for a similar position on similar wording. See Cilliers *et al Cilliers & Benade Corporate Law* (2000) 186.

11 S 20(2). This ratification will only have an effect 'internally' as the contract is valid (not void) to the outside under all circumstances.

12 Between the company, directors and shareholders in that capacity.

13 S 20(5).

14 S 218(1).

restriction or qualification and therefore cannot claim damages. 'Actual knowledge' is required. The definition of 'knowledge' in section 1[15] includes actual knowledge but also extends the definition of 'knowledge'. The extended definition will obviously then not apply here. Suspicious circumstances, which should have put the third party on alert, is still knowledge in terms of the definition in s 1 but not actual knowledge, and the person will not be protected by section 20(5). Section 19(5) provides that the person must be regarded as having had notice and 'knowledge' of the provisions in respect of RF companies. This knowledge is clearly 'actual' knowledge in terms of the definition of 'knowledge' in section 1.

Each shareholder of a company has a claim for damages against any person who intentionally, fraudulently or due to gross negligence[16] causes the company to do anything inconsistent with the Act or with a limit, restriction or qualification, unless that fraudulent act or act with gross negligence (in respect of a limit, restriction or qualification) has been ratified by the shareholders.[17] 'Ordinary' negligence is not mentioned, presumably because gross negligence includes ordinary negligence and also because ordinary negligence can, under common law, always be ratified. Fraudulent actions, except for contraventions of the Act, can apparently now be ratified by special resolution, which is a departure from the common law.

This remedy elevates the proprietary right of a shareholder to a direct financial right in the sense that the shareholder can sue the perpetrators directly on the basis of company law principles, rather than on principles of delict and

---

15 S 20(5). S 1 defines 'knowing', 'knowingly' or 'knows' as –
'when used with respect to a person, and in relation to a particular matter, means that the person either –
(a) had actual knowledge of that the matter or;
(b) was in a position in which the person reasonably ought to have –
(i) had actual knowledge;
(ii) investigated the matter to an extent that would have provided the person with actual knowledge; or
(iii) taken other measures which, if taken, would reasonably be expected to have provided the person with actual knowledge of the matter.'

16 S 218(2) would be an easier alternative as mere negligence would suffice. See ch 12.

17 S 20(6). See also s 20(3).

actually ignores the separate entity of the company.[18] The absence of any indication that there must be a causal link ('each shareholder of a company has a claim for damages against any person who . . . causes the company . . .') is significant, and will clearly lead to a multiplicity of actions. This right is apparently in addition to the remedies in, *inter alia*, Parts B and D of Chapter 7 and any common law remedies.[19]

4 Representation

4.1 General

Subject to the provisions of the Act, the general principles of the common law in respect of agency and representation should still apply. One issue that will limit the application of the common law principles is the absence of the doctrine of constructive notice, which will lessen the protection afforded to the company.[20]

Section 20(1)(a) provides that the contract will be valid (that is, not void) only if the directors had no authority to authorise the action by the company *only* as a result of the limitation, restriction or qualification on the capacity of the company. Therefore, if there is a lack of authority on any other basis (even a restriction in authority based on the capacity), section 20(1)(a) does not apply, and the company is not bound by the contract, even if the third party is *bona fide*.[21] The problems of the 1973 Act were unfortunately transferred to the 2008 Act with this provision. In the first instance it is a question whether a company (like a natural person) can in fact give authority for something outside its capacity. The common law principles of authority do not allow it because the rights and duties from the contract go to the principal. In the second instance the question is whether the authority can be restricted with reference to capacity. Therefore, whether the MOI can contain a provision that directors do not have the authority to conclude contracts beyond the capacity of the

---

18 See ch 12.

19 S 218(3). S 165 expressly abolishes any common law derivative action.

20 However, s 19(5)–(6) provides for a qualified doctrine of constructive notice (see par 2).

21 Based on the basic common law principles of authority (see e.g. Cilliers *et al Cilliers & Benade Corporate Law* (2000) 188 *et seq* and authorities quoted there).

company, which is in actual fact a restriction on authority (purely with reference to capacity) and an action in conflict with that provision will be an action beyond the authority and not beyond the capacity *per se*. Thirdly, it is not clear if the provision applies only if the directors act as a board or whether also when a single director acts.

A company cannot participate in the legal sphere as legal subject on its own, because it cannot sign contracts or drive a car (as a natural person can). It must therefore, due to its nature, act 'to the outside' by concluding contracts through agents who will, as general rule, be natural persons.[22] There is nothing sinister about the agency principles in company law and if the basic rules are applied, it is quite simple. The rules are that there are always three parties involved (namely the principal, the agent and the third (contracting) party). The agent has the consent (authority) to act for and on behalf of the principal, and the contract comes into existence between the principal and the third party.[23] It should be remembered that if the agent acts outside her mandate (authority) the principal is not bound. The third party can obviously not accept that the agent is acting within her authority and has to make certain that it is indeed the case. If the agent acts outside her authority, the principal will not be bound unless the principal retrospectively ratifies the lack of the necessary authority.

The one aspect that may complicate matters is that the company can act also 'to the inside', through organs. For example, if a company's agent acts outside his authority, the company can, like a natural person as principal, ratify the lack of authority. This is done by an organ of the company, because if the organ acts, the company acts. (The hand of a natural person is an organ and if it acts, the natural person acts. It does not need authority to act for and on behalf of the natural person.) Therefore, whereas an agent of a company must act within the scope of his authority, the organ does not have or need 'authority'. Confusion can arise because a 'functionary' in a company can act as organ and agent.

---

22 E.g. directors must be natural persons (s 69(7)(a)).

23 See Nagel (ed) *Commercial Law* (2011) 157 *et seq* about other intricacies of agency law.

4.1.1 *Organs*

The organs of the company are ordinarily the shareholders acting in a meeting (or the equivalent thereof like unanimous consent or informal meetings in terms of section 60),[24] and the board of directors. However, in terms of the Act there are two additional organs, namely the social and ethics committee (SEC)[25] and the audit committee (AC).[26] These committees are appointed by the shareholders and therefore have original powers as conferred in the Act. The powers and functions of the organs in a company are as determined by the Act and this division of powers is absolute and original, in the sense that the one organ cannot usurp the powers and functions of the other. However, if there is no allocation of a particular power, or the MOI or Act does not expressly provide which organ much exercise a particular power, the question will be which organ has 'residual' power; alternately the question is, which organ has the 'ultimate' powers. The position was that the shareholders in meeting had the inherent and residual powers to ratify acts that are *intra vires* the company but *ultra vires* the powers of the directors, and to exercise a power if it is unclear which organ has the power as they originally have all the powers and functions based on the principles of partnership.[27] This has now changed with section 66(1) of the Act which provides –

> '**Board, directors and prescribed officers.**—(1) The business and affairs of a company must be managed by or under the direction of its board, which has the authority to exercise all of the powers and perform any of the functions of the company, except to the extent that this Act or the company's Memorandum of Incorporation provides otherwise.'

It is accepted that the word 'business' refers to the dealings between the company and outsiders, and that 'affairs' is a much wider term that encompasses

---

24 See ch 6.

25 S 72. Although s 72 lists the SEC under a 'board' committee, the regulations provide that the first SEC must be appointed by the board and thereafter by the 'company' (reg 43). See also ch 7. The AC must also be appointed by the company, i.e. the shareholders in the (annual) general meeting (s 94(2) and see ch 9).

26 S 94 and see ch 9.

27 Cilliers *et al Cilliers & Benade Corporate Law* (2000) 85–88.

the internal relationships as well as the existence of the company.[28] The effect is now that the ultimate power in the company is not with the shareholders in meeting but with the directors, '. . . except to the extent that this Act or the company's Memorandum of Incorporation provides otherwise.'[29] Therefore, where the Act states that 'the company can. . .',[30] the organ that can act for the company will be the board.

4.1.2 *Agents*

As far as agency is concerned, section 66(1) clearly gives the *board* the authority to bind the company. The company will be bound by the actions of its agents (or purported agents) other than the board on the basis of the following principles:

4.1.2.1 Contractual: agency

Authority can be conferred on an agent in the following ways:

(a) *Actual authority*

This authority is conferred by some act, expressly or tacitly.

(b) *Express authority*[31]

This actual authority may be given by a company's MOI or by the board of directors (as a unit), which has the ultimate original authority and then delegates it to a person or persons (a single director or anybody else, whether inside or outside the company) by board resolution and acceptance thereof by the particular agent.[32]

---

28 See e.g. *Ex parte Russlyn Construction (Pty) Ltd* 1987 (1) SA 33 (D) 36–37. See also the statutory definition of 'affairs' in Canadian legislation, e.g. the Ontario Business Corporation Act RSO 1990, c B16 and Bruce Welling *Corporate Law in Canada* (2006) 314 *et seq*.

29 See e.g. s 20(2) where the power is expressly conferred on the shareholders.

30 Examples abound in the Act. See e.g. ss 44 and 45 which provide that '. . . the board may authorise the company . . .', indicating the supremacy of the board, but the division of powers is confused and complicated by certain provisions, like s 75(7). See ch 7.

31 *Tuckers Land & Development Corporation (Pty) Ltd v Perpellief* 1978 (2) SA 11 (T).

32 A mere resolution without concurrence by the third party cannot confer authority, as authority is a contract.

(c) *Implied authority*

Implied authority exists 'when the official acting on behalf of the company purports to exercise an authority which that type of official usually has even though the official is exceeding his actual authority.'[33]

(d) Turquand *rule (common law)*

Lack of *actual authority* can be rectified under certain circumstances by the (common law) *Turquand* rule.[34] This rule states that if a third party is dealing with a person who has authority to bind the company, but for a particular act there is an additional internal requirement or, in the language of the 2008 Act, there is a 'restrictive condition' (for instance certain contracts must be authorised by the shareholders)[35] the third party can accept that the additional requirement has been complied with and the company cannot claim a lack of authority, as long as the third party is *bona fide* and/or there is nothing suspicious (that is, the act is apparently properly executed).[36]

4.1.2.2 Delictual: estoppel (ostensible 'authority')

The company can be bound by the acts of the purported agent, not because of the contract that he concluded within his mandate or authority, but because the company is estopped (that is, precluded) from claiming lack of authority since it (as principal through any body that has actual authority) has allowed an unauthorised act under certain circumstance (that is, the elements of the delict). The requirements are:

- There must be a culpable representation by the principal

  Where the agent on whose 'apparent' authority the contractor relies has no 'actual' authority from the corporation to enter into a particular kind of

---

33 *Wolpert v Uitzigt Properties (Pty) Ltd* 1961 (2) SA 257 (W); *NBS Bank Ltd v Cape Produce Co (Pty) Ltd* 2002 (1) SA 396 (SCA); *Big Dutchman (South Africa) (Pty) Ltd v Barclays National Bank Ltd* 1979 (3) SA 267 (W) and *Glofinco v ABSA Bank Ltd t/a United Bank* 2002 (6) SA 470 (SCA).

34 *Royal British Bank v Turquand* (1856) 6 E & B 327; 119 ER 886.

35 See e.g. s 48(8), which is a potential *Turquand* or s 20(7) situation.

36 *Vrystaat Mielies v Nieuwoudt* 2004 (3) SA 487 (SCA); *Quintessence Opportunities Ltd v BLRT Investments Ltd; BLRT Investments Ltd v Grand Parade Investments Ltd* 2007 (6) SA 523 (C).

> contract with the contractor on behalf of the corporation, the contractor cannot rely on the agent's own representation as to his actual authority. He can rely only on a representation by a person or persons who have actual authority to manage or conduct that part of the business of the corporation to which the contract relates.[37]

- The representation must be such that it could reasonably have been expected to mislead the third party.
- The third party must have acted on the faith of the representation.
- The third party has acted to his prejudice.[38]

If the company is for example a 'RF' company, the doctrine of constructive notice applies and the company will not be bound if the representation is contrary to a provision in the MOI. [39]

Liability is in terms of delict and not contract and therefore there is no 'authority' in the true sense of the word.

4.2 Ratification

If a company's MOI *limits the authority of the directors to perform an act on behalf of the company*, the shareholders may ratify any action by the company that is inconsistent with any such limit, restriction or qualification (except for an act in contravention of any provision of the Act) by a special resolution.[40]

---

37 *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480 (CA).

38 Nagel (ed) *Commercial Law* (2006) 142; *NBS Bank Ltd v Cape Produce Co (Pty) Ltd* 2002 (1) SA 396 (SCA); *Glofinco v ABSA Bank Ltd t/a United Bank* 2002 (6) SA 470 (SCA).

39 See ch 2.

40 S 20(2). S 218(1) does not apply as the common law principles of authority regulate the situation.

5 'Statutory' *Turquand*

The *Turquand* rule was modified and included, in addition to the common law rule, in the Act, because a person (other than a director, prescribed officer or shareholder of the company) dealing with a company in good faith, is entitled to presume that the company, in making any decision in the exercise of its powers, has complied with all of the formal and procedural requirements in terms of this Act, the company's MOI and any rules of the company unless, in the circumstances, the person knew or reasonably ought to have known of any failure by the company to comply with any such requirement.[41] This provision must also be construed concurrently with, and not as a substitution for, presumably, the common law *Turquand* or for any other rules. Because section 20(8) provides that 'Subsection (7) must be construed concurrently with, and not in substitution for, any relevant common law principle relating to the presumed validity of the actions of a company in the exercise of its powers.', which would, at least, include *Turquand*.

The statutory *Turquand* creates a vexing situation as the area covered by section 20(7) appears not to be the same as that of the common law *Turquand* rule. The common law *Turquand* rule applies only if it is clear that a person has actual authority, but for a *particular* act a prerequisite applies. This means, *inter alia*, that if the MOI provides that the board can appoint a person (as agent) to conclude a contract for the company, the common law Turquand cannot be used by the *bona fide* third party to accept that the particular person was appointed, as the rule only starts working if the person has *actual* authority. This principle, that existed for a long time but which was not applied consistently, was confirmed in *Vrystaat Mielies v Nieuwoudt*.[42] Section 20(7), however, appears to make it possible for a third party to accept that the requirement for actual authority (the appointment) has been complied with. Section 20(7) also only states that the third party can presume that the action is proper, but it apparently does not preclude the company from using it as a defence and therefore it can be argued that it only covers part of the present common law *Turquand* rule and is merely a rebuttable presumption.

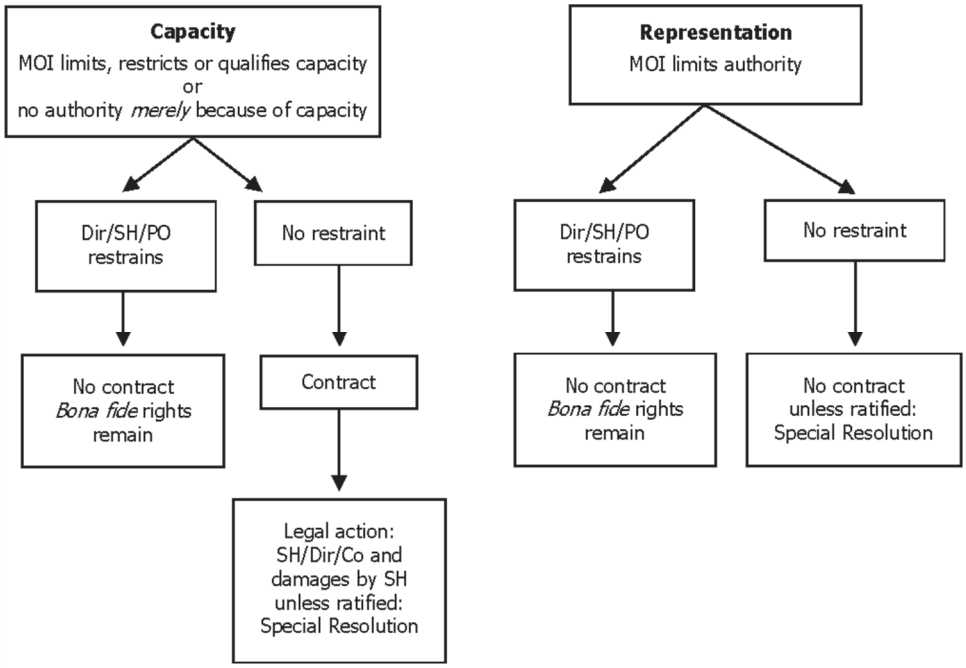
---

41 S 20(7).

42 2004 (3) SA 487 (SCA).

SUMMARY

CAPACITY AND REPRESENTATION



Chapter 6 Corporate governance: shareholders

1 Meetings

1.1 General

Section 57(1) of the Companies Act[1] provides that

> 'In this Part[2] a "shareholder" means, in addition to the meaning in section 1, also a person who is entitled to exercise any voting rights in relation to a company, irrespective of the form, title or nature of the securities to which those voting rights are attached.'

It is trite that voting rights are property that can be alienated without the transfer of the underlying shares. This will have the effect of making it very difficult to establish whether a person is a 'shareholder' as defined for the purposes of the applicable provisions.[3] If a profit company, other than a state-owned company (SOC), *has only one shareholder*, that shareholder may exercise

1 Act 71 of 2008 (the Act/2008 Act).
2 I.e. Part F of Ch 2, dealing with 'Governance of Companies'.
3 See s 1 for the default definition of 'shareholder' and ch 3 for 'share' and 'security'.

any or all of the voting rights pertaining to that company on any matter, at any time, without notice or compliance with any other internal formalities, except to the extent that the company's Memorandum of Incorporation (MOI) provides otherwise and sections 59 to 65 do not apply to the governance of that company.[4] Why a sole shareholder would want to restrict its rights is not clear.

If every shareholder of a particular company, other than a SOC, is also a director of that company, any matter that is required to be referred by the board to the shareholders for decision may be decided by the shareholders at any time after being referred by the board, without notice or compliance with any other internal formalities, except to the extent that the MOI provides otherwise. However, the requirements are that every such person must have been present at the board meeting when the matter was referred to them in their capacity as shareholders and that enough persons are present in their capacity as shareholders to satisfy the quorum requirements set out in section 64 of the Act.[5] A resolution is adopted by those persons in their capacity as shareholders if it has at least the support that would have been required for it to be adopted as an ordinary or special resolution, as the case may be, at a properly constituted shareholder's meeting. When acting in their capacity as shareholders, those persons are not subject to the provisions of sections 73 to 78 relating to the duties, obligations, liabilities and indemnification of directors.[6]

If a profit company, other than a SOC, *has only one director*, that director may exercise any power or perform any function of the board at any time, without notice or compliance with any other internal formalities, except to the extent that the company's MOI provides otherwise, and sections 71(3) to (7), 73 and 74 do not apply to the governance of that company.[7]

The board of a company may set a record date for the purposes of determining the shareholders entitled to receive a notice of a meeting of shareholders

---

4 S 57(2).

5 This is superfluous, as all the shareholders must have been present in the first instance. 'Present at a meeting' includes the proxy/ies of the shareholder (s 1).

6 S 57(4).

7 S 57(3).

and to participate in and vote at such a meeting, or to decide any matter by written[8] consent or electronic communication, to exercise pre-emptive rights, as contemplated in section 39, or to receive a distribution, or to be allotted or exercise other rights.[9] A record date cannot be set retroactively and may not be more than ten business days before the date on which the action for which the record date is being set is scheduled to occur.[10] The record date must be published to the shareholders in a manner that satisfies any prescribed requirements. If the board does not determine a record date for any action or event, the record date is the latest date by which the company is required to give shareholders notice of that meeting in the case of a meeting, or the date of the action or event in any other case, unless the MOI or rules of the company provide otherwise.[11]

1.2 Compulsory annual general meeting

A public company must convene the first annual general meeting (AGM) of its shareholders no more than 18 months after the company's date of incorporation. Thereafter, an AGM must be held once in every calendar year, but no more than 15 months after the date of the previous AGM, or within an extended time allowed by the Companies Tribunal, on good cause shown.[12] At least the following must be transacted –

- The presentation of –
  - the directors' report;
  - the audited financial statements for the immediately preceding financial year; and
  - the audit committee report;

---

8 Note s 12 of the Electronic Communications and Transactions Act 25 of 2002 (ECT Act), which provides that it would include any data message accessible in a manner usable for subsequent reference. A 'data message' means a voice message (which is automated) and also a stored record (s 1 of the ECT Act).

9 S 59(1).

10 S 59(2).

11 S 59(3).

12 S 61(7).

- the election of directors, to the extent required by the Act or the company's MOI; and
- the appointment of –
  - an auditor for the ensuing financial year; and
  - an audit committee (AC); and
- any matters raised by shareholders, with or without advance notice to the company.[13]

1.3 Meetings: all companies

The board of a company, or any other person specified in the company's MOI or rules[14] *may* call a meeting of shareholders at any time.

A company *must* hold a shareholders' meeting –

- when the board is required by the Act[15] or the MOI to refer a matter to shareholders for decision;
- whenever required in terms of section 70(3) to fill a vacancy on the board;
- when otherwise required by the company's MOI; and
- when an AGM of a public company is required.

The company must also hold a meeting –

- if one or more written and signed demands for such a meeting are delivered to the company; *and*
- each such demand describes the purpose of the meeting; *and*
- the aggregate of the demands for substantially the same purpose are made and signed by the holders of at least 10% (or a lower percentage, if permitted by the MOI) of the shares entitled to be voted in respect of the matter that is proposed for consideration at the meeting.

---

13 S 61(7)–(8).

14 S 61(1).

15 See s 71 in respect of dismissal of directors and ch 10 for fundamental transactions.

If the directors are incapacitated (or there are no directors), any person authorised in the MOI can call the meeting. If there is no such person authorised, any shareholder can apply to the Companies Tribunal, which may issue an administrative order for a shareholders' meeting to be convened on a date, and subject to any terms, that the Tribunal considers appropriate in the circumstances.[16]

It is therefore also possible for one person with 10% of the votes to request such a meeting.[17] At any time before the start of such a shareholders' meeting, a shareholder who submitted a demand for that meeting may withdraw that demand and the company must cancel the meeting, if, as a result of one or more demands being withdrawn, the voting rights of any remaining shareholders continuing to demand the meeting, in aggregate, fall below the minimum percentage of voting rights required to call a meeting.[18]

A company, or any shareholder of the company, may apply to the court for an order setting aside such a demand, on the grounds that the demand is frivolous, calls for a meeting for no other purpose than to reconsider a matter that has already been decided by the shareholders, or is otherwise vexatious.[19]

1.4 Notice of meetings

1.4.1 *Form and content*

The notice for the meeting must be in writing. It must include the date, time and place and the record date for the meeting, the general purpose of the meeting, and any specific purpose.[20] If an amendment to the MOI is proposed that will materially and adversely affect the preferences, rights and limitations of the shares, the notice must also contain the information as required by section 164(2). In addition, it must contain a copy of any proposed resolution of which the company has received notice that is to be considered at the meeting, plus a notice of the percentage of voting rights that will be required for that resolution to be adopted. The notice must bear a reasonably prominent

---

16 S 61(11).
17 S 61(3)–(4). See ch 3 about voting rights.
18 S 61(6).
19 S 61(3).
20 Such as meetings requested by shareholders in terms of s 61(3).

statement that a shareholder entitled to attend and vote at the meeting is entitled to appoint a proxy, who need not also be a shareholder of the company. The notice must also state that satisfactory identification from participants will be required as provided for in section 61(3).[21]

Except to the extent that the MOI of a company provides otherwise, the board of the company may determine the location, in the Republic or in any foreign country, for any shareholders' meeting of the company.[22] In the case of a public company, irrespective of whether the meeting is held in the Republic or elsewhere, it must be reasonably accessible within the Republic for electronic participation by shareholders.[23]

Failure to give 'required' notice,[24] or a defect in the notice (such as time or information) may be condoned if all the holders of shares entitled to be voted in respect of each item are present[25] at the meeting ratify the defective notice.[26] In effect unanimous consent is therefore required.

It would therefore appear that a 'material' defect in the form and manner must be expressly ratified by 100% of the shareholders with votes. If a material defect in the form or manner of giving notice of a meeting relates only to one or more particular matters on the agenda for the meeting, any such matter may be severed from the agenda, and the notice remains valid with respect to any remaining matters on the agenda. The meeting may proceed to consider a severed matter, if the defective notice in respect of that matter has been ratified in terms of section 62(4)(d). Section 62(7) provides that a shareholder who is present at a meeting is deemed to have received the notice, or to have waived notice of the meeting if at least the required minimum notice was given, and also to have waived any right based on an actual or alleged defect in the notice of the meeting, except to the extent that he can allege a material defect in the form of notice and participate in a determination whether to waive

---

21 S 62(3) and see ch 3. Notice for an AGM must also comply with s 62(3)(d).
22 S 61(9).
23 S 61(10)
24 S 62(2A).
25 'Present at a meeting' includes the proxy/ies of the shareholder (s 1).
26 S 62(4).

the requirements if less than the required minimum notice was given, or to ratify a defective notice.

An 'immaterial'[27] defect in the form or manner of giving notice of a shareholders meeting, or an accidental or inadvertent failure in the delivery of the notice to any particular shareholder to whom it was addressed, does not invalidate any action taken at the meeting.[28]

1.4.2 *Notice period*

The company must deliver the notice to all of the shareholders with the following notice periods –

- 15 business days for public companies, and non-profit companies (NPC) with members; or
- ten business days for any other company,[29]

but the MOI can provide for longer or shorter periods.[30]

1.5 Quorum, conduct at meetings and resolutions

The quorum for all meetings is the presence at the meeting of the holders of at least 25% of the shares, personally or by proxy, entitled to be voted in respect of at least one matter to be decided at the meeting. A matter to be decided at the meeting may not begin to be debated unless holders of at least 25% of the shares entitled to be voted on *that* matter are present at the meeting when the matter is called on the agenda (votes quorum).[31]

---

27 'Material', when used as an adjective, means significant in the circumstances of a particular matter, to a degree that is of consequence in determining the matter or might reasonably affect a person's judgement or decision-making in the matter (s 1).

28 S 62(6).

29 S 62(1).

30 S 62(2). See Annexure 3 of the regulations for examples of forms of notice and presumptions in respect of receipt.

31 S 64(2). After a quorum (presumably a vote and person quorum) has been established for a meeting, or for a matter to be considered at a meeting, the meeting may continue, or the matter may be considered, as long as the holder of at least one share entitled to be voted is present at the meeting, unless the MOI provides otherwise (s 64(9)).

The MOI may, however, set lower percentages and there is no lower limit.[32]

Irrespective of the votes quorum, if a company has more than two shareholders, a meeting may not begin, or a matter begin to be debated, unless at least three shareholders are present at the meeting (person quorum).[33]

If either the vote or the person quorum is not satisfied within one hour after the appointed time at which the meeting is to begin, the meeting cannot begin. It must then be *postponed* without motion, vote, or further notice, for one week (without additional or a new notice). The company need only give additional notice of the postponed or adjourned meeting if the place of the subsequent meeting is different.[34]

If the quorums for a particular matter have not been satisfied, but there is other business on the agenda, that non-quorate matter may be *postponed* to a later time in the meeting without motion or vote. However, if there is no other business on the agenda of the meeting, the meeting must be *adjourned* for one week, without motion or vote.[35]

If, at the time appointed in terms of this section for a postponed meeting to begin, or for an adjourned meeting to resume, the vote or person requirements are still not met, the shareholders[36] present in person or by proxy will be deemed to constitute a quorum.[37]

---

32 S 64(2).

33 S 64(3). As with the votes quorum, the MOI may set a lower limit (s 64(2)).

34 S 64(4).

35 S 64(4). The one hour limit may be extended by the chairperson under certain circumstances (shareholders are delayed etc.) (s 64(5)). The MOI or rules may provide for other periods in respect of the hour or week respectively (s 64(6)). Voluntary adjournments are regulated in s 64(10)–(13).

36 Or members of the company in the case of a NPC.

37 S 64(8). This is the *de facto* position in terms of the Companies Act 61 of 1973 (1973 Act), although it was not allowed by s 190 of the 1973 Act (see Cilliers *et al Cilliers & Benade Corporate Law* (2000) 101).

A shareholder's identity must be verified, and the right to attend or participate, either as a shareholder or as a proxy for a shareholder, must be verified to the reasonable satisfaction of the person presiding at the meeting.[38]

A meeting of shareholders may be conducted entirely by electronic communication. Alternatively, if a meeting is being held in person, one or more shareholders (or their proxies) may participate in that meeting by electronic communication, as long as the electronic communication medium employed enables all persons participating in that meeting to simultaneously communicate with each other, and participate effectively in the meeting.[39]

1.5.1 *Resolutions*

A proposed resolution must be sufficiently clear and specific and must be accompanied by sufficient information to enable a shareholder to decide whether to participate in the meeting.[40]

The respective percentages are calculated with reference to the votes present at the meeting, either in person or by proxy, voting in favour of the resolution, provided that there is a quorum. Abstentions are not votes exercised, but rather the exercise of the right to vote or not to vote, and are neither a vote for or against the proposed resolution and are excluded from the calculation.

---

38 S 63(1).

39 The company's MOI can prohibit this. If a company provides for participation in a meeting by electronic communication, the notice of that meeting must inform shareholders thereof. Access to the medium or means of electronic communication is at the expense of the shareholder or proxy, except to the extent that the company determines otherwise (s 63(3)).

40 S 65(4). At any time before the start of the meeting at which a resolution will be considered, a shareholder or director who believes that the form of the resolution does not satisfy these requirements may apply to a court for an order restraining the company from putting the proposed resolution to a vote until the requirements are satisfied, and requiring the company, or the shareholders who proposed the resolution, to take appropriate steps to alter the resolution so that it satisfies the requirements and to compensate the applicant for costs of the proceedings, if successful (s 65(5)). If, however, the resolution is passed, it cannot be challenged in any forum purely on the grounds that these requirements were not complied with (s 65(6)).

A resolution is either a special resolution or an ordinary resolution. A special resolution must be supported by the holders of at least 75% of the voting rights exercised on the resolution.[41] Special resolutions are required in the following instances –

- amendment the company's MOI to the extent required by sections 16(1)(c) and 36(2)(a);
- ratification of a consolidated revision of a company's MOI, as contemplated in section 18(1)(b);
- ratification of actions by the company or directors in excess of their authority, as contemplated in section 20(2);
- approval of an issue of shares or grant of rights in the circumstances contemplated in section 41(1);
- approval of an issue of shares or securities as contemplated in section 41(3);
- authority to the board to grant financial assistance in the circumstances contemplated in section 44(3)(a)(ii) or 45(3)(a)(ii);
- approval of a decision of the board for reacquisition of shares in the circumstances as contemplated in section 48(8);
- to authorise the basis for compensation to directors of a profit company, as required by section 66(9);
- approval of the voluntary winding up of the company, as contemplated in section 80(1);
- approval of the winding up of a company in the circumstances contemplated in section 81(1);
- approval of an application to transfer the registration of the company to a foreign jurisdiction as contemplated in section 82(5);
- approval of any proposed fundamental transaction, to the extent required by Part A of Chapter 5;

---

41 S 65(9).

- revoking a resolution contemplated in section 164(9)(c);[42] and
- if the MOI requires a special resolution for any other matter.[43]

An ordinary resolution must be supported by a majority of *more than* 50% of the voting rights *exercised* on the resolution.[44]

The MOI may provide for a different (higher or lower) percentage in respect of special resolutions and for different percentages for resolutions in respect of specified matters.[45] The MOI can also provide for a higher percentage in respect of the highest requirement for ordinary resolutions.[46] However, the percentage difference between an ordinary and a (any) special resolution must at least be 10%. Therefore, if the MOI provides for different percentages for different ordinary resolutions and for different percentages for different special resolutions, the percentage difference between the highest ordinary resolution and the lowest special resolution, must be at least 10%. The special resolutions prescribed by the Act can be increased but not decreased as the MOI can amend an unalterable provision but it must impose on the company a higher standard, greater restriction, longer period of time or any similarly more onerous requirement than would otherwise apply to the company in terms of an unalterable provision of the Act.[47] This will also apply to the minimum percentage of 50% + 1 for the removal of directors in terms of section 71.[48]

1.6 Voting

Voting on any matter at a shareholders' meeting will be conducted by polling the persons present and entitled to exercise voting rights on that matter or by

---

42 S 65(11).
43 S 65(12).
44 S 65(7).
45 S 65(9) and (10). The MOI can, e.g., provide that all special resolutions are 75%, except for a s 115 transaction, where it will be 99%.
46 S 65(8) and (9).
47 S15(2)(a)(iii). See ch 2.
48 S 65(8).

show of hands.[49] On a show of hands, a person will have only one vote, irrespective of the number of shares he holds or represents.[50] On a poll, however, a member (including his proxy) must be entitled to exercise all the voting rights attached to the shares held or represented by that person.[51] Despite any provision of a company's MOI or agreement to the contrary, a polled vote must be held on any particular matter to be voted on at a meeting if a demand for such a vote is made by at least five persons who have the right to vote on that matter, either as a shareholder or a proxy representing a shareholder, or by a person who is, or persons who together are, entitled, as a shareholder or proxy representing a shareholder, to exercise at least 10% of the voting rights entitled to be voted on that matter.[52]

1.7 Proxies

A shareholder of a company may appoint any individual, including an individual who is not a shareholder of that company, as a proxy[53] to participate in, speak and vote at a shareholders' meeting on behalf of the shareholder, or to give or withhold written consent on behalf of the shareholder to a decision contemplated in section 60. A proxy appointment must be in writing, dated and signed by the shareholder and it remains valid for one year after the date on which it was signed, or any longer or shorter period expressly set out in the appointment, unless it is revoked[54] or expires[55] earlier.[56]

---

49 S 63(4).
50 S 63(5).
51 S 63(6).
52 S 63(7).
53 See also ch 3 par 3.2. in respect of beneficial shareholders.
54 As provided for in s 58(4). See e.g. CoR 36.1 in terms of reg 36.
55 If intended to expire at the end of the intended meeting (s 58(8)(d)).
56 S 58(1)–(2). See s 85(3)–(9) for requirements for proxies.

2 Shareholders acting other than at a meeting

A resolution may be adopted by written consent, given in person (or by proxy),[57] or by electronic communication, if it is submitted for consideration to the shareholders entitled to exercise voting rights in relation to the resolution, and if it is voted on in writing by such shareholders within 20 business days after the resolution was submitted to them.[58]

Such a resolution will be deemed to have been adopted if it is supported by persons entitled to exercise sufficient voting rights for it to have been adopted as an ordinary or special resolution (as the case may be) at a properly constituted shareholders' meeting, and, if adopted, it has the same effect as if it had been approved by voting at a meeting.[59] The notice requirements, at least in respect of the contents of the notice, should be complied with.

Apart from the above, shareholders can also in terms of the common law, take resolutions by way of (formal or informal) unanimous consent. Formal requirements for the particular action, whether in terms of the Act or in terms of an agreement, must however be complied with for validity.[60]

---

57 S 58(1)(b).

58 S 60(1). See e.g. CoR 36.2 in terms of reg 36. If the Act or the company's MOI requires matters to be conducted at an AGM, those matters cannot be conducted by written consent (s 60(5)).

59 S 60(2). The words 'supported by persons entitled to exercise sufficient voting rights for it to have been adopted as an ordinary or special resolution, as the case may be, at a properly constituted shareholders meeting' give the impression that the minimum majority will be as at a minimum quorate meeting, i.e. by the requisite majority of the votes at a meeting where the minimum quorum (25% of all the votes) is present.

60 *In re Duomatic Ltd* [1969] 2 Ch 365; *Gohlke and Schneider v Westies Minerale (Edms) Bpk* 1970 (2) SA 685 (A).

Chapter 7 Corporate governance: directors

1 General

Every company must have a board of directors, comprising of –

- at least three directors in the case of public companies and non-profit companies (NPCs); or
- at least one director in the case of private companies and personal liability companies.[1]

1 S 66(2) of the 2008 Act. If the number of incorporators of a company, with any *ex officio* directors, or directors to be appointed as contemplated in s 66(4)(a)(i), is fewer than the minimum number of directors required for that company in terms of the Act or the company's MOI, the board must call a shareholders' meeting within 40 business days after incorporation of the company for the purpose of electing sufficient directors to fill all the vacancies on the board at the time of the election (s 67(2)).

However, a company's Memorandum of Incorporation (MOI) may provide for a higher minimum number of directors.[2] 'Director' is defined in section 1 as a member of the board of a company, as contemplated in section 66, or an alternate director of a company, and includes *any person occupying the position of a director or alternate director, by whatever name designated*. This includes all *de facto* and *de jure* directors, but should exclude pretended directors. A *de facto* director is a director who is appointed, but there is irregularity in the procedure which makes the appointment invalid. A *de jure* director is a director that is properly appointed and a pretended director on the other hand acts as if there was an appointment, although there was no act of appointment.

Any failure to have the minimum number of directors required by the Act or the MOI does not limit or negate the authority of the board, or invalidate anything done by the board or the company.[3] The minimum number of directors is the number *in addition* to the minimum number of directors that the company must have to satisfy any requirement, whether in terms of the Act or its MOI, to appoint an audit committee (AC), or a social and ethics committee (SEC).[4] If a company has an AC, the number of directors for a public company will therefore be six. If it must also have a SEC, the same directors can serve on both committees. When calculating the minimum number of directors required for a company, any director appointed to more than one committee must be counted only once.[5]

Each incorporator of a company is a first director of the company,[6] and serves until enough other directors, to satisfy the minimum requirements of the Act or the company's MOI, have been appointed,[7] or first elected.[8]

The company may pay remuneration to its directors for their service *as directors*, except if the MOI provides otherwise.[9] Remuneration may be paid only in

---

2 S 66(3).
3 S 66(11).
4 S 66(1).
5 S 66(12).
6 S 67(1).
7 S 66(4)(a)(i).
8 S 68.
9 S 66(8).

accordance with a special resolution approved by the shareholders within the previous two years.[10]

2 Qualification, appointment and removal of directors

The directors of a company are elected by the holders of shares entitled to be voted in such an election,[11] or appointed,[12] as determined in section 66 and the term is indefinite unless a term is set in the MOI.[13] The board may also appoint an eligible person to fill a vacancy until an election is held, unless the MOI provides otherwise.[14] A person is a director if he is appointed or elected and has delivered a written consent to the company.[15]

Unless the company's MOI provides otherwise, directors are to be elected separately, that is the election is to be conducted as a series of votes, each of which is on the candidacy of a single individual to fill a single vacancy, with the series of votes continuing until all vacancies on the board at that time have been filled. Each share entitled to vote may be cast once (per vacancy). The vacancy is filled by a majority of votes cast for a candidate.[16] The MOI must provide that the shareholders of a profit company other than a state-owned company (SOC) must elect at least 50% of the directors and 50% of any alternate directors.[17]

A company's MOI may also provide for a person named or determined in it to appoint or remove one or more directors; for a person to be an *ex officio* director

---

10 S 66(9). See also ch 9 for disclosure 'of remuneration'.

11 S 68(1). Any appointment or election of a person as director who is ineligible or disqualified in terms of s 69 is a 'nullity' (s 66(9)). See ch 2 on the effect of s 218 on the provision that the election is a 'nullity'.

12 Appointment can be by a person as determined in the MOI or *ex officio* on the basis of that person holding an office, title, designation or status (s 66(4) and (5)).

13 S 68(1). The company must file a notice on CoR 39 within ten business days after a person becomes or ceases to be a director of the company (s 70(6)).

14 S 68(3). See also s 70 about the filling of vacancies.

15 S 66(7).

16 S 68(2). The impression is created that a particular individual must be elected only in a particular position. This cannot be the true position.

17 S 66(4)(b).

of the company as a consequence of that person holding some other office, title, designation or similar status; or the appointment or election of one or more persons as alternate directors of the company.[18] An *ex officio* director has all the powers and functions of any other director of the company, except to the extent that the company's MOI restricts the powers, functions or duties of an *ex officio* director, and (irrespective of the powers) has all the duties and liabilities of any other director of the company.[19] It is doubted if a third party can acquire contractual rights in terms of the MOI end therefore enforce such an appointment.[20]

Despite anything to the contrary in a company's MOI, or any agreement between a company and a director, or between any shareholders and a director, an *elected* director may be removed by an ordinary resolution at a meeting of holders of the shares entitled to be voted in an election of that director, if the director has received notice of the meeting and the resolution, at least equivalent to that which a shareholder is entitled to receive, irrespective of whether the director is a shareholder of the company. The particular director must be given a reasonable opportunity to make a presentation to the meeting in person or through a representative before the resolution is put to a vote.[21] An agreement between shareholders only not to dismiss a director may circumvent section 71, although it may fall foul of section 15(7) which makes a shareholders' agreement void to the extent that it is in conflict with the Act. Removal of a director in terms of section 71 does not deprive such a person of any right he may have at common law, or prevent him from applying to a court for damages or other compensation for loss of office as a director, or loss of any other office as a consequence of being removed as a director.[22] Whether the consequential dismissal as an employee will be 'loss of any other office' will depend on the circumstances, but it will obviously not apply in all cases. Contractual claims

---

18 S 66(4).

19 S 66(5).

20 See ch 2 par 4.

21 S 71(1)–(2). The requirement in previous versions of the Bill that 'a statement setting out reasons for the resolution, with sufficient specificity to reasonably permit the director to prepare and present a response', has been omitted.

22 S 71(9).

based solely on the provisions of the MOI may be possible as the MOI is binding between the company and the directors in the exercise of their functions.[23]

3 Disqualification

3.1 General

A person is *ineligible* to be a director of a company if the person –

- is a juristic person;
- is an unemancipated minor, or is under a similar legal disability; or
- does not satisfy any qualification set out in the company's MOI.[24]

A person (who is eligible) is *disqualified* from being a director of a company if –

- a court has prohibited that person from being a director, or declared the person to be delinquent in terms of section 162 of the Act, or in terms of section 47 of the Close Corporations Act;[25] or
- subject to section 69(9) to (12), the person[26] –
  - is an un-rehabilitated insolvent;
  - is prohibited in terms of any public regulation from being a director of the company;
  - has been removed from an office of trust, on the grounds of misconduct involving dishonesty;[27] or

---

23 S 15(6). See *Mpofu v South African Broadcasting Corporation Limited (SABC) and Others* (2008/18386) [2008] ZAGPHC 413 (16 September 2008) and also ch 2.

24 S 69(7).

25 Act 69 of 1984 (CC Act).

26 The court may also exempt a person who falls within this category of disqualification (s 69(11)).

27 This disqualification ends five years after removal or completion of the sentence, or at the end of one or more extensions imposed by the court on application by the CIPC (s 69(9)(a)).

– has been convicted, in the Republic or elsewhere, and imprisoned without the option of a fine, or fined more than the prescribed amount,[28] for theft, fraud, forgery, perjury, or an offence –
  * involving fraud, misrepresentation or dishonesty;
  * in connection with the promotion, formation or management of a company, or in connection with any act contemplated in section 69(2) or (5); or
  * in terms of the Act; the CC Act; the Financial Intelligence Centre Act;[29] the Financial Markets Act;[30] the Insolvency Act;[31] the Competition Act;[32] or Chapter 2 of the Prevention and Combating of Corruption Activities Act.[33]

The MOI of a company may impose additional grounds for the ineligibility or disqualification of directors, or minimum qualifications to be met by directors of that company.[34] It is possible that qualification shares may fall under this category. The importance thereof is that non-compliance at appointment may vitiate the appointment. A person who is ineligible or disqualified must not be appointed or elected as a director of a company, or consent to being appointed or elected as a director, or act as a director of a company,[35] and a company must

---

28 R1 000 as per reg 39.
29 Act 38 of 2001.
30 Act 19 of 2012.
31 Act 24 of 1936.
32 Act 89 of 1998.
33 Act 12 of 2004. See s 69(8).
34 S 69(6). The directorship of a person who becomes disqualified 'ceases immediately' (subject to s 70(2) – see vacancies) (s 69(3)). A company (directors) must not knowingly permit a disqualified person to serve as a director (s 69(2)). Directors' liability will result, but only if there is loss, damage or costs to the company (s 77(2)(b)) or to a third party (s 218(2)).
35 S 69(2). There is no definition of 'acting' as a director. The first version of the Bill defined this as –
  • 'to make, or participate in making any decision that affects the whole, or a substantial part, of a company's business;
  • to exercise the capacity to affect significantly a company's financial standing;
  • to communicate advice, instructions or wishes to the directors of a company, other than in the proper performance of the person's role as a professional advisor to the company in terms of a business relationship with the company, if the person –
    – knows that the directors are accustomed to act in accordance with the person's advice, instructions or wishes; or

(*continued*)

not knowingly permit an ineligible or disqualified person to serve or act as a director.[36]

3.2 Court order: delinquency

3.2.1 *Grounds*

A person may be declared delinquent under the circumstances prescribed in section 162(5). These grounds are that the person –

- consented to serve as a director or acted as such while disqualified in terms of section 69;[37] or
- while under a court order of probation, acted as a director in a manner that contravened that order;[38] and
- while a director –
  - grossly abused the position of director; or
  - took personal advantage of information or an opportunity, contrary to section 76(2)(a);[39] or
  - intentionally, or by gross negligence, inflicted harm upon the company or a subsidiary contrary to section 76(2)(a);[40] or
  - acted in a manner –
    * that amounted to gross negligence, wilful misconduct or breach of trust; or
    * contemplated in section 77(3)(a), (b) or (c);[41] or

  - intends that the directors will act in accordance with the person's advice, instructions or wishes; or
  - to act in the capacity of a director of a company in any other manner may be instructive.'

See the definition of a 'prescribed officer' (s 66(10)) in reg 38, which incorporates some of the actions above.

36 S 69(3). The difference between 'ineligible' and 'disqualified' is that the latter means eligible but disqualified.

37 S 162(5)(a).

38 S 162(5)(b). The disqualifications in terms of s 162(5)(a) or (b) are unconditional and last the lifetime of the person (s 162(6)(a)).

39 See par 6.2.4.

40 See par 6.2.4 and *Kukama v Lobelo* [2013] ZAGPJHC 72 (31 May 2013)).

41 S 162(5)(c) and see par 6.3.2.

- has repeatedly been personally subject to a compliance notice for substantially similar contraventions of the Act;[42] or
- has at least twice been personally convicted of an offence or subjected to an administrative fine or similar penalty in terms of any legislation;[43] or
- within a period of five years, was a director of one or more companies or a managing member of one or more close corporations, or controlled or participated in the control of a juristic person, irrespective of whether concurrently, sequentially or at unrelated times, that was convicted of an offence, or subjected to an administrative fine or similar penalty, in terms of any legislation, and the person was a director of each such company, or a managing member of each such close corporation or was responsible for the management of each such juristic person, at the time of the contravention that resulted in the conviction, administrative fine or other penalty and the court is satisfied that the declaration of delinquency is justified, having regard to the nature of the contraventions, and the person's conduct in relation to the management, business or property of any company, close corporation or juristic person at the time.[44]

3.2.2 *Applicants*

A company, a shareholder, director, company secretary or prescribed officer[45] of a company, a registered trade union or other representative of the employees of

---

42 S 162(5)(d) and see ch 12.

43 S 162(5)(e). 'Legislation' as defined in s 162(1).

44 S 162(5)(f). The (collective) circumstances in terms of sub-s (5)(*c*) were categorised as " 'substantive' abuses of office" in *Grancy Property Limited and Another v Gihwala and Others; In Re: Grancy Property Limited and Another v Gihwala and Others* [2014] ZAWCHC 97 (26 June 2014). The disqualifications in terms of s 162(5)(c)–(f) can be under conditions imposed by the court (e.g. limiting it to certain categories of companies) and last for seven years from the date of the order (or longer if the court so orders) (s 162(6)(b)). A person who has been declared delinquent (except in terms of s 162(6)(a)), can apply for suspension of the order or substitution for a probation order, three years after the granting of the order. If suspension is granted, the person can apply for setting aside of the order two years after it was suspended or for setting aside a probation order two years after it was granted (s 162(11) and see s 162(12) on the court's discretion and powers).

45 See ss 1 and 66(11).

a company, may apply to a court for an order declaring a person delinquent. The court must make an order declaring that person delinquent if –

- she is a director of that company or, within the 24 months immediately preceding the application, was a director of that company; and
- the grounds listed in the first three main points at paragraph 3.2.1 above are present.[46]

The CIPC or the Takeover Regulation Panel (TRP) may also apply to a court for an order declaring a person delinquent. The court must make an order declaring that person delinquent if –

- she is a director of that company or, within the 24 months immediately preceding the application, was a director of that company; and
- all the above grounds are present.[47]

In addition, any *organ of state* responsible for the administration of any legislation may apply to a court for an order declaring a person delinquent. The court must make an order declaring that person delinquent if –

- she is a director of that company or, within the 24 months immediately preceding the application, was a director of that company; and
- the grounds listed in the last three main points at paragraph 3.2.1 above are present.[48]

3.3 Court order: probation

3.3.1 *Grounds*

A person may be placed under probation under the circumstances prescribed in section 162(5) for delinquency, and in addition also on the following grounds[49] –

- while serving as a director, the person –
  - was present at a meeting and failed to vote against a resolution despite the inability of the company to satisfy the solvency and liquidity test, contrary to the Act;[50]

---

46 S 162(2).
47 S 162(3).
48 S 162(4).
49 S 162(7).
50 See par 6.3.2.

  - otherwise acted in a manner materially inconsistent with the duties of a director; or
  - acted in, or supported a decision of the company to act in a manner contemplated in section 163 (1) (oppressive conduct);[51] or
- within any period of ten years after the effective date[52] –
  - the person has been a director of more than one company, or a managing member of more than one close corporation, irrespective of whether concurrently, sequentially or at unrelated times; and
  - during the time that the person was a director of each such company or managing member of each such close corporation, two or more of those companies or close corporations each failed to fully pay all of its creditors or meet all of its obligations, except in terms of –
    * a business rescue plan resulting from a resolution of the board in terms of section 129; or
    * a compromise with creditors in terms of section 155.[53]

3.3.2 *Applicants*

A company, shareholder, director, company secretary or prescribed officer of a company, a registered trade union or other representative of the employees of a company may apply to a court for an order placing a person under probation. The court may make an order placing a person under probation if –

- he is a director of that company or, within the 24 months immediately preceding the application, was a director of that company; and

---

51 S 162(7)(a).

52 That is the date when a provision came into operation in terms of s 225 (definition of 'effective date' in s 1).

53 S 162(7)(b).

- the grounds under the first ground for probation above are present[54] and only if the court is satisfied that (if the director acted in, or supported a decision of the company to act in a manner contemplated in section 163 (1) (oppressive conduct)) the declaration is justified having regard to the circumstances of the company's or close corporation's conduct, if applicable, and the person's conduct in relation to the management, business or property of the company or close corporation at the time.[55]

The CIPC or the TRP may also apply to a court for an order declaring a person under probation. The court may make an order placing a person under probation if –

- he is a director of that company or, within the 24 months immediately preceding the application, was a director of that company; and
- the grounds listed in the first two main points at paragraph 3.3.1 above are present.[56] In respect of the third secondary point at paragraph 3.3.1 above, the court must be satisfied that the declaration is justified having regard to the circumstances of the company's or close corporation's conduct, if applicable, and the person's conduct in relation to the management, business or property of the company or close corporation at the time. In respect of the second main point at paragraph 3.3.1 above, the court must be satisfied that the manner in which the company or close corporation was managed was wholly or partly responsible for it failing to meet its obligations and that the declaration is justified, having regard to the circumstances of the company's or close corporation's failure, and the person's conduct in relation to the management, business or property of the company or close corporation at the time.[57]

A court may, in a declaration of probation or delinquency, order that the person –

- undergo a program of remedial education;
- carry out a designated program of community service;

---

54 S 162(2)(b)(ii).
55 S 162(8).
56 S 162(3)(b)(ii).
57 S 162(8).

- pay compensation to any person adversely affected by his conduct as a director, to the extent that such a victim does not otherwise have a legal basis to claim compensation; or
- in the case of an order of probation, be supervised by a mentor in any future participation as a director while the order remains in force, or be limited to serving as a director of a private company or a company of which the person is the sole shareholder.[58]

4 Vacancies

A person *ceases* to be a director, and a vacancy arises on the board of a company under a number of circumstances,[59] that is when –

- the term of office as director expires in the case of a company whose MOI provides for fixed terms; or
- the director resigns or dies; or
- the director is an *ex officio* director and ceases to hold the qualification, office, title, designation or similar status; or
- the director becomes incapacitated to such an extent that the person is unable to perform the functions of a director, and is unlikely to regain that capacity within a reasonable time, subject to section 71(3); or
- the director is declared delinquent by a court, or placed on probation under conditions that are inconsistent with continuing to be a director of the company, in terms of section 162 or becomes ineligible or disqualified in terms of section 69, subject to section 71(3); or
- the director is removed by resolution of the shareholders in terms of section 71(1); by resolution of the board in terms of section 71(3); or by order of the court in terms of section 71(5) or (6).[60]

---

58 S 162(10). The CIPC must establish and maintain (in the prescribed manner) a public registry of persons who are subject to an order of a court in terms of this section (s 162(13)).

59 If, as a result of a vacancy arising in the board of a company, there are no remaining directors of the company, any holder of voting rights entitled to be exercised in the election of a director may convene a meeting for the purpose of such an election (s 70(4)). It is not clear how the wording of s 70(1), i.e. 'ceases to be a director' as a result of incapacitation is to be reconciled with the provisions of s 71(3), which requires a prescribed process.

60 S 70(1).

If a casual vacancy arises in the board, other than as a result of an *ex officio* director ceasing to hold that office, it must be filled by a new appointment if the director was appointed by a person determined in the MOI. Alternatively, the vacancy may be filled at an election conducted at the next annual general meeting (AGM) of the (public) company, or within six months after the vacancy arose at a shareholders' meeting of the persons entitled to exercise voting rights in an election of the director that has been called for the purpose of electing the director by a poll in terms of section 60.[61]

If a company has *more than two directors*, and a shareholder or director has alleged that a director of the company has become ineligible or disqualified in terms of section 69[62] or incapacitated to the extent that he is unable to perform the functions of a director, and is unlikely to regain that capacity within a reasonable time or has neglected, or been derelict in the performance of the functions of director, the board, other than the director concerned, must determine the matter by resolution, and may remove a director whom it has determined to be ineligible or disqualified, incapacitated, or negligent or derelict, as the case may be.[63] Before the board of a company may consider a resolution, the director concerned must be given notice of the meeting, including a copy of the proposed resolution and a statement setting out reasons for the resolution, with sufficient specificity to reasonably permit the director to prepare and

---

61 S 70(3). The board may also fill casual vacancies (s 68(3)).

62 Except for s 69(8)(a), where a court has prohibited a person from being a director or declared that person delinquent.

63 S 71(3). If the board has determined that a director is ineligible or disqualified, incapacitated or has been negligent or derelict, the director concerned, or a person who appointed that director in terms of s 66(4)(a)(i), may apply within 20 business days to a court to review the determination of the board (s 71(5)). If the board makes a decision that the director is *not* ineligible or disqualified, incapacitated, or has not been negligent or derelict, any director who voted otherwise, or a shareholder who can vote on the election of that director, can apply to a court to review the determination of the board or to remove the director from office, on pain of liability for costs if the court does not make the ruling (s 71(6)–(7)).

present a response, and he must be afforded a reasonable opportunity to make a presentation, in person or through a representative, to the meeting before the resolution is put to a vote.[64] If it has less than three directors, the shareholder or director must apply to the Companies Tribunal for a determination.[65]

5 Management

5.1 Meetings

A director authorised by the board may call a meeting of the board, and *must* call a meeting of the board if at least two directors (or 25% of the directors if there are more than two) require it.[66] A meeting of the board may be conducted entirely by electronic communication. Alternatively, one or more directors may participate in that meeting by electronic communication but the electronic communication employed must enable all persons participating in that meeting to simultaneously communicate with each other and participate effectively in the meeting.[67]

The board can determine the format and time for notice of meetings, but it must comply with the MOI and the notice must be given to all the directors.[68] If all the directors of the company acknowledge actual receipt of the notice and are present at the meeting *or* waive notice of the meeting, failure of or defect in the required notice will not vitiate the meeting, unless the MOI provides otherwise.[69]

The quorum is a majority of directors. Resolutions are taken by a majority, with each director entitled to one vote. The chairperson will have a casting vote only if he did not initially have or cast a vote. All this applies unless the MOI

64 S 71(4).
65 S 71(8).
66 S 73(1). The number and percentage can be increased or decreased in the MOI (s 73(2)).
67 S 73(3).
68 S 85(4).
69 S 73(5).

provides otherwise, which implies that weighted votes of directors, a 'majority' of less than 50% + 1 and a veto by a director would be possible.[70] Unless the MOI provides otherwise, a resolution may instead be adopted by written unanimous consent, or by electronic communication, if all the directors had notice of the resolution. Such a resolution has the same effect as it would have had if it had been approved by voting at a meeting.[71]

5.2 Board and company committees

The board of a company may appoint any number of committees of directors and may delegate any authority, subject to the MOI, to a committee of the board. Subject to the company's MOI and the resolution establishing a committee, the committee has the full authority of the board in respect of a matter referred to it.[72] Except to the extent that the MOI of a company, or a resolution establishing a committee, provides otherwise, the committee may include a person(s) who is not a director of the company, but is eligible and not disqualified such a person will have no voting rights.[73]

The creation of a committee, delegation of any power to a committee, or action taken by a committee, does not alone satisfy or constitute compliance by a director with the required duty of a director to the company, as set out in section 76, with the effect that power/authority can be delegated, but not responsibilities.[74] Section 76(4)(b) provides that the director can rely under certain circumstances on the information as provided by the committee/s in the compliance of (some of) the fiduciary duties[75] and duties of care and skill.[76]

The Act does not prescribe the procedures (such as quorum and majorities) of the committees and the common law will therefore apply.

---

70 S 73(5).
71 S 74(1).
72 S 72(1).
73 S 72(2).
74 S 72(3).
75 See s 76(3)(b).
76 See also the common law principle in *Fisheries Development Corporation v Jorgenson* 1980 (4) SA 156 (W).

5.2.1 *Social and ethics committee*

The minister may prescribe by regulation a category of companies that must each have a SEC, if it is desirable in the public interest, having regard to annual turnover, workforce size or the nature and extent of the activities of such companies.[77] The Tribunal can give an exemption if a company is required in terms of other legislation to have, and does have, some form of formal mechanism that substantially performs the function that would otherwise be performed by the SEC or that it is not reasonably necessary in the public interest that the company must have a SEC.[78] Initial appointment of the first members is by the board and thereafter apparently by the company (shareholders). The SEC is, it is submitted, not a board committee but is appointed by the company (shareholders) and as such is a separate organ of the company.[79]

The SEC must have at least three directors or prescribed officers of whom at least one must be a director (not prescribed officer) who is not involved in the day-to-day management of the company's business or was so involved within the previous three financial years.

Every SOC, listed public company[80] and other company with a public interest score (PIS)[81] above 500,[82] must appoint a SEC.[83]

The appointment must be within one year of either incorporation as SOC, or the listing date of a listed company, or, in the case of any other company, when the PIS is 500. The first SEC of an existing company must be appointed by the board within 12 months after the Act comes into operation.[84]

---

77 S 72(4). The company must pay the expenses of the SEC (s 72(9)) and the SEC has wide powers (s 72(8)).

78 S 72(5).

79 See ch 5 in respect of organs of the company.

80 A listed company must in any case always be a public company.

81 See reg 26 and ch 9.

82 Reg 43. Subsidiaries of holding companies with an SEC do not have to appoint the committee, nor do they have to do so if the Tribunal has exempted the company in terms of s 72(5) and (6) (reg 43(3)).

83 Appointment, except for the first appointment by the board, must be made by the company (reg 43(2)).

84 Reg 43(3). The PIS must be above 500 for two of the preceding five years (reg 43(1)).

The functions of the SEC are –

- to monitor the company's activities, having regard to any relevant legislation, other legal requirements or prevailing codes of best practice, with regard to –
  - social and economic development, including the company's standing in terms of certain prescribed goals;
  - good corporate citizenship, in respect of equality and community contribution;
  - donations and charity;
  - consumer relationships, public relations and compliance with consumer protection laws; and
  - labour and employment; and
- to draw matters within its mandate to the attention of the board as occasion requires; and
- to report, through one of its members, to the shareholders at the company's annual general meeting on the matters within its mandate.[85]

5.2.2 *Audit committee*

The AC is also a separate organ of the company and is not a board committee within the meaning attributed to it in section 72.[86]

6 Rights and duties

6.1 General powers

The business and affairs of a company must be managed by or under the direction of its board, which has the authority to exercise all of the powers and perform any of the functions of the company, except to the extent that the Act or the company's MOI provides otherwise.[87] It is uncertain if the MOI can exclude all management functions, but it is doubted. Also, although the management powers can be delegated to other persons and/or organs, the obligations

85 Reg 43(5).

86 See ch 9.

87 S 66(1). See also ch 5.

in terms of the Act and the common law will remain with the directors. It would also appear that there is now, at least by implication, a positive duty on the directors and the board to manage the company.

The board now has original power, and it is not delegated from the shareholders as other organ in the company. An organ is distinguished from an agent because the act by the organ is that of the company and is not subject to (the granting of) authority. The organ, as a rule, does not have duties similar to that of an agent *vis-à-vis* the principal, unless provided for in the law or in an Act, as is the case with directors. The effect of the original powers is that the shareholders do not have residual powers such as the power to act if the board does not act or to act 'as the company', unless the Act gives that authority.[88] Therefore, if the Act refers to actions by the company, without specifying the particular organ, it will be actions by the board.

6.2 Duties: standards of conduct

6.2.1 *Common law duties*

The Act does not exclude the common law, and to the extent that it is not in conflict with a statutory provision, it still applies. When determining a matter brought before it in terms of the Act, or making an order contemplated in the Act, a court must develop the common law as necessary to improve the realisation and enjoyment of rights established by the Act.[89] A basic exposition of the common law duties of directors will therefore be necessary to determine the interaction between the common law and the duties in terms of the Act, and especially to determine the content of the respective duties. The statutory duties are not an exclusive or even a proper codification of the common law duties. Also, the concepts as used in the Act, like '*bona fide* in the interest of the company' and 'care and skill', are not defined in the Act and the common law definitions will apply.

6.2.2 *Fiduciary duties*

In general, fiduciary duties can be divided into the duty to act *bona fide* and the duty to avoid a conflict of interest.

---

88 See s 20(2) in respect of ratification for such an exception.

89 S 158(a). See s 7, ch 1 and ch 12.

Breach of the duties results in liability for the director. The *quantum* is the benefit for the director and/or the loss to the company which are not mutually exclusive. Absence/presence of the one therefore does not influence the other, therefore if the company does not suffer a loss but the director benefits, liability still exists. [90]

6.2.2.1 '*Bona fides*' (good faith)

This is a subjective overarching duty applying to the exercise of any and all of the powers in the company. In essence it requires that the director must act honestly.[91]

Apart from the duty of (subjective) honesty, there are also objective standards, which are not subservient to the duty of honesty. Therefore, the objective duties apply, and non-compliance will not be excluded if the director avers that he acted honestly (*bona fide*).

The objective standards are:

(a) *'Interests of the company'*

The duty must be exercised in the interests of the company.[92] The question will then be who the company is, as there is a multiplicity of 'stakeholders' inside the company, (for example, the shareholder/s) as well as 'outside' the company (such as, to name a few, the creditors, employees, the state and the community). The basic principle is that the company must be used for profit maximisation in favour of the shareholders, and the shareholders as body will therefore be the 'company' in this sense. This viewpoint has been questioned by two opposing alternatives: the one is that the directors can, under certain circumstances, ignore the interests of the shareholders in favour of the interests of the other stakeholders (pluralist approach) and the other one is that the

---

90 *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134 n (HL); *Symington v Pretoria-Oos Privaat Hospitaal Bedryfs (Pty) Ltd* [2005] 4 All SA 403 (SCA).

91 *South African Fabrics Ltd v Millman NO* 1972 (4) SA 592 (A); *Da Silva v CH Chemicals (Pty) Ltd* [2009] 1 All SA 216 (SCA); 2008 (6) SA 620 (SCA).

92 *Da Silva v CH Chemicals (Pty) Ltd* [2009] 1 All SA 216 (SCA); *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd and Others* 2014 (5) SA 179 (WCC).

interests of another stakeholder must also be taken into account if it promotes the interests of the shareholders (enlightened shareholders approach) with the latter being the most accepted.[93]

(b) *'Do not exceed powers'*

This entails that the directors must not exceed the limits of their powers (that is, perform acts outside the capacity of the company or their agency or the restrictions in the Act), irrespective of whether the act will be valid/binding in respect of third parties.[94]

(c) *'Use powers for a proper purpose'*

The test is firstly what the power was conferred for, and secondly whether it was exercised for that purpose,[95] such as that the power to issue shares must be used to obtain capital, not to entrench or change control.[96] This duty actually also serves as a test, and therefore is not a separate duty in that sense, to determine if the act was for the benefit of the company.[97]

(d) *'Exercise an independent and unfettered discretion'*

The director must exercise an independent discretion and must not agree to act in a particular manner in future or to act as a 'puppet' of another.[98]

6.2.2.2 Duty to avoid a conflict of interest

A director must not make any 'secret' profit. The test is only whether the director received any benefit, as a result of the position.[99] Knowledge by the company (it is actually not 'secret') without full disclosure to and approval by the

---

93 See in general 'South African Company Law for the 21st century – Guidelines for Corporate Law Reform' (policy paper) (*GG* 26493 of 23 June 2004).

94 See e.g. s 20 in respect of acts *ultra vires* the company that will be valid in respect of third parties but which were outside the authority of the directors because it was *ultra vires* the company.

95 *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd and Others* 2014 (5) SA 179 (WCC).

96 *Punt v Symons & Co Ltd* [1903] 2 Ch 506; *Piercy v S Mills & Co Ltd* [1920] 1 Ch 77.

97 *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] 1 All ER 1126 (PC).

98 *Novick v Comair Holdings Ltd* 1979 (2) SA 116 (W); *Howard v Herrigel NO* 1991 (2) SA 660 (A).

99 *Phillips v Fieldstone* [2004] 1 All SA 150 (SCA); *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168.

company will still result in liability.[100]

The director should also not usurp corporate opportunities.[101] If the profit is claimed by the company the effect will therefore be as if the director acted for and on behalf of the company, as he should have done in the first instance.[102]

(a) *Contracts between company and director are voidable*

Contracts between the company and its director constitute conflicts of interest *per se* and as such are voidable at the instance of the company if not approved after full disclosure. Mere knowledge of the company is not sufficient.[103]

6.2.2.3 Duties of care and of skill

The director must exercise care as well as skill in the execution of his functions or powers within the company. In contrast to *sui generis* liability in respect of fiduciary duties, liability will be on the basis of delict, therefore all the elements of a delict must be proved.

(a) *'Act'*

The director must either act (*commissio*) or fail to act while, *inter alia*, under a duty to act (*omissio*).

(b) *'Wrongful'*

The act must result in the infringement of the rights of the company when the director has a duty (the opposite of a right) not to infringe or affect that right.

(c) *'Fault'*

The director is culpable, that is, he acted either intentionally (meaning that he directed his mind at achieving a certain result), or negligently. Negligence

---

100 Only the free consent of the principal (company) after full disclosure will suffice: *Phillips v Fieldstone* [2004] 1 All SA 150 (SCA).

101 Defined in *Bellairs v Hodnett* 1978 (1) SA 1109 (A) as, *inter alia*, 'related to the operations of the company within the scope of its business'; *Da Silva v CH Chemicals (Pty) Ltd* [2009] 1 All SA 216 (SCA); 2008 (6) SA 620 (SCA).

102 *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168.

103 *Phillips v Fieldstone* [2004] 1 All SA 150 (SCA); *Symington v Pretoria-Oos Privaat Hospitaal Bedryfs (Pty) Ltd* [2005] 4 All SA 403 (SCA).

occurs when the director's conduct does not conform to the objective standard measured against that of the reasonable man under the circumstances. An extensive departure from these standards will result in gross negligence (or recklessness).[104] A director must exercise the care and skill that would be expected of a reasonable man (objective test) with his skill and experience (subjective test). The effect of this test is that there is no minimum standard, that is, the subjective element will be the determinant.

(d) *'Damage/loss'*

The damage/loss can be physical (such as damage to a company vehicle) or purely financial (for example, the director may have failed to properly inspect a property that he bought for the company, resulting in over-payment compared to the actual value) and must be patrimonial (that is, measurable in money).

(e) *'Causation'*

The wrongful culpable act must be the direct reason for the loss or damage not only in law (legal causation) but also in fact (factual causation – that is, if the act was removed the damage/loss disappears).[105]

6.2.3 *Statutory: general*

The standards of conduct prescribed in section 76 of the Act apply to a 'director' and includes an alternate director, a prescribed officer, or a person who is a member of a committee of a board of a company, or a member of the AC of a company, irrespective of whether the person is also a member of the company's board.[106]

---

104 'Recklessness in this context is not limited to the more onerous test inherent in the concept of *dolus eventualis*. Gross negligence without a conscious or wilful regard for the consequences will be sufficient to bring a respondent within the scope of the section': *Triptomania Twee (Pty) Ltd v Connolly* [2003] 1 All SA 374 (C); *Philotex (Pty) Ltd v Snyman* 1998 (2) SA 138 (SCA).

105 Nagel (ed) *Commercial Law* (2011) 27 *et seq*.

106 S 76(1). The duties apply also to certain 'non-directors', i.e. to persons appointed to committees who are not directors. In respect of the latter, s 72 provides that such a person has no vote unless the MOI provides otherwise. Therefore, a person may have the duties

(*continued*)

The section does not exclude the common law; therefore, the common law duties that are not expressly amended by this section or the duties that are not in conflict with the section will still apply. The basic principle under common law is that if a third party knows that a particular act committed by a director is in contravention of his fiduciary duty, the resultant agreement is void.[107] This rule no longer applies in respect of statutory duties, because subject to any provision specifically declaring an agreement, resolution or provision of an agreement, MOI or rules of a company void, nothing in the Act renders void any other agreement, resolution or provision of an agreement, MOI or rules of a company that is prohibited, voidable or that may be declared unlawful in terms of the Act, unless a court has made a 'declaration' to that effect regarding that agreement, resolution or provision.[108]

Statutory duties are a purported codification of common law duties. However, common law duties not so codified still apply, with the content and liability basis as under the common law. An example of such a residual common law duty is the duty on the director to exercise an independent and unfettered discretion.

6.2.4 *Positive duties*

6.2.4.1 General

A director of a company (when acting in the capacity of director) must exercise the powers and perform the functions of director –

- in good faith and for a proper purpose;
- in the best interests of the company; and

---

without the decision-making powers. A 'prescribed officer' means the holder of an office, within a company, that has been designated by the minister in terms of s 66(11) (s 1). The definition of 'director', however, differs in respect of certain provisions (e.g. s 75).

107 See e.g. *Letseng Diamonds v JCI Ltd* 2007 (5) SA 564 (W).

108 S 218(1). See however e.g. *Letseng Diamonds v JCI Ltd* 2007 (5) SA 564 (W).

- with the degree of care, skill and diligence that may reasonably be expected of a person –
  - carrying out the same functions in relation to the company as those carried out by that director; and
  - having the general knowledge, skill and experience of that director. This is accepted to provide for a minimum objective standard with the subjective standard serving only to increase the level above the objective standard, but which would never be below the objective standard.[109]

The King III Report on Governance for South Africa (King III) applies to all companies and although it is not law, it may have an effect on the possible liability of directors if it is not complied with. Non-compliance could, as a general rule, result in liability for not complying with the duty of care, if not skill.[110] The care and skill duty is towards the company, and would obviously result in liability towards the company as discussed below.

6.2.4.2 The 'business judgment rule'

A director will have satisfied the obligations of acting in the best interests of the company and with the required care and skill[111] if –

- she has taken reasonably diligent steps to become informed about the matter; and

---

109 S 76(3). It is uncertain whether this is a 'codification' of the common law duties of care and skill discussed above. S 60 of the Banks Act 94 of 1990 has a similar provision which provides *inter alia* that a bank director must '(c) possess and maintain the knowledge and skill that may reasonably be expected of a person holding a similar appointment and carrying out similar functions . . .' and '(d) exercise such care in the carrying out of his or her functions in relation to that bank as may reasonably be expected of a diligent person who holds the same appointment under similar circumstances, and who possesses both the knowledge and skill mentioned in (c) above and any such additional knowledge and skill as the director, chief executive officer or executive officer in question may have.' See De Jager 2005 *SA Merc LJ* 170.

110 *De Villiers v BOE Bank Ltd* [2004] 2 All SA 457 (SCA) and *Stilfontein Minister of Water Affairs and Forestry v Stilfontein Gold Mining Co Ltd* 2006 (5) SA 333 (W).

111 S 76(3)(b)–(c).

- either –
  - she had no material personal financial interest in the subject matter of the decision, and had no reasonable basis to know that any related person had a personal financial interest in the matter; or
  - she complied with the requirements of section 75 in respect of any interest contemplated in the immediately preceding point; and
- she made a decision, or supported the decision of a committee or the board with regard to that matter, and had a rational basis for believing, and did believe, that the decision was in the best interests of the company.[112] Fault (or absence thereof) is therefore introduced as an element of fiduciary duties. Although fault is an element of liability for breach of care and skill, it was never a requirement for breach of fiduciary duties, such as acting in the interest of the company. It should be noted that the director must act (do something), therefore an *omissio* apparently does not qualify.[113]

The director is entitled to rely on –

- the performance by any of the persons –
  - referred to in section 76(5);[114] or

112 S 76(4)(a).

113 See *ASIC v Rich* [2009] NSWSC 1229.

114 S 76(5) refers to employees of the company whom the director reasonably believes to be reliable and competent in either the functions that they perform or the information, opinions, reports or statements that they provide. In addition, reliance can be placed on legal counsel, accountants, or other professional persons retained by the company, by the board or a committee in respect of matters involving skills or expertise, if the director reasonably believes that the matter falls within the particular person's professional or expert competence or that the particular (professional) person merits confidence in respect of that matter. The director can also rely on a committee of the board of which the director is not a member, unless the director has reason to believe that the actions of the committee do not merit confidence (s 76(5)). The latter is a curious provision as under such circumstances it cannot be said that either the committee (members) or the particular director acted in the best interests of the company.

  - to whom the board may reasonably have delegated, formally or informally by course of conduct, the authority or duty to perform one or more of the board's functions that are delegable under applicable law; and

- any information, opinions, recommendations, reports or statements, including financial statements and other financial data, prepared or presented by any of the persons specified in section 76(5).[115]

6.2.4.3 Duty to disclose

(a) *Conflict of (personal financial) interest*

The common law principle is that all contracts between a director and the company are voidable at the instance of the company, based on the principle that there shall be no conflict of interest and also, flowing from that, that a director cannot make a 'secret' profit.[116] While the latter rule has been retained, the former is, apparently, modified by the principle that the contract is 'not valid' if the statutory requirements have not been complied with. Therefore, if the contact is between the company and a director,[117] and disclosure is not required under the statutory provisions (discussed below), the contract will be voidable[118] under common law principles. If disclosure is required,[119] then apparently the statutory principles will apply to the exclusion of the common law.

---

115 S 76(4)(b).

116 See par 6.2.4.

117 Under common law, the prescribed officer is obviously not included and the position of such a person will be regulated by, presumably, the principles of agency etc.

118 S 218(1) is not applicable as the agreement, etc., was not in terms of the Act.

119 Not all contracts are subject to the disclosure requirements, e.g. if the directors' interest is not material.

(b) *General duty*

A director must communicate to the board at the earliest practicable opportunity any information that comes to his attention, unless he reasonably believes that the information is –

- immaterial to the company; or
- generally available to the public; or
- known to the other directors; or
- he is bound not to disclose that information by a legal or ethical obligation of confidentiality.[120]

(c) *Interest in future contracts*

The definition of 'director' for section 75 includes an alternate director, a prescribed officer, and a person who is a member of a committee of a board of a company, irrespective of whether the person is also a member of the company's board and 'related person' when used in reference to a director has the meaning set out in section 1. It also includes a second company of which the director or a related person is also a director, or a close corporation of which the director or a related person is a member.[121]

If a director of a company has a personal financial interest[122] in respect of a matter to be considered at a meeting of the board, or knows that a related person[123] has a personal financial interest in the matter, she –

- must disclose the interest and its general nature before the matter is considered at the meeting;[124]

---

120 S 76(2)(b). This duty is very wide in respect of the information that must be disseminated, but also quite easy to circumvent.

121 S 75(1)(b). The AC (and possibly the SEC) and are not committees 'of a board of a company'. See ch 5.

122 See s 1 and par 6.2.4.2. Disclosure can be on CoR 36.4 in terms of reg 36.

123 See s 1 and ch 3.

124 Disclosure is on CoR 36.3. However, in the context of the section, it would appear that prior written notification, as well as oral notification at the meeting would be sufficient.

- must disclose to the meeting any material information relating to the matter, and known to her;
- *may*, presumably at her discretion, disclose any observations or pertinent insights relating to the matter if requested to do so by the other directors;
- if present at the meeting, must leave the meeting immediately after making any disclosure;[125] and
- must not take part in the consideration of the matter, except as in the second and third points above.[126]

A 'personal financial interest' is defined in section 1 as a direct material interest of that person, of a financial, monetary or economic nature, or to which a monetary value may be attributed, but does not include any interest held by a person in a unit trust or collective investment scheme in terms of the Collective Investment Schemes Act,[127] unless that person has direct control over the investment decisions of that fund or investment. When the financial interest will be 'material' is to be determined using the definition in section 1. Materiality must therefore be determined not in respect of the 'subject matter', but in respect of the (subjective) position of the director.

(d) *Interest in existing contracts*

If a director of a company acquires a personal financial interest in an agreement or other matter in which the company has a material interest, or knows that a related person has acquired a personal financial interest in the matter after the agreement or other matter has been approved by the company, the director must promptly disclose to the board, or to the shareholders in certain circumstances,[128] the nature and extent of that interest, and the material circumstances relating to the director or related person's acquisition of that interest.[129]

---

125 While absent from the meeting, the director is to be regarded as being present for the purpose of determining whether sufficient directors are present to constitute the (quorate) meeting, and is not to be regarded as being present at the meeting for the purpose of determining whether a resolution has sufficient support to be adopted (s 75(5)(f)).

126 S 75(5).

127 Act 45 of 2002.

128 S 75(3). See par 6.2.4.3(g).

129 S 75(6). What is required here is a personal financial interest, irrespective of whether it is material, in a matter in which the company has a material interest. There does not seem to

(*continued*)

(e) *Effect on contract*

A decision by the board, or a transaction or agreement approved by the board, is valid despite any personal financial interest of a director or person related to the director, only if it was approved as in section 75 after disclosure or, if it was approved without any disclosure, if it has either been ratified by an ordinary resolution of the shareholders after disclosure or if declared 'valid' by the court.[130] The requirement apparently is that there must be no disclosure. Partial disclosure or incorrect disclosure would not seem to suffice. Under these circumstances, section 75 seems not to apply and the common law could apply. Full disclosure and approval under section 75 excuses the director. Non-disclosure followed by approval will only excuse the director if he discloses and the shareholders ratify. This allows the shareholders to ratify a fraudulent act, which non-disclosure under these circumstances will be.

If the director does not declare the interest as required by section 75, a court, upon application by any interested person, may declare valid a transaction or agreement that had been approved by the board, despite the director's failure to satisfy the requirements of this section.[131] The provision that the court can declare a contract 'valid' implies that the contract is void. It would therefore appear that the common law rule that the contract is (valid but) voidable at the instance of the company does not apply.[132]

(f) *Exclusions*

The disclosure of the personal financial interests does not apply to a director –

- in respect of a decision that may generally affect all the directors of the company in their capacity as directors, or affect a class of persons, despite

---

be any requirement in respect of this type of situation (i.e. the board must approve it, or the resultant liability of the director).

130 S 75(7). The division of powers between the board and the shareholders is complicated further by s 75(7). See s 66(1) and ch 5.

131 S 75(8). The impression is created that this contract is void. See s 218(1) and ch 2.

132 See par 6.2.4.3(a).

the fact that the director is one member of that class of persons, unless the only members of the class are the director or persons related or inter-related to the director. Resolutions in terms of section 71 to remove a director are also excluded;

- or a company if one person holds all the beneficial interests of all the issued securities of the company and is the only director of that company.[133]

(g) *Disclosure to shareholders*

If a person is the only director of a company, but does not hold all the beneficial interests of all the issued securities of the company, he may not approve or enter into any agreement in which he or a related person has a personal financial interest, or as a director determine any other matter in which the person or a related person has a personal financial interest, unless the agreement or determination is approved by an ordinary resolution of the shareholders after the director has disclosed the nature and extent of that interest to them.[134]

6.2.5 *Negative duties*

A director of a company must not use her position as director, or any information obtained while acting in the capacity of director, to gain an advantage for herself, or for another person other than the company or a wholly-owned subsidiary of the company and must not knowingly cause harm to the company or a subsidiary of the company.[135] 'Knowingly' means that the person either *had* actual knowledge of that matter, or was in a position in which he *reasonably ought to have had* actual knowledge, or *reasonably ought to have* investigated the matter to an extent that would have provided him with actual knowledge, or *reasonably ought to have* taken other measures which, if taken, would reasonably be expected to have provided him with actual knowledge of the matter.[136]

---

133 S 75(2).

134 S 75(3).

135 S 76(2)(a). This is the equivalent of the 'conflict of interest' common law duty discussed above.

136 S 1.

This duty extends the ambit beyond that of the company of which the person is a director, which was not the position in terms of the common law, where the director only had a duty towards the company of which he was the director and not to subsidiary companies, wholly owned or otherwise.[137]

In terms of the common law, the extension of duties can also be in terms of general legal principles, such as in the case of instrumentality if the subsidiary is used as a (puppet) agent and holding company and/or the directors thereof has the liability as the principal, if the directors of the holding and subsidiary company are the same (but then it actually remains independent duties towards two companies), and if the legal personality of the subsidiary company is 'abused'.[138]

6.2.6 *Reckless trading*

A company must not carry on its business –

- recklessly;[139]
- with gross negligence;
- with intent to defraud any person; or
- for any fraudulent purpose (prohibited conduct).[140]

If the CIPC has reasonable grounds to believe that a company is engaging in prohibited conduct, or that it is unable to pay its debts as they become due and payable in the normal course of business,[141] it may issue a notice to the company ordering it to show cause why it should be permitted to continue the

---

137 See *Scottish Co-operative Wholesale Society Ltd v Meyer* [1959] AC 324 (HL).

138 See also ch 2 par 1.6.

139 See the discussion on 'recklessness' above.

140 S 22(1); *Rabinowitz v Van Graan and Others* 2013 (5) SA 315 (GSJ) and ch 12. Ss 22 and 424 of the Companies Act 61 of 1973 (973 Act), which overlap to a certain degree, will apply concurrently until Ch XIV of the 1973 Act is repealed (item 9 of Sch 5 and see ch 13).

141 See *Ex parte De Villiers NO: In re Carbon Developments (Pty) Ltd* 1993 (1) SA 493 (A) and *Cooper v A & G Fashions (Pty) Ltd: Ex parte Millman NO* 1991 (4) SA 204 (C) in respect of the effect of subordination agreements on 'insolvency'. See ch 13 for the meaning of 'insolvency'.

prohibited conduct.[142] If the company fails to satisfy the CIPC that it is not engaging in prohibited conduct or that it is able to pay its debts as they fall due and payable in the normal course of business,[143] the CIPC can issue a compliance notice requiring the company to cease the prohibited conduct, or trading, as the case may be.[144] A director is liable to the company for any loss, damage or costs arising as a *direct* or *indirect* consequence of the prohibited conduct.[145] This liability is in respect of breach of fiduciary duties if that director agreed to carry on the business of the company while knowing that it is prohibited in terms of section 22.[146] Liability towards third parties will be in terms of section 218(2) or, if the company is in liquidation, in terms of section 424 of the 1973 Act.[147]

6.3 Liability

6.3.1 *Breach of duties*

A director (and prescribed officer and member of a committee of the board) will be liable in accordance with the principles of the common law relating to breach of *fiduciary duty*, for any loss, damages or costs sustained by the company as a consequence of any breach of duty by him –

- to disclose a personal financial interest (section 75); or
- to avoid a conflict of interest (section 76(2)); or

---

142 S 22(2). Notice is on CoR 19.1.

143 It cannot 'show cause why it should be permitted to carry on' with the prohibited conduct as per the notice by the CIPC, but only that it is *not engaging* in prohibited conduct.

144 S 22(3).

145 Whether the 'direct or indirect' requirement is as wide as the present liability in terms of s 424 of the 1973 Act is uncertain. In terms of s 424, a causal link is not required, but the absence of a link will exclude liability (*Saincic v Industro-Clean (Pty) Ltd* 2009 (1) SA 538 (SCA)). S 424 will continue to apply after the Act comes into operation (item 9 of Sch 5, and ch 14).

146 S 77(3)(b). See also liability in terms of s 20(6). A director also cannot be indemnified for this liability (s 78(6)).

147 Item 9 van Bylae 5 that states that the winding-up provisions in Ch XIV of the 1973 Act still apply.

- to act –
  - in good faith *and* for a proper purpose; or
  - in the best interests of the company (section 76(3)(a) to (b)).[148]

The liability of the director for any benefit (irrespective of the damage to the company) is apparently not covered.[149] It is not clear whether the common law will apply in this regard and the company can nonetheless hold the director liable if the company did not suffer a loss but the director obtained a benefit. The wording of the section appears to exclude the common law.

Liability for any breach by the director of –

- the duty to act with the required degree of care, skill and diligence (section 76(3)(c)); or
- any provision of the Act not otherwise mentioned in this section; or
- any provision of the company's MOI,

is in accordance with the principles of the common law relating to *delict* for any loss, damages or costs sustained by the company as a consequence thereof.[150]

6.3.2 *Specific actions: liability*

A director is liable to the company for any loss, damage or costs arising as a direct or indirect consequence of him –

- acting for and on behalf of the company despite knowing that he lacked authority to do so;[151] or
- agreeing to carry on the business of the company while knowing that is prohibited in terms of section 22;[152] or

---

148 S 77(2)(a).

149 As in *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134 (HL) and *Symington v Pretoria-Oos Privaat Hospitaal Bedryfs (Pty) Ltd* [2005] 4 All SA 403 (SCA).

150 S 77(2)(b).

151 S 77(3)(a).

152 S 77(3)(b).

- being a party to an act or omission by the company despite knowing that it was calculated to defraud a creditor, employee or shareholder of the company, or had another fraudulent purpose;[153] or

- having signed, or consented to the publication of a financial statement that was false or misleading in a material respect, or publication of a prospectus, or a written statement contemplated in section 101, that contained an 'untrue statement' as defined in section 95, or contained a statement that the person consented to be a director while the consent was not given, knowing that, or with reckless disregard as to whether, the statement was false, misleading or untrue, as the case may be.[154]

If the director took part in a meeting (formal or informal)[155] and failed to vote against –

- the issuing of any unauthorised shares or options on those *shares*, despite knowing that those shares had not been authorised in terms of section 36; or

- the issuing of any authorised *securities* without shareholder approval in terms of section 41; or

- the provision of financial assistance to any person in the acquisition of securities of the company, knowing that the financial assistance is in contravention of section 44 or the company's MOI; or

- the provision of financial assistance to a director in terms of section 45, knowing that it was in contravention of the Act or the company's MOI;[156] or

- a resolution approving a distribution, despite knowing that the distribution was contrary to section 46;[157] or

---

153 S 77(3)(c). S 77(3)(a)–(c) are also grounds for delinquency (see par 3.2).

154 S 77(3)(d).

155 A director can apply to court for the setting aside of the resolution (s 77(5)). Liability is joint and several with any other liable person (s 77(6)).

156 Financial assistance to related companies of the lending company is apparently excluded.

157 To the extent that the company is insolvent or illiquid, minus any recovered amount (s 77(4)(b)). A director who was present at a meeting and failed to vote against a

(*continued*)

- the acquisition by the company of any of its shares, or the shares of its holding company, despite knowing that the acquisition was contrary to section 46 or 48; or
- an allotment by the company despite knowing that the allotment was contrary to any provision of Chapter 4.[158]

6.3.3 *Other liability*

6.3.3.1 Section 20

Each shareholder of a company has a claim for damages against any person, including a director, who fraudulently or due to gross negligence causes the company to do anything inconsistent with the Act or a limitation, restriction or qualification in terms of section 20, unless the action has been ratified by the shareholders.[159]

6.3.3.2 Section 15

The MOI, and any rules of the company, are binding between the company and each director or prescribed officer of the company.[160] Therefore, the contractual rights of parties *vis-à-vis* the directors will apply in a contravention of the provisions of the MOI to the extent that the Act does not expressly provide otherwise.[161]

In addition, one or more shareholders, directors or prescribed officers of a company may institute proceedings to restrain the company or the directors from doing anything inconsistent with any limitation, restriction or qualification contained in the MOI.[162]

---

resolution despite the fact that the company did not satisfy the solvency and liquidity tests (e.g. for s 44, 45 or 46) makes that director liable for a probationary order (see par 3.3).

158 S 77(3)(e). This provision is extremely vague, and it is submitted that a distinction is made between allotments contrary to any provision in Ch 4 and allotments if the provisions of Ch 4 have not been complied with, e.g. an offer to the public without a registered prospectus accompanying the offer. The latter situation is clearly not covered by the former.

159 S 20(6). This is a personal action.

160 S 15(6)(c). See ch 2. It is submitted that, based on the common law, this relationship is contractual.

161 Liability, however, is based on delict and not on breach of contract (s 77(2)(b)).

162 S 20(5). One or more shareholders, directors or prescribed officers of a company, or a trade union representing employees of the company, may also take proceedings

(*continued*)

6.3.3.3 Section 218

It is not necessary for conduct to be fraudulent or carried out with gross negligence towards the company for a shareholder to also have a claim against, for example the directors,[163] as any person who contravenes[164] any provision of the Act is liable to any other person for any loss or damage suffered by that person as a result of that contravention.[165]

6.3.4 *Exclusion of duties*

Any provision of an agreement, the MOI or rules of a company, or a resolution adopted by a company, whether express or implied, is void to the extent that it directly or indirectly purports to relieve a director of –

- a *duty* in terms of sections 75 and 76; or
- *liability* in terms of section 77; or
- to limit, negate, or restrict any legal consequences arising from an act or omission that constitutes wilful misconduct or wilful breach of trust.[166]

6.3.5 *Indemnification*

Except to the extent that the MOI provides otherwise, a company may indemnify a director in respect of any liability, except if the director –

- acted or purported to act in the name of the company or on behalf of the company despite knowing that he lacked the authority to do so; or

---

to restrain the company from doing anything inconsistent with the Act (s 20(4)).

163 See par 6.3.3.1 above.

164 Non-compliance with a statutory provision, whether in the form of a fiduciary duty or otherwise, would surely constitute a 'contravention'.

165 S 218(2) and ch 12 par 4.1. It is therefore inconceivable that a shareholder will want to prove fraud or gross negligence against the company in order to succeed with a direct claim against the director (s 20(6) and ch 5). Non-compliance with King III could therefore now also result in direct liability towards third parties for not complying with duties towards the company (see par 6.2.3.1).

166 S 78(2). This prohibition is subject to the exceptions in s 78(6). It is not clear why a prohibition is stated with the particular exceptions, rather than just a general enabling provision, such as occurs in s 78(6). The principle in *Movitex Ltd v Bulfield* [1988] BCLC 104 (Ch) has therefore been excluded, at least in respect of statutory duties. The contract is only void if the court declares it void (see s 218(1) and ch 2).

- acquiesced in the carrying on of the company's business recklessly, with gross negligence, with intent to defraud any person or for any fraudulent purpose, or acquiesced to trading under insolvent circumstances (section 22(1)); or
- had been a party to an act or omission by the company despite knowing that the act or omission was calculated to defraud a creditor, employee or shareholder of the company, or had another fraudulent purpose; or
- committed wilful misconduct or wilful breach of trust.[167]

A company may –

- advance expenses to a director to defend litigation in any proceedings arising out of the director's service to the company; and
- (directly or indirectly) indemnify a director for these litigation expenses, irrespective of whether it has advanced those expenses and the proceedings are subsequently abandoned or the director is found not liable; or the expenses are as a result of litigation in respect of which the company can indemnify the director.[168]

If, in any proceedings against a director (*other* than for wilful misconduct or wilful breach of trust), it appears to the court that the director is or may be liable, but has acted honestly and reasonably, and having regard to all the circumstances of the case (including those connected with the appointment of the director), that it would be fair to excuse the director, the court may relieve

---

167 S 78(6).

168 S 78(4)(a) – subject to the MOI. The company may also, subject to the MOI, purchase insurance to protect the company, or the director, against this liability and the concomitant expenses (s 78(7)). The company may, however, not directly or indirectly pay a fine imposed on the director of the company or of a related company as a consequence of that director having been convicted of an offence, unless the conviction was based on strict liability (s 78(3)). This does not apply to a private or personal liability company if a single individual is the sole shareholder and sole director of that company, or two or more related individuals are the only shareholders of that company, and there are no directors of the company other than one or more of those individuals (s 78(3A)).

the person, either wholly or partly, from the liability on any terms as the court considers just.[169] Wilful misconduct or wilful breach of trust means that the director did not act 'honestly'.[170]

A director who has reason to believe that a claim will be made alleging that she is liable, other than for wilful misconduct or wilful breach of trust, may apply to the court for relief. The court may grant relief to the director on the same grounds as if the matter had come before the court in terms of the principles above.[171]

SUMMARY **COMMON LAW AND STATUTORY DUTIES OF DIRECTORS**				
Fiduciary duties				
Duty	**Content**	**Source**	**Liability**	**Validity**
Act *bona fide.*	Common law	S 76(3)(a)	Ss 77(2)(a) and 218(2) (loss only)	S 218(1)
Best interests of company.	Common law	S 76(3)(b)	Ss 77(2)(b) and 218(2) (loss only) *Except* s 76(4)(a) (business judgment))	S 218(1)
Proper purpose	Common law	S 76(3)(a)	Ss 77(2)(a) and 218(2) (loss only)	S 218(1)
Not exceed powers	Common law	S 20	Ss 20(5), 77(3)(a) and 218(2) (loss only)	S 218(1)
Maintain unfettered discretion	Common law	S 76(3)(b)	Common law (loss or benefit)	Common law (if 3rd party is *mala fide* no contract – s 218 not applicable).

continued

169 S 77(9). Why these acts are therefore expressly excluded is not clear.

170 *Ex parte Lebowa Development Corporation Ltd* 1989 (3) SA 71 (T).

171 S 77(10). The equivalent of s 248 of the 1973 Act, but much narrower and with the same deficiencies.

Fiduciary duties				
Duty	**Content**	**Source**	**Liability**	**Validity**
Avoid conflict of interest				
Not use position/information for personal gain	S 76(2)(a)(i)	S 76(2)(a)(i)	Ss 77(2)(a) and 218(2) (loss only)	S 218(1)
Must use position/ information for the benefit of company and wholly owned subsidiaries	S 76(2)(a)(i)	S 76(2)(a)(i)	Ss 77(2)(a) and 218(2) (loss only)	S 218(1)
Not use information to knowingly cause harm to company or subsidiaries	S 76(2)(a)(ii)	S 76(2)(a)(ii)	Ss 77(2)(a) and 218(2) (loss only)	S 218(1)
Disclose any information to board	S 76(2)(b)	S 76(2)(a)	Ss 77(2)(a) and 218(2) (loss only)	S 218(1)
Contract between company and director voidable at instance of company (unless s 75 applies)	Common law	Common law	Common law	Common law (voidable at instance of company – s 218 not applicable)
Disclose material personal financial interest (future contracts)	S 75(5) (*except* s 75(2) and (3)	S 75(5)	Ss 77(2)(a) and 218(2) (loss only)	Ss 218(1) and 75(7) and (8) (void if not complied with)
Disclose material personal financial interest if material to company (existing contracts)	S 75(6) (*except* s 75(2) and (3)	S 75(6)	Ss 77(2)(a) and 218(2) (loss only)	Ss 218(1) and 75(7) and (8) (void if not complied with)

continued

Care and Skill				
Duty	**Content**	**Source**	**Liability**	**Validity**
Care, skill, diligence	Objective – S 76(3)(c)(i) Subjective – S 76(3)(c)(ii)	S 76(3)(c)	S 77(2)(b) (loss only) *Except* s 76(4)(a) (business judgment)	S 218(1)

Chapter 8 Groups of companies

1 General

In the Companies Act[1] 'group of companies' means a holding company and all of its subsidiaries. A 'holding company', in relation to a subsidiary, means a juristic person that controls that subsidiary as a result of any circumstances contemplated in section 2(2)(a) or 3(1)(a).[2] The definition of 'subsidiary' refers to a 'juristic person' as a holding company but only to a 'company' as a subsidiary, which would exclude a trust or partnership or other 'juristic

1 Act 71 of 2008 (the Act/2008 Act).

2 S 1. The word 'control' is defined in respect of related parties in s 2, and is based on the holding company/subsidiary definition. It is, however, possible to exert control outside the definition of holding company/subsidiary, and the exclusion of the membership (shareholder) requirement as in the Companies Act 61 of 1973 (1973 Act) increases the alternatives.

person'.[3] Therefore a trust or partnership or other 'juristic person' can be a holding company, but not a subsidiary.

The basic initial philosophy with this relationship was to regulate abuse of control (by the holding company over the subsidiary)[4] and to provide for consolidated financial statements for the 'group' as business entity in addition to the financial statements of the individual companies due to the fact that the holding of different assets in different subsidiary companies could create a misleading impression of the business as a whole.[5] 'Abuse of control' sections are for example sections 44 and 45 of the 2008 Act.[6]

2 Definition

A company is[7] –

'(a) a subsidiary of another juristic person if that juristic person, one or more other subsidiaries of that juristic person, or one or more nominees of that juristic person or any of its subsidiaries, alone or in any combination –

(i) is or are directly or indirectly able to exercise, or control the exercise of, a majority of the general voting rights associated with issued securities of that company, whether pursuant to a shareholder agreement or otherwise; or

(ii) has or have the right to appoint or elect, or control the appointment or election of, directors of that company who control a majority of the votes at a meeting of the board;[8] or

(b) a wholly-owned subsidiary of another juristic person if all of the general voting rights associated with issued securities of the company are held or controlled, alone or in any combination, by persons contemplated in paragraph (a).'

---

3 S 1(3)(c) of the 1973 Act uses the word 'undertaking' at a subsidiary level, in contrast to the holding level in this instance.

4 Initially through the controlled/controlling definition.

5 See ch 9.

6 See ch 4.

7 S 3(1).

8 The power to dismiss the directors who control the majority of the votes is not included. This (negative) power is as important as the appointment of those directors.

In determining whether a person controls the general voting rights of the issued securities of a company, voting rights that are exercisable only in certain circumstances are to be taken into account only when those circumstances have arisen and for so long as they continue, or when those circumstances are under the control of the person holding the voting rights.

Voting rights that are exercisable only on the instructions or with the consent or concurrence of another person are to be treated as being held by a nominee for that other person. Voting rights held by a person as nominee for another person are to be treated as held by that other person. Voting rights held by a person in a fiduciary capacity are to be treated as held by the beneficiary of those voting rights.[9]

The holding–subsidiary relationship is also used to determine certain elements of the related and inter-related relationship. The 'related–inter-related' definition provides that a juristic person is related to another juristic person if either of them directly or indirectly controls the other or the business of the other as determined in accordance with section 2(2), or the controlled company is a subsidiary of the controller. Section 2(2) then provides again, *inter alia*, that a company controls another company if the second is a subsidiary of the first.[10]

The holding–subsidiary relationship can become complicated if the different alternatives are used together, but a few examples of simple situations follow:

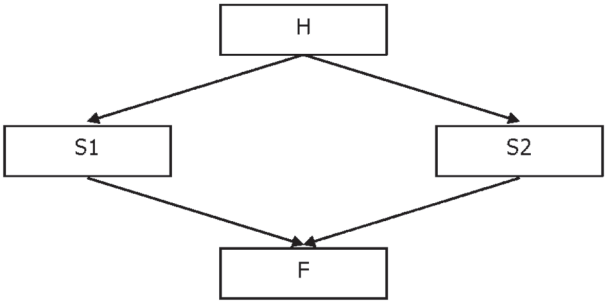
- S has 1 000 shares and 1 000 debentures in issue. The debentures each have one vote. H is the registered shareholder of 800 of the shares in S. S will not be the subsidiary of H, as the latter only holds 40% of the voting rights. If the debentures are non-voting, S will be the subsidiary of H.

---

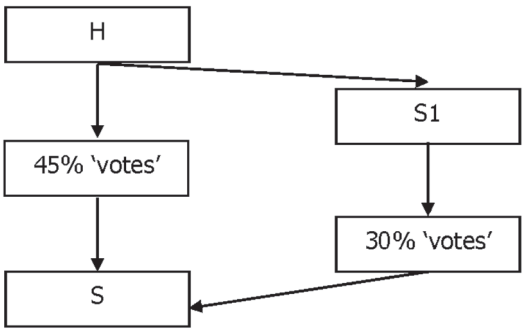
9 To 'hold' means that a person is the registered, direct or indirect beneficial holder of securities conferring a right to vote (s 3(2)–(3)). It should be noted that the basic requirement in the 1973 Act that a person must also be a 'member' ('shareholder' in the 2008 Act) is not required. This extends the ambit of the definition of 'holding/subsidiary' to the extreme.

10 S 2(1)–(2). The circular reference to subsidiary is confusing.

- S has 1 000 shares in issue. The shares in S are held by X. H lends R1 million to X and as security X cedes his voting rights in S to H. S will be a subsidiary of H, because H is able to exercise more than 50% of the voting rights, even though H is not shown in the securities register of S as shareholder.
- S has 1 000 shares in issue. The shares in S are held by X. H is a trust registered in Bermuda and it lends R1 million to X. X cedes his voting rights in S to H as security. S will be a subsidiary of the H trust because it is able to exercise more than 50% of the voting rights.
- H has the power to appoint two of the three directors in S1 and holds 60% of the voting securities in S2. The directors in S1 have one vote each at board meetings. S1 holds 20% of the voting securities in S, and S2 holds 40% of the voting securities in S. S is a subsidiary of H because, through its subsidiaries (S1 and S2), it 'holds' more than 50% of the votes in S.

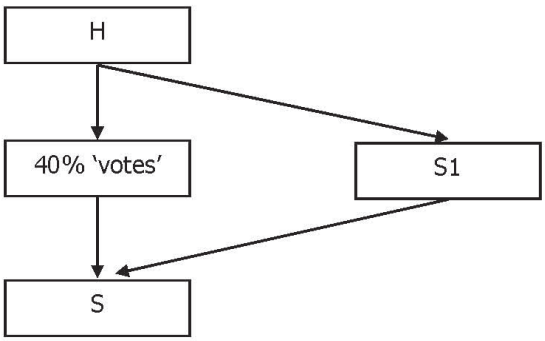


- H holds 45% of the voting securities in S and has the power to appoint two of the three directors in S1. The directors in S1 have one vote each on board meetings. S1 holds 30% of the votes in S as security for a loan made by S1 to a shareholder of S. S is a subsidiary of H because on its own (45%) and through its subsidiary S1 (30%) it is able to exercise more than 50% of the votes in S.



A final example illustrates some more complexities, and some serious deficiencies:

- The directors of S1 are A, B, C and D. The shareholders appoint all the directors, but H has the power to *dismiss* A and B. A and B have two votes each on the board and therefore have the majority of the votes. S1 holds 20% of the voting securities in S and H holds 40% of the voting securities in S. S is not a subsidiary of H, because the power to dismiss the directors who hold the majority votes on the board, in contrast to the power to appoint them, does not make S1 a subsidiary of H. H therefore does not control S on its own and through subsidiaries.



3 Application

The holding company–subsidiary relationship is important in a number of provisions[11] of the Act in respect of principles that go beyond the abuse of control and consolidation of financial reporting as in the 1973 Act.

3.1 Acquisition of shares

Section 48 regulates the acquisition of shares by the subsidiary in the holding company. A subsidiary may acquire shares of that company subject to the following, *inter alia*, that not more than 10%, in aggregate, of the number of issued shares of any class of shares of a company may be held by, or for the

11 Apart from those discussed here, there are *inter alia* also provisions in s 11 ('Criteria for company names') and s 93 ('Rights and restricted functions of auditors').

benefit of, all the subsidiaries of that company. The voting rights in those shares cannot be exercised as long as the company remains a subsidiary. This acquisition is regulated as a 'distribution' under section 46.[12]

A distribution is also a –

'transfer by a company of money or other property of the company, other than its own shares, to or for the benefit of one more holders of any of the shares [of that company], or to the holder of a beneficial interest in any such shares, of that company or of another company within the same group of companies, whether –

. . .

(iii) as consideration for the acquisition –

(aa) by the company of any of its shares, as contemplated in section 48; or

(bb) by any company within the same group of companies, of any shares of a company within that group of companies . . .'[13]

This would imply that the requirements for board and company resolutions are on the subsidiary company level.[14]

3.2 Standards of director's conduct

Section 76 requires that a director must not use his position, or any information obtained while acting in the capacity of a director to gain an advantage for himself, or for another person other than the company or a *wholly-owned subsidiary* of the company, or to knowingly cause harm to the company or a *subsidiary* of the company. This duty implies that the director of the holding company has fiduciary duties towards the subsidiary company as well.[15] There is therefore a positive duty to a wholly-owned subsidiary and a negative duty to a subsidiary. It is not clear what the position should be if there is conflict between the interests of the company of which the person is a director and the interests of a wholly-owned subsidiary.

---

12 See ch 4.

13 Definition of 'distribution' in s 1.

14 It is doubtful that this is the correct procedure.

15 See ch 7.

3.3 Public offerings of securities

In terms of the definition in section 95(1) an 'employee share scheme' which is not an 'offering' to the public means a scheme established by a company for the purpose of offering participation therein solely to employees and officers of the company or a subsidiary of the company by means of the issue of shares in the company or by the grant of options for shares in the company.

A 'secondary offering' means an offer for sale to the public of any securities of a company or its subsidiary, made by or on behalf of a person other than that company or its subsidiary. It is not clear why a subsidiary is seen as part of the holding company in this regard. If the offer is made of shares of the subsidiary, and it is to the public, a prospectus is required. The control relationship does not add to or subtract from this situation.

3.4 Proposals to dispose of all or the greater part of assets or undertaking

Section 112 regulates the disposal of the greater part of the assets or of the undertaking of the company and provides that the disposal must be approved as determined in section 115. However, this requirement does not apply if the disposal is between a wholly-owned subsidiary and its holding company, or between or among two or more wholly-owned subsidiaries of the same holding company, or between a wholly-owned subsidiary of a holding company, on the one hand, and its holding company and one or more wholly-owned subsidiaries of that holding company, on the other.[16]

16 See ch 10.

Chapter 9 Accounting records, financial statements and audit

1 Accountability and transparency: all companies (Part C of Chapter 2)

1.1 Registered office

Every company (including an external company) must continuously maintain at least one office in the Republic, and register the address of its office, or its principal office if it has more than one office, initially providing the required information on its Notice of Incorporation (NOI). Any change must also be so filed.[1]

1 S 23(3) of the Companies Act 71 of 2008 (the Act/2008 Act). An external company must provide the information when filing its registration under s 23(1). Whether a company can (*continued*)

1.2 Company records

Every company must maintain the following records –

- a copy of its Memorandum of Incorporation (MOI), and any amendments or alterations to it, and any rules of the company;
- a record of its directors (including past directors);
- copies of –
  - all reports presented at annual general meetings (AGMs);
  - annual financial statements (AFS) and accounting records;
  - notice and minutes of all shareholders' meetings, including all resolutions and any document that was made available to the holders of securities in relation to each such resolution;
  - any written communications sent generally by the company to all holders of any class of the company's securities; and
  - minutes of all meetings and resolutions of directors, and directors' committees, and the audit committee (AC).

Every profit company must also maintain a securities register and, if required, a register of company secretaries and auditors.[2]

A person who holds or has a beneficial interest in any securities issued by a company has a right to inspect and copy the information contained in the records of the company *as required by the Act*, with the exception of the accounting records and minutes of directors' meetings.[3]

---

have more than one office is uncertain: see ch 2 and *Sibakhulu Construction (Pty) Ltd v Wedgewood Village Golf Country Estate (Pty) Ltd* 2013 (1) SA 191 (WCC).

2 S 24. The records must be kept at, or be accessible from, the registered office (s 25(1)) and in a written or electronic form (s 24(1) and reg 22). Changes in respect of the location of the records must be notified to the Companies and Intellectual Property Commission (CIPC) on CoR 22 and changes in respect of the registered office must be notified to the CIPC on CoR 21.1 (reg 21).

3 See s 26(1) and ch 2 in respect of inspection by other persons. It is an offence if a company fails to accommodate a request for access or otherwise impedes these rights (s 26(5)). Note,

(*continued*)

1.3 Accounting records

A company must keep accurate *accounting records* in one[4] of the official languages of the Republic at its registered office –

- as necessary to enable the company to satisfy its obligations in terms of the Act or any other law with respect to the preparation of financial statements; and
- including any prescribed accounting records, which must be kept in the prescribed manner and form.[5]

1.4 Financial statements

If a company provides any financial statements, including any AFS, *to any person for any reason*, the statements must satisfy the financial reporting standards in respect of form and content. Financial statements *include* AFS and provisional AFS; interim or preliminary reports; group and consolidated financial statements in the case of a group of companies, and financial information in a circular, prospectus or provisional announcement of results that an actual or prospective creditor, or holder of the company's securities, or the CIPC, Takeover Regulation Panel (TRP) or other regulatory authority may reasonably be expected to rely on.[6]

It must also present fairly the state of affairs and business of the company; explain the transactions and financial position of the business of the company; show the company's assets, liabilities and equity, as well as its income and expenses, and any other prescribed information and set out the date on which the statements were produced, and the accounting period to which the

---

however, that s 5(4)(i) provides that if the Act and, e.g., the Promotion of Access to Information Act 2 of 2000 contain conflicting provisions, the latter will apply. This could have the effect that access to certain information may be compelled under the latter Act although the former Act does not allow it. See ch 2 and *La Lucia Sands Share Block Ltd v Barkhan* [2011] 2 All SA 26 (SCA) in respect of the type of information that can be inspected.

4 'Accounting records' as defined in s 1 – apparently in any one of the official languages.

5 S 28. The manner and form of accounting records are prescribed in reg 25. It is an offence for the company to fail to keep records or to keep records other than in the prescribed form with the intent to mislead or deceive any person or to falsify records. Any person who falsifies records also commits an offence (s 28(3)).

6 S 1.

statements apply. The statements must have a prominent notice on the first page indicating –

- whether the statements have been audited in compliance with any applicable requirements of the Act, and, if not audited, whether they have been independently reviewed in compliance with any applicable requirements of the Act; or
- whether the statements have not been audited or independently reviewed; and
- the name and professional designation, if any, of the individual who prepared or supervised the preparation of the statements.[7]

A company may provide any person with a summary of any particular financial statements, and any such summary must comply with any prescribed requirements.[8]

1.5 Annual financial statements

A company must prepare AFS within six months after the end of the financial year.[9] A financial year starts when the company is incorporated (the date of its registration certificate) and ends at the date determined by company in the NOI, but not more than 15 months after incorporation date. The financial year is the annual accounting period.[10]

The AFS of a company must include[11] –

- an auditor's report, if the statements are audited;
- a report by the directors pertaining to the state of affairs of the business and the profit or loss of the company, or of the group of companies, if the company is part of a group, including any matter considered material in

---

7 S 29(1). Non-compliance is an offence (ss 29(6) and 218(2)). See below for form and content.

8 S 29(3). Non-compliance is an offence (ss 29(6) and 218(2)). See below for form and content.

9 S 30(1).

10 See s 27 for the determination of a financial year. Changes in the financial year end must be notified to the CIPC on CoR 25 (reg 25).

11 The actual content will presumably be set by regulation after consultation with the Financial Reporting Standards Council (FRSC) (s 204).

enabling the shareholders to appreciate the company's state of affairs, and any prescribed information.[12]

The AFS must be approved by the board, signed by an authorised director and presented to the first shareholders' meeting[13] after approval by the board.[14] The notice of the AGM given to the shareholders must contain a summary of the AFS, as well as directions for obtaining a copy of those financial statements.[15] Section 30 refers to a 'shareholders' meeting' while section 62(3) refers to the 'annual general meeting'. The latter includes the former, but not *vice versa*. If every person in a private company who holds or has all of the beneficial interests in the securities issued by the company is also a director of the company, the financial statement need not be presented to the shareholders' meeting.[16]

If the AFS are required to be audited, they must contain extensive information about any remuneration received by a director or prescribed officer apparently only in that capacity and not in any other capacity such as, for instance, employee.[17]

1.6 Access to annual financial statements

A person who holds or has a beneficial interest in any securities issued by a company is entitled to receive a notice of the publication of any AFS. The notice must set out the steps required to obtain a copy of those statements as well as those needed to receive (on demand) without charge, one copy of any AFS.[18]

If there has been a *nulla bona* return in respect of a judgment, that is there is insufficient disposable property to satisfy that judgment, the creditor is entitled,

---

12 S 30(3). See below for form and content.
13 S 30.
14 S 30(3).
15 S 62(3).
16 S 30(3)(d).
17 S 30(4)–(6). See ch 7.
18 S 31(1).

within five business days after making a demand, to receive without charge one copy of the most recent AFS of the company.[19]

Trade unions must, through the CIPC and under the conditions determined by the CIPC, be given access to company financial statements for the purposes of initiating a business rescue process.[20]

1.7 Form and content

The minister, after consulting the FRSC, may make regulations prescribing financial reporting standards, or the form and content requirements for summaries.[21]

The regulations must promote sound and consistent accounting practices, and in the case of financial reporting standards, must be consistent with the International Financial Reporting Standards (IFRS). Different standards may be applicable to profit and non-profit companies (NPCs) and different categories of profit companies.[22]

Irrespective of the general requirements, the financial statements (including the AFS) must, apparently, also not be false or misleading or incomplete (except in the case of a summary).[23]

The form and content is as follows:[24]

State-owned companies (SOCs) and profit companies	
Category of company	**Financial reporting standard**
SOCs.	IFRS, but in the case of any conflict with any requirement in terms of the Public Finance Management Act 1 of 1999, the latter prevails.

continued

19 S 31(2).
20 S 31(3).
21 S 29(4). These regulations also apply to close corporations: item 5 of Sch 3.
22 S 29(5). See s 203 about the FRSC.
23 S 29(2). Non-compliance is an offence (ss 29(6) and 218(2)). The question is whether this is an additional requirement to the formal requirements.
24 Reg 27.

Category of company	**Financial reporting standard**
Public companies listed on an exchange.	IFRS.
Public companies not listed on an exchange.	One of – (a) IFRS; or (b) IFRS for Small and Medium Enterprises (SMEs) , provided that the company meets the scoping requirements outlined in the IFRS for SMEs.
Profit companies, other than SOCs or public companies, whose public interest score (PIS) for the particular financial year is at least 350.	One of – (a) IFRS; or (b) IFRS for SMEs, provided that the company meets the scoping requirements outlined in the IFRS for SMEs.
Profit companies, other than SOCs or public companies – (a) whose PIS for the particular financial year is at least 100 but less than 350; or (b) whose PIS for the particular financial year is less than 100, and whose statements are independently compiled.	One of – (a) IFRS; or (b) IFRS for SMEs, provided that the company meets the scoping requirements outlined in the IFRS for SMEs; or (c) SA GAAP.
Profit companies, other than SOCs or public companies, whose PIS for the particular financial year is less than 100, and whose statements are internally compiled.	Financial reporting standard determined by the company as long as there is no prescribed financial reporting standard.
Non-profit companies (NPCs)	
Category of company	**Financial reporting standard**
NPCs that are required in terms of regulation 28 (1)(b) to have their AFS audited.	IFRS, but in the case of any conflict with any requirements in terms of the Public Finance Management Act, the latter prevails.
NPCs, other than those contemplated in the first row above whose PIS for the particular financial year is at least 350.	One of – (a) IFRS; or (b) IFRS for SMEs, provided that the company meets the scoping requirements outlined in the IFRS for SMEs.
NPCs, other than those contemplated in the first row above – (a) whose PIS for the particular financial year is at least 100, but less than 350; or (b) whose PIS for the particular financial year is at less than 100, and whose financial statements are independently compiled.	One of – (a) IFRS; or (b) IFRS for SMEs, provided that the company meets the scoping requirements outlined in the IFRS for SMEs; or (c) SA GAAP.

continued

Category of company	Financial reporting standard
NPCs, other than those contemplated in the first row above, whose PIS for the particular financial year is less than 100, and whose financial statements are internally compiled.[25]	Financial reporting standard determined by the company as long as there is no prescribed financial reporting standard.

The PIS is calculated as follows –

- a number of points equal to the average number of employees of the company during the financial year ('employee' has the meaning set out in the Labour Relations Act[26] (reg 26(1)(a));

---

25 'Independently compiled and reported' means that the AFS are prepared by an independent accounting professional on the basis of financial records provided by the company and in accordance with any relevant financial reporting standards (reg 26(1)(d)). If the AFS are not independently compiled and reported, it will be regarded as having been compiled 'internally' (reg 27(2)). An 'independent accounting professional' when used with respect to any particular company, means a person who –

'(i) is –
(aa) a registered auditor in terms of the Auditing Profession Act [26 of 2005]; or
(bb) a member in good standing of a professional body that has been accredited in terms of section 33 of the Auditing Profession Act; or
(cc) qualified to be appointed as an accounting officer of a close corporation in terms of section 60(1), (2) and (4) of the Close Corporations Act, 1984 (Act No. 69 of 1984) [CC Act]; and

(ii) does not have a personal financial interest in the company or a related or interrelated company; and

(iii) is not –
(aa) involved in the day to day management of the company's business, nor has been so involved at any time during the previous three financial years; or
(bb) a prescribed officer, or full-time executive employee, of the company or another related or inter-related company, or have been such an officer or employee at any time during the previous three financial years; and

(iv) is not related to any person who falls within any of the criteria set out in clause (ii) or (iii) (reg 26(1)(c)).'

26 Act 66 of 1995.

- one point for every R1 million (or portion thereof) in third party liability of the company held by creditors at the financial year end;
- one point for every R1 million (or portion thereof) in turnover during the financial year; and
- one point for every individual who, at the end of the financial year, is known by the company –
  - in the case of a profit company, to directly or indirectly have a beneficial interest in any of the company's issued securities; or
  - in the case of a non-profit company, to be a member of the company, or a member of an association that is a member of the company.[27]

If the AFS must be audited, it must also be filed with the CIPC.[28]

1.8 Audit and review

1.8.1 *Compulsory audit and review*

1.8.1.1 Audit

The AFS of a *public company* must be audited.[29] In the case of any other profit or non-profit company, such statements must be audited if required by regulation[30] because it is desirable in the public interest, having regard to the economic or social significance of the company, as indicated by any relevant factors, including its annual turnover, the size of its workforce, or the nature and extent of its activities (public interest audit).[31] These regulations can provide for different categories of companies and prescribe the categories of private companies that are required to have their respective AFS audited,[32] and then the whole of Part C of Chapter 3 will apply but Part B (company secretary) and Part D (audit committee) will not apply.[33]

---

27 Reg 26(2).
28 S 33 and see par 1.9.
29 S 30(2)(a).
30 These regulations also apply to close corporations: item 5 of Sch 3.
31 S 30(2)(b). Reg 28 sets out the criteria for the 'public interest audit'.
32 S 30(7).
33 S 84(1)(c).

These regulations provide that the following companies must have their AFS audited, unless closely held and excluded under section 30(2A) –

- a public company and an SOC;[34]
- a *profit or non-profit* company must have AFS audited if –
  - in the ordinary course of its primary activities;
  - it holds assets in a fiduciary capacity for persons who are not related to the company and the aggregate value of such assets held at any time during the financial year exceeds R5 million;[35]
- a *non-profit* company (NPC), if it was incorporated
  - directly or indirectly by the state, an organ of state, a SOC, an international entity, a foreign state entity or a company; or
  - primarily to perform a statutory or regulatory function in terms of any legislation, or to carry out a public function at the direct or indirect initiation or direction of an organ of the state, a SOC, an international entity, or a foreign state entity, or for a purpose ancillary to any such function;[36]
- any 'other' company with a PIS of –
  - 350 or more; or
  - at least 100 if its financial statements were internally compiled.[37]

1.8.1.2 Review

A company whose AFS are not required to be audited or which is not subject to a voluntary audit and which is not excluded under section 30(2A), must have its AFS independently reviewed in accordance with ISRE 2400[38] –

---

34 Reg 28(2). SOCs are included as a result of the provisions of s 9, which provides that all provisions that apply to public companies apply to SOCs.

35 Reg 28(2)(a).

36 Reg 28(2)(b).

37 Reg 28(2)(c).

38 S 30(2)(b)(ii)(bb). The manner, form and procedures for the conduct of an independent review other than an audit, as well as the professional qualifications, if any, of persons who may conduct such reviews, are determined by regulation (s 30(7)). Reg 29 contains the requirements for the review. See reg 29(6) for the duties in respect of a 'reportable irregularity', which is defined in reg 29(1) as any act or omission committed by any person responsible for

(*continued*)

- by a registered auditor, or a member in good standing of a professional body that has been accredited in terms of section 33 of the Auditing Profession Act[39] if the PIS was at least 100;[40] or
- by a person who is qualified to be appointed as an accounting officer of a close corporation in terms of section 60(1), (2) and (4) of the CC Act if the PIS is less than 100.[41]

1.8.1.3 Voluntary audit

In all other cases, the financial statements *may* be audited[42] voluntarily if the MOI requires it, or if so decided by a shareholders' resolution or a board resolution.[43]

1.8.1.4 'Closely held' company exemption

The AFS of a company do not have to be audited or independently reviewed if every person who holds or has all of the beneficial interests in the securities issued by the company (directly and not through another entity like a company or trust) is also a director of the company. This exemption will, however, not apply if the company is subject to a 'public interest audit' or in terms of another law or in terms of an agreement to which the company is a party.[44] If the interest in the securities are held by the director 'through' another entity, such as a trust or another company, this exemption can clearly not apply.

---

the management of a company, which unlawfully has caused or is likely to cause material financial loss to the company or to any member, shareholder, creditor or investor of the company in respect of dealings with 'that entity', (presumably the company) or which is fraudulent or amounts to theft or that causes or has caused the company to trade under insolvent circumstances.

39 Act 26 of 2005.

40 Reg 29(4)(a).

41 Reg 29(4)(b). See also ch 16.

42 What is intended here is only the audit (presumably only Part C of Ch 3) and not the application of Part D of Ch 3 (audit committees).

43 S 30(2)(b)(ii)(aa).

44 S 30(2A). 'Another law' could obviously be in respect of companies used by professionals.

1.8.1.5 Summary: Audit and review

	Category of company	**Audit/Review**
1	Public companies and SOCs.	Audit.
2	NPCs (incorporated by state or regulatory function for organ of state).	Audit.
3	Profit companies and other NPCs. Holds assets in a fiduciary capacity that exceed R5m at any time in financial year.	Audit.
4	Other companies – PIS – • of 350 or more • of 100 but less than 350 – statements internally compiled.	Audit.
5	Voluntary audit (Part C of Ch 3) – • MOI requires; or • shareholders resolution; or • board resolution.	Audit.
6	PIS of at least 100 – statements not internally compiled.	Review (by auditor or person accredited in terms of s 33 of the Auditing Profession Act).
7	PIS less than 100.	Review (by accounting officer as in CC Act).
8	Directors of company hold or have all of the beneficial interests in the securities issued by the company if not subject to 'public interest audit' (categories 3 and 4 above) (s 30(2A)).	No audit or review.

1.9 Annual return

Every company[45] must file an annual return in the prescribed form[46] within the prescribed period after the anniversary of its incorporation. The return must include a copy of its audited AFS if the company is required to have the statements audited[47] and any other prescribed information. If it is not required to

45 S 33(1). Including an external company.

46 On CoR 30.1 (reg 30).

47 In terms of s 30(2) or the regulations under s 30(7).

have its financial statements audited, it *may* file a copy of its audited or reviewed financial statements, otherwise it *must* file the financial accountability supplement.[48]

The annual return must designate a director, employee or other person who is responsible for the company's compliance with the requirements of Part C of Chapter 2, and Chapter 3, if these apply to the company.[49]

2 Increased accountability and transparency: Chapter 3

In addition to the requirements above, public companies, SOC and certain private companies[50] must also comply with the additional requirements of Chapter 3 of the Act.[51] A private company, personal liability company, or NPC is not required to comply with Chapter 3, except *to the extent* that the company's MOI provides otherwise.[52] Chapter 3 requires the relevant companies to –

- appoint a company secretary;
- appoint an auditor; and
- establish an AC.[53]

---

48 Reg 30(3) and (4) and form CoR 30.2. The CIPC must monitor compliance with 'financial record keeping and financial reporting provisions of the Act' and can issue compliance notices (reg 33(5)).

49 S 33(3).

50 If the minister has made regulations prescribing that the particular category of private company must have its AFS audited (s 30(7)), but then Part B (company secretary) and Part D (audit committee) of Ch 3 will not apply (s 84(1)(c)).

51 S 34(1). See s 84(3) if there is a conflict between Ch 3 and a provision of the Public Audit Act 25 of 2004 in respect of an SOC.

52 S 34(2). The company can therefore choose the whole or any part of Ch 3. A voluntary audit only (Part C of Ch 3) can therefore be determined by the MOI, or if decided by a shareholders' resolution or a board resolution (s 30(2)(b)), but an application of Part B and/or Part D only if the MOI requires it (s 84(1)(c)).

53 S 84(4). If the company or SOC does not take the necessary steps, the CIPC may, after notice to the company, convene a shareholders' meeting and apportion the cost between the directors (s 84(6)). A person disqualified as director is also disqualified to be appointed as company secretary or auditor or member of the AC (s 84(5)). A register of company

(*continued*)

2.1 Company secretary

2.1.1 *Appointment*

A public company or SOC must appoint a company secretary who must be a permanent resident of the Republic, and must remain so while serving in that capacity.[54] It can also be a juristic person or partnership, in which case at least one employee or partner must comply with this requirement.[55]

2.1.2 *Duties*

The company secretary is accountable to the board. His duties include, but are not restricted to –

- providing the directors of the company collectively and individually with guidance about their duties, responsibilities and powers;
- making the directors aware of any law relevant to or affecting the company;
- reporting to the company's board any failure on the part of the company or a director to comply with the Act;
- ensuring that minutes of all shareholders' meetings, board meetings and the meetings of any committees of the directors, or of the company's AC, are properly recorded in accordance with the Act;
- certifying in the company's AFS whether the company has filed the required returns and notices, and whether all such returns and notices appear to be true, correct and up to date;
- ensuring that a copy of the company's AFS is sent to every person who is entitled to it; and
- carrying out the functions of a person designated in terms of s 33(3).[56]

---

secretaries and auditors must be kept by the company, and appointments and terminations of service must be filed (s 85).

54 S 86. It can also be a juristic person or partnership, in which case at least one employee or partner must comply with s 86. Notice of appointment is on CoR 44 in terms of reg 44.

55 S 87(1).

56 S 88.

2.2 Auditor[57]

2.2.1 *Appointment*

Public companies, SOCs and certain private companies[58] must appoint an auditor upon incorporation, and each year at its AGM.[59] If an auditor is not appointed at the registration of the company, the directors must appoint the auditor within 40 business days after the date of incorporation.[60]

---

57 See s 85 for the register of auditors and secretaries.

58 S 90. A private company must appoint an auditor if it falls within the category of companies that the minister has provided by regulation must have its AFS audited (s 30(7)) or if the company's MOI requires that its financial statements must be audited in terms of s 34(2) ((s 84(1)(c)). The voluntary audit is actually regulated by s 30(2)(b)(ii), and s 34(2) refers to the application of enhanced accountability in terms of Ch 3. The difference is significant, as s 34(2) provides for the voluntary application of Ch 3, and the audit, only if the MOI requires it, while s 30(2)(b)(ii) provides that a voluntary audit can be required by the MOI or if a shareholders' resolution or the board resolution requires it. S 90 is applicable to the above appointment by a private company in terms of s 34 (s 90(2)(c)). The extent of the application of s 90, especially in respect of the role of the AC in the case of the voluntary audit in terms of s 30(2)(b)(ii) is unclear, but it would apparently only be applicable if required by the MOI (ss 34(2) and 84(1)(c)(ii)).

59 S 90. See s 61(7) for the requirements for the AGM. No resolution is prescribed, with the effect that an ordinary resolution would suffice. Private companies are, however, not required to hold an AGM and it is therefore uncertain how the auditor will be appointed if a private company is required to have an auditor in terms of s 84(1)(c). The retiring auditor may be automatically reappointed, unless that auditor is no longer qualified for appointment, not willing to accept the appointment, must cease as serving auditor due to holding the position for five consecutive years (s 92), AC objects to the appointment or a notice is given to the company of an intended resolution to appoint another auditor (s 90(6)). If the annual meeting fails to appoint an auditor, the directors must fill the vacancy within 40 business days from the date of the meeting, failing which the CIPC may apply to court for an order to appoint the auditor (s 90(7)). A private company does not have a compulsory AGM, and the appointment process in the case of a voluntary audit or compulsory audit as determined by regulation by the minister is uncertain. Notice of appointment is on CoR 44 in terms of reg 44.

60 S 90(4). The first auditor appointed by the directors holds office until the first annual meeting (s 90(5)).

The auditor (person or firm to be appointed) must be a registered auditor[61] acceptable to the AC as being independent of the company. He must not, at the time of appointment be, or for the previous five years have been, a director, officer or employee of the company or of an entity that maintains the company's financial records for more than one year, or as company secretary for the company, or be related to such a person.[62]

The same *individual* may not serve as auditor or 'designated auditor' for more than five consecutive years. In addition, if an individual has served as the auditor or designated auditor of a company for two or more consecutive financial years and then ceases to be the auditor or designated auditor, he may not be appointed again as the auditor or designated auditor of that company until after the expiry of at least two further financial years.[63]

The appointment by a public company at its AGM of an auditor other than one nominated by the AC is only valid if the AC is satisfied that the proposed auditor is independent of the company.[64]

2.2.2 *Rights and 'restricted functions'*[65]

The auditor of a company has the right of access at all times to the accounting records and all books and documents of the company. He is also entitled to require from the directors or officers of the company any information and explanations necessary for the performance of his duties.

---

61 S 90(2) requires that the person 'or firm' must be a registered auditor (see s 1 definition of 'registered auditor' in the Auditing Profession Act 26 of 2005). If a firm is appointed, it must designate a person responsible for the audit (s 44 of the Auditing Profession Act).

62 S 90(2)(b).

63 S 92.

64 S 94(9). The effect is that the appointment is *void ab initio* and the process of appointment must start over. This can result in the company being without an auditor for a period of time. It is not clear how the first auditor appointed upon incorporation can be acceptable to the (to be appointed) AC. If the latter is appointed and the auditor is not acceptable, then the initial appointment of the auditor is void.

65 Short title of s 93.

In the case of the auditor of a holding company, the auditor has the right of access to all current and former financial statements of any subsidiary of that holding company.[66] He is also entitled to require from the directors or officers of the holding company or subsidiary any information and explanations in connection with any such statements, accounting records, books and documents of the subsidiary as necessary for the performance of his duties.

In addition, the auditor is entitled to –

- attend any general meeting of the company;
- receive all notices of and other communications relating to any general meeting which any member of the company is entitled to receive; and
- be heard at any general meeting on any part of the business of the meeting which concerns his duties or functions.[67]

2.2.3 *Professional services by auditor*

An auditor may not perform any services –

- that would place him in a conflict of interest as prescribed or determined by the Independent Regulatory Board for Auditors (IRBA) in terms of the Auditing Profession Act; or
- other than may be determined by the company's AC.[68]

2.2.4 *Resignation and casual vacancy*

The resignation of an auditor is effective when the notice is filed.[69] If the auditor is removed from office by the board, he may require the company to

---

66 See ch 8.

67 S 93(1). The rights of access to accounting records of the company or subsidiaries can be enforced by a court order. A court may make any order that is just and reasonable to prevent frustration of the auditor's duties by the company or any of its directors, prescribed officers or employees, and may make an order of costs personally against any director or prescribed officer whom the court has found to have wilfully and knowingly frustrated, or attempted to frustrate, the performance of the auditor's functions (s 93(2)).

68 S 93(3). The repetition of the IRBA restrictions is superfluous. The AC can authorise other services in terms of s 94(7)(d).

69 Presumably the auditor gives notice to the company which must then file the notice (s 91(1) and filing CoR 44 in terms of reg 44). The auditory may resign by giving the company one month's written notice or less than one month's written notice, with the approval of the

(*continued*)

include a statement in its AFS relating to that financial year, not exceeding a reasonable length, setting out the auditor's contention as to the circumstances that resulted in the removal.[70]

If a casual vacancy arises, the board must appoint a new auditor within 40 business days if there is only one incumbent auditor of the company. The board may also appoint a new auditor at any time, if there is more than one incumbent, but while any such vacancy continues, the surviving or continuing auditor may act as auditor of the company. The board must propose the name of at least one registered auditor to be considered as the new auditor within 15 business days after the vacancy occurs to the AC. If, within five business days after making the proposal, the AC does not give notice in writing to the board rejecting the proposed auditor, the board may appoint the proposed auditor.[71]

2.3 Audit committee

2.3.1 *Composition*

At each AGM of a public company or SOC,[72] the company[73] must elect an AC, unless it is a subsidiary, and the AC of the holding company will act as AC.[74]

---

board (s 91(6) read with s 89(1)). If a company appoints a firm as its auditor, any change in the composition of the members of that firm does not by itself create a vacancy in the office of auditor for that year. However, if by comparison with the membership of a firm at the time of its latest appointment, less than one half of the members remain after a change, that change constitutes the resignation of the firm as auditor of the company, giving rise to a vacancy (s 91(4)–(5)). It is not clear if the resignation is then automatic; nor is it clear who will inform the company to be able to file the notice.

70 If the auditor wants this statement to be included in the AFS, he must give written notice to that effect to the company by not later than the end of the financial year in which the removal took place and that notice must include the statement. The statement must be included in the directors' report in the company's AFS (s 91(6) read with s 89(2)–(4)).

71 S 91.

72 Or a company that has voluntarily decided to have an AC.

73 Not the board of directors.

74 S 94(2). The first members of the AC may be appointed by the incorporator(s) or by the board (s 94(3)).

The AC must have at least three members who must be directors who are not involved (or have been so involved at any time during the previous financial year) in the day-to-day management of the company's business. These directors must also not be (or must not have been during the previous three financial years) prescribed officers or full-time executive employees of the company or another related or inter-related company. In addition, they must not be material suppliers or customers of the company, or be related to any of these persons in such a manner that a reasonable and informed third party would conclude in the circumstances that the integrity, impartiality or objectivity of any of these directors is compromised by that relationship.[75]

2.3.2 *Duties*

The duties of the AC[76] are to –

- nominate, for appointment as auditor of the company under section 90, a registered auditor who, in the opinion of the audit committee, is independent[77] of the company; and
- determine the fees to be paid to the auditor and the auditor's terms of engagement; and
- ensure that the appointment of the auditor complies with the provisions of the Act and any other legislation relating to the appointment of auditors; and
- determine, subject to the provisions of Chapter 3, the nature and extent of any non-audit services that the auditor may provide to the company;[78] and

---

75 S 94(4). The board may determine that it is necessary to enhance the financial knowledge and experience of the committee taken as a whole, and may appoint, as an additional member of the AC, a person who is not a director, but who has, in the opinion of the directors, the requisite knowledge and experience in financial matters to better equip the AC to carry out its functions (s 94(5)). Reg 42, however, requires that at least one-third of the members of a company's AC at any particular time must have academic qualifications, or experience, in economics, law, corporate governance, finance, accounting, commerce, industry, public affairs or human resource management.

76 S 94(7).

77 As determined in s 94(8).

78 See however s 93(3), which requires the AC to state the services that the auditor cannot perform.

- pre-approve any proposed contract with the auditor for the provision of non-audit services to the company; and
- insert into the financial statements to be issued in respect of that financial year a report –
  - describing how the AC carried out its functions; and
  - stating whether the AC is satisfied that the auditor was independent of the company; and
  - commenting in any way the committee considers appropriate on the financial statements, the accounting practices and internal financial control of the company; and
- receive and deal appropriately with any complaints, *whether from within or outside the company*, or on its own initiative, relating either to the accounting practices and internal audit of the company, or to the content or auditing of its financial statements, or to any related matter; and
- make submissions to the board on any matter concerning the company's accounting policies, financial control, records and reporting; and
- perform other functions determined by the board.[79]

A company must pay all expenses reasonably incurred by its AC including, if the AC considers it appropriate, the fees of any consultant or specialist engaged by the AC to assist it in the performance of its duties.[80]

---

79 The AC does not reduce the functions and duties of the board except for the appointment, fees and terms of engagement of the auditor (s 94(1)). See also the conditions in s 87 and ch 7 pertaining to the board committees and the relationship with the board.

80 S 94(11).

Chapter 10 Fundamental transactions and take-over regulation

1 General

Chapter 5 of the Companies Act[1] applies to 'fundamental transactions' and take-overs. Fundamental transactions are not defined, but are no more than particular actions/transactions by a company for which there are specific requirements. Irrespective of any provision of a company's Memorandum of Incorporation (MOI), or any resolution adopted by its board or holders of its securities to the contrary, a company may not dispose of all or the greater part of its assets or undertaking, or implement an amalgamation or a merger, or implement a scheme of arrangement, unless the transaction has been

1 Act 71 of 2008 (the Act/2008 Act).

approved in terms of section 115, or is pursuant to or contemplated in an approved business rescue plan for that company, in terms of Chapter 6 of the Act.[2]

2 Fundamental transactions

2.1 Proposals to dispose of substantially all assets or undertakings (section 112)

A company may not dispose of all or the greater part of its assets or undertaking unless the disposal has been approved by a special resolution of the shareholders[3] in accordance with section 115, and the company has satisfied all the other requirements set out in section 115.[4] The reference is to 'a company' and not to 'the directors'. The significance of this is that it is a capacity and not an authority issue.[5] The exact meaning of 'disposal' is uncertain but it will usually mean a permanent divestiture of ownership. If an asset is provided as security, such as in respect of a mortgage bond over fixed property, it will not be a disposal, but the terms of the contract will be important. Therefore, if shares are pledged as security but it is an out and out cession in the sense that the shares are transferred to the other party, subject to a term that it must be transferred back if the debt is paid, it will be a disposal.[6]

---

2 S 115.

3 S 112(2). S 112(5) provides that this resolution is effective only to the extent that it 'authorises' a specific transaction The words 'or ratifies' were deleted by s 69 of the Companies Amendment Act 3 of 2011 (2011 CAA). A different resolution as to the special resolution is obviously contemplated here, but it is not stated in s 112.

4 S 112. The section does not apply to a *proposal* to dispose of all or the greater part of the assets or undertaking of a company, if that disposal would constitute a transaction that is pursuant to or contemplated in a business rescue plan adopted in accordance with Ch 6, or between a wholly-owned subsidiary and its holding company, or between or among two or more wholly-owned subsidiaries of the same holding company, or between a wholly-owned subsidiary of a holding company, on the one hand, and its holding company and one or more wholly-owned subsidiaries of that holding company, on the other hand (s 112(1)).

5 See s 20 and ch 2.

6 *The Standard Bank of South Africa v Hunkydory Investments 194 (Pty) Ltd* 2009 JDR 0705 (WCC).

All or the greater part of the assets or undertaking means, in the case of the company's assets, more than 50% of its gross assets fairly valued, irrespective of its liabilities or, in the case of the company's undertaking, more than 50% of the value of its entire undertaking, fairly valued.[7] If the disposal is a regulated transaction, that is a fundamental transaction in respect of a regulated company,[8] an independent expert must do the valuation.[9]

A notice of a meeting of shareholders to consider a resolution must be in the prescribed manner, and must be delivered within the prescribed time.[10] It must include or be accompanied by a written summary of the precise terms of the transaction or series of transactions, and a written summary of the provisions of sections 115 and 164.[11]

2.2 Amalgamations or mergers (section 113)

An amalgamation or merger means a transaction, or series of transactions, pursuant to an agreement between two or more companies, resulting in the formation of one or more new companies, which together hold all of the assets and liabilities that were held by any of the amalgamating or merging companies immediately before the implementation of the agreement, and the dissolution of each of the amalgamating or merging companies, or the survival of at least one of the amalgamating or merging companies, with or without the formation of one or more new companies, and the vesting in the surviving company or companies, together with such new company or companies, of all of the assets and liabilities that were held by any of the amalgamating or merging companies immediately before the implementation of the agreement.[12]

---

7 S 1. The undertaking or assets must be fairly valued, as calculated in the prescribed manner as at the date of the proposal, which date must be determined in the prescribed manner (s 112(4)).

8 See s 118 and par 4.

9 See reg 90 in respect of the principles that the independent expert must take into account to determine value for purposes of s 117(1)(c)(i), (ii), (v) and (vi).

10 Reg 7 and table CR3.

11 S 112(3). As to the summary, see s 6(4) and (5) in respect of plain language.

12 S 1. Actually there is therefore no fundamental difference between an amalgamation and a merger.

There are many reasons to effect an amalgamation or merger and the most important are the reorganisation of the companies involved to be more efficient, or the acquisition of the control over an asset or undertaking of another company. This acquisition can be done by way of section 112, but it can also be done indirectly by acquiring the control over the company that controls the asset or undertaking. There are many factors that need to be taken into account to do a reorganisation or to acquire an asset or undertaking and an important one would be risk for the acquiring party.

There are many permutations to do a merger, but the 'standard' is a triangular merger, where the holding company (H) creates a subsidiary (S), which then merges with the target company (T) and the remaining entity is (S). The merger consideration (for the shareholders in T would be paid by cash or shares in H). In this way the target company is risk remote[13] from H. In a reverse triangular merger T remains, with S disappearing, but the mechanics and effect stay the same.

2.2.1 *Requirements*[14]

The board of each amalgamating or merging company must consider whether, upon implementation of the agreement, each proposed amalgamated or merged company will satisfy the solvency and liquidity test.[15] If the board reasonably believes that each proposed amalgamated or merged company will satisfy this test,[16] it may submit the agreement for consideration at a meeting of the shareholders of *that*[17] amalgamating or merging company, in accordance with section 115.[18] The notice of the meeting of shareholders to consider the amalgamation or merger must include or be accompanied by a copy or

13 The risk of and in the target company is not transferred to H.

14 The procedures apply to all profit companies (s 113(1)).

15 See s 4 and ch 4 for the solvency and liquidity test. Solvency and liquidity of the amalgamated or merged companies are prerequisites for the proposed amalgamation or merger (s 113(4)). In the case of a business rescue in terms of Ch 6, solvency and liquidity are not required (s 113(6)).

16 There must therefore be a reasonable belief that, based on reasonably foreseeable circumstances, the companies will be solvent and liquid.

17 I.e., a company that is a party to an amalgamation or merger agreement (s 1).

18 S 113(4)(b). The notice must contain the amalgamation or merger agreement as well as the provisions of ss 115 and 164 (s 113(5)).

summary of the merger or amalgamation agreement, *and* a copy or summary[19] of the provisions of sections 115 and 164.[20]

The agreement setting out the terms and means of effecting the amalgamation or merger must be entered into and, in particular, *must* contain the following – [21]

- the proposed MOI of any new company;
- the name and identity number of each proposed director;
- the manner in which the securities of each amalgamating or merging company are to be converted into securities of the proposed amalgamated or merged company, or exchanged for other property;
- details of the consideration that the holders of the securities are to receive in addition to or instead of securities of the proposed amalgamated or merged company, if any securities are not to be converted into securities of the proposed amalgamated or merged company;[22]
- the manner of payment of any consideration paid in lieu of the issue of fractional securities of an amalgamated or merged company, or of any other body corporate whose securities are to be received in the amalgamation or merger;
- details of the proposed allocation of the assets and liabilities of the amalgamating or merging companies among the companies that will be formed or continue to exist when the amalgamation or merger agreement has been implemented;
- details of any arrangements necessary to complete the amalgamation or merger, and to provide for the subsequent management and operation of the proposed amalgamated or merged company;
- the estimated cost of the amalgamation or merger;[23] and

---

19 Not only a summary as required by s 112(3)(b).

20 S 113(5). Neither this requirement, nor the solvency and liquidity requirements, (s 113(4)(a)) will apply to a company engaged in a business rescue (s 113(6)).

21 S 113(3).

22 The consideration can therefore be something other than securities, such as cash.

23 S 113(2).

- if securities in one of the amalgamating or merging companies are held by or on behalf of another of the amalgamating or merging companies when the amalgamation or merger becomes effective, details of the cancellation of shares without any repayment of capital in respect thereof. No provision may be made in the agreement for the conversion of those shares into shares of an amalgamated or merged company.[24]

2.2.2 *Implementation*

After the resolution to merge has been adopted (by all the companies party to the agreement in terms of section 115,[25] each of the companies must notify every known creditor in the prescribed manner and form.[26] The creditor may then object to the merger within 15 business days after delivery (not receipt) of the notification, on the grounds that it will be materially prejudiced by the amalgamation or merger. The court may grant relief if it is satisfied that the creditor will be prejudiced, that the creditor is acting in good faith, and that there are no other remedies available.[27]

If no application has been made to the court, or after the court has disposed of any proceedings, and subject to the order of the court, a Notice of Amalgamation or Merger must be filed with the Companies and Intellectual Property Commission (CIPC).[28] The notice must *include* –

- a confirmation of the merger or amalgamation's compliance with sections 113 and 115;
- the new MOI (if applicable);
- proof of the merger or amalgamation's sanction from any applicable statutory regulatory authority, including the Banks Act,[29] which will prevail in the event of any conflict with the Act;[30] and

---

24 Some of these requirements are mutually exclusive.
25 See par 3.
26 Reg 7 and table CR3.
27 S 116(1).
28 CoR 89 as per reg 89.
29 Act 94 of 1990.
30 S 116(9). It is uncertain why the Banks Act is mentioned expressly if there are various other 'financial' Acts that regulate specific mergers.

- proof of the approval of the merger or amalgamation in terms of the Competition Act.[31]

After receiving a Notice of Amalgamation or Merger, the CIPC must issue a certificate of incorporation for each newly-incorporated company and de-register each of the companies that did not 'survive' the amalgamation or merger.[32]

2.2.3 *Effect of a merger or amalgamation*

A merger or amalgamation takes effect as set out in the merger or amalgamation agreement, but does not affect any –

- existing liability for criminal prosecution of a party to the agreement. A director is, for example, not a party to the agreement and this situation is therefore not addressed in section 116(6);
- civil, criminal or administrative action or proceedings pending by or against an amalgamating or merging company (any such proceeding may continue to be prosecuted by or against *any* amalgamated or merged company, even if the original company is deregistered); or
- conviction against, or ruling, order or judgment in favour of or against, an amalgamating or merged company (any such ruling, order or judgement may be enforced by or against any amalgamated or merged company even if the original company is deregistered).[33]

When a merger or amalgamation agreement takes effect –

- the property of each amalgamating or merging company becomes the property of the newly amalgamated or surviving merged company; and

---

31 Act 89 of 1998.

32 S 116(5).

33 S 116(6)(b). A proper due diligence will be very important.

- each newly amalgamated or surviving merged company is liable for all of the obligations of every amalgamating or merged company, subject to –
  - any provision of the agreement to the contrary;
  - section 113(1) regarding solvency and liquidity; or
  - any other agreement.[34]

The transfer of property, however, creates problems in the sense that it is not clear whether personal rights, subject to a *pactum de non cedendo*, or transfer of property subject to approval or concurrence by a third party, such as mining rights, also transfers (by operation of law) as envisaged in s 116(7).

If, as a consequence of an amalgamation or merger, any property that is registered in terms of any public regulation is to be transferred from an amalgamating or merging company to an amalgamated or merged company, copies of the amalgamation or merger agreement and the filed notice of amalgamation or merger constitute sufficient evidence to effect a transfer of the registration of that property.[35]

2.3 Scheme of arrangement (section 114)[36]

The board[37] of a company[38] may propose and implement any arrangement between the company and its shareholders, or any class of them, by way of, among other things –

- a consolidation of shares of different classes;
- a division of shares into different classes;
- an expropriation of shares from shareholders;
- a share exchange;

---

34 S 116(7). Delegation of obligations is, as a general rule, subject to permission by the creditor. The provisions of s 116(7) seem to change this principle.

35 S 116(8).

36 See ch 11 for compromises (s 155).

37 Only the board may propose the arrangement.

38 Not in liquidation or in the course of business rescue proceedings.

- a share re-acquisition;[39] or
- a combination of the methods contemplated in this subsection.[40]

A typical arrangement could be where a holding company (H) has 80% of the shares in a subsidiary (S) and the remaining 20% of the shares in S are held by the 'scheme shareholders'. H wants to make S its wholly-owned subsidiary and in order to achieve this S proposes an arrangement with the scheme shareholders in terms of which their shares will either be 'cancelled' and as consideration they will receive a cash payment or alternatively shares in H, or that they will swop their shares for shares in H.[41] The concepts 'arrangement' and 'between the company and its shareholders, or class of them' are not defined, with the effect that the meanings, as developed under section 311 of the Companies Act of 1973[42] should apply. 'Arrangement' implies some element of give and take (that is, reciprocity) and it can include an expropriation, also for cash, but it cannot be a confiscation (expropriation without compensation). There must be enforceable rights *inter se* and a third party can be involved, for example, H in the example above, but not to the exclusion of the company.[43]

Also, if an exclusive process is provided for in the Act, it cannot be 'substituted' with a scheme of arrangement but that process can be part of the scheme and can be implemented by it.[44] Section 114 now provides for arrangements in respect of which other exclusive processes are described, for example, a share acquisition which creates the impression that it can, under certain circumstances, be used as an alternative in that situation.[45] Section 114(4) provides that if the arrangement would result in any re-acquisition by a company of any of its issued securities, section 48 applies. Section 48(1)(b) then excludes redeemable securities redeemed in terms of the terms and conditions of those

---

39 This is a 'distribution' regulated under ss 46 and 48, and s 48 is applicable (s 114(4)). The implication is that a scheme cannot be used as an alternative to s 46. See however s 123(2)(i), where the two processes are indicated as alternatives.

40 The first two options can be achieved by a mere special resolution (s 36(2)).

41 *Ex parte Federale Nywerhede Bpk* 1975 (1) SA 826 (W).

42 Act 61 of 1973 (1973 Act).

43 *Ex parte Kaplan: In re Robin Consolidated Industries Ltd* 1987 (3) SA 413 (W).

44 *Ex parte NBSA Centre Ltd* 1987 (2) SA 783 (T).

45 See ch 3.

securities[46] and provides that sections 114 and 115 will only apply if the company acquires more than 5% of the issued shares of a particular class.[47] The consolidation of securities or a division into different classes in terms of section 114(1)(a) and (b) can obviously also be done in terms of section 36(2)(a). 'Class' as in 'between the company and its shareholders, or class of them' has been interpreted to mean shareholders with the same rights (and not the shareholders with the same interests, such as the scheme shareholders). However, later cases have allowed the scheme shareholders to be grouped together as a class on their own, separate from the other shareholders with similar rights, based on the rationale that they are the ones to whom the offer is made.[48]

The company[49] must retain an independent expert[50] to compile a report as required by section 114(3). The person to be retained must be –

- qualified, and have the experience necessary to understand the type of arrangement proposed, evaluate its consequences, and assess the impact of the arrangement on the value of securities and its effect on the rights and interests of a holder of securities or creditor of the company; and
- able to express opinions, exercise judgment and make decisions impartially.

However, the retained person must not –

- have any other relationship with the company or with a proponent of the arrangement that would lead a reasonable and informed third party to conclude that the integrity, impartiality or objectivity of that person is compromised by that relationship;
- be a full-time employee of the company, or have been a full-time employee within the past two years;
- be the company's current auditor;
- currently be, or have been within the past year, a legal, professional or other advisor of the company; or

---

46 This is a 'distribution' as defined in s 1 and s 46 will apply.

47 S 48(8)(b).

48 *Verimark Holding Ltd v Brait Specialised Trustees (Pty) Ltd* (2009/22928 GSJ).

49 Only the board of the company can make the proposal (s 114(1)).

50 See reg 90 in respect of affected transactions (s 117(1)(c)(i)).

- be related to any of the above ('the insiders').[51]

The report, which must be prepared and distributed[52] by the expert for the board to all holders of the of the company's securities,[53] must –

- state all prescribed information relevant to the value of the securities affected by the proposed arrangement;
- identify every type and class of holder of securities ('insiders') affected by the proposed arrangement;
- describe the material effects of the proposed arrangement on the rights and interests of the insiders;
- evaluate any material *adverse* effects on –
  - the compensation that any of those persons will receive in terms of the arrangement; and
  - any reasonably probable beneficial and significant effect of the arrangement on the business and prospects of the company;
- state any material interest of any director of the company or trustee for security holders, and state the effect of the arrangement on those interests and persons; and
- include a copy of sections 115 and 164 of the Act.[54]

3 Section 115 approval[55]

3.1 Requirements

Irrespective of any action under section 65 (resolutions by shareholders), any provision of a company's MOI, or any resolution adopted by its board or the holders of its securities to the contrary, a company may not dispose of, or give effect to an agreement or series of agreements to dispose of all or the greater

---

51 S 114(2).

52 As provided for in reg 7.

53 Note that, in terms of s 1, securities are as defined to include other instruments; therefore the recipients are not only those affected by the arrangement and could include, e.g. holders of debentures.

54 S 114(3).

55 See diagram at the end of the chapter.

part of its assets or undertaking (section 112), or implement an amalgamation or a merger (section 113), or implement a scheme of arrangement (section 114),[56] unless the transaction has been approved in terms of section 115 or alternatively is pursuant to or contemplated in an approved business rescue plan for that company, in terms of Chapter 6 of the Act.[57]

A proposed transaction in terms of sections 112, 113 and 114 must be approved by –

- a special resolution[58] adopted by persons entitled to exercise voting rights on such a matter, at a meeting called for that purpose and at which sufficient persons are present to exercise, in aggregate, at least 25% of all of the voting rights that are entitled to be exercised on that matter; and
- the court, in the circumstances and manner contemplated in section 115(3) to (6).

If a section of a class, or only the shareholders to whom the offer is made according to the *Verimark* principle (a sub-class),[59] is targeted, it could be impossible to get a 25% quorum, unless the quorum is then calculated in respect of that section of the class. The wording '25% of all the voting rights that are entitled to be exercised on that matter . . .' would seem to imply, through the use of ' . . . in that matter . . .' that a quorum of the particular section of the class would be required. The votes of an acquiring party cannot be counted

56 It is not clear why the 'implementation' of an amalgamation or merger rather than the transaction itself is subject to s 115. Certain acquisitions of shares must be done by way of ss 114 and 115. See s 48(8)(b) and ch 4.

57 If these transactions are 'proposed' in respect of regulated companies, the Takeover Regulation Panel (TRP) must either issue a compliance certificate or exempt the transaction (ss 115(1)(b), 119(4)(b) and 119(6)).

58 Or the higher percentage provided for in the MOI (s 64(2)). The minimum is apparently 75% because if the MOI requires a different percentage, only the higher one is applicable.

59 *Verimark Holding Ltd v Brait Specialised Trustees (Pty) Ltd* (2009/22928 GSJ).

for the calculation of the quorum or for the majority acquired at the meeting.[60] An acquiring party is defined very imprecisely in section 1 as a person who acquires or establishes, directly or indirectly as a result of the transaction, direct or indirect or increased control over all or the greater part of the company or (over) all or the greater part of the assets or undertaking of the company. 'Control' is, however, not defined in the Act and the reference to control over assets, as opposed to the acquisition of assets (in terms of section 112), is inherently uncertain.

If the holding company is a company or an external company and the transaction concerns a disposal of all or the greater part of the assets or undertaking of the subsidiary, and, based on the consolidated financial statements of the holding company, the disposal by the subsidiary substantially constitutes a disposal of all or the greater part of the assets or undertaking of the holding company, the shareholders of the holding company must approve the transaction by special resolution.[61]

3.2 Court approval

3.2.1 *A 75% to 85% majority*

If the resolution was opposed by at least 15% of the voting rights that were exercised on that resolution, that is, there was at least a 75% majority (the 'minimum' required for the resolution) but less than 85%, and any person who voted *against* the resolution requires the company to seek court approval,[62] the company must apply to the court for such approval[63] and bear the costs of the application, or treat the resolution as a nullity.[64] It is uncertain how the company

60 S 115(5) and the example in par 2.3 above in respect of a scheme of arrangement.

61 S 115(2)(b).

62 S 115(3)(a). It must be done within five business days after the vote.

63 It must be done within ten business days after the vote, not receipt of notice from the shareholder, under s 115(3).

64 S 115(5).

will treat the resolution as a 'nullity'. Presumably a resolutive condition should be included in the resolution to the effect that if there is a challenge in the 75% to 85% category, and the company does not bring the application, that the resolution will lapse.

The percentage that voted against the resolution is fixed at 15%. This apparently does not take into account the fact that the MOI can increase the voting percentage for the special resolution. This would mean that if a company increases its special resolution percentage in the MOI to 85%, this remedy for dissenting shareholders would not be possible. If, however, the percentages (quorum, majority and the 15% vote against) are to be calculated in respect of a sub-class, the (complex) calculations would be totally different.

3.2.2 *More than an 85% majority*

In the event of a majority vote of more that 85%, any shareholder of the *more than* 15% who voted *against* the resolution also has the right to apply to court for review of the resolution. It must be done within ten business days after the vote. The court may grant leave to apply for review if it is satisfied that the shareholder is acting in good faith, that it appears that the shareholder is prepared to sustain the proceedings and that the alleged facts support a finding as contemplated in s 115(7). It is uncertain how a shareholder will be able to prove how she voted.[65]

The effect is therefore that if the majority is between 75% and 85%, the company can be instructed by any dissenting voter to apply for court approval. In all other cases, for example, when the majority is more than 85%, any shareholder can apply to the court to review the resolution.

3.2.3 *Discretion of court*

The court may set aside the resolution only if –

- the resolution is manifestly unfair to any class of shareholders; or

65 S 115(3)(b).

- the vote was tainted by –
  - a conflict of interest;
  - inadequate disclosure;
  - failure to comply with the Act, the MOI or any applicable rules of the company; or
  - other significant and material procedural irregularity.[66]

3.2.4 '*Minority rights*'

The holder of any voting rights in a company is entitled to seek relief in terms of section 164 if that person notified the company in advance of the intention to oppose a section 115 special resolution, was present at the meeting and voted against the special resolution.[67]

4 'Take-overs'[68]

4.1 Ambit

The TRP must regulate any '*affected transaction*' in respect of '*regulated companies*' in accordance with Parts B and C of Chapter 5 of the Act, and the Takeover Regulations,[69] in order to –

- ensure the integrity of the marketplace and fairness to the holders of the securities of '*regulated companies*';
- ensure the provision of –
  - necessary information to holders of securities of regulated companies, to the extent required to facilitate the making of fair and informed decisions; and
  - adequate time for regulated companies and holders of their securities to obtain and provide advice with respect to offers; and

---

66 S 115(7).

67 S 115(8) and see ch 12.

68 Parts B and C of Ch 5 regulate more than take-overs in the general sense, but the term 'take-overs' will be used here in a generic sense.

69 Prescribed by the minister after consultation with the TRP (s 120). See Ch 5 of the regulations.

- prevent actions by a regulated company designed to impede, frustrate, or defeat an offer, or the making of fair and informed decisions by the holders of that company's securities.[70]

An 'affected transaction' is –

- a transaction or series of transactions amounting to the disposal of all or the greater part of the assets or undertaking of a regulated company as contemplated in section 112;
- an amalgamation or merger as contemplated in section 113, if it involves at least one regulated company;
- a scheme of arrangement between a regulated company and its shareholders as contemplated in section 114;
- the acquisition[71] of, or announced intention to acquire, a beneficial interest in any voting securities of a regulated company to the extent and in the circumstances contemplated in section 122(1) (disclosure of shareholding);
- the announced intention to acquire a beneficial interest in the remaining voting securities of a regulated company not already held by a person or persons acting in concert[72] ('general offer');[73]

---

70 S 119(1).

71 See *Sefalana v Haslam* 2000 (2) SA 415 (SCA). In terms of s 117(1)(a), it includes an acquisition by a regulated company of its own securities in terms of s 48, but excludes a transaction in terms of s 164 (appraisal rights). See also TRP Guideline 4/2011.

72 'Acting in concert' means any action pursuant to an agreement between or among two or more persons, in terms of which any of them co-operate for the purpose of entering into or proposing an affected transaction or offer (s 117(1)(b)); *SRP v MGX Holdings Ltd* (16026/03 (WPD); *Bock and Others v Duboro Investments (Pty) Ltd* 2004 (2) SA 242 (SCA)). A company with any of its directors, with any company controlled by one or more of its directors, with any trust of which any one or more of its directors is a beneficiary or a trustee and any of the company's pension, provident or benefit funds and share incentive schemes with one another, will be presumed unless proved otherwise to the TRP, to be acting in concert (reg 84(1)).

73 Reg 102(1).

- a mandatory offer under section 123; or
- a compulsory acquisition under section 124.[74]

A 'regulated company' with respect to an affected transaction[75] or an offer for securities of a profit company, is –

- a public company;
- a state-owned company (SOC), except to the extent that any such company has been exempted in terms of section 9; or
- a private company if –
  - the percentage of the issued securities of that company that have been transferred within the 24 months immediately preceding the date of a particular affected transaction or offer, other than by transfer between or among related or interrelated persons or shares bought back by the company which are then cancelled,[76] exceeds the percentage prescribed in terms of subsection (2), presently 10%;[77] or
  - the MOI of that company expressly provides that the company and its securities are subject to Part B and Part C of the Act and the Takeover Regulations.[78]

The sale of private 'shelf companies' is also excluded.[79]

Takeover regulation is basically aimed at the change of control in a company, and therefore 'securities' as used in Parts B and C of Chapter 5 of the Act is defined as securities that have general voting rights or (other) securities that can be converted into securities with general voting rights.[80]

4.2 Regulation of affected transactions and offers

Any person making an offer must comply with the reporting or approval requirements except to the extent that the TRP has granted that person an

---

74 S 117(1)(c).

75 This is a circuitous requirement as it is only an 'affected transaction' if the transaction is in respect of a 'regulated company'.

76 Reg 91(2).

77 Reg 91(1). Securities held by subsiidaries in holding companies are excluded.

78 S 118(1).

79 See TRP Guideline 3/2011.

80 S 117(1)(j).

exemption from any such requirement, and must not give effect to an affected transaction unless the TRP has –

- issued a compliance certificate with respect to the transaction; or
- granted an exemption for that transaction.[81]

An offer is a proposal of any sort, including a partial offer, which, if accepted, would result in an affected transaction.[82] 'Offeror' usually includes any related or inter-related person or a person acting in concert with the offeror.

4.2.1 *Disclosure of shareholding* [83]

A person[84] must notify a regulated company in the prescribed manner within three business days after that person acquires a beneficial interest in sufficient securities of a class issued by that company such that, as a result of the acquisition, the person holds a beneficial interest in securities amounting to 5%, 10%, 15%,[85] or any further whole multiple of 5%, of the issued securities of that class, or disposes of a beneficial interest[86] such that the person no longer holds the particular multiples of 5%.[87]

---

81 S 121.

82 S 117(1)(f).

83 The short title of s 122 refers to shares; the section refers to securities.

84 S 122(1). The 'person' must do so whether she acquires or disposes of any securities directly, indirectly, individually, or in concert with any other person or persons; or the stipulated percentage is held by her alone, or in aggregate by her and any related or inter-related person, and any person who has acted in concert with any other person (s 122(2)).

85 In determining the securities of the person acquiring or disposing thereof, fractions must be aggregated, and any shares that may be issued to the person/s if they exercised any options, conversion privileges or similar rights, are to be included. In respect of any other person (e.g. presumably to determine the 5% of total securities) the securities that may be issued if options, conversion privileges or similar rights are exercised, are excluded (s 122(4)(b)(ii)).

86 On TRP 121.1 (reg 121).

87 S 122(1). See also ch 3 for a discussion of beneficial interest and securities.

The regulated company must file a copy with the TRP[88] and report the information to the holders of that class of securities unless the disposition (not acquisition) is less than 1% of those securities.[89]

The acquisition or disposal of securities in terms of section 122 is an affected transaction in respect of a regulated company and is subject to approval or exemption by the TRP in terms of section 121. The TRP has, however, granted an exemption from this requirement. The aim with the section was clearly that the transactions should merely be notified.[90]

4.2.2 *Mandatory offers*

If a regulated company acquires its own voting securities under section 48, or under a scheme of arrangement contemplated in section 114,[91] or a person[92] *has acquired* a beneficial interest in voting rights[93] attached to any securities of a regulated company and before that acquisition was able to exercise less than the prescribed percentage of all the voting rights attached to the securities of that company, and as a result of that acquisition, together with any other securities of the company already held, is able to exercise *at least*[94] the prescribed percentage[95] of all the general voting rights attached to the securities

---

88 On TRP 121.2 (reg 121).

89 S 122(3). See also s 122(2).

90 TRP Guideline 4/2011.

91 Re-acquisition merely by using s 114 is not possible, as it is not an alternative process to s 48.

92 Acting alone, or two or more related or inter-related persons, or two or more persons acting in concert.

93 A 'beneficial interest' in a voting right is an untenable concept. A beneficial interest in a share can be a voting right, not in a voting right. See also the definition of a 'beneficial interest' in s 1.

94 A comparable offer in terms of s 125 must only be made if more than the prescribed percentage can be acquired.

95 The minister, on the advice of the TRP, may prescribe a percentage of not more than 35% of the voting securities of a company (s 123(5)) It is prescribed in reg 86(1) as '. . . 35% of the issued voting securities of the company'. The use, apparently indiscriminately, of the concepts 'voting rights', 'general voting rights' and 'voting securities' is confusing, as the meanings differ. See the definitions in ss 1 and 117(1)(j) and ch 3. The definition of prescribed percentage in reg 86(1) refers to the 'issued voting securities'. A mandatory offer is triggered if a person is able to exercise at least the 'prescribed percentage' of all the general

(*continued*)

of that company, that person must give notice in the prescribed manner to the holders of the remaining securities that he is in a position to exercise at least the prescribed percentage of all the voting rights attached to the securities of that regulated company and offer to acquire any remaining such securities.[96]

The comparable offer in terms of section 125 must be made if the offer could result in the acquisition of more than the prescribed percentage, but the mandatory offer in terms of section 123 must be made if that offer has resulted in the acquisition of at least the prescribed percentage. A non *pro rata* acquisition of securities by the company can result in the holding of securities of a person exceeding the prescribed percentage as the shares so acquired are cancelled.[97] Unless en exemption is provided in terms of section 121, such a person will have to make a mandatory offer.

Within one month after giving this notice, the person or persons must, in compliance with the Takeover Regulations, deliver to the holders of the remaining securities of that company, a written offer to acquire those securities on the terms determined in accordance with the Act and the Takeover Regulations.[98]

4.2.3 *Comparable offers*

If a regulated company reacquires any of its voting securities as contemplated in section 48, or in terms of a scheme of arrangement in terms of section 114, or a person acting alone makes, or two or more related or inter-related persons, or two or more persons acting in concert, make an offer for any securities of a regulated company that has more than one class of issued securities that, if accepted, could result in him/them being able to exercise more than the prescribed percentage[99] of the general voting rights associated with of all

---

voting rights attached to the securities of that company. 'Prescribed percentage', however, already refers to voting securities, which gives a curious result if the phrase 'prescribed percentage' is substituted with the definition of 'prescribed securities'.

96 S 123(1) and reg 86. The requirements for voting do not make sense in respect of a s 48 acquisition. If securities are issued as consideration for an acquisition, for a cash subscription or a rights offer, the independent holders of more than 50% of the general voting rights of all issued securities of the regulated company can agree to waive the mandatory offer (reg 86(4)). See also TRP Guideline 2/2011.

97 Ss 35 and 48.

98 S 123(4).

99 As defined in s 125(1)(b) as the percentage prescribed in s 123(5) which is then prescribed in reg 86(1).

issued securities of the company, a comparable offer must be made for each class of issued securities of that company.[100] The offer in respect of, for instance, the preference shares must be comparable and does not have to be identical.

4.2.4 *Partial offers*

A partial offer,[101] which is an offer that can have the result that *less than* 100% of the voting securities in the company can be acquired if accepted, such as the offeror for example only wants to acquire 65%, must be made to all the holders of a class of securities.[102] If the offer could result in the acquisition of the prescribed percentage, the offeror must make the offer conditional on a specified number of acceptances[103] and the offer must then also be with the approval of independent holders of that class[104] if they control an aggregate of more than 50% of the general voting rights of all issued securities of the company.[105] If the offer could result in acquisition of securities above the prescribed percentage, but below 50% of the general voting rights, the offer must state the precise number of securities to be acquired (offered for).[106] If the offer could result in the acquisition of more than the prescribed percentage of the general voting rights of all securities, a prominent statement to the effect must also be included in the offer.[107] The holder of any of those securities is entitled to accept the offer in full for the relevant percentage of his holding. Any securities tendered in excess of the relevant percentage must be accepted by the offeror

---

100 S 125(2)(a). See also reg 87.

101 S 117(1)(h).

102 S 125(3)(a). Offers which will not take the offeror over the prescribed percentage or give total voting (100%), are excluded. See reg 88.

103 Only when this specified number of acceptances has been received, can the offer be declared unconditional (s 125(4)).

104 Defined as a person who holds any securities of a company that entitle the person to exercise a general voting right and who is independent of an offeror or any related or inter-related person, or person acting in concert with any of them (s 125(1)(a)).

105 S 125(3)(b).

106 S 125(3)(c).

107 S 125(3)(d).

from each holder of securities, in the same proportion to the number tendered as will enable the offeror to obtain the total number of shares for which it has offered.[108]

4.2.5 *Compulsory acquisitions and squeeze out*[109]

If, within four months after the date of an offer for the acquisition of any class of securities of a regulated company, that offer has been accepted by the holders of at least 90% of that class of securities, *including* securities already held by the offeror, a related or inter-related person, or a nominee or subsidiary of the offeror, related or inter-related person, the holders of the remaining securities of the class must be notified that the offer has been accepted to that extent. An offer is defined in section 117(1)(f) as an offer or proposal, including a partial offer, which would result in an affected transaction. Comparable offers are, however, not included in the definition of affected transactions in section 117(1)(c).

Within three months after receiving this notice, a person may demand in the prescribed manner and form[110] that the offeror acquire all of her securities of the class concerned (transfer notice by the addressee). After receiving the demand, the offeror is entitled and bound to acquire the securities concerned on the same terms that applied to the securities whose holders accepted the original offer (compulsory acquisition).[111]

If, within four months after the date of an offer for the acquisition of any class of securities of a regulated company, that offer has been accepted by the independent holders, that is holders *other than* the offeror, a related or inter-related person, or a nominee or subsidiary of the offeror or by a related or inter-related person, of at least 90% of that class of securities, the offeror may notify the holders of the remaining securities of the class (coercion notice by the offeror) that the offer has been accepted to that extent, and that the

---

108 S 125(5).

109 This is a combination of the transfer and coercion notices under s 440K of the 1973 Act. See also *Vlok NO and Others v Sun International South Africa Ltd and Others* 2014 (1) SA 487 (GSJ) in respect of the process in general.

110 There is no prescribed manner and form.

111 S 124(4).

offeror wants to acquire all the remaining securities of that class. The offeror is then entitled and bound to acquire the securities concerned on the same terms that applied to the securities whose holders accepted the original offer. This then is the start of the squeeze out.[112]

Within 30 business days after receiving a coercion notice, a person may apply to the court for an order prohibiting the offeror from acquiring the applicant's securities of that class, or for an order imposing conditions of acquisition different from those of the original offer.[113]

If (independent) holders of at least 90% of that class of securities have not accepted the offer (to enable the automatic coercion notice), the offeror may apply to the court for an order authorising her to give a coercion notice.

The court may make the order applied for –

- if (after having made reasonable enquiries) the offeror has been unable to trace one or more of the persons holding the securities to which the offer relates; and
- by virtue of the acceptances of the original offer, the securities that are the subject of the application, plus the securities already held by the offeror, related persons and nominees, constitute at least 90% of the particular class of securities; and
- if the consideration offered is fair and reasonable; and
- if the court is satisfied that it is just and equitable to make the order, having regard, in particular, to the number of holders of securities who have been traced but who have not accepted the offer.[114]

If six weeks have elapsed after a coercion notice by the offeror is given, and the court has not prohibited the offeror from acquiring the applicant's securities of that class, or given an order imposing conditions of acquisition different from

---

112 S 124(1).

113 S 124(2). The court cannot condone an application outside this time: *Vlok NO and Others v Sun International South Africa Ltd and Others* 2014 (1) SA 487 (GSJ).

114 S 124(3).

those of the original offer, the offeror must transmit a copy of the notice to the company whose securities are the subject of the offer. At the same time, the offeror must pay (or transfer) the consideration representing the price payable for the securities concerned to that company. Subject to the payment of the prescribed fees or duties, the company must thereupon register the offeror as the holder of those securities.[115]

A company must deposit any consideration received under this section into a separate bank account with a registered bank. These deposits must be held by the company in trust for the person entitled to the securities in respect of which the consideration was received and must be paid on demand, with interest to the date of payment.[116]

4.3 Frustrating action

If the board of a regulated company believes that a *bona fide* offer might be imminent, or has received such an offer, the board must not –

- take any action in relation to the affairs of the company that could effectively result in the offer being frustrated or the holders of relevant securities being denied an opportunity to decide on its merits;
- issue any authorised but unissued securities;
- issue or grant options in respect of any unissued securities;
- authorise, issue, or permit the authorisation or issuance of, any securities carrying rights of conversion into securities or subscription for other securities;
- sell, dispose of, or acquire, or agree to sell, dispose of or acquire, assets of a material amount, except in the ordinary course of business;
- enter into contracts otherwise than in the ordinary course of business; or
- make a distribution that is abnormal regarding timing and amount,

---

115 S 124(5). No instrument of transfer is required.

116 If the holder of securities who is entitled to the payment does not claim it within three years, it is forfeited to the Guardians' Fund (s 124(8)).

without the prior written approval of the TRP, and the approval of the holders of the relevant securities, or in terms of a pre-existing obligation or agreement.[117]

4.4 Offer procedures and conduct

The rules pertaining to the offer procedures and the conduct during the offer are contained in Part B of Chapter 5 of the regulations.

The offer must be made to the board of the regulated (target) company who can then require reasonable evidence that the offeror will be in a position to implement the offer in full. If the board of the company has received a formal written offer or if a mandatory offer is required, the offeror must make a firm intention announcement and then the process begins.

A typical timeline for an offer is:

- An offeror's offer circular, or combined offer circular, must be posted within 20 business days after the date of publication of a firm intention announcement or such longer period allowed by the Executive Director of the TRP, on good cause shown.
- The opening date of a general offer, mandatory offer or partial offer is the day after the date of posting of the offeror's offer circular, or combined offer circular, as the case may be.
- A general offer, mandatory offer or partial offer must remain open for at least 30 business days after the opening date. These offers must state –
  - a closing date;
  - an initial closing date, with a right to extend; or
  - an objective method of determining the closing date.

An offer relating to a disposal of all or the greater part of the assets or undertaking of the company, an amalgamation or merger or a scheme of arrangement, must state an expected effective or operative date or an objective method of determining the effective or operative date.

---

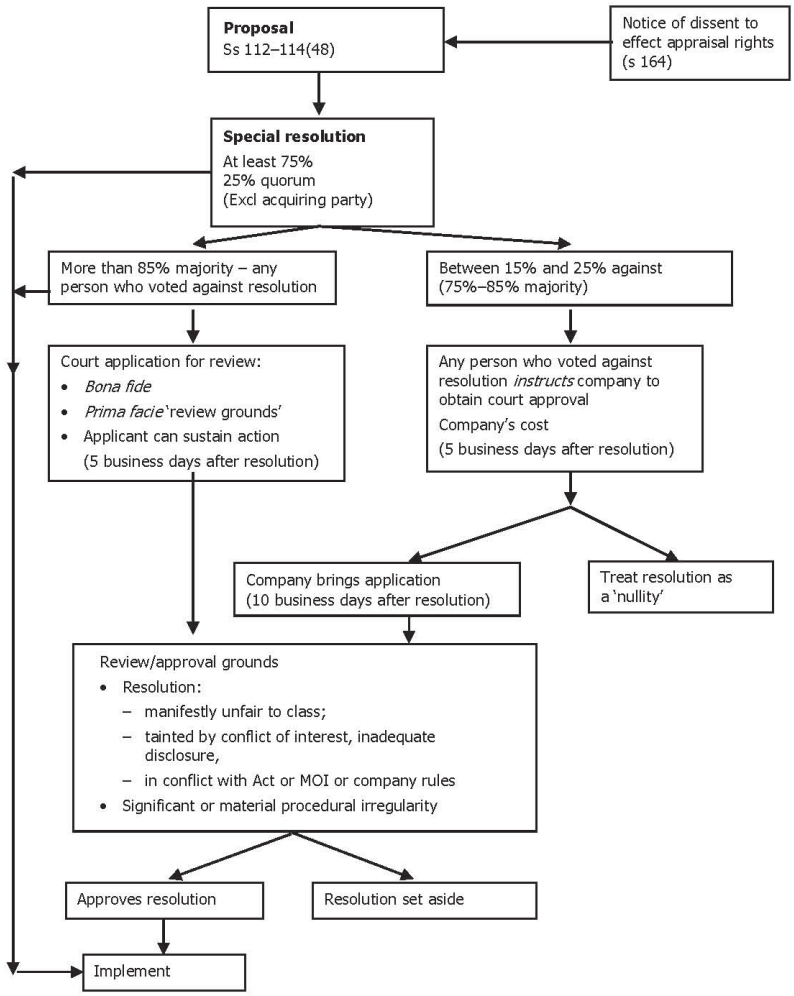
117 S 126. See s 41 which requires a special resolution for some of the securities issues. See also ch 3.

The independent board must post the offeree response circular within 20 business days after an offeror's offer circular has been posted. An announcement is made by no later than 16:30 on the 45th business day after the day upon which a conditional general offer opened as to whether the offer is unconditional as to acceptances, or has terminated. No announcement revising an offer consideration may be posted on or after the 45th business day after an offer has opened, unless the offer is unconditional as to acceptances.

The consideration for the offer must be settled within six business days after the later of the offer being declared wholly unconditional and acceptance thereof by a holder of securities.

The offer may not be implemented or given effect to until the TRP has issued a compliance certificate at the request of the offeror.

Section 115 approval: procedure



Chapter 11 Business rescue and compromise

1 General

'Business rescue' is defined as proceedings to facilitate the rehabilitation by its management of a company[1] that is insolvent, or may imminently become insolvent, by providing for –

- the temporary supervision of the management of the affairs, business and property of the company;

1 Also a close corporation. See item 6(1) of Sch 3 of the Companies Act 71 of 2008 (the Act/2008 Act) and s 66(1A) of the Close Corporations Act 69 of 1984 (CC Act).

- a temporary moratorium on the rights of claimants against the company or in respect of property in its possession; and
- the development and implementation, if approved,
- of a plan to rescue the company by re-structuring its affairs, business, property, debt and other liabilities, and equity in a manner that
- maximises the likelihood of the company –
  - continuing in existence on a solvent basis or;
  - if it is not possible for the company to so continue in existence, results in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company.[2]

The business rescue therefore has two possible independent alternative results. The company would either be able to continue on a solvent basis, or, if that is not possible, it would result in a better return for the creditors compared to the situation if it was liquidated immediately. 'Solvency' is not defined in the Act and it will therefore be the ability for the company to pay its debts as they become due in the ordinary course of business (commercial solvency).[3]

However, the second alternative does not allow the business rescue to become an 'informal' liquidation process, as the eventual formal liquidation in terms of Chapter 14 of the Companies Act of 1973[4] will have certain results and liabilities, such as the application of section 340 (voidable and undue preferences) and section 424 (reckless or fraudulent conduct of business), that do not apply in the business rescue process.[5] To allow the business rescue to be an 'informal' liquidation, would have the effect that these consequences would be circumvented.

---

2 S 130(1)(b). See in general A Loubser 'Some comparative aspects of corporate rescue in South African company law' LLD thesis, Unisa (2010) for a thorough discussion of business rescue.

3 *Boschpoort Ondernemings (Pty) Ltd v Absa Bank Ltd* 2014 (2) SA 518 (SCA).

4 Act 61 of 1973 (1973 Act).

5 Item 9 of Sch 5 provides that for the winding-up of 'insolvent companies' Ch XIV of the 1973 Act still applies. See also ch 13.

2 Initiation of business rescue

2.1 Voluntary

The board of a company *may* resolve[6] that the company voluntarily begin business rescue proceedings and place the company under supervision, if the board has reasonable grounds to believe that –

- the company is financially distressed; and
- there appears to be a reasonable prospect of rescuing the company.[7]

A company is financially distressed if it –

- appears to be reasonably unlikely that the company will be able to pay all of its debts as they fall due and payable within the immediately ensuing six months; or
- appears to be reasonably likely that the company will become insolvent within the immediately ensuing six months.[8]

The company must, after the resolution –

- file the resolution with the Companies and Intellectual Property Commission (CIPC);[9]
- publish a notice of the resolution to every affected[10] person within five business days after filing;
- appoint a practitioner who satisfies the requirements of section 38 within five business days after filing;[11]
- file a notice of the appointment of a practitioner with the CIPC within two business days after making the appointment; and

---

6 The resolution is not possible if liquidation proceedings have been initiated by or against the company, and it otherwise has no force or effect until it has been filed (s 129(2)).

7 S 129(1).

8 S 128(1)(f).

9 Notices are filed on CoR 123.1. See also reg 123 and CIPC Practice note 3 of 2014.

10 The court can also make the order *mero motu* during liquidation proceedings (s 131(7)).

11 S 129(3). The company appoints the practitioner, and agrees his remuneration, which ranks in priority before all other secured and unsecured creditors (s 146). The practitioner advises and supervises the management of the company (see s 143 regarding the powers of the practitioner).

- publish a copy of the notice of appointment to each affected person within five business days after the notice of appointment was filed.[12]

An affected person is a shareholder or creditor of the company, any registered trade union representing employees of the company, and each of those employees if any of them are not represented by a registered trade union.[13]

An affected person can apply to court[14] before adoption of the business plan (in terms of section 152) for an order setting aside the resolution of the board because –

- there is no reasonable basis for believing the company is financially distressed;
- there is no reasonable prospect for rescuing the company; or
- the procedural requirements in section 129 were not complied with.

The application by the affected person if certain of the requirements in terms of section 129 are not complied with seems to be unnecessary as section 129(5) voids the actions in any case.

The court can set aside the resolution on the grounds above, or if it considers it otherwise just and equitable to do so. Alternatively, it must give the practitioner sufficient time to form an opinion about whether the company appears to be financially distressed, or there is a reasonable prospect of rescuing the company.[15]

Application for setting aside the appointment of the practitioner can be brought on the grounds that he –

- does not comply with section 138 (qualifications);
- is not independent of the company; or

---

12 S 129(4).

13 S 128(1)(a).

14 For purposes of Ch 6 a 'court' depending on the context, means either the High Court that has jurisdiction over the matter, or a designated judge of the High Court designated by the Judge President in terms of s 128(3) or otherwise as assigned by the Judge President to hear the particular matter (s 128(1)(e) and (3)).

15 S 130(5)(b).

- lacks the skills, having regard to the company's circumstances.

Application can also be made for the practitioner to provide security in an amount and on terms and conditions that the court considers necessary to secure the interests of the company and any affected persons.[16]

If the application is in respect of the practitioner, the court must appoint an alternate practitioner who complies with section 141 and is recommended by or acceptable to a majority of independent creditors.[17] An independent creditor is a creditor of the company, including an employee of the company, who is not related to the company, a director, or the practitioner.[18]

If the board does not take the resolution if the company is financially distressed, it *must* notify every affected person and give reasons why it did not take the resolution.[19] The affected parties will then have the opportunity to either apply to the court for business rescue or to commence liquidation proceedings (voluntary or otherwise). The decision by the board whether or not to put the company under business rescue is critical. If the board does not take the resolution, there is a possibility of civil liability[20] and notification to affected persons will have the effect that the company is either put under business rescue by an order of court, or it will be liquidated because it cannot pay its debts.

A 'reasonable prospect' means something less is required than that the recovery should be a reasonable probability but would rather indicate a reasonable possibility.[21]

2.2 Court order

An affected person can apply to court for an order to place the company under supervision and to commence business rescue proceedings. Unlike a resolution to commence voluntary business rescue, the court order can be given after

---

16 S 130(1).
17 S 130(6)(a).
18 S 128(1)(g).
19 S 129(7). Notice is on CoR 123.3. See also reg 123.
20 Ss 77 and 218(2). See chs 7 and 12.
21 *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd* [2013] JOL 30498 (SCA).

initiation of liquidation proceedings.[22] A copy of the application must be served on the Commissioner of the CIPC and every affected person must be *notified*. The court can grant the order if it is satisfied that –

- the company is financially distressed;
- the company has failed to pay over any amount in terms of an obligation under or in terms of a public regulation or contract, with respect to employment-related matters; or
- it is otherwise just and equitable to do so for financial reasons; and
- there is a reasonable prospect for rescuing the company.[23]

The 'reasonable prospect' must be based on reasonable grounds and not on speculation.[24]

The order can also be made during the course of liquidation proceedings.[25] 'Liquidation proceedings' is the process of winding-up, being the execution of the winding-up order and is not the legal process (application and provisional and final order) to wind-up a company.

The court can appoint an interim practitioner who complies with section 138 and is recommended by the affected person who made the application, subject to ratification by the holders of a majority of the independent creditors' voting interests at the first meeting of creditors.[26] The effect on the company is that it cannot place itself in voluntary liquidation. The process of notification is the same as with a resolution.[27]

---

22 Ss 129(2) and 131(6).

23 S 131(4) and par 2.1 for 'reasonable prospect'.

24 *Propspec Investments (Pty) Ltd v Pacific Coast Investments 97 Ltd* 2013 (1) SA 542 (FSB); *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd* [2013] JOL 30498 (SCA).

25 S 131(7).

26 S 131(5). The order can also be made during the course of liquidation proceedings (s 131(7)).

27 S 131(8).

3 Commencement of business rescue and process

Business rescue proceedings begin when the company files the resolution to place itself under supervision, or applies to the court for consent to file a resolution,[28] or a person applies to the court for an order placing the company under supervision.[29] The court can also, during the course of liquidation proceedings or proceedings to enforce a security interest, make an order placing the company under supervision.[30]

3.1 Practitioner

A person[31] may be appointed as the business rescue practitioner of a company only if the person is a member in good standing of a legal, accounting or business management profession accredited[32] by the CIPC. The person must not be subject to an order of probation in terms of section 162(7), or be disqualified from acting as a director of the company in terms of section 69(8), and must not have any other relationship with the company that would lead a reasonable and informed third party to conclude that the integrity, impartiality or objectivity of that person is compromised by that relationship, or be related to such a person.[33]

---

28 S 129(3). Alternatively, proceedings begin when the company applies to the court for consent to file a resolution in terms of section 129(5)(b) because it did not publish the notice of the resolution to the affected persons or did not appoint the practitioner, or, if the practitioner was appointed, it did not file a notice of appointment and publish a notice in respect thereof to the affected persons (s 129(5)(b)).

29 S 131(1).

30 S 132(1)(c).

31 A 'person' is defined to include a juristic person (s 1). It is doubtful whether this interpretation can be used in respect of a practitioner. See e.g. reg 126(4) where 'good character and integrity' and a certain 'education' are required.

32 S 138(1)(a). See reg 126(1)(a). The minister may make regulations prescribing standards and procedures to be followed by the CIPC in respect of its licensing functions and powers, as well as minimum qualifications for a person to practice as a business rescue practitioner, including different minimum qualifications for different categories of companies (s 138(3)(b)).

33 S 138.

The CIPC can also license a person to act as a business practitioner.[34]

A junior practitioner[35] can be appointed as the practitioner for any small company[36] but for any medium[37] or large company[38] or for an SOC, he can only be appointed as assistant to an experienced[39] or senior practitioner.[40] An experienced practitioner can be appointed for any small or medium company but can only be appointed for a large company or for an SOC as an assistant to a senior practitioner. A senior practitioner can be appointed as the practitioner for any company.

The practitioner has full management control of the company in substitution for its board and pre-existing management[41] and may delegate any of his powers or functions to a person who was part of the board or pre-existing management of the company. The practitioner may also remove from office any person who forms part of the pre-existing management of the company or

34 Application is on CoR 126.1. The CIPC may issue a business rescue practitioner's licence if it is satisfied that the applicant is of good character and integrity and has sufficient education and experience to equip her to perform the functions of a business rescue practitioner (reg 126(4)).

35 A person who is qualified to be appointed, but either has no experience in business turnaround practice (i.e. activities comparable to that of a business rescue practitioner), or has not acted as business practitioner, or if so, has less than five years' experience as at the effective date of the Act (reg 127(2)(c)(iii)).

36 A company, other than a state-owned company (SOC) or public company, whose most recent public interest score (PIS) is less than 100 (reg 127(2)(b)(iii)). See reg 26(2) and ch 9 for the calculation of the PIS.

37 A public company, whose most recent PIS is less than 500, and any other company other than an SOC whose most recent PIS is at least 100 but less than 500 (reg 127(2)(b)(ii)). See reg 26(2) and ch 9 for the calculation of the PIS.

38 A company, other than an SOC, whose most recent PIS is 500 or more (reg 127(2)(b)(i)). See reg 26(2) and ch 9 for the calculation of the PIS.

39 A person who is qualified to be appointed but either has at least five years' experience in business turnaround practice or as business practitioner as at the effective date of the Act (reg 127(2)(c)(ii)).

40 A person who is qualified to be appointed and has at least ten years' experience in either business turnaround practice or as business practitioner as at the effective date of the Act (reg 127(2)(c)(i)).

41 See par 4.2.5.

appoint a person as part of the management of a company, whether to fill a vacancy or not.[42] Depending on the circumstances, removal from 'office' is not necessarily termination of an employment contract.[43] The latter, if applicable, can only be in terms of section 136(1), (2) and (2A). Retrenchments in terms of the business plan are subject to sections 189 and 189A of the Labour Relations Act.[44] Directors continue to exercise their functions as directors, but subject to the authority of the practitioner.[45]

The practitioner is responsible for developing a business rescue plan to be considered by the affected persons, and for implementing it, if it is adopted. The practitioner must, as soon as practicable after appointment, inform all relevant regulatory authorities who have authority in respect of the activities of the company of the fact that the company has been placed under business rescue proceedings and of his appointment.[46]

3.2 Investigation

As soon as practicable after being appointed, the practitioner must investigate the company's affairs, business, property and financial situation. After having done so, he must determine whether there is any reasonable prospect of the company being rescued. If, during business rescue proceedings, the practitioner concludes that there is no such reasonable prospect, he must inform the court, the company, and all affected persons in the prescribed manner, and apply to the court for an order discontinuing the business rescue proceedings, and placing the company into liquidation.[47]

If there are no longer reasonable grounds to believe that the company is financially distressed, the practitioner must inform the court, the company,

---

42 Appointment of another person other than the board or pre-existing management as advisor or part of management can only be with approval of the court if that person has any relationship with the company such as would lead a reasonable and informed third party to conclude that the integrity, impartiality or objectivity of that person is compromised by that relationship or he is related to such a person (s 140(2)).

43 A director holds office but can, depending on the circumstances, also be an employee.

44 Act 66 of 1995.

45 See par 4.2.5.

46 S 140(1).

47 S 141(2).

and all affected persons in the prescribed manner. In addition, if the business rescue process was confirmed by a court order or initiated by an application to the court, he must apply to a court for an order terminating the business rescue proceedings.[48] In all other instances (for example, voluntary initiation in terms of section 129), the practitioner must file a notice of termination of the business rescue proceedings.

If there is evidence in the dealings of the company before the business rescue proceedings began, of voidable transactions, or a failure by the company or any director to perform any *material* obligation relating to the company, the practitioner must direct management to take any necessary steps to rectify the matter. If there was reckless trading, fraud or other contravention of any law relating to the company, the practitioner must forward the evidence to the appropriate authority for further investigation and possible prosecution, and direct the management to take any necessary steps to rectify the matter, including recovering any misappropriated assets of the company.[49] It is uncertain how reckless trading and voidable dispositions are to be rectified as sections 340 (voidable and undue preferences) and 424 (reckless or fraudulent conduct of business) of the 1973 Act do not apply and the practitioner does not have any other powers, such as in terms of section 340 of the 1973 Act in the case of voidable transactions in a winding-up.

3.3 Meetings

Within ten days after the appointment, the practitioner must convene a meeting of creditors.[50] The practitioner must inform the creditors whether he believes that there is a reasonable prospect of rescuing the company. He must obtain proof of claims by creditors. The creditors can appoint members of a committee of creditors, if they require such a committee.[51] The same process is

48 S 141(2)(a)(ii). The court can make any appropriate order – also for winding-up (s 141(3)).

49 S 141(2)(c).

50 Notice must be given to every creditor of the company whose name and address is known to, or can reasonably be obtained by, the practitioner (s 150(2)).

51 S 147(1).

to be followed in respect of employees.[52] These committees –

- may consult with the practitioner about any matter relating to the business rescue proceedings, but may not direct or instruct him;
- may, on behalf of the general body of creditors or employees, receive and consider reports relating to the business rescue proceedings; and
- must act independently of the practitioner to ensure fair and unbiased representation of creditors' or employees' interests.[53]

3.4 Rights of creditors[54]

Each creditor is entitled to –

- notice of each significant court proceeding, decision, meeting or other relevant event concerning the business rescue proceedings;
- participate in any court proceedings arising during the business rescue proceedings;
- formally participate in the company's business rescue proceedings;
- informally participate in those proceedings by making proposals for a business rescue plan to the practitioner;
- the right to vote to amend, approve or reject a proposed business rescue plan; and
- if the proposed business rescue plan is not adopted, a further right to propose the development of an alternative plan, or to present an offer to purchase the interests of one or more of the affected persons.[55]

---

52 S 148.

53 Members must be independent creditors or employees or proxies of the same (s 149(2)).

54 S 145.

55 S 145 (creditors) and s 144 (employees).

3.5 Rights of employees[56]

Employees are entitled, either through a trade union or through a representative, to –

- notice[57] of each significant court proceeding, decision, meeting or other relevant event concerning the business rescue proceedings;
- participate in any court proceedings arising during the business rescue proceedings;
- form a committee of employees' representatives;
- be consulted by the practitioner during the development of the business rescue plan, and afforded sufficient opportunity to review any such plan and prepare a submission contemplated in section 152(1)(c); and
- be present and make a submission to the meeting of the holders of voting interests before a vote is taken on any proposed business rescue plan, as contemplated in section 152(1)(c).

To the extent that any money became due and payable by a company to an employee at any time before the beginning of the company's business rescue proceedings, and had not been paid to that employee immediately before the beginning of those proceedings, the employee is a preferred unsecured creditor. In this instance, employees, either through a trade union or through a representative, have the right to vote with/as creditor to amend, approve or reject a proposed business rescue plan, and if the proposed business rescue plan is not adopted, a further right to propose the development of an alternative plan, or to present an offer to purchase the interests of one or more of the affected persons.[58]

3.6 Rights of securities holders[59]

Each holder of any security is entitled to –

- notice of each significant court proceeding, decision, meeting or other relevant event concerning the business rescue proceedings;

---

56 S 144.

57 Which must be given in the prescribed manner and form to employees at their workplace, and served at the head office of the relevant trade union.

58 S 144(3)(f).

59 S 146.

- participate in any court proceedings arising during the business rescue proceedings;
- formally participate in a company's business rescue proceedings;
- the right to vote, as determined in section 152, to approve or reject (not amend) a proposed business rescue plan if it would alter the rights of that class of securities; and
- if the proposed business rescue plan is not adopted, a further right to propose the development of an alternative plan, or to present an offer to purchase the interests of any or all of the creditors or other holders of securities.[60]

A debenture holder is the holder of a security, but it can also be a claim against the company, that could make such a holder a creditor.[61]

4 Business rescue plan

4.1 Content and voting

The practitioner, after consultation with the management of the company, affected persons and creditors, must prepare a business rescue plan that contains at least the information in section 150(2), as well as any other information needed to assist persons to accept or reject the plan.[62] The company must publish the plan 25 business days after the appointment of the practitioner.[63]

The practitioner must convene and preside over a meeting (with five business days' notice)[64] of creditors and any other holders of a voting interest that has been called for the purpose of considering the proposed rescue plan within ten business days after the publication of the plan.[65]

---

60 S 146.
61 See ch 3 about 'share' and 'security'.
62 S 150(2).
63 S 150(5). The Act does not stipulate where the plan must be published.
64 S 151(2).
65 S 151(1).

At the meeting, the practitioner must introduce the proposed business rescue plan for consideration by the creditors, and (if applicable) by the *shareholders*. It is not clear how security holders, other than shareholders, are going to vote. He must also –

- inform the meeting whether he continues to believe that there is a reasonable prospect of the company being rescued;
- provide an opportunity for the employees' representatives to address the meeting; and
- invite discussion, and entertain and conduct a vote on –
  - any motions to amend the proposed plan, in any manner moved and seconded by holders of creditors' voting interests, and satisfactory to the practitioner; or
  - to direct the practitioner to adjourn the meeting in order to revise the plan for further consideration.[66]

The proposed business rescue plan will be approved on a preliminary basis[67] if it was supported by the holders of more than 75% of the creditors' voting interests, and the votes in support included at least 50% of the independent creditors' voting interests, if any, that were voted.[68] A secured or unsecured creditor has a voting interest equal to the value of the amount owed to that creditor by the company, and a concurrent creditor who would be subordinated in a liquidation has a voting interest, as independently and expertly appraised[69] and valued at the request of the practitioner, equal to the amount, if any, that the creditor could reasonably expect to receive in such a liquidation of the company. Preferences among concurrent creditors are not taken into account.[70]

---

66 S 152(1).
67 Preliminary if it does alter the rights of holders of securities.
68 S 152(2).
69 S 145(5).
70 S 145(4). *CSARS v Beginsel* 2013 (1) SA 307 (WCC).

If the plan alters the rights of any class of holders of the company's securities, adoption by the creditors is preliminary. The practitioner must then immediately hold a meeting[71] of holders of the class/es of securities whose rights would be altered by the plan, and call for a vote to approve the adoption of the proposed business rescue plan. If a majority of the voting rights that were exercised support of the adoption of the plan, it will have been finally adopted, subject only to satisfaction of any conditions on which it is contingent.[72] If the majority (that is at least 50% + 1) does not support the plan, the practitioner can apply to the court for an order to set aside the voting on the basis that it is 'inappropriate', whatever that may mean, or publish a revised plan. Alternatively, the other affected parties can make a binding offer to buy the voting interests of the dissenting affected parties at a value independently and expertly determined, on the request of the practitioner, to be a fair and reasonable estimate of the return to that person, or those persons, if the company were to be liquidated.[73] This is clearly a binding offer and not an 'automatic contract'.[74] If none of these actions are taken, the practitioner must file a notice of the termination of the business plan with the CIPC.[75]

If the plan is adopted, it binds the company, each of the creditors of the company, and every holder of the company's securities, regardless of whether such a person was present at the meeting, voted in favour of adoption of the plan, or (in the case of creditors) had proven their claims against the company.[76] It is not clear why a secured creditor would vote to change his security.[77] This is a so-called 'cram down' where the rights of the minority are subject to the will of the majority without any other requirements (such as concurrence).[78]

---

71 No indication is given about the process to call this meeting.

72 S 152(3)(b)–(c).

73 S 153(1).

74 See, however, *African Banking Corporation of Botswana v Kariba Furniture Manufacturers (Pty) Ltd and Others* 2013 (6) SA 471 (GNP).

75 S 153.

76 S 152(4).

77 See s 134(2) and par 4.2.3.

78 *Tuning Fork (Pty) Ltd t/a Balanced Audio v Greeff and Another* [2014] 3 All SA 500 (WCC).

The company must then satisfy any conditions of the business plan and implement it, under the direction of the practitioner.[79] The practitioner must then file a notice of substantial implementation with the CIPC.[80]

4.2 Effect of business plan

4.2.1 *Legal proceedings*

During business rescue proceedings, no legal proceeding (with certain exceptions), including enforcement action, against the company, or in relation to any property belonging to the company, or lawfully in its possession, may be commenced or proceeded with in any forum without the written consent of the practitioner or with the leave of the court.[81] It should be logical that legal proceedings in respect of business rescue itself should be excluded because it has got nothing to do with the company's financial position. No guarantee or surety *by a company* may be enforced and if any claim is subject to a time limit, the measurement of time is suspended during the business rescue.[82]

Obligations of a surety for the company can, however, be enforced, unless the business rescue plan provides for the extinction (not only unenforceability) of the principal debt.[83] The business rescue plan can otherwise only bind sureties if they were parties to the plan. If the surety performs, he cannot claim from the company as principal debtor based on his right of recourse, due to the provisions of section 133.

If a business rescue plan has been approved and implemented, a creditor is not entitled to enforce any debt owed by the company immediately before the beginning of the business rescue process, except to the extent provided for in

---

79 S 152(5).

80 S 152(8).

81 'Legal proceedings' usually excludes, mediation, arbitration (whether voluntary, by contract, or mandatory) and refers to a court process: *Van Zyl v Euodia Trust (Edms) Bpk* 1983 (3) SA 394 (T).

82 S 133.

83 *Tuning Fork (Pty) Ltd t/a Balanced Audio v Greeff and Another* [2014] 3 All SA 500 (WCC).

the business rescue plan.[84] A business rescue plan *may* provide that, if it is implemented in accordance with its terms and conditions, a creditor who has acceded to the discharge of the whole or part of a debt owing to that creditor will lose the right to enforce the relevant debt or part of it.[85] Therefore, if the plan does not so provide, it is uncertain whether the creditor can still enforce the debt, but it is submitted that the 'cram down' principle applies, otherwise the plan would be ineffective.[86]

4.2.2 *Property dealing*

Dealings in property owned by the company are only allowed in the ordinary course of business, at arm's length (for fair value and approved in advance in writing by the practitioner), or in terms of the business plan, or by court order.[87]

4.2.3 *Secured claims*

If disposal of any property over which a person has any security or title interest, the company must obtain the prior consent of that person, unless the proceeds of the disposal would be sufficient to fully discharge the indebtedness protected by that person's security or title interest. The company must 'promptly' pay the sale proceeds attributable to that property up to the amount of the company's indebtedness to that other person or provide security for the amount of those proceeds, to the reasonable satisfaction of that other person.[88]

---

84 S 154(2).

85 S 154(1).

86 *Tuning Fork (Pty) Ltd t/a Balanced Audio v Greeff and Another* [2014] 3 All SA 500 (WCC).

87 S 134(1).

88 S 134(2). If a practitioner suspends, in terms of s 136, a provision of an agreement relating to a security granted by the company, that provision nevertheless continues to apply for the purpose of s 134 with respect to any proposed disposal of property by the company (s 136(2A)(c)).

4.2.4 *Contracts with the company*

The practitioner may entirely, partially or conditionally *suspend*, for the duration of the business rescue proceedings, any obligation of the company that arises under an agreement to which the company was a party at the commencement of the business rescue period and would otherwise become due during those proceedings, other than an agreement of employment and an agreement to which section 35A or 35B[89] of the Insolvency Act[90] applies.[91] The practitioner may also apply urgently to a court to entirely, partially or conditionally *cancel*, on any terms that are just and reasonable in the circumstances, any obligation of the company that arises under an agreement to which the company was a party at the commencement of the business rescue period.[92] A party to a contract dealt with as above by the practitioner has only a claim for damages against the company.[93]

Employees are employed on their existing terms and conditions, unless other terms and conditions are agreed between employers and employees in terms of the labour laws or changes occur in the ordinary course of attrition.[94] The practitioner cannot suspend any provision of an employment contract or an agreement to which section 35A or 35B of the Insolvency Act applies. The court can only cancel an employment contract subject to sections 189 and 189A of the Labour Relations Act and cannot cancel an agreement to which section 35A or 35B of the Insolvency Act would have applied if the company were being liquidated.

4.2.5 *Directors and shareholders*

An alteration in the classification or status[95] of any issued securities, other than a transfer in the ordinary course of business, is invalid unless it is according to a business rescue plan or a court order.[96]

---

89 These are specialised transactions in respect of financial instruments on an exchange.
90 Act 24 of 1936.
91 S 136(2) and (2A).
92 S 136(2)(b).
93 S 136(3).
94 S 136(1)(a).
95 The term 'status' is unclear.
96 S 137(1).

The directors must continue to exercise the *functions of director*, subject to the authority of the practitioner, and must exercise a *management function* in accordance with the express instructions or direction of the practitioner, to the extent that it is reasonable to do so. The directors remain bound by the requirements of section 75 concerning personal financial interests, but, to the extent that they act under instruction or direction from the practitioner, are exempted from the duties in section 76.[97]

In exercising the *functions of the director*, the director remains a director and subject to the duties in section 76. However, if he exercises the *functions of the director* in accordance with the express instructions or direction of the practitioner, the duties apply to the practitioner, not the director. The difference between *functions of the director* and *management functions of the director* is uncertain, and, in most instances, non-existent.[98]

Any action *on behalf of the company* that requires the approval of the practitioner is void unless approved by the practitioner.[99] *Bona fide* third parties will therefore be at risk in respect of the validity of contracts during business rescue.[100]

4.2.6 *Existing debt*

A business rescue plan may provide that, if it is implemented in accordance with its terms and conditions, a creditor who has acceded to the discharge of the whole or part of a debt owing to himself will lose the right to enforce the relevant debt or part of it.

A creditor is not entitled to enforce any debt owed by the company immediately before the beginning of the business rescue process, except to the extent provided for in the business rescue plan.[101]

---

97 S 137(2). These duties now rest with the practitioner.

98 See e.g. s 66 about the duty to manage.

99 S 137(4). S 20 and the common law *Turquand* rule therefore do not apply. It is uncertain what 'action on behalf of the company' is supposed to mean.

100 See also ss 17 and 218(1).

101 S 154 and see par 4.2.1.

4.3 Post-commencement finance

After payment of the practitioner's remuneration, costs and other claims[102] arising out of the costs of the business rescue proceedings, claims are paid as follows:

- Remuneration, reimbursement for expenses or other amounts of money relating to employment that are due and payable by a company to an employee during the company's business rescue proceedings, but not paid to the employee, will be paid in preference to post-commencement finance (secured or not) and all unsecured claims against the company.
- Post-commencement finance will have preference, in the order in which it was incurred, over all unsecured claims against the company.

If business rescue proceedings are superseded by a liquidation order, the preference conferred in terms of this section will remain in force, except to the extent of any claims arising out of the costs of liquidation.[103]

4.4 Termination

Business rescue proceedings end when the court sets aside the resolution or order that began those proceedings, or has converted the proceedings to liquidation proceedings.

The business rescue proceedings also end when the practitioner has filed a notice of the termination of business rescue proceedings with the CIPC, or when a business rescue plan has been proposed and rejected, or when it has been adopted and the practitioner has subsequently filed a notice of substantial implementation of that plan with the CIPC.[104]

If a company's business rescue proceedings have not ended within three months after the start thereof (or such longer time as the court, on application by the practitioner, may allow) the practitioner must prepare a report on the

---

102 Additional remuneration above that prescribed by the minister under s 143(6), e.g. also on a contingency basis linked to certain deliverables in respect of the business plan and time frames (s 143(2)), but only if agreed by the creditors and equity 'shareholders' under s 143(3). There is no provision for the taxing of the account of the practitioner.

103 S 135; *Merchant West Working Capital Solutions (Pty) Ltd v Advanced Technologies and Engineering Company Ltd* 13/12406 10 May 2013 (GSJ).

104 S 132(2)(b).

progress of the business rescue proceedings, and update it at the end of each subsequent month until the end of the proceedings. The practitioner must also deliver the report and each update in the prescribed manner to each affected person, and to the court, if the proceedings have been the subject of a court order, or to the CIPC in other cases.[105]

5 Compromise[106]

The board of a company (or the liquidator of such a company if it is being wound up)[107] may propose an arrangement or a compromise of its financial obligations to all of its creditors, or to all of the members of any class of its creditors, by delivering a copy of the proposal and notice of meeting to consider the proposal, to every creditor of the company, or every member of the relevant class of creditors whose name or address is known to, or can reasonably be obtained by, the company, and to the CIPC.[108] The process is available irrespective of whether the company is 'financially distressed' or not, but it cannot be initiated if the company is engaged in business rescue. The concepts of 'arrangement' and 'compromise' are not defined and the meaning given thereto under section 311 of the 1973 Act may apply. A compromise presupposes a dispute regarding rights or the enforcement of the rights.[109] A third party can be involved, but not to the exclusion of the company or creditors.[110] 'Arrangement' should have the meaning in respect of the 'share' cases.[111]

The proposal must contain all information reasonably required to assist the creditors to decide whether to accept or reject the proposal, and must be divided into –

- Part A – Background;
- Part B – Proposals; and

---

105 S 132(3).

106 Arrangements are regulated by s 114 *et seq*. See ch 10.

107 The categories of persons who can initiate a compromise under s 311 of the 1973 Act are much wider.

108 S 155(2).

109 *Namex (Edms) Bpk v Kommissaris van Binnelandse Inkomste* 1994 (2) SA 265 (A).

110 *Ex parte Kaplan: In re Robin Consolidated Industries Ltd* 1987 (3) SA 413 (W).

111 See ch 10.

- Part C – Assumptions and conditions.[112]

It must conclude with a certificate by an authorised director or prescribed officer of the company, stating that –

- any factual information provided *appears* to be accurate, complete, and up to date; and
- the projections provided are estimates made in good faith on the basis of the factual information and assumptions as set out in the statement.[113]

A proposal will have been adopted by the creditors or the members of a particular class of creditors of the company, if it is supported by a majority in number, representing at least 75% in value of the creditors or class present and voting in person or by proxy, at a meeting called for that purpose.[114] The majority is by number and not value, with the effect that small creditors will be favoured at the expense of large creditors.

If a proposal is adopted, the company *may* apply to the court for an order approving the proposal. The word 'may' implies that the application is made at the discretion of the company. The rest of the section, however, creates the impression that it is not and it is suggested that due to the fact that the sections do not expressly provide for it, application in respect of dissenting parties can only be by court order. The court may sanction the compromise as set out in the adopted proposal, if it considers it just and equitable to do so, having regard to the number of creditors of any affected class of creditors who were present or represented at the meeting and who voted in favour of the proposal, and also to the report of the Master required in terms of the laws contemplated in item 9 of Schedule 5 in the case of a compromise in respect of a company being wound up. A copy of an order of the court must be filed by the company within five business days and must be attached to each copy of the company's Memorandum of Incorporation (MOI) that is kept at the company's registered office.[115]

---

112 S 155(3).
113 S 155(5).
114 S 155(6).
115 S 155(7).

A *copy* (not the original) of an order of the court is final and binding on all of the company's creditors or all of members of the relevant class of creditors, as the case may be, as of the date on which it is filed.[116] This requirement is ambiguous and it is not clear whether a compromise must be sanctioned by the court before it is binding, due to the use of the word 'may' in section 155(7)(a), but see the remarks above.

116 S 155(8).

Chapter 12 Remedies and enforcement

1 General

The Companies Act[1] provides for specific remedies for holders of securities and/or the company to enforce their rights. It also provides for various alternatives to settle disputes. These alternative remedies include 'voluntary' mediation, conciliation or arbitration.[2]

2 *Locus standi*

A person who can apply to court, the Companies Tribunal, the Companies and Intellectual Property Commission (CIPC) or the Takeover Regulation Panel (TRP) is, in the first instance, the person contemplated in the particular provision of the Act, but also a person acting on behalf of those who cannot act in their own names, and also a person acting as a member of, or in the interest of, a group or class of affected persons, or an association acting in the interest of its members or, with the leave of the court, a person acting in the public interest.[3]

3 Common law

3.1 General

The basic principle in corporate law (and the law of associations in general), is that

> '. . . by becoming a shareholder in a company a person undertakes by his contract to be bound by the decisions of the prescribed majority of shareholders, if those decisions on the affairs of the company are arrived at in accordance with the law, even where they adversely affect his own rights as a shareholder . . . That principle of the supremacy of the majority is essential to the proper functioning of companies.'[4]

---

1 Act 71 of 2008 (the Act/2008 Act).

2 S 166.

3 S 157. These categories pose vexing questions, especially in respect of civil procedure and the proof of *locus standi*, e.g. under what circumstances a person cannot act in his own name. The reference to an association as acting for its members is also uncertain, as the impression is created that it is an association without legal personality (see s 8(3)).

4 *Sammel v President Brand Gold Mining Co Ltd* 1969 (3) SA 629 (A); *Grancy Property Limited v Manala* [2013] 3 All SA 111 (SCA).

The court will therefore not interfere with the management of companies, if it is within these boundaries.[5] Therefore, if the requisite (prescribed) majority took a decision or authorised an action (or for that matter can ratify a purported irregular decision or action), any shareholder whose rights in terms of the Act or the Memorandum of Incorporation (MOI) (or presumably also the rules of the company) were affected by that action is subject to the 'majority rule'. [6] If such an action is, however, 'not in accordance with the law', any shareholder whose rights in terms of the Act or the MOI (or presumably also the rules of the company) was affected can institute action.[7]

The following are actions that will not be 'in accordance with the law', and therefore not ratifiable as a proper exercise of majority power:

- Illegal acts, that is, acts in contravention of statutory or common law which cannot be ratified by an ordinary resolution and which affect the rights of the shareholder. There are many examples but the most obvious one may be the (purported) ratification of theft by an 'insider'.
- Acts in contravention of the Act, the MOI or rules of the company that can only be ratified by a resolution other than an ordinary resolution.[8]
- Acts in accordance with the law, but which are 'fraud on the minority'. This entails an abuse of the majority power to prejudice the minority. The motive of the majority, for instance to disenfranchise or expropriate a minority will usually be indicative of 'fraud' in this sense, like the issue of unissued shares to dilute the shareholding of a particular shareholder and converting shares into redeemable shares and redeeming those shares to expropriate the

---

5 '. . . This court is not to be required on every occasion to take the management of every playhouse and brewhouse in the Kingdom . . .' *Carlen v Drury* (1812) 1 V 7 B 154; 35 ER 61.

6 *Ex parte NBSA Centre Ltd* 1987 (2) SA 783 (T). There are statutory exceptions where a shareholder has a remedy even in the case of the 'proper' exercise of majority power, e.g. s 164, which is discussed below.

7 In part, the rule in *Foss v Harbottle* (1843) 2 Hare 461; 67 ER 189; *Communicare and Others v Khan and Another* 2013 (4) SA 482 (SCA). The common law derivative action has been abolished by s 165. See below.

8 Unless ratification by a resolution other than an ordinary resolution is expressly provided for, e.g. acts *ultra vires* the company can be ratified by special resolution: s 20(2).

minority, but is not conclusive.[9] It is not possible to give a definitive definition of 'fraud on the minority', but it can be defined in the negative. Therefore, if an act by the majority and or company is *bona fide* in the best interest of the company, the interests of the minority are automatically subservient to those of the company and the act will not constitute 'fraud on the minority'.[10]

The action that can be instituted in common law will be the personal action (to enforce rights of a particular shareholder) or a representative action (to enforce the rights of all shareholders in the same position).[11]

A court must develop the common law as necessary to improve the realisation and enjoyment of rights established by the Act when determining a matter brought before it or making an order in terms of the Act. The CIPC, TRP, Companies Tribunal or a court must promote the spirit, purpose and objects of the Act and if a provision of the Act, or other document in terms of the Act, read in its context, can be reasonably construed to have more than one meaning, it must prefer the meaning that best promotes the spirit and purpose of the Act, and that will best improve the realisation and enjoyment of rights.[12]

3.2 Contractual

The MOI, and any rules of the company, are binding between the company and each shareholder, between or among the shareholders of the company, and, in the exercise of their functions within the company, between the company and

---

9 *Hogg v Cramphorn Ltd* [1967] Ch 254; *Bamford v Bamford* [1970] Ch 212; *Ex parte JR Starck & Co (Pty) Ltd* 1983 (3) SA 41 (W).

10 See e.g. *Ex parte JR Starck & Co (Pty) Ltd* 1983 (3) SA 41 (W); *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd and Others* 2014 (5) SA 179 (WCC).

11 These remedies are in addition to any remedies a shareholder has otherwise, e.g. s 20(4) and (6). The representative action is therefore a type of class action.

12 S 158(a). The purposes of the Act are set out in s 7 and see e.g. *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd* [2013] JOL 30498 (SCA) and ch 1.

each director (or prescribed officer) of the company and any other person serving as a member of a committee of the board.[13]

Therefore, the contractual rights of parties will also apply[14] in a contravention of the provisions of the MOI to the extent that the Act does not expressly provide otherwise.

4 Statutory remedies

4.1 General

One or more shareholders, directors or prescribed officers of a company, or a trade union representing the employees of the company, may apply to the High Court for an appropriate order to restrain the company from doing anything inconsistent with the Act.[15] In addition, one or more shareholders, directors or prescribed officers of a company may apply to the High Court for an appropriate order to restrain the company or the directors from doing anything inconsistent with any limitation, restriction or qualification as provided for in section 20(2).[16]

Each shareholder of a company also has a claim for damages against any person who intentionally, fraudulently or due to gross negligence causes the company to do anything inconsistent with the Act or a limitation, restriction or qualification as provided for in section 20(6).

Section 218(2) provides that any person who contravenes any provision of the Act is also liable to any other person (including but not limited to shareholders) for any loss or damage suffered by that person as a result of that contravention.[17] This liability apparently also follows if a person acted innocently, and, because a company is also a 'person',[18] it can also institute action. It is inconceivable why a shareholder would want to exercise his remedies in respect of damages under section 20(6),[19] as fraud or gross negligence is not

---

13 S 15(6)(c). It is submitted that, based on the common law, this relationship is contractual. See ch 2.

14 As modified by and also in addition to the statutory remedies.

15 S 20(4).

16 S 20(5).

17 S 218(2). See also ch 7.

18 S 1.

19 See ch 5.

required under section 218(2). This liability is in addition to any other liability in terms of any Act or the common law. Whether the ordinary common law principles in respect of liability (delictual or otherwise) will be made applicable to section 218(2) remains to be seen, but in the absence of a clear indication by the legislature (as in section 77(2)) it seems illogical.[20] The liability should be on the basis of section 424 of the Companies Act of 1973,[21] otherwise the application of section 22 of the 2008 Act would be ineffective.[22]

A third party can obviously also claim directly from the directors on a delictual basis, but then the elements of the common law delict must be proved. As the primary duty of the directors is to the company, proving a duty to the third party (or even a shareholder) may not always be possible.[23]

4.2 Securities holder's declaratory order

A securities holder of a company may apply to a court[24] for –

- a declaratory order determining any rights of the securities holder in terms of the Act, the company's MOI, or any rules of the company; or
- any appropriate order necessary to –
  - protect any right; or
  - rectify any harm done to the securities holder by the company or any of its directors as a consequence of an act or omission that contravened the Act or the company's MOI or rules, or violated any right.[25]

---

20 It is clear that the liability in terms of s 218(2) is not subject to any common law basis.

21 Act 61 of 1973 (1973 Act).

22 See *Philotex (Pty) Ltd v Snyman* 1998 (2) SA 138 (SCA); *Saincic v Industro-Clean (Pty) Ltd* 2009 (1) SA 538 (SCA).

23 See, e.g., *McLelland v Hulett* 1992 (1) SA 456 (D).

24 The right to apply to a court is in addition to any other remedy available to a securities holder in terms of the Act or the common law, subject to the Act.

25 S 161.

4.3 Oppressive or prejudicial conduct[26]

A shareholder or director of a company may apply to a court for relief if –

- any act or omission of the company, or a related person,[27] *has had* a result that is oppressive or unfairly prejudicial to,[28] or unfairly disregards the interests of, the applicant;
- the business of the company, or a related person, *is being* or has been carried on or conducted in a manner that is oppressive or unfairly prejudicial to, or unfairly disregards the interests of the applicant; or
- the powers of the directors of the company, or a related person, *are being* or have been exercised in a manner that is oppressive or unfairly prejudicial to, or unfairly disregards the interests of the applicant.[29]

When considering an application, the court may make any interim or final order it thinks fit, including, without limiting the generality of the foregoing, an order –

- restraining the conduct complained of;
- appointing a liquidator, if the company appears to be insolvent;
- placing the company under supervision and commencing business rescue proceedings in terms of Chapter 6 of the Act;
- regulating the company's affairs by amending its MOI or creating or amending a unanimous shareholders' agreement;[30]

---

26 S 163(1).

27 Presumably that of, e.g., a subsidiary, but also anybody within the definition of 'related party'.

28 The act must be completed (i.e. 'has had the result'). The result, and not the act, must be oppressive or unfairly prejudicial.

29 The section clearly attempts to address the issues in *Scottish Co-operative Wholesale Society Ltd v Meyer* [1959] AC 324 (HL). The remedy is now also available in respect of actions by directors, who can also use the remedy, even if they are not shareholders.

30 If an order directs the amendment of the company's MOI, the directors must promptly file (with the CIPC) a Notice of Amendment to give effect to that order. No further amendment altering, limiting or negating the effect of the court order may be made to the MOI, until a court orders otherwise.

- directing an issue or exchange of shares;
- appointing directors in place of, or in addition to, all or any of the directors then in office,[31] or declaring any person delinquent or under probation, as contemplated in section 162;
- directing the company or any other person to restore to a shareholder any part of the consideration that the securities holder paid for shares, or pay the equivalent value, with or without conditions;[32]
- varying or setting aside a transaction or contract to which the company is a party and compensating the company or any other party to the transaction or contract;
- requiring the company, within a time specified by the court, to produce to the court or an interested person financial statements in a form required by the Act, or an accounting in *any other form* the court may determine;
- to pay compensation to an aggrieved person, subject to any other law entitling that person to compensation;
- directing rectification of the registers or other records of a company; or
- for the trial of any as determined by the court.[33]

This section is extremely wide and covers not only the standard majority control 'abuse', but also affects consensual agreements, as well as shareholders' agreements. Creditor–debtor relationships, irrespective of the source thereof, are also covered. Consequently, the section introduces a new dimension to contracts, which must, upon conclusion, also be tested against the criteria of 'oppressive or unfairly prejudicial' conduct.

---

31 The court will therefore directly intervene in the management of the company. *Contra* s 252 of the 1973 Act.

32 It is not clear whether this is a repurchase of securities. The solvency and liquidity of the company can obviously be influenced by this order. See e.g. s 50 of the Close Corporations Act 69 of 1984 (CC Act).

33 S 163(2).

The action can be instituted by a shareholder or director of any company or related company in respect of acts by the company or a related person. Therefore if the act of the holding company or of a co-subsidiary is in conflict with this section, a shareholder or director of the subsidiary can institute such action.

The circumstances under which the action can be instituted are also in respect of interests, (not only rights) of the particular parties and 'acts by the company or a related person' will mean the acts by the directors and/or by the majority.[34]

However, the act must be oppressive *or* unfairly prejudicial. Oppression implies unfairness, if not something more. Mere prejudice, without oppression, is not enough, it must also be unfair. Acts that are unlawful are *per se* unfair. The question will be when acts that are legal are nevertheless unfair, taking into account that a lot of acts by the company will 'prejudice' some shareholders, as a minority.[35] If the MOI (and the Act and the law) are complied with, an act by directors within their fiduciary duties, and an act by the majority *bona fide* in the interest of the company and not an abuse of power will not be impeachable (not 'fraud on the minority').[36]

However, there can be other rights and interests between the majority and minority based on express or implied agreements or legitimate expectations as a result thereof. Acts by the majority *vis-à-vis* the minority in conflict with this (for example the legitimate expectation), such as that a particular shareholder will take part in the management of the company, which is not honoured, are obviously prejudicial *per se*, but, under these circumstances, also unfair.[37]

---

34 Interests are wider than rights and would include 'legitimate expectations': Count *Gotthard SA Pilati v Witfontein Game Farm (Pty) Ltd and Others* [2013] 2 All SA 190 (GNP); *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd and Others* 2014 (5) SA 179 (WKK).

35 See par 3.1 in respect of the majority rule.

36 See par 3.1.

37 *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd and Others* 2014 (5) SA 179 (WCC); *Grancy Property Limited v Manala* [2013] 3 All SA 111 (SCA).

5 Derivative action[38]

5.1 Demand (notice) to company

A shareholder, or person entitled to be registered as a shareholder of the company or of a related company, or a director or prescribed officer of the company or of a related company, or a registered trade union that represents employees, another representative of employees of the company[39] or any person who has been granted the leave (which may be granted only if the court is satisfied that it is necessary or expedient to do so to protect a *legal right* of that other person) of the court to do so, may serve a demand upon a company to commence or continue legal proceedings[40] or take related steps to protect the *legal interests*[41] of a company.[42] It is not defined what the 'legal interests' of a company may be. The concept is extremely wide and covers not only rights but, it is submitted, may even include potential (future) rights.

5.2 Company action

A company that has been served with such a demand may, within 15 business days, apply to the court to set aside the demand only on the grounds that it is –

- frivolous;
- vexatious; or
- without merit.[43]

---

38 S 165. This section abolishes any right at common law of a person other than a company to bring or prosecute any legal proceedings on behalf of that company (s 165(1)).

39 For greater certainty, the right of a person in terms of this section to serve a demand on a company, or apply to a court for leave, may be exercised by that person directly, or by the CIPC or TRP, or another person on behalf of that first person as permitted by s 159.

40 'Legal proceedings' usually excludes, mediation, and arbitration (whether voluntary, by contract, or mandatory) and refers to a court process: *Van Zyl v Euodia Trust (Edms) Bpk* 1983 (3) SA 394 (T).

41 The abolition of the common law excludes the 'fraud on the company' cases.

42 S 165(2).

43 S 165(3).

If a company does not make the application, or the court does not set aside the demand, the company must appoint an independent and impartial person or committee to investigate the demand. This person or committee must report on the facts, the probable costs, and whether it is in the company's best interests to bring action or proceedings. Within 60 business days after being served with the demand, or within a longer time as the court (on application by the company) may allow, the company *must* either initiate or continue legal proceedings, or take related legal steps to protect the legal interests of the company or serve a notice on the person who made the demand, refusing to comply with it (refusal notice).[44]

5.3 Personal derivative action

The person who has made a demand may apply to the court for leave to bring or continue proceedings in the name and on behalf of the company, if the company –

- has failed to take any particular step required as above;
- appointed an investigator or committee who was not independent and impartial;
- accepted a report that was clearly inadequate in its preparation, or was irrational or unreasonable in its conclusions or recommendations;
- acted in a manner that was inconsistent with the reasonable report of an independent, impartial investigator or committee; or
- has served a refusal notice.[45]

5.4 Court's discretion

The court may grant leave only if it is satisfied that –

- the applicant for leave is acting in good faith;
- the proposed or continuing proceedings involve the trial of a *serious question* of *material consequence* to the company; and

---

44 S 165(4). If the company decides to initiate proceedings, it must nevertheless appoint the investigator. This seems to be unnecessary.

45 S 165(5)(a).

- it is in the best interests of the company that the applicant be granted leave to commence the proposed proceedings or proceed with the proceedings.[46]

In exceptional circumstances, such a person may apply to the court for leave to bring proceedings in the name and on behalf of the company without making the prior demand, or without affording the company time to respond to the demand. The court may grant leave only if it is satisfied that –

- the delay required for the required procedures may result in –
  - irreparable harm to the company; or
  - substantial prejudice to the interests of the applicant or another person;
- there is a reasonable probability that the company may not act to prevent that harm or prejudice, or act to protect the company's interests that the applicant seeks to protect; and
- that the requirements under the court's discretion above are satisfied.[47]

5.5 Interests of company

There is a *rebuttable presumption* that granting leave is not in the *best interests*[48] of the company if –

- the proposed or continuing proceedings are –
  - by the company against a third party; or
  - by a third party against the company; *and*

---

46 S 165(5)(b).

47 S 165(6). The person to whom leave has been granted is entitled, on giving reasonable notice to the company, to inspect any books of the company for any purpose connected with the legal proceedings (s 165(9)(e)). Any person who can apply for leave can also apply to be substituted for the person to whom leave was initially granted (s 165(12), where the court's discretion as well as the effect of the substitution is also prescribed).

48 Not legal interests.

- the company has decided –
  - not to bring the proceedings; or
  - not to defend the proceedings; or
  - to discontinue, settle or compromise the proceedings; *and*
- all the directors who participated in that decision –
  - acted in good faith for a proper purpose; and
  - did not have a personal financial interest in the decision; and
  - informed themselves about the subject matter of the decision to the extent they reasonably believed to be appropriate; *and*
- reasonably believed that the decision was in the best interests of the company.[49]

5.6 Costs

5.6.1 *Investigator*

If the court grants leave to a person under section 165, it must also make an order stating who is liable for the remuneration and expenses of the person appointed (the investigator). The party liable may be all or any of the parties to the proceedings or application, and the company. If the order makes two or more persons liable, it may also determine the nature and extent of the liability of each of those persons.[50]

5.6.2 *Legal costs*

The court may at any time make any orders it considers appropriate about the costs of the following persons in relation to the proceedings –

- the person who applied for or was granted leave;

---

49 S 165(7) – a modified business judgment rule: see s 76(4) and ch 7. A person is a third party if the company and that person are not related or inter-related; proceedings by or against the company includes any appeal from a decision made in proceedings by or against the company (s 165(8)).

50 S 165(9). The court may (obviously) also vary the order. No provision is made for the costs of the committee instead of the person.

- the company; and
- any other party to the proceedings or application.[51]

If the shareholders of a company have ratified or approved any particular conduct of the company, the ratification or approval does not prevent a person from making a demand or applying for leave. In addition, the ratification or approval does not prejudice the outcome of any application for leave, but the court may take that ratification or approval into account in making any judgment or order.[52]

Proceedings brought under section 165 must not be discontinued, compromised or settled without the leave of the court.[53]

5.7 Whistle-blowers

A shareholder, director, company secretary, prescribed officer or employee[54] of a company, a registered trade union representing employees of the company or another representative of the employees of that company, a supplier of goods or services to a company, or an employee of such a supplier (the whistle-blower) can disclose information to the CIPC, Companies Tribunal, TRP, a regulatory authority, an exchange, a legal advisor, director, prescribed officer, company secretary, auditor, or committee of the company,[55] to the effect that the whistle-blower reasonably believed at the time of the disclosure that the disclosed information showed or tended to show that a company or external company, or a director or prescribed officer of a company acting in that capacity, has –

- contravened the Act,[56] or a law mentioned in Schedule 6;
- failed or is failing to comply with any legal statutory obligation to which the company is subject;

---

51 S 165(10).
52 S 165(14).
53 S 165(15).
54 These rights are in addition to any rights an employee has in terms of the Protected Disclosures Act 26 of 2000.
55 S 159(4).
56 Any contravention, irrespective of the potential result.

- engaged in conduct that has endangered or is likely to endanger the health or safety of any individual, or that damaged or is likely to damage the environment;
- unfairly discriminated, or condoned unfair discrimination, against any person, as contemplated in section 9 of the Constitution and the Promotion of Equality and Prevention of Unfair Discrimination Act;[57] or
- contravened any other legislation in a manner that could expose the company to an actual or contingent risk of liability, or is inherently prejudicial to the interests of the company.[58]

The whistle-blower has qualified privilege in respect of the disclosure and is immune from any civil, criminal or administrative liability for that disclosure.[59]

If a person (any person) –

- engages in conduct with the intent to cause detriment to the whistle-blower, *and* the conduct causes such detriment; or
- directly or indirectly makes an express or implied threat, whether conditional or unconditional, to cause any detriment to the whistle-blower or to another person; and
  - intends the whistle-blower to fear that the threat will be carried out; or
  - is reckless as to causing the whistle-blower to fear that the threat will be carried out, irrespective of whether the whistle-blower actually feared that the threat would be carried out,

the whistle-blower is entitled to compensation from that person for any damages suffered.[60]

---

57 Act 4 of 2000.

58 S 159(3). The effect of non-compliance will determine whether a contravention must be disclosed, in contrast with Companies Act contraventions, where the result or potential result is irrelevant. A public company and SOC must directly *or indirectly* establish and maintain a system to receive disclosures confidentially and to act on them, and also routinely publicise the availability of the system to the categories of potential whistle blowers (s 159(7)).

59 S 159(4).

6 Dissenting shareholders' appraisal rights

6.1 Initiation

If a company, except under a business rescue plan, has given the shareholders notice of a meeting to consider adopting a resolution to –

- amend its MOI by altering the preferences, rights, limitations or other terms of any class of its shares in any manner *materially adverse* to the rights or interests of holders of that class of shares 'as contemplated in section 37(8)';[61] or
- enter into a transaction contemplated in sections 112 (disposal of substantially all assets or undertaking), 113 (proposed merger or amalgamation) or 114 (proposed scheme of arrangement),[62]

the notice must include a statement informing shareholders of their rights under section 164.[63]

---

60 S 159(5). These actions are presumed to have taken place unless the opposite can be proved (s 159(6)).

61 S 164(2). S 37(8) merely refers back to s 164. However, s 37(8) gives the appraisal remedy if the MOI has been amended to 'materially and adversely alter the preferences, rights, limitations or other terms of a class of shares'. The requirement that it must 'materially *and* adversely alter' is clearly different from the requirement in s 164, which provides that it must be 'materially adverse to rights or interests'.

62 If the resolution that gave rise to a shareholder's rights under this section authorised the company to merge or amalgamate with one or more other companies, in such a manner that the company whose shares are the subject of a demand in terms of this section has ceased to exist, the obligations of that company under this section are obligations of the successor to that company resulting from the merger or amalgamation (s 164(18)).

63 S 164(1). The requirement 'materially adverse to rights or interests' is very wide and not clear. There are two tests, i.e. rights or interests, and the action must be materially adverse to those rights and interests. The basis of the rights and interests is not defined, and those rights and interests can therefore be other than in terms of the MOI. Interests can also, conceivably, include a dilution of relative voting rights (see e.g. *Utopia Vakansie-oorde v Du Plessis* 1974 (3) SA 148 (A)). When an action is 'materially adverse' *vis-à-vis* the shareholders (as a group) can also be subjective, and it will be impossible for the company to determine this before the intended action.

At or before this meeting, a dissenting shareholder may send a written objection to the resolution to the company.[64] The shareholder is not bound to follow the process after the objection notice. This could have the effect that shareholders could send objection notices without the intention to proceed with the process. The company, on the other hand, can decide not to proceed based on these 'phantom' notices. The possibility for abuse is patent.

Within ten business days after a company has adopted a resolution contemplated in section 164, the company must send a notice that the resolution has been adopted to each shareholder who –

- filed this objection; and
- has not withdrawn that objection, or voted in support of the resolution.[65]

6.2 Shareholder demand

A shareholder of any class of shares of a company may demand that the company pay the shareholder the fair value for those shares if[66] –

- the company gives notice of a meeting to consider the resolutions as below;
- the shareholder sent the company a notice of objection;[67] and
- the company has adopted a resolution to amend the MOI and the shareholder holds shares of a class that is materially and adversely affected by the amendment to the MOI; or
- he has adopted a resolution contemplated in sections 112 (disposal of substantially all assets or undertaking), 113 (proposed merger or amalgamation) or 114 (proposed scheme of arrangement);

---

64 S 164(3).

65 S 164(4). How the company will know how the shareholder voted is not clear.

66 S 164 only applies to shares and securities are not included.

67 This requirement does not apply if the company failed to give notice of the meeting, or failed to include in that notice a statement of the securities holders' rights under s 164.

- the shareholder voted those shares in opposition to that resolution; and
- he has complied with the procedural requirements in section 164.[68]

The shareholder demand is a written notice,[69] which must be sent to the company within 20 business days after receiving a notice from the company that the resolution has been adopted, or (if the securities holder does not receive a notice) within 20 business days after learning that the resolution has been adopted.[70] The demand must also be delivered to the TRP.[71] The logic for this requirement in respect of all companies, also other than 'regulated' companies where it cannot be an 'offer to acquire securities', is obscure.

A shareholder who has sent a demand has no further rights in respect of those shares, other than to be paid their fair value, unless –

- he withdraws that demand before the company makes an offer, or allows an offer made by the company to lapse within 30 business days after it is made;
- the company fails to make an offer and the shareholder withdraws the demand; or
- the company revokes the adopted resolution that gave rise to the shareholder's rights by special resolution,[72] obviously again by special resolution. It is unclear what will happen is the shareholders cannot or will not take such a resolution.

What these 'rights in respect of shares' are is not clear, and although rights as contained in the MOI are obviously included, it is not clear whether other rights (for example property rights) are also affected. It should be noted that a shareholder does not have any rights to dividends. Due to the wording of the

---

68 S 164(5).

69 The demand must contain the details in s 164(8).

70 S 164(7).

71 S 165(8), which sets out the details of the notice, requires the demand to be sent to the TRP. The requirement of 20 business days in s 165(7) then obviously does not apply to this delivery to the TRP.

72 S 164(9).

particular section, it may be deduced that obligations and other competencies in respect of shares are excluded.

If any of these events occur, all of the shareholder's rights in respect of the shares are re-instated without interruption, therefore retrospectively.

6.3 Company action

The company must send to each shareholder who has sent a demand, a written offer to pay an amount considered by the company's directors to be the fair value of the relevant shares, accompanied by a statement showing how that value was determined. This must happen within five business days after the later of –

- the day on which the action approved by the resolution is effective;
- the last day for the receipt of demands (20 business days after notification by the company); or
- 20 business days after the securities holder has 'learn[ed] that the resolution has been adopted'.[73]

The fair value in respect of any shares must be determined as at the date on which, and time immediately before, the company adopted the resolution that gave rise to a shareholder's rights under this section. It can, of course, happen that the value of the shares can increase as a result of the action, such as when the company sells uneconomical assets. This can have the result that the offer is lower than the true value.[74]

Every offer made by the company to dissenting shareholders in respect of shares of the same class or series must be on the same terms. The offer lapses if it has not been accepted within 30 business days after it was made.[75]

A payment by a company to a shareholder in terms of section 164 does not obligate any person to make a comparable offer under section 125 to any other

---

73 S 164(11).
74 S 164(16).
75 S 164(12).

person, except to the extent that it is expressly provided for in section 164 or if the TRP rules otherwise in a particular case.[76]

6.4 Shareholder options

6.4.1 *Acceptance of offer*

If a shareholder accepts the offer by the company, the shareholder must either –

- tender the share certificates to the company or the company's transfer agent in the case of shares evidenced by certificates; or
- take the steps required in terms of section 53 in the case of uncertificated shares to transfer those shares to the company or the company's transfer agent.[77]

The company must pay the agreed amount within ten business days after the shareholder accepted the offer and tendered the share certificates or took steps as required in section 53.[78]

A payment by the company is not a 'distribution' by the company (section 46) or an acquisition of its shares (section 48) and are therefore not subject to the provisions of those sections or to solvency and liquidity in terms of section 4.[79]

6.4.2 *Court application*

6.4.2.1 Shareholder's orders

If the company –

- has failed to make an offer; or
- has made an offer that the shareholder considers to be inadequate, and that offer has not lapsed,

---

76 S 164(20). See ch 10 in respect of mandatory offers in terms of s 125.

77 S 164(13)(a). See ch 3 for the distinction between the types of proof of shares.

78 S 164(13)(b). A dissenting shareholder can accept the company's offer at any time before the court has made an order in terms of s 164(15)(c)(v).

79 S 164(19). See ch 4.

a shareholder may apply to the court to determine a fair value in respect of the shares, and for an order requiring the company to pay the shareholder that fair value.[80]

All dissenting shareholders who have not accepted an offer from the company as at the date of the application, *must* be joined as parties, and are bound by the decision of the court. The company must notify each affected dissenting shareholder of the date, place and consequences of the application, and of their right to participate in the court proceedings (presumably only in respect of a court application by the company under section 164(15)(b)(ii)).

The court –

- may determine whether any other person is a dissenting shareholder[81] who should be joined as a party;
- must determine a fair value in respect of the shares of all dissenting shareholders as at the date on which, and time immediately before, the company adopted the resolution that gave rise to a shareholder's rights under section 164;
- in its discretion may –
  - appoint an appraiser to assist it in determining the fair value in respect of the shares; or[82]
  - allow a reasonable rate of interest on the amount payable to each dissenting shareholder from the date the action approved by the resolution is effective, until the date of payment; and
- may make an appropriate order of costs, having regard to any offer made by the company, and the final determination of the fair value by the court.[83]

---

80 S 164(14).

81 Presumably other than the dissenting shareholders, because those have been joined already.

82 Why this is disjunctive is not clear. Therefore, if a value has been determined by the appraiser, the interest cannot be ordered.

83 S 164(15)(c)(i)–(iv).

The court must then make an order requiring –

- the dissenting shareholders to either withdraw their demand or to transfer of the securities (presumably if the court considers the offer fair); and[84]
- the company to pay the fair value in respect of their shares to each dissenting shareholder who tenders share certificates (transfer uncertificated shares), subject to any conditions the court considers necessary to ensure that the company fulfils its obligations under this section.[85]

A dissenting shareholder can, however, accept the company's offer at any time before the court has made this order.[86]

6.4.2.2 Company orders

If there are reasonable grounds to believe that *mero motu* payment of a demand by a company,[87] or compliance with a court order, would result in the company being unable to pay its debts as they fall due and payable for the ensuing 12 months, the company may apply to a court for an order varying its obligations.

The court may make an order that is just and equitable, having regard to the financial circumstances of the company, and that ensures that the person is paid at the earliest possible date compatible with the company satisfying its *other financial obligations as they fall due and payable*.[88] There is no definition for 'unable to pays [*sic*] its debts as they fall due and payable for the ensuing twelve months' and the definition of solvency and liquidity in section 4 obviously does not apply. It should be noted that the debts are all debts, not only those that are paid in the ordinary course of business. 'Other financial obligations as they fall due and payable' is likewise not defined, and other obligations to other dissenting shareholders clearly fall within 'other financial obligations'.

---

84 This cannot be conjunctive and should be 'or'.

85 S 164(15)(c)(v). A dissenting shareholder can accept the offer by the company at any stage before the court makes its order.

86 S 164(15A).

87 S 164(13)(b).

88 S 164(17).

7 Dispute resolution

7.1 Alternative remedies

Various alternative procedures in respect of a court process are provided for to address complaints, deal with disputes about and/or contraventions of the Act, or to enforce a provision of the MOI or rules.

These procedures are –

- attempting to resolve any dispute with or within a company (with concurrence of the parties to the dispute) through alternative dispute resolution (ADR) in accordance with Part C of Chapter 7;
- applying to the Companies Tribunal[89] for adjudication in respect of any matter for which such an application is permitted in terms of the Act;[90]
- applying for appropriate relief to the division of the High Court that has jurisdiction over the matter; or
- filing a complaint in accordance with Part D of Chapter 7 within the time permitted with either –
  - the TRP, if the complaint concerns a matter within its jurisdiction; or
  - the CIPC, in respect of any matter arising in terms of the Act, other than a matter within the jurisdiction of the TRP.[91]

8 Alternative dispute resolution

As an alternative to applying for relief to a court, or filing a complaint with the CIPC or the TRP, in terms of Part D of Chapter 7, a person who would be entitled to apply for relief or file a complaint in terms of the Act, may refer a matter that could be the subject of such an application or complaint to –

- the Companies Tribunal; or

---

89 See s 1 'Companies Tribunal' and ss 193–195 for the establishment, powers and functions of the Companies Tribunal.

90 E.g. ss 6(2), 71(8) and 160.

91 S 156.

- an accredited entity; or
- for resolution by mediation, conciliation or arbitration.[92]

Although reference is only made to the person 'entitled' to apply for relief, any other party must obviously agree to ADR. The company can also utilise these procedures, which poses questions about the enforceability of such awards *vis-à-vis* other securities holders (class application).

If the dispute was resolved through the application of mediation, conciliation or arbitration by the Companies Tribunal, or by an entity accredited in terms of section 166,[93] the parties can submit the order to a court to be confirmed as a court order.[94] Such an order can also include an award for damages, or, in its absence, any person may 'apply' for an award for civil damages.[95] The constitutionality of the latter 'award' is, however, in doubt.[96]

9 Complaints to the Companies and Intellectual Property Commission or the Takeover Regulation Panel

9.1 Complaints

Any person (not only a securities holder or other 'insider') may file a complaint[97] with –

- the TRP[98] in respect of a matter within its jurisdiction; or
- the CIPC in respect of any other provision of the Act,

alleging that –

- a person has acted in a manner inconsistent with the Act; or

---

92 S 166.

93 But excluding, apparently, an order made by 'any other person'.

94 S 167(1)–(2).

95 S 167(3).

96 S 34 of the Constitution of the Republic of South Africa, 1996 (Constitution).

97 S 219 provides that the complaint must be filed not more than three years after the act or omission that is the cause of the complaint, or, in the case of a course of conduct or continuing practice, the date that the conduct or practice ceased.

98 See s 1 'Panel' and Part C of Ch 8 (ss 196–202) for the establishment, powers and functions of the TRP.

- that the complainant's rights under the Act, or under a company's MOI or rules have been infringed.[99]

The CIPC or TRP may also initiate a complaint to itself directly (presumably within the categories above), on its own motion or on the request of another regulatory authority.

The minister may also direct the CIPC or TRP, to investigate[100] –

- an alleged contravention of the Act; or
- other alleged contravention of the Act or 'any matter or circumstances with respect to the administration of the Act whether or not those circumstances amount to a possible contravention of the Act.'[101]

9.2 Procedure

If the CIPC or TRP receives a complaint, it –

- can refuse to investigate because the complaint is frivolous or vexatious (except for ministerial 'complaints', which must be investigated);
- can refer the complaint to the Companies Tribunal or accredited entity or 'person', apparently only for ADR (subject to agreement between the parties);[102] or
- can direct an inspector or investigator to investigate the complaint as quickly as possible.[103]

9.3 Appointment of investigator

If a complaint concerns a dispute that is internal to a particular company, and does not appear to implicate a party other than the company, the holders of its securities, its directors, committees, prescribed officers, company secretary or auditor, the CIPC or TRP can try to reach an agreement with the company in

---

99 S 168(1).
100 S 168(3).
101 Under s 190(2)(b).
102 The 'person' referred to here is in respect of s 166(3) and not s 166(1).
103 S 169(1) read with s 166. Part E of Ch 7 details the powers to support investigations and inspections.

order to jointly appoint an independent investigator at the expense of the company, or on a cost-shared basis, and report to both the company, and the CIPC or TRP. Alternatively, the CIPC or TRP can apply to a court for an order appointing an independent investigator (at the expense of the company) for the investigator to report[104] to both the CIPC or TRP (as the case may be) and the company.[105]

9.4 Powers of the Companies and Intellectual Property Commission and the Takeover Regulation Panel

9.4.1 *General*

Upon receipt of the report from the investigator the CIPC or TRP can[106] –

- excuse any person as a respondent in the complaint, if the CIPC or TRP considers it reasonable to do so, having regard to the person's conduct, and the degree to which the person has co-operated in the investigation;
- refer the complaint to the Companies Tribunal, or to the CIPC or TRP (as the case may be), if the matter falls within their respective jurisdictions in terms of the Act;
- issue a notice of non-referral in the prescribed form to the complainant, with a statement advising the complainant of any rights he may have under the Act to seek a remedy in court;[107]

---

104 The report must be published to the persons mentioned in s 170(2), upon payment of the prescribed fee.

105 S 169(2)(b). See s 169(3) about the powers of the investigator.

106 S 170.

107 In such an instance, the complainant concerned may apply to a court for leave to refer the matter directly to the court, but no such complaint may be referred directly to a court in respect of a person who has been excused as a respondent under s 170(1)(a) (s 174(1)). A court may grant leave only if it appears that the applicant has no other remedy available in terms of the Act, and if, after conducting a hearing, it determines that the respondent has contravened the Act, it may require the CIPC or TRP Executive Director to issue a compliance notice sufficient to address that contravention, or make any other order contemplated in the Act that is just and reasonable in the circumstances (s 174(2)).

- in the case of the CIPC, propose that the complainant and any affected person meet with the CIPC or with the Companies Tribunal, with a view to resolving the matter (after agreement between the parties) by consent order;
- commence proceedings in a court in the name of the complainant, if the complainant –
  - has a right in terms of the Act to apply to the court in respect of that matter; and
  - has consented to the CIPC or TRP doing so; or
- refer the matter to the National Prosecuting Authority, or other regulatory authority concerned if the CIPC or TRP alleges that a person has committed an offence in terms of the Act or any other legislation; or
- in the case of –
  - the CIPC, issue a compliance notice in terms of section 171;[108] or
  - the TRP, refer the matter to the Executive Director who may issue a compliance notice in terms of section 171.[109]

9.4.2 *Compliance notices*

9.4.2.1 Issue

The CIPC or the Executive Director of the TRP (as the case may be), may issue a compliance notice in the prescribed form to any person whom the CIPC or the Executive Director of the TRP (as the case may be), on reasonable grounds believes has –

- contravened the Act; or
- assented to, was implicated in, or directly or indirectly benefited from, a contravention of the Act,

unless the alleged contravention could otherwise be addressed by an application to a court in terms of the Act or by the Companies Tribunal.[110]

---

108 On CoR 139.1 in terms of reg 139.
109 S 170(1).
110 S 171(1).

9.4.2.2 Effect

A compliance notice may require the person to whom it is addressed to –

- cease, correct or reverse any action in contravention of the Act;
- take any action required by the Act;
- restore assets or their value to a company or any other person;
- provide a community service (for CIPC notices); or
- take any other steps reasonably related to the contravention and designed to rectify its effect.[111]

9.4.2.3 Objections

Any person issued with a compliance notice in terms of the Act may, within 15 business days after receipt, apply to –

- the Companies Tribunal (in the case of CIPC notices), or
- the Takeover Special Committee (in the case of notices by the TRP Executive Director), or
- a court (in either case),

to review the notice. The relevant body can then confirm, modify or cancel all or part of a notice.[112]

9.4.2.4 Duration

The compliance notice remains in force until it is set aside by either –

- the Companies Tribunal, or a court (CIPC notice), or the Takeover Special Committee, or a court (TRP Executive Director notice); or
- the CIPC or TRP Executive Director issues a compliance certificate[113] to the effect that the requirements of the notice have been complied with.[114]

---

111 S 171(2).

112 S 172(1)–(2). Decisions by the Companies Tribunal and the Takeover Special Committee (see s 202) are subject to 'review or appeal' (presumably review by or appeal to a court) (s 172(4)).

113 S 171(5).

114 S 171(6) in respect of the compliance certificate.

9.4.2.5 Consent order

If a matter has been investigated and the CIPC and the respondent have agreed to a resolution of the complaint, the CIPC may record the resolution in the form of an order. If the person who is the subject of the complaint consents to that order, the CIPC may apply to the High Court to have it confirmed as a consent order, in terms of its rules.[115]

9.4.2.6 Administrative fines

A court, on application by the CIPC or TRP, may impose an administrative fine for failure to comply with a compliance notice. The fine may not be more than the greater of 10% of the respondent's turnover for the period during which the company failed to comply with the compliance notice and the maximum prescribed by the minister[116] (the minimum so prescribed is R1 million).[117]

9.4.3 *Guidelines and practice notes*

The senior officer[118] of a regulatory agency[119] can issue a guideline[120] and practice notes.[121] The guidelines can be published in the *Government Gazette*, any generally circulated newspaper, on the regulatory agency's website, or by

---

115 S 173(1). This process does not apply to TRP notices. The consent of the respondent is necessary to ensure that the process is not unconstitutional. Why a respondent would agree to such an order is not clear.

116 S 175(1). The maximum is prescribed at R1 million (reg 163). Reg 164 prescribes how the assets and turnover are calculated.

117 S 175(5). The constitutionality of this procedure is doubted because the fine was not imposed by the court and the division of powers (executive and judiciary) is not observed. See s 34 of the Constitution.

118 As defined in reg 1(g).

119 The CIPC, TRP or Companies Tribunal (reg 2(f)).

120 A 'guideline' is a document issued by a regulatory agency with respect to a matter within its authority, which sets out recommended procedures, standards or forms reflecting that regulatory agency's advice about what constitutes best practice on a matter (reg 4(1)(a)).

121 A 'practice note' means a document issued by a regulatory agency with respect to a matter within its authority, which sets out a procedure that will be followed by that regulatory agency or a procedure to be followed when dealing with that regulatory agency or that regulatory agency's interpretation of, or intended manner of applying, a provision of the Act or these regulations (reg 4(1)(b)).

any other means of providing information to the public generally. Practice notes can only be published, and also amended and retracted, in the *Government Gazette*.[122]

A guideline or practice note must be consistent with the Act and the regulations, and if there is any inconsistency, the Act or the regulations will apply.

122 This is not complied with in practice and these practice notes are more often than not only published retrospectively in the *Government Gazette*.

Chapter 13 Winding-up, deregistration and dissolution

1 General

The winding-up of solvent companies is regulated under the Companies Act,[1] while insolvent companies will, until the proposed Bankruptcy Act is a reality, be wound up under the provisions of the Companies Act of 1973.[2] The 2008 Act does not define 'solvency' and the question was therefore when is a company solvent/insolvent. 'Insolvency' has two possible meanings, namely factual insolvency, when the liabilities of the company exceed its assets, and commercial insolvency, when the company is unable to pay its debts as they fall due in the ordinary course of business. The application of section 345 of the 1973 Act, which creates presumptions as to when a company will be unable to pay its debts, was also uncertain, as it could only be applied, due to the fact that it was in Chapter XIV of the 1973 Act, if a company is 'insolvent'. *Boschpoort*

1 Act 71 of 2008 (the Act/2008 Act).
2 Act 61 of 1973 (1973 Act). See item 9(1) of Sch 5.

Ondernemings (Pty) Ltd v Absa Bank Ltd[3] eventually confirmed that the lack of a definition in the 2008 Act means that the existing accepted definition of insolvency, that is commercial insolvency, will still apply. A solvent company is therefore one that is commercially solvent, that is not commercially insolvent. The presumptions in section 345 of the 1973 Act can also be applied to prove commercial insolvency.

2 Solvent companies

2.1 Shareholders' winding-up

2.1.1 *Initiation*

A solvent company may be wound up voluntarily. The process is initiated by a special resolution of its shareholders.[4] Section 80(1) also provides that a solvent company can be wound up by its creditors. This process is not prescribed, and it is suspected that what is meant is that a voluntary winding up initiated by shareholders can be transformed into a voluntary winding-up of creditors if the company appears, after the passing of the special resolution, to be insolvent, as section 79 states that the procedures for *winding-up* and *liquidation*[5] of a solvent company, whether voluntary or by court order, are also governed, to the extent applicable, by the laws referred to or contemplated in item 9 of Schedule 5.[6] Creditors can obviously also liquidate a company on the ground that it is just and equitable.[7] If, at any time after a company has adopted a solution, it is determined that the company to be wound up is or may be insolvent, a court, on application by any interested person, may order that the company be wound up as an insolvent company.[8]

---

3 2014 (2) SA 518 (SCA).

4 S 80(1). This process (Part G of Ch 2) also applies to close corporations (item 7(2) of Sch 3).

5 There seems to be a difference between 'winding-up' and 'liquidation'. What it is, is not clear.

6 Item 9 of Sch 5 provides that ss 349–353 of the 1973 Act do not apply to the winding-up of a solvent company, except to the extent necessary to give full effect to the provisions of Part G of Ch 2. Whether this will make s 351 of that Act applicable, is not clear.

7 *Kyle v Maritz & Pieterse Inc* [2002] 3 All SA 223 (T).

8 S 79(3). Actual ('is') or potential ('may be') insolvency is sufficient for the application. When a company is potentially insolvent is not defined.

The resolution must be filed with the Companies and Intellectual Property Commission (CIPC) with the prescribed notice and filing fee.[9] The CIPC must 'promptly' deliver a copy of the resolution to the Master.[10]

Before filing, the company must arrange for security to the satisfaction of the Master, for the payment of the company's debts within no more than 12 months after the start of the winding-up of the company. Alternatively, the company must obtain the consent of the Master to dispense with security. The Master may only dispense with the provision of security if the company has submitted a sworn statement by a director authorised by the board of the company, stating that the company has no debts, with a certificate by the company's auditor or (if it does not have an auditor) a person who meets the requirements for appointment as an auditor, and appointed for the purpose, stating that to the best of the auditor's knowledge and belief and according to the financial records of the company, the company appears to have no debts.[11]

2.1.2 *Process*

The Act does not provide how the liquidator is appointed,[12] but provides that upon appointment, he may exercise all powers given by the Act to a liquidator in a winding-up by court[13] without requiring specific order or sanction of the court and subject only to directions given by the shareholders of the company in a general meeting (in the case of a winding-up by the company) or by the creditors (in the case of a winding-up by creditors).

The company remains a juristic person and retains all its powers as such while it is being wound up voluntarily. However, from the beginning of the

---

9 S 80(2). The date of filing is the date of commencement of the winding-up (s 80(6)).

10 S 80(7).

11 S 80(3). The cost for the furnishing of security must be borne by the company (s 80(4)).

12 Appointment will be in terms of Ch 14 of the 1973 Act (item 9 of Sch 5).

13 Including as provided for in Ch 14 of the 1973 Act. Ss 343–344, 346, and 348–353 of 1973 Act only apply to the extent necessary to give full effect to the provisions of the 2008 Act (item 9 of Sch 5).

company's winding-up, it must stop carrying on its business, except to the extent required for the beneficial winding-up of the company. In addition, all the powers of the company's directors cease, except to the extent specifically authorised in the case of a winding-up by the company (presumably by the shareholders), by the liquidator or the shareholders in a general meeting, or (in the case of a winding-up by creditors) the liquidator or the creditors.[14]

2.2 Court order

2.2.1 *General*

A court may order a solvent company to be wound up.[15] If, at any time after an application has been made to a court, it is determined that the company to be wound up *is* or *may be insolvent*, a court, on application by any interested person, may order that the company be wound up as an insolvent company.[16]

2.2.2 *Applicant*

2.2.2.1 Company

(a) *Special resolution*

The application can be brought by the company on the basis of a special resolution, and not by a resolution of directors.[17] The shareholders can also, by special resolution, apply to have the voluntary winding-up continued by the court.[18] Winding-up commences when the application has been made to court.[19] The implication is that if the court order is not granted, the winding-up is then cancelled and the process must be reversed. The process in section 348 of the 1973 Act whereby the liquidation commences upon granting of the order retrospectively from application would have been better.

---

14 S 80(8).

15 S 81(1).

16 S 79(3). Actual ('is') or potential ('may be') insolvency is sufficient for the application. When a company is potentially insolvent is not defined.

17 See however s 66(1) and ch 7.

18 S 81(1)(a).

19 S 81(4)(a).

(b) *Deadlock*

The company, one or more directors or shareholders (therefore otherwise than by special resolution) can apply for the winding-up on the grounds of a deadlock, if –

- the directors are deadlocked in the management of the company, and the shareholders are unable to break the deadlock,[20] and irreparable injury to the company is resulting, or may result, from the deadlock or that the company's business cannot be conducted *to the advantage of shareholders generally* as a result of the deadlock;[21]
- the shareholders are deadlocked in voting power, and have failed for a period that includes at least two consecutive Annual General Meeting (AGM) dates, to elect successors to directors whose terms have expired;[22]
- it is otherwise just and equitable for the company to be wound up.[23]

A deadlock between the directors or between shareholders as above, can also be a ground for winding-up on the basis that it is 'just and equitable'[24] as it can have the effect which makes it just and equitable.[25]

Just and equitable 'postulates not facts but only a broad conclusion of law, justice and equity, as a ground for winding-up.[26] In companies that have but a few shareholders the courts look at the personal relationship between the shareholders in deciding whether or not to liquidate the company and, as long

---

20 Although the shareholders are not the ultimate power in the company anymore, this status is being conferred on them under these circumstances. See ch 6 and ch 7.

21 S 81(1)(d)(i). 'Deadlock' and 'just and equitable' are now separate grounds.

22 S 81(1)(d)(ii).

23 S 81(1)(d)(iii). See *Apco Africa Incorporated v Apco Worldwide (Pty) Ltd* [2008] 4 All SA 1 (SCA).

24 Under s 81(1)(d)(iii).

25 *Thunder Cats Investments 92 (Pty) Ltd and Another v Nkonjane Economic Prospecting and Investment (Pty) Ltd and Others* [2014] 1 All SA 474 (SCA).

26 *Moosa NO v Mavjee Bhawan* (*Pty*) *Ltd* 1967 (3) SA 131 (T).

as there is proof of a dispute which upsets this personal relationship, there need not even be a deadlock which makes it impossible to carry on the business of the company. This would be the case if the personal relationship of confidence and trust between the shareholders is analogous to that existing between partners and is such that it requires the shareholders to act reasonably and honestly towards one another and to co-operate in running the company's affairs.

Consequently, where a shareholder destroys that personal relationship through wrongful or improper conduct, the other shareholders are entitled to claim that it is just and equitable that the company be wound up. In *Ebrahimi v Westbourne Galleries Ltd*[27] the following elements that can be considered, were indicated –

- the relationship between the shareholders was formed and continued on a basis of a personal relationship based on mutual confidence, an element usually present where an existing partnership is converted into a company;
- an agreement or understanding that all or some of the shareholders will take part in the conduct of the business; and
- a restriction upon the transfer of the 'interest' in the business to non-shareholders outside this personal relationship.

Examples of conduct which has destroyed the personal relationship between shareholders and led to winding-up on the ground that it was just and equitable include enduring litigation between shareholders; quarrelling about the management of the company's affairs and refusal to give a shareholders information about her shareholding; one shareholder of a two-shareholder company committing adultery with the other's wife; the expulsion of a shareholder as a director with the result that he is excluded from the management of the company. The applicant, who relies on this provision, must not have been wrongfully responsible for the impossibility which has arisen in regard to the carrying on of the business of the company.[28]

---

27 [1972] 2 All ER 492 (HL).

28 *Erasmus v Pentamed Investments (Pty) Ltd* 1982 (1) SA 178 (W) 182; *Wackrill v Sandton International Removals (Pty) Ltd* 1984 (1) SA 282 (W); *Rentekor (Pty) Ltd v Rheeder & Berman NNO* 1988 (4) SA 469 (T); *Tjospomie Boerdery (Pty) Ltd v Drakensberg Botteliers* (*continued*)

2.2.2.2 Business rescue practitioner

The practitioner in a business rescue scheme can apply for 'liquidation' on the grounds that there is no reasonable prospect of the company being rescued.[29] Winding-up commences when the application has been made to court.[30]

2.2.2.3 Creditors

One or more of the company's creditors can apply for an order on the grounds that –

- the company's business rescue plan has been rejected and the practitioner has filed a notice of termination;[31] or
- the business rescue plan has been proposed and rejected and an affected person has not acted to extend the proceedings in terms of section 153[32] and it appears to the court that it is just and equitable in the circumstances for the company to be wound up; or
- it is *otherwise* just and equitable for the company to be wound up.[33]

Winding-up commences the moment the order is made.[34]

(Pty) Ltd 1989 (4) SA 31 (T); *Thunder Cats Investments 92 (Pty) Ltd and Another v Nkonjane Economic Prospecting and Investment (Pty) Ltd and Others* [2014] 1 All SA 474 (SCA).

29 S 81(1)(b).

30 S 81(4)(a). The implication is that if the court order is not granted, the winding-up is then cancelled and the process must be reversed.

31 Ss 81(1)(c)(i), 132(2)(b) and 153(5).

32 Ss 81(1)(c)(i) and 132(2)(c)(i). These two requirements overlap, as s 153(5) provides that the practitioner must file a notice of termination when the business rescue plan has been proposed and rejected and an affected person has not acted to extend the proceedings. See ch 11.

33 S 81(1)(c). See also par 2.2.2.1(b) and *Kyle v Maritz & Pieterse Inc* [2002] 3 All SA 223 (T).

34 S 81(4)(b). For the period between the application and granting of the order, the company can still operate and dispose of assets.

2.2.2.4 Shareholders

A shareholder (or shareholders) can apply for winding-up on the grounds –

- that there is a deadlock;[35] and

with leave of the court –

- that the directors,[36] prescribed officers or other persons in control of the company are acting in a manner that is fraudulent or otherwise illegal; or
- that the company's assets are being misapplied or wasted.[37]

The shareholder (also for an application in terms of section 81(1)(d))[38] must have been a shareholder continuously for at least six months immediately before the date of the application, or must have become a shareholder as a result of acquiring another shareholder or as a result of the distribution of the estate of a former shareholder, and the present shareholder, and other or former shareholder, in aggregate, satisfied the six months requirement.[39] If the responsible directors resigned or were removed, the court cannot grant the order if the remaining directors were not materially implicated in the conduct or if there is an application in terms of section 162 to declare the directors delinquent or on probation, and the court is satisfied that removal will end the misconduct.[40]

Winding-up commences the moment the order is made.[41]

---

35 S 81(1)(d).
36 S 81(3)(a).
37 S 81(1)(e).
38 See par 2.2.2.1(b).
39 S 81(2). See ch 6 in respect of shareholders and when a person becomes a shareholder.
40 S 81(3)(a). The latter qualification does not require that there is an order in terms of s 162, but only that an application is made.
41 S 81(4)(b). For the period between the application and granting of the order, the company can still operate and dispose of assets as the winding-up order does not operate retroactively.

2.2.2.5 Directors

A director, in the capacity of director, can apply to the court for winding-up on the basis of a deadlock.[42]

Winding-up commences the moment the order is made.[43]

2.2.2.6 Companies and Intellectual Property Commission or Takeover Regulation Panel

The CIPC or TRP can apply for an order to wind up the company on the grounds that –

- the company, its directors or prescribed officers or other persons in control of the company are acting, or have acted, in a manner that is fraudulent or otherwise illegal;
- the CIPC or TRP has issued a compliance notice in respect of that conduct, and that the company has failed to comply with that compliance notice; *and*
- within the previous five years, enforcement procedures in terms of the Act or the Close Corporations Act[44] were taken against the company, its directors, prescribed officers, or other persons in control of the company, for substantially the same conduct, resulting in an administrative fine, or conviction for an offence.[45]

Winding-up commences the moment the order is made.[46]

2.3 Dissolution and deregistration

When the affairs of a company have been completely wound up, and a court order of final liquidation has been made, the Master must file a certificate to

---

42 S 81(1)(d).

43 S 81(4)(b). For the period between the application and granting of the order, the company can still operate and, e.g., dispose of assets as the winding-up order does not operate retroactively.

44 Act 69 of 1984 (CC Act).

45 S 81(1)(f).

46 S 81(4)(b). For the period between the application and granting of the order, the company can still operate and dispose of assets as the winding-up order does not operate retroactively.

that effect.[47] The CIPC must then record the dissolution of the company and remove the company's name from the Companies Register.[48]

3 Deregistration

3.1 Procedure

The CIPC *may* otherwise deregister a company only if –

- the company has transferred its registration to a foreign jurisdiction;[49]
- the company[50] did not file an annual return for two or more years in succession and on demand by the CIPC[51] has either failed to give satisfactory reasons for the failure or has failed to show satisfactory cause for the company to remain registered;[52] or
- it has determined in the prescribed manner that the company appears to have been inactive for at least seven years and no person has demonstrated a reasonable interest in, or reason for, its continued existence; or
- it has received a request in the prescribed manner and form and has determined that the company has ceased to carry on business and that it has no assets, or that because of the inadequacy of its assets, there is no reasonable probability of the company being liquidated.[53]

Any interested person may apply to the CIPC to reinstate the registration of the company in the prescribed manner and form.[54] The prescribed format of the CIPC however makes it clear that the application can only be brought by, or with the concurrence of, the company. If deregistration is restored by the CIPC, it is from the date of such restoration and not retrospectively from the date the

---

47 S 82(1).

48 S 82(2).

49 S 82(3)(a) and (5). Notice to the CIPC is on CoR 40.2 in terms of reg 40(8).

50 Also an external company in terms of reg 40(2).

51 On CoR 40.3 in terms of reg 40(2).

52 S 82(3)(a).

53 S 82(3)(b). The basis for deregistration because there is 'no reasonable probability of the company being liquidated' seems inappropriate. Notice of Pending Deregistration will be given to the company on CoR 40.4 in terms of reg 40(4).

54 S 82(4). Application is on CoR 40.5 in terms of reg 40(7).

company was deregistered. Effects of the original deregistration, such as that assets go to the state *bona vacantia* as well as that any acts by the deregistered company are void, can only be rectified or validated by a court order in terms of section 83(4).[55]

3.2 Effect

A company is dissolved if it is deregistered,[56] but this does not affect the liability of any former director or shareholder of the company (or any other person) in respect of any act or omission that took place before deregistration. The liability can be enforced as if the company is not deregistered.[57]

At any time after a company has been deregistered, the liquidator of the company, or other person with an interest in the company,[58] may apply to a court for an order declaring the dissolution to have been void, *or* any other order that is just and equitable in the circumstances, such as retrospective restoration of registration and orders in respect of acts during this period.[59]

If the court orders that the dissolution, after deregistration is void, any proceedings may be taken against the company as might have been taken if the company had not been dissolved.[60] This situation must be distinguished from the restoration of registration, as above, because the court finds that it is just and equitable, and not because it was void *ab initio*. Restoration of registration because it was void, restores the company retrospectively from the void deregistration (*ex tunc*).

---

55 See par 4.2 and *Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic and Others* [2014] 1 All SA 592 (WCC); *Missouri Trading CC and Another v Absa Bank Ltd and Others* 2014 (4) SA 55 (KZD).

56 Except when the deregistration is because of the transfer to a foreign jurisdiction in terms of s 82(3)(a) and (5).

57 S 83(1)–(3). Upon deregistration, all the property of the company become property of the state as *bona vacantia*. See *Suid-Afrikaanse Nasionale Lewensassuransie-Maatskappy v Rainbow Diamonds (Edms) Bpk* 1982 (4) SA 633 (C).

58 Which would include a creditor. See also *Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic and Others* [2014] 1 All SA 592 (WCC).

59 *Absa Bank Limited v Companies and Intellectual Property Commission of South Africa and Others* [2013] JOL 30290 (WCC).

60 S 83(4). The dissolution is declared *ab initio* and the position of the court seems to be the same as though it has not been deregistered.

Chapter 14 Trusts

1 Introduction

The trust is a versatile legal concept which may be utilised for a variety of purposes, amongst others for carrying on a business. The trust is an English legal concept which was adopted into South African law on account of its practical value. As the principles subjacent to the trust are foreign to Roman Dutch law, various aspects of the South African trust are cloaked in legal uncertainty.[1]

1 *Braun v Blann and Botha NNO* 1984 (2) SA 850 (A).

The business trust is in essence a trust that carries on business. Due to the flexibility of this legal concept and the legal uncertainty regarding certain aspects of the trust, a discussion of the trust as a business form within the framework of this book focuses only broadly on some of the most important legal rules which apply to this interesting legal concept.

2 The trust

A trust is, in its most simplistic form, a legal concept or relationship in terms of which one or more persons (the 'founder(s)') hand over assets to another person or persons (the 'trustee(s)') to administer it for the benefit of a third party or parties (the 'beneficiary(ies)') or for one or more impersonal objects.[2] A trust is generally created by means of a will, in which case it is called a trust *mortis causa*, or by means of contract, when it is termed a trust *inter vivos*.

Ownership of the trust property often vests in the trustee in his official capacity. However, it is possible to create a trust in such a way that the beneficiary owns the trust assets and that the trustee only manages it. In South Africa this type of trust is commonly called a 'bewindtrust'.[3] In this discussion the focus will, however, fall on the ordinary trust where the ownership of the assets vests in the trustee.

Legal and natural persons may be parties to a trust, whether as founders, trustees or beneficiaries. In this respect the trust offers a distinct advantage in comparison with a close corporation, where membership is in principle limited to natural persons,[4] and a company, where only natural persons may be appointed as directors.

2.1 Legal nature of a trust

A trust is not a legal person. It does not, therefore, enjoy a separate existence and is also not the subject of its own rights and liabilities. The assets, liabilities, rights and duties of the trust vest in the trustee. They vest, however, in the

---

2 See s 1 of the Trust Property Control Act 57 of 1988 for a more comprehensive statutory definition of a trust.

3 See *Commissioner, South African Revenue Service v Dyefin Fextiles (Pty) Ltd* 2002 (4) SA 606 (N); *Coetzee v Peet Smith Trust en Andere* 2003 (5) SA 674 (T).

4 See however s 29(1A) of the Close Corporations Act 69 of 1984 (CC Act) and ch 16 in respect of a trust as member of a close corporation.

trustee in his official capacity as trustee and not in his personal capacity. In his capacity as trustee, the trustee normally does not acquire any personal rights to the trust property and does not personally incur any liabilities in respect of the debts of the trust. Although the trustee is the owner of both the trust assets and the assets in his private estate, the law treats him as two owners of two totally separate estates. For instance:

- If any of the two estates is declared insolvent, the creditors of that estate will normally not be entitled to attach assets which clearly and officially form part of the other estate.
- If the trustee dies, his personal heirs will not be entitled to inherit the assets of the trust.
- If a trustee acts officially in his capacity as trustee, he does not bind his private estate. Any claims which arise from that course of action will be payable only from the trust estate.
- The trustee can commit theft by willfully and wrongfully appropriating movables which belong to the trust for his private estate.
- The trustee's ownership of trust assets lapses when he relinquishes his office as trustee.
- The law also requires the trustee to prevent the assets of the two estates from mingling.

Even though the trust is not a legal person it enjoys a measure of independence and separateness because the law differentiates between the trust estate and the private estate of the trustee.[5]

2.2 Creation of a trust

In order to create a trust, whether by means of a will or contract, the following five requirements must be met, namely:

- The founder must intend to create a trust.

5 *Land and Agricultural Bank of South Africa v Parker and Others* 2005 (2) SA 77 (SCA).

- The founder must express his intention in such a way that a legally binding trust obligation is created. This obligation either consists of a duty on the trustee to administer the trust property in terms of the trust document or, in the case where a trustee has not yet been appointed, of a duty on the founder to ensure that the trust assets are administered by a trustee. In order to create a legally binding obligation, the will or agreement which gives rise to the obligation must be legally valid.
- The trust property must be defined with sufficient certainty. It must be possible to ascertain which property is subject to the trust.
- The object of the trust must be certain. The object can either be –
  - to benefit named or ascertainable persons or a class of persons; or
  - to further one or more impersonal objects, for instance sports or culture.
- The trust object must be lawful.

A legally binding trust is created when the above requirements are complied with. Legally, no general formalities are attached to the creation of a trust. Certain formalities must, however, be complied with before a person may act as a trustee. One of these requirements is the lodging of the trust instrument or a copy thereof with the Master of the High Court.[6] The practical effect of this requirement is that modern trusts are created in writing or, if the trust agreement is concluded orally, that the terms of the agreement are put into writing in order to enable the trustee to meet the requirements of the Trust Property Control Act.

If the intention is not to create a trust, but rather to create the impression that a trust is formed, it is a simulated transaction and the law will not give effect to the simulated situation, but rather to the real intention, with the effect that the trust is ignored.[7] However, if a trust is established dishonestly or unconscionably to evade liability or for a person artificially to divest himself of his property, the court will ignore the veneer of the trust and will determine that

6 S 4 of the Trust Property Control Act.

7 *Zandberg v Van Zyl* 1910 AD 268 and Nagel (ed) *Commercial Law* (2011) 198.

the property was not vested in the trust. The element of effective control by that person such as the ability to appoint or control all the trustees, can be used to infer such an intention.[8] This will also happen if the trustees treat the trust property as their own without heeding the provisions of the trust deed. The effect of ignoring the veneer can also be that the trustees may be held personally liable for performance where the trust is the contracting party or, if the trustees did not have the authority to act for the trust, hold the trust liable as if they had that authority.[9]

It has however started to happen, especially in the case of business trusts, that that the functional separation between control, that is the trustees, and the enjoyment, being the beneficiaries has disappeared, and the trustees and beneficiaries are the same (or related *inter se*). Where the trustees are also the sole beneficiaries, the veneer could be ignored with the effect as mentioned above.

2.3 Variation of the trust document

After creation of the trust, the provisions of the trust document can be amended in a variety of ways. If the beneficiaries have not yet accepted the trust benefits, the document can usually be amended by agreement between the founder and the trustee.[10] If the benefits have been accepted, an amendment which affects the benefits of the beneficiary cannot be made without the consent of the beneficiary. If a beneficiary is under tutorship or curatorship, his tutor or curator may consent to the amendment of the trust document on behalf of the beneficiary, provided such amendment is to the benefit of the beneficiary.[11] In addition, a trust document can also be amended in a way prescribed in the document itself or by agreement between all the beneficiaries,

---

8 *Van Zyl NO and Another v Kaye NO and Others* (1110/14) [2014] ZAWCHC 52 (15 April 2014). See s 20(9) of the Companies Act 71 of 2008 (the Act/2008 Act) and ch 2.

9 *Van der Merwe NO and Others v Hydraberg Hydraulics CC and Others* 2010 (5) SA 555 (WCC).

10 *Crookes NO v Watson* 1956 (1) SA 277 (A); *Hofer v Kevitt* 1998 (1) SA 382 (A); *Potgieter v Potgieter NO and Others* 2012 (1) SA 637 (SCA).

11 S 14 of the Trust Property Control Act.

provided they are ascertained, have the necessary legal capacity and are entitled to the trust benefits.

Section 13 of the Trust Property Control Act provides that a court may amend a trust instrument under certain circumstances. When the document contains a provision which brings about consequences which, in the opinion of the court, the founder of a trust did not contemplate or foresee and which –

- hampers the achievement of the objects of the founder; or
- prejudices the interests of the beneficiaries; or
- is in conflict with the public interest,

the court may, on application of the trustee or an interested party, delete or vary such provision, terminate the trust or make any other order which it deems just.[12]

3 The parties to a trust

The main parties to the trust are the founder, the trustee and the beneficiary. The legal position of each of these parties is discussed briefly below.

3.1 The founder

The founder usually takes the initiative in the creation of the trust. He chooses the way in which the trust is created, that is to say whether by will or by contract. He determines the extent and the nature of the trust assets. The founder also determines the object of the trust and names the trust beneficiaries or determines the mode by which the trust beneficiaries are to be determined. He normally also nominates the trustee or trustees and determines their powers and authority.

The role of the founder is, however, not necessarily terminated after creation of the trust. The founder can, for instance, also be a trustee of the trust. Legally, he may also be the only trustee, thereby retaining his control over the trust assets.[13] The founder must, however, consider possible detrimental tax

12 S 13 of the Trust Property Control Act.

13 See, however, par 2.2 if the trustees/s and beneficiary/ies are the same.

implications if he retains his control over the trust assets and the allocation of trust income.[14]

The founder can stipulate in the trust document that the trust will be irrevocable or can retain for himself or for his executor the right to revoke the trust at any stage. The founder can also retain the right to vary the trust document with the consent of the trustee or trustees and, sometimes, the beneficiary and/or the court.

3.2 The trustee

The trustee is the person who is entrusted with the management of the trust property as owner or administrator in accordance with the objects of the trust. The trustee is the owner or administrator of the trust property only for purposes of administration of the trust. In his capacity as trustee he does not personally acquire any rights in respect of trust assets.[15]

Generally, any person with full legal capacity can act as trustee. In addition to a few general statutory requirements, such a person must also comply with any specific requirements which are posed by the trust document itself. More than one trustee can be appointed if the trust document provides for such appointment.

In order to be appointed as a trustee, a person who qualifies must be legally nominated as trustee and must accept his nomination. Depending on the circumstances and the terms of the trust document, the following persons may, *inter alia*, nominate a trustee –

- the founder;
- existing trustees;
- beneficiaries; and
- the Master of the High Court.

A trust will not fail for want of a trustee. If the founder fails to nominate a trustee or a nominated person does not accept his nomination, a court will ensure that a trustee is appointed.

---

14 S 7 of the Income Tax Act 58 of 1962 and see par 2.2.

15 *Braun v Blann and Botha NNO* 1984 (2) SA 850 (A).

A trustee may, however, act as a trustee only if authorised thereto by the Master of the High Court. The Master will grant authorisation only after the trust document or a copy certified as a true copy by a notary has been lodged at his office and the trustee has furnished security to the satisfaction of the Master for the due and faithful performance of his duties as trustee, unless he has been exempted from this duty.[16] An act concluded by a trustee prior to receipt of authorisation to act in terms of section 6 of the Trust Property Control Act is null and void.[17]

3.2.1 *Duties of the trustee*

The trustee must comply, *inter alia*, with the following general duties:

- He must observe his duties in terms of the trust document. In particular, he must transfer the trust benefits to the trust beneficiaries in terms of the trust document.
- He must fulfil his duties impartially and in good faith.
- In the performance of his duties and the exercise of his powers he must act with the care, diligence and skill that can reasonably be expected of a person who manages the affairs of another.[18]
- He must take possession of the trust assets and keep these clearly separate from his personal property, for example, by opening a separate trust account at a bank for the money of the trust.[19]
- He must preserve the trust property and keep it free from burdens such as liens.
- He must manage those trust assets which are capable of producing an income in such a way that a reasonable return is obtained.
- He must maintain a proper account of trust funds and trust business, retain documents relating to the administration of the trust[20] and render account of his administration of the trust when the Master requests him to do so.[21]

---

16 Ss 4 and 6 of the Trust Property Control Act.

17 *Simplex (Pty) Ltd v Van der Merwe* 1996 (1) SA 111 (W); *Kropman v Nysschen* 1999 (2) SA 567 (T).

18 S 9(1) of the Trust Property Control Act.

19 Ss 10 and 11 of the Trust Property Control Act.

20 S 17 of the Trust Property Control Act.

21 S 16 of the Trust Property Control Act.

- A trustee whose appointment has been effected after 31 March 1989, the date of commencement of the Trust Property Control Act, is obliged to furnish the Master with an address where notices and processes can be delivered and must, in case of a change of address, notify the Master of his new address within 14 days by registered post.[22]

3.2.2 *Powers of the trustee*

Under common law the trustee does not have extensive powers to deal with trust assets. Traditionally, the trustee preserved and protected the trust assets and managed these, as far as possible, free from risk. The trustee does not, therefore, automatically possess the right, *inter alia*, to –

- sell trust assets;
- enter into a loan agreement and to mortgage trust assets; or
- expose trust assets to business risks by conducting a business.

These and other powers can, however, be conferred on the trustee in the trust document. Obviously such powers must be conferred on the trustee where the trust will be used for business purposes.

A wide discretion may be conferred on a trustee in the trust document regarding the nomination of beneficiaries and the extent of any benefits which they are to receive. Such a type of trust is called a discretionary trust.[23]

3.2.3 *Remuneration of the trustee*

The Trust Property Control Act stipulates that a trustee is entitled to remuneration for the execution of his official duties. If the trust document does not provide for such remuneration, the trustee is entitled to reasonable remuneration which will be fixed by the Master of the High Court in the event of a dispute.[24]

---

22 S 5 of the Trust Property Control Act.

23 *CIR v Sive's Estate* 1955 (1) SA 249 (A); *Braun v Blann and Botha NNO* 1984 (2) SA 850 (A).

24 S 22 of the Trust Property Control Act.

3.2.4 *Removal and resignation*

The office of the trustee may be vacated in a variety of ways, for instance:

- The office becomes automatically vacant on the death of the trustee.
- The trust document often stipulates grounds on which a trustee must vacate his office.
- The trustee is entitled to resign from his office by giving written notice to the Master of the High Court and trust beneficiaries.[25]
- The Master has wide powers to remove a trustee from his office, *inter alia*, if he has been found guilty of an offence of which dishonesty is an element, if he becomes insolvent, is declared mentally ill or should fail to perform any statutory duties satisfactorily.[26]
- The court may also, on application of the Master or an interested party, remove a trustee from his office if the court is satisfied that such removal will be in the interests of the trust and trust beneficiaries.[27]

3.3 The trust beneficiary

A trust beneficiary is a person who is entitled to receive a benefit from the trust in terms of the trust document. This right may be conditional. Not all trusts have beneficiaries as some trusts are created to further an impersonal object, for instance nature conservation or education. Business trusts, however, usually have trust beneficiaries.

Any person, whether a natural or juristic person, and even another trust, can be a beneficiary. A beneficiary is not required to have legal capacity. Minors, an insolvent person and even unborn persons may be nominated as beneficiaries. In general there are no limitations on the number of beneficiaries which a trust could have.

---

25 S 21 of the Trust Property Control Act.

26 S 20(2) of the Trust Property Control Act.

27 S 20(1) of the Trust Property Control Act.

The trustee may also be a beneficiary of the trust which he manages. It is a basic principle of the law of trusts that a trustee must manage the trust property in the interest of other persons or for an impersonal object. He may, however, have an interest in the trust as long as this is not exclusive. Therefore the trustee may not be the sole beneficiary of the trust. The founder, however, may also be a beneficiary or even the only beneficiary. These possibilities create the necessary scope for using the trust as a business form.

Trust beneficiaries are usually named by the founder. He may name them individually or as a class. The founder may also confer the right on his trustee to select trust beneficiaries, whether from a designated group or not.[28]

3.3.1 *Rights of the trust beneficiary*

The trust document determines the nature and extent of the rights of a trust beneficiary. The right may be conditional or unconditional. It can vest immediately or on a future date. The trustee can even have the right to decide which beneficiaries will receive which benefits, if any.

The beneficiary acquires his right to benefit from the trust when he accepts the benefit offered in the trust document. Before acceptance, the founder can revoke or vary the benefit.[29] The right of the beneficiary remains, however, subject to the terms of the trust document and the exercise of a discretion, if any, by the trustee. As soon as the beneficiary acquires a vested right in the benefit, the right will form part of his estate and his creditors can attach it.

If the ownership of the trust assets vests in the trustee, the trust beneficiary usually enjoys only a personal right against the trustee in respect of the trust benefit. This right is not a real right in respect of the trust property. The beneficiary can, however, acquire such a real right in terms of the trust document.

---

28 *Braun v Blann and Botha NNO* 1984 (2) SA 850 (A); *Pretorius v CIR* 1984 (2) SA 619 (T).

29 *Potgieter v Potgieter NO and Others* 2012 (1) SA 637 (SCA).

The flexibility regarding the nature and type of right which a trust beneficiary can acquire is a valuable benefit of the trust. It is particularly useful for tax and estate planning in respect of business trusts.

The beneficiary may forfeit his right to benefit. He can, for example, forfeit it in a way provided for in the trust document. The trust benefit may be subject to a condition, for instance, the obtaining by the trust beneficiary of a particular qualification before a specified date. If the beneficiary fails to obtain that qualification before the set date, he forfeits his rights to the benefit.

3.3.2 *Remedies of the trust beneficiary*

The trust beneficiary has a wide range of remedies at his disposal to protect his interests. After acceptance of the trust benefit he may enforce his rights in terms of the trust document. If the trustee commits a breach of trust and the beneficiary suffers actual patrimonial loss as a result, he may recover damages with an action for breach of trust. The beneficiary can also bring an action against a trustee or another party for unjust enrichment in an appropriate case. Unlawful interference with the rights of a beneficiary can be prevented by means of an interdict.

4 External relations

4.1 Contracting on behalf of a trust

As the trust is not a legal person, it cannot conclude a contract on its own. Contracts of the trust are concluded by the trustee acting as the representative of the trust. The trustee acquires his authorisation to contract on behalf of the trust from the trust document. He may, therefore, only act within the limits laid down by the document. If there are two or more trustees, the general rule is that they should act jointly. Acts in conflict with the requirements of the trust document, for example if it is required that all trustees must act, and only two do so, will have the effect that the act is void.[30] If the acts of the trustees are subject to an internal requirement, such as that two trustees can act, but they must get permission from the third to make a loan, the question is if the

30 *Lupacchini NO and Another v Minister of Safety & Security* 2010 (6) SA 457 (SCA).

common law *Turquand* rule will apply.[31] It is, however, doubted as, amongst others, because one of the requirements of the *Turquand* rule, being that there must be publication of the requirements in respect of potential authority, is not complied with in the case of a trust.[32]

4.2 Actions by or against the trust

Actions by or against the trust are normally instituted by or against the trustee in his capacity as trustee. However, when the trust has to sue the trustee, for instance for loss caused by maladministration, the beneficiaries have *locus standi* to institute the action on behalf of the trust.[33] If judgment is given against the trust, execution can normally only be levied against assets of the trust.

5 Termination of the trust

A trust may be terminated in a variety of ways. The trust will, for example, be discharged if the trust assets are destroyed, if the objects of the trust are fulfilled or if the term for which the trust was created expires. The right to terminate the trust may be awarded to several persons by the trust document. In the trust document the founder may, for example, reserve for himself or for the trustee the right to terminate the trust. If all the trust beneficiaries have the necessary legal capacity and are entitled to the trust assets in terms of the trust document, they can generally terminate the trust by unanimous agreement.

The application of any remaining trust assets depends largely on the mode of termination of the trust. If the founder revokes the trust, he will be entitled to the trust property. If the beneficiaries terminate the trust, they may determine how it should be divided. In other cases the terms of the trust document will be conclusive. If no person is entitled to the assets, they will vest in the state as *bona vacantia*.

---

31 See ch 5.

32 *Nieuwoudt NNO v Vrystaat Mielies (Edms) Bpk* 2004 (3) SA 486 (SCA); *Van der Merwe NO and Others v Hydraberg Hydraulics CC and Others* 2010 (5) SA 555 (WCC).

33 *Gross v Pentz* 1996 (4) SA 617 (A).

6 The business trust

6.1 General

One of the most problematic aspects of the law of business trusts is a precise definition of the business trust. For the purposes of this discussion, a business trust is defined as a trust where the trustee does not simply protect, manage and apply the trust assets, but uses them primarily for carrying on a business for profit in order to benefit the trust beneficiary or to further the aims of the trust.

In practice, a trustee of a business trust possesses only the management powers which are conferred on him in the trust document. Since extensive management powers are indispensable for conducting a business, it is essential that the trust document of a business trust should explicitly confer wide powers on the trustee, *inter alia*, to enter into business transactions on behalf of the trust, to acquire new assets, to employ staff and to provide security.

Certain other Acts, like the 2008 Companies Act apply directly or indirectly to trusts (and business trusts). Section 99 of the Act provides that a person may not offer any securities of a person to the public unless that second person is a company in terms of the Act. The offer above by a trust is therefore prohibited. However, section 3 of the Act defines a holding–subsidiary relationship and in terms of that definition, a 'juristic person', and therefore a trust, can be a holding 'company'. The effect is therefore that certain of the sections that regulate abuse of control will apply to the trust and that the requirements for consolidated financial reporting apply.[34]

6.2 Advantages of the business trust

Advantages of the trust as a business form include the following:

6.2.1 *Limited liability*

Although a trust does not have legal personality, the debts of the trust are normally only payable from the trust estate. Generally, neither the estate of the trustee, nor the estates of the founder or the beneficiary can be excused for those debts. In effect, the parties to the trust enjoy a measure of protection

34 See s 3 of the Act and ch 8.

against liability for the debts of the trust. This is similar to the protection generally enjoyed by shareholders and directors of a company in respect of the debts of the company.[35]

6.2.2 *Continued existence*

It is possible to provide that a trust will continue despite a change in its trustees or beneficiaries. The trust can therefore have the benefit of perpetual succession.

6.2.3 *Limited statutory duties*

The trust is generally not subject to the rules which apply to companies and close corporations. There are, for example, no equivalent rules regarding disclosure by trusts, unless the trust is a holding 'company'.[36] It is frequently the very absence of disclosure, making for greater confidentiality in the trust, which prompts interested parties to decide on a business trust.

In addition, the trust does not have to comply with the large number of statutory rules which bind companies and close corporations.

6.2.4 *Flexibility*

The trust is a fairly flexible business form because there are so few statutory restrictions on trusts. The lack of extensive statutory regulation unfortunately also has disadvantages because such regulation, if properly compiled, gives a level of certainty in respect of the management of an entity and the relationship with third parties.

6.2.5 *Inherent risks*

Parties wishing to form a business trust should also consider the risks inherent in the structure of the business trust. The founders of a business trust are usually also (some of the) beneficiaries of the trust. They contribute the assets

---

35 See however par 2.2.

36 See par 6.1.

of the trust and place these in the hands of the trustees.[37] The control of the founders and beneficiaries over the acts of the trustees is mainly dependent on the provisions of the trust deed which, traditionally, are minimal and are supplemented only by the fiduciary duty of the trustees to act in accordance with their instructions as formulated in the trust deed. The risk is usually limited by ensuring that all the parties to a private trust are also appointed as trustees. However, in practice, it is difficult for a trustee to exercise effective control over co-trustees. This element of risk and the minimal control over trustees will have to be weighed up against the possible benefits of the trust as a business form.

37 See however par 2.2.

Chapter 15 Partnerships

1 The partnership as business form

A partnership is established when the prospective partners conclude a partnership agreement with one another.

A partnership is always aimed at the acquisition of material or patrimonial benefit. A partnership cannot therefore be formed solely in order to further a non-pecuniary object such as the advancement of art, culture or sport. The intention of partners to work together on an equal footing in order to make a profit and to divide it amongst themselves (mutual material benefit) is the basis of the partnership. This associative element is called the *affectio societatis*. A valid partnership agreement is a prerequisite for the establishment of a partnership. Since the co-operation of at least two parties is required for the

formation of a contract, a partnership cannot be created unilaterally.[1] A testator can therefore not establish a partnership between his heirs by means of his will.

2 The legal nature of a partnership

A partnership does not have legal personality.[2] Generally, it is simply a contractual association of persons and has no existence in law independent of its partners.

Internationally, there are different views on the legal nature of a partnership. Some countries adhere to the so-called 'entity theory' and view the partnership as an entity or body which exists independently of its members and can acquire its own rights, liabilities and assets, even though ultimately the partners are liable for the payment of the partnership debts. Other countries, such as South Africa, support the 'aggregate theory'. In terms of this theory, the partnership is simply regarded as a contractual association of specific persons. This association does not possess legal personality. In these countries, therefore, the partnership is not an entity which exists independently of the partners. The rights and obligations of the partnership are the rights and obligations of the partners and the assets of the partnership usually belong to the partners jointly in undivided shares.

The effect of the 'aggregate theory' is to:

- Dissolve a partnership whenever the composition of its membership changes, because a partnership is viewed as an association of specific persons. Such a change can occur in a variety of ways, for example by the death or retirement of a partner or by the admission of a new partner. When a partnership dissolves, the whole enterprise can be liquidated or a new partnership comprising the new members can take over and continue the business of the previous partnership.
- Prevent the partnership from ever being the owner of the assets of the partnership, or from being legally entitled to the rights, or liable for the responsibilities of the partnership. The partners are legally entitled to the assets and

1 Unlike s 30 of the Companies Act 61 of 1973 (1973 Act), the Companies Act 71 of 2008 (the Act/2008 Act) does not limit the number of partners.

2 See s 8(3) of the Act.

the rights of the partnership. They are also liable for the responsibilities of the partnership. In principle, therefore, a creditor of the partnership can recover the debts of the partnership from the partners in their personal capacity.

Although the view that a partnership is only an association of persons is closely adhered to in South Africa, it is not being applied consistently. While the correctness of the principle is accepted, its consistent application can sometimes give rise to practical problems and even injustice. For the sake of efficacy and equity, the partnership is therefore treated as a separate entity in certain limited cases and under certain conditions. Litigation and sequestration number amongst the most important instances.

2.1 Litigation

The rights and duties of the partnership are the rights and duties of the partners jointly. An individual partner cannot therefore be sued for a partnership debt during the existence of the partnership. Similarly, an individual partner cannot generally enforce a partnership claim in a court. In principle, all the partners must sue and be sued jointly in their *own* names during the existence of the partnership.

However, in terms of the Rules of Court, a partnership may sue and be sued in its *business name*. When judgment is levied against a partnership, partnership assets must first be exhausted before execution can be levied on the separate property of the partners.[3]

2.2 Sequestration

For the purposes of sequestration, the Insolvency Act[4] treats a partnership as an independent entity which is separate from its members.[5] If an insolvent partnership is sequestrated, the partnership estate and the estates of the various ordinary partners are sequestrated simultaneously, but separately. The premise of the Insolvency Act is that partnership assets should be utilised for the payment of partnership creditors, while the private creditors of a partner should rely on the separate estate of that particular partner. In principle, private creditors can therefore not claim against the partnership estate and

3 See in general Rule 14 of the Uniform Rules and Magistrates' Courts Rules 40 and 54.

4 Act 24 of 1936.

5 *Muller v Pienaar* 1968 (3) SA 195 (A).

partnership creditors cannot claim against the different estates of the partners. If a surplus remains in one of the private estates after all the creditors of that partner have been paid, the balance will be available to the trustee of the partnership estate in so far as it may be required for the payment of partnership debts. Should a surplus remain in the partnership estate, it will be divided and each partner's proportional share will be made available to the trustee of his personal estate. Section 92(5) of the Insolvency Act provides that separate liquidation and distribution accounts must be framed in the partnership estate and the estate of each partner.

Only claims against a partner's private estate will be taken into account, and not the claims against the partnership estate, when determining whether the application by a partner for his rehabilitation ought to be granted. The court may, however, take into consideration the conduct of the partner with regard to partnership affairs.[6]

3 Partnership contract

3.1 General principles

Although it is a special type of contract, the partnership agreement is still a contract. It must, therefore, comply with all the requirements for a valid contract, that is[7] –

- the parties must reach agreement;
- the parties to the contract must have contractual capacity;
- the contract and performance must be legally possible;
- performance must be physically possible; and
- contractual formalities, if any, must be complied with.

3.1.1 *Agreement*

The parties to the contract must reach agreement (*consensus*) about the nature and content of their contract. The parties must, for instance, agree that they are going to form a partnership. If one party is under the impression that they are concluding a partnership agreement while the other party regards it as

---

6 *Ex parte Cohen* 1974 (4) SA 674 (W).

7 Nagel (ed) *Commercial Law* (2011) 42 *et seq.*

a contract of service, or an association agreement, there is no contract, based on mistake.

3.1.2 *Contractual capacity*

The parties to the contract must have contractual capacity. A minor is thus generally unable to be a party to a partnership agreement without the assistance of his guardian, and an unrehabilitated insolvent needs the consent of his trustee to enter into a partnership agreement.

Legal entities, such as companies and close corporations, may be parties to a partnership agreement. A company can, for instance, conclude a partnership agreement with another company and/or close corporation and/or natural person.

3.1.3 *Legality*

The contract, as well as the business of the partnership, must therefore not be unlawful or contrary to the good morals of society. There are various statutory provisions which restrict the formation of a partnership agreement, for example, the right of members of certain professions and occupations to enter into professional partnerships is restricted by statute. Some professions prohibit their members from entering into professional partnerships with persons who are not members of that profession.

3.1.4 *Physical possibility of performance*

The partnership agreement must be executable. If the agreement or the object of the partnership is physically impossible, the contract is void.

3.1.5 *Formalities*

The law prescribes no general formalities regarding the formation of a partnership agreement. The agreement may, therefore, be concluded in writing, or orally, or even tacitly. The parties to the contract may, however, agree amongst themselves that certain formalities have to be complied with, for instance that the contract must be put into writing and signed by all the prospective parties before it will be binding. In such a case, no partnership agreement arises before compliance with the agreed formalities is achieved.

3.1.6 *Conditions and terms*

Like any other contract, partnership agreements can be subject to certain terms and conditions. The parties to the contract may, therefore, agree that the partnership will only be established when a certain condition has been fulfilled,

for instance that they are awarded a certain tender, or that the partnership will only exist for a specific term such as 12 months, after which it will terminate.

4 The *essentialia* of the partnership

When parties conclude a contract and comply with the abovementioned general requirements for the formation of a contract, a valid contract exists. However, that contract is not necessarily a partnership agreement. It is often necessary to ascertain whether a specific contract is truly a partnership agreement and whether it is not perhaps another type of agreement, such as a contract of sale or lease.

Sometimes this question is complicated by the fact that parties deliberately try to conceal the nature of their agreement. One type of agreement is then cloaked in the format of another. This device is often utilised in tax avoidance schemes. For instance, the terminology and format of a lease agreement can be used to disguise a partnership agreement, or a partnership agreement can be used to disguise an ordinary contract of sale.

The well-known legal maxim *plus valet quod agitur quam quod simulate concipitur* ('the real intention carries more weight than a fraudulent formulation') applies to these imitated or simulated legal acts. That is to say, the true intention of the parties, and not that which they profess, is conclusive. A court that is confronted with this question must, therefore, give effect to the true intention of the parties and not to the format behind which they are attempting to hide.[8]

In the abovementioned cases, a court will judge the nature of the agreement against the *essentialia* of a contract, which are the essential minimum elements of a particular contract (in respect of which agreement must be reached) and which will distinguish the contract from any other type of contract.[9]

The South African courts rely in general on Pothier's formulation of the *essentialia*. His formulation was expressed as follows in *Joubert v Tarry and Co*:[10]

> 'These essentials are fourfold. First, that each of the partners brings something into the partnership, or binds himself to bring something into it, whether it be

---

8 *Zandberg v Van Zyl* 1910 AD 268; *Michau v Maize Board* 2003 (6) SA 459 (SCA) and see ch 14.

9 Nagel (ed) *Commercial Law* (2011) 44.

10 1915 TPD 277.

> money, or his labour or skill. The second essential is that the business should be carried on for the joint benefit of both parties. The third is, that the object should be to make profit. Finally, the contract between the parties should be a legitimate contract. . . . Where all these four essentials are present, in the absence of something showing that the contract between the parties is not an agreement of partnership, the Court must come to the conclusion that it is a partnership.'

This summary of the *essentialia* has been criticised, *inter alia*, because the fourth essential, namely that the contract must be a legitimate contract, is a general requirement for all contracts and not unique to partnership agreements. In *Bester v Van Niekerk*[11] the Supreme Court of Appeal affirmed the *essentialia* of the South African partnership agreement as –

- each partner must contribute towards the partnership;
- the partnership must have the making of profit as its object; and
- the business of the partnership must be carried on for the joint benefit of the partners.[12]

When a court has to judge whether a particular contract is a partnership agreement, attention will be given to –

- the presence of the *essentialia*; and
- the intention of the parties as manifested by their agreement and conduct.

In *Pezzutto v Dreyer*,[13] Smallberger JA said:

> 'For a partnership to come about there must be an agreement to that effect between the contracting parties. In determining whether or not an agreement creates a partnership a Court will have regard, *inter alia*, to the substance of the agreement, the circumstances in which it was made and the subsequent conduct of the parties. The fact that parties regard themselves as partners, or referred to themselves as such, is an important, though not necessarily decisive, consideration.'

If the parties intended to establish a partnership and the *essentialia* are present, the contract is clearly a partnership agreement. However, if the parties intended to conclude a partnership agreement but one or more of the *essentialia* are

---

11 1960 (2) SA 779 (A).

12 See also *Butters v Mncora* 2012 (4) SA 1 (SCA).

13 1992 (3) SA 379 (A).

absent, our courts do not view the contract as a partnership agreement. If the *essentialia* are present and the parties did not intend to conclude a partnership agreement but rather another type of agreement (for example a contract of lease or sale), the contract will not constitute a partnership agreement, but may be the intended type of agreement. The court will therefore give effect to the intention of the parties, despite the presence of the *essentialia*.[14]

It is submitted that our courts are over-emphasising the subjective intention of the parties. Jurisprudentially it would have been more correct if the presence or absence of the associative element had been the conclusive factor.

4.1 Contribution

Each partner must make a contribution to the partnership or give a binding undertaking to make a contribution. The contribution may, for instance, be money, corporeal or incorporeal items (such as copyright), expertise or labour. A contribution can also consist of a combination of different types of contributions, for example labour and money. In general, there are no specific restrictions on the type of contribution that must be delivered, as long as it has commercial value.[15]

The nature of the contributions may also differ from partner to partner. One partner may, for instance, contribute money to the partnership, while another contributes his expertise and goods.

The contribution must be exposed to the risks of the partnership business. If a person makes a contribution on condition that it will be returned to him even if the enterprise fails, that contribution will not meet with this requirement of the *essentialia* as he will then be a creditor and not a partner.

4.2 Profit as object

The main object of the parties must be to procure patrimonial benefit. This benefit is usually referred to as 'profit'. Patrimonial benefit, however, is much

---

14 *Purdon v Muller* 1961 (2) SA 211 (A).

15 '. . . [E]ach partner must contribute something "appreciable", i.e. something of commercial value, although such contribution need not be capable of exact pecuniary assessment as, for example, where a partner contributes his labour or skill. . .': *Pezzutto v Dreyer* 1992 (3) SA 379 (A) 389.

wider than the narrow accounting definition of 'profit', because it also includes the avoidance of a financial loss or the reduction of expenses. The making of profit must be the main object and not only a possible result of the partnership. If the parties to the enterprise are not interested in making a profit but have another objective, such as the advancement of culture or sport, no partnership is formed. A charitable organisation which makes a profit in order to utilise it solely for a charitable purpose will also not be a partnership, because its aim is not to distribute the profit amongst its members.

4.3 Business to be carried on for joint benefit

4.3.1 *The term 'business'*

In the context of a partnership, 'business' means anything which occupies the time, attention and labour of a person for the purpose of making a profit.[16] The nature and extent of the business which a partnership can carry on is widely divergent. A partnership may, for instance, be aimed at the completion of a single transaction, such as a specific building project. After completion of that project, the partnership usually dissolves, unless the partners agree to the contrary. By contrast, a partnership can carry on a property development business and undertake numerous building projects annually. One partnership can also carry on different businesses in different places. The nature and extent of the business which a specific partnership carries on plays an important role in determining the extent of the rights and powers of the partners concerned. The powers of partners are generally limited by the scope of the business of the partnership. What the scope of the business of a specific partnership entails, is a question of fact. The answer to this question is determined by, *inter alia*, the purpose and usual business of the partnership, the nature of the business and general commercial usage.

4.3.2 *Patrimonial gain for each*

Each of the partners must be entitled to receive patrimonial benefit from the partnership. In practice this requirement usually entails that each of the partners must have the right to share in all the profits of the business of the partnership. If the agreement is concluded on the basis that the profit will accrue

16 *Standard General Insurance Co v Hennop* 1954 (4) SA 560 (A).

exclusively to some of the parties to the contract, or that some of the parties will be wholly excluded from profit sharing, the relationship does not constitute a partnership. A partnership can also not be established on the basis that one party is to receive all the profits while the other parties have to bear all the losses. Such a type of agreement is called a 'leonine partnership' (*societas leonina*) and is not a valid partnership.

This requirement does not, however, imply that the partners must receive equal shares in the profit. A disproportionate division is valid; for example, an agreement that a partner will only share in the profit if the net profit exceeds a stipulated profit margin. Although such a partner will not share in the profit when the profit margin is not exceeded, he at least has a right to share in it when the business of the partnership improves.

It is preferable for partners to expressly stipulate the proportion in which profit is to be divided in their agreement. If the parties have not determined the proportion, they will have to rely on the general consequences of a partnership, the so-called *naturalia*, and the rules which naturally apply to profit-sharing in a partnership, in the absence of an agreement.[17]

5 The *naturalia* of the partnership agreement

There are certain contractual terms which 'naturally' (automatically) form part of a contract by operation of law. The parties do not have to agree to these terms and may not even be aware of them.[18] In contrast with the *essentialia*, partners are free to alter or even exclude the *naturalia*. In the absence of such an alteration or exclusion, the *naturalia* are the legal rules which apply to those particular aspects of the partnership.

5.1 The proportion in which profit is shared

One of the *essentialia* is that each partner must be entitled to share in the net profits of the partnership. The net profit is the amount by which the gross

17 See par 5.

18 Nagel (ed) *Commercial Law* (2011) 44.

income exceeds the expenses, losses and other deductions, like taxes. The proportion in which partners share the profit is one of the *naturalia* and can be agreed to by the partners. If there is no agreement on the proportion in which profits are to be shared, the following general rules apply:

- The profits are shared between the partners in proportion to the value of their respective contributions to the firm.
- If the value of the contributions cannot be ascertained and compared, the partners share the profits equally.

5.2 The proportion in which losses are shared

It is a natural consequence of a partnership that the partners must share in the losses of the partnership, because they share in its *net* profits. Consequently, the partners in a profitable partnership inevitably share the losses since losses and expenses are deducted from the gross income of the partnership in order to calculate the net profit.

It is, however, permissible for partners to exclude one or more of the partners from sharing in the losses should the partnership make no profit and sustain a net loss. This exemption may, however, be given to only some and not all the partners, because there must remain at least one ordinary partner who will carry the losses of the partnership. If the partners did not conclude such an exemption agreement, the natural rule is that the partners are liable to share the net loss in the same proportion that they would have divided the profit. This consequence may be inequitable, because the partner who makes the biggest contribution to the partnership and would, therefore, have received the biggest share of the profits, must bear the biggest share of the net loss. It may therefore be sensible for partners to amend this natural consequence by agreement.

5.3 Partners' power of representation

Unless the parties agree to the contrary, it is a natural consequence of the partnership that each partner has the power to represent the partnership in transactions which fall within the usual scope of the business of the partnership. Partners are, however, entitled to limit the power of representation of any of the co-partners by agreement.[19]

---

19 See par 10.3.

5.4 Compensation for contribution

It is a natural consequence of a partnership that a partner is not entitled to compensation (for example, interest) for his contribution to the partnership. The basic principle is that a partner's compensation lies in profit-sharing. Partners are, however, entitled to come to a different arrangement and to agree to pay, additional, compensation for the various contributions.[20]

5.5 The partnership fund and co-ownership

One of the *naturalia* of a partnership is that partners are co-owners of the assets of the partnership in joint undivided shares, because a partnership is not a legal entity. Although it is legally possible for a partner to be the sole owner of a specific piece of partnership property, the normal position is that the partners are jointly entitled to the partnership assets. The co-ownership of the partners is physically manifested by a separate fund, the so-called partnership fund. The partnership fund comprises all the assets and rights which are jointly owned by the partners or to which they are jointly entitled, whether these were contributed to the partnership by the partners or acquired by the partnership through trading, donation or otherwise.

5.5.1 *Extent of the partnership fund*

A partner may contribute property, such as a car, to the partnership, in which case that car will form part of the partnership fund and will be jointly owned by the partners. In this case, the partner transfers the ownership in the car to the partnership. The partner is, however, entitled to contribute only the use of the car to the partnership. In such a case, he remains sole owner of the car and it does not form part of the partnership fund. He and his partners become jointly entitled to the use of the car and that right of use forms part of the partnership fund. The general rule is that partners acquire joint ownership in all property which forms part of a partner's contribution, unless another intention is evident. A partner who does not want to contribute ownership but only the use of property must therefore ensure that his intention is conveyed clearly.

---

20 See par 8.

The question of whether a specific asset belongs to the partnership or to a partner in his personal capacity often arises. It is, for instance, important when partners want to exercise their rights over partnership property, or when creditors of the partnership or of an individual partner want to attach property of the debtor. When answering this question, the position between the partners must be distinguished from the position between the partners and third parties.

- Amongst the partners, the intention of the parties, and not compliance with the applicable legal formalities of the law of things (such as the requirements for the transfer of ownership/use), is conclusive. In so far as the partners are concerned, an asset is a partnership asset when partners agree that it is a partnership asset. As between the partners, that asset is a partnership asset even though ownership in it has not been transferred to the partnership correctly in accordance with the rules of the law of things. Among themselves they will, therefore, enjoy the rights of joint co-owners in undivided shares in respect of that property.[21]

- The mere fact that the partners regard the asset as a partnership asset amongst themselves is not sufficient to make it a partnership asset as far as third parties are concerned. For third parties, that asset is only a partnership asset if the partners carried out their intention correctly by complying with the applicable formalities of the law of things. If these formalities have not been complied with, an asset which the partners regard amongst themselves as partnership property will not be partnership property as far as third parties are concerned. Generally, such an asset will therefore not be subject to attachment by a partnership creditor.

The appropriate way to transfer immovable property (land) to a partnership is through registration of ownership. As far as movables are concerned, the necessary delivery of the goods to the partnership must take place. Delivery of movables is generally a physical act whereby one party transfers his property to the other party in order to change ownership. Physical delivery is hampered in the law of partnership, because the partnership is not a separate entity to which property can be transferred. Constructive delivery therefore takes place in many cases. Constructive delivery is a non-physical form of delivery, whereby

---

21 *Michalow v Premier Milling Co* 1960 (2) SA 59 (W).

the partner simply ceases to hold goods which are his property and in his possession on his own behalf and starts holding it in joint ownership on behalf of the partnership.

5.5.2 *Undivided share*

Each partner has an undivided share in the partnership assets, unless the partners have agreed to the contrary. Although it may be possible to divide the property physically, it is often not subjected to physical division between the different owners. Each owner simply holds a share in the undivided property. That share is often not connected to a specific section of the property. If four owners own four books in co-ownership, each owner is not entitled to one book, but holds a quarter share in each of the four books. The size of the undivided share which each partner holds in the partnership assets is determined by agreement between the partners. This aspect will usually be determined in the partnership agreement. If it is not provided for in the partnership agreement, but the proportion in which the partners will share in the profit is fixed, this proportion will determine the size of the respective shares of the partners. If this proportion is also not determined, the values of the respective contributions of the partners will determine the size of their share. If it is not possible to ascertain and weigh the values of the respective contributions, they will hold equal shares.

The size of a member's share is mostly of theoretical importance during the existence of the partnership, because the partners remain joint owners in undivided shares until the dissolution and liquidation of the partnership. The assets of the partnership are usually sold during liquidation and the remaining cash (after payment of creditors) is distributed amongst the partners. The size of each partner's share then becomes of practical importance, because it determines his share in the amount of cash that is available. Until the final distribution, no partner has the right to regard any assets of the partnership as his own.

5.5.3 *Restricted usage*

In principle, the assets of the partnership may only be used for the purpose of the partnership objectives. Each partner's rights as joint owner of the partnership fund are restrained by the objectives of the partnership. A partner is generally

entitled to use partnership assets in the interest of the partnership to further the aims of the partnership. In principle, a partner may not use partnership assets for his own personal purposes. A partner in a taxi business may, therefore, in the absence of an agreement to the contrary, use a partnership taxi to do business for the partnership, but he can only use the taxi to take his family on holiday when he has the permission of his co-partners, or in cases where his limited use of an asset will not conflict with the interests of the partnership, like when he drops off some groceries at home on his way to the next pick-up. If a partner misapplies any partnership assets for his own purposes, his co-partners can obtain an interdict to prevent him from continuing his abuse of the assets. The partnership will also be able to hold him liable for damages. If a partner appropriates a movable asset that is a partnership asset for himself, he can be found guilty of theft if he took that asset intentionally and wrongfully for his own benefit and contrary to the interests of the partnership.

6 Statutory provisions

A partnership is established informally and there are no formalities required. However, there are ancillary statutory provisions that may apply.

Partners must take note of the provisions of the Consumer Protection Act.[22] Section 79 of that Act[23] provides that a person must not carry on business, advertise, promote, offer to supply or supply any goods or services, or enter into a transaction or agreement with a consumer under any name except a business name registered to, and for the use of, that person in terms of section 80, or any other public regulation.

The following particulars must be included on any trade catalogue, trade circular, business letter, order for goods, sales record or statement of account that the person issues –

- the name, title or description under which the business is carried on; and
- a statement of the primary place at which, or from which, the business is carried on; and
- the name of the person to whom that business name is registered.

---

22 Act 68 of 2008.

23 Which must still be put into operation. See ch 2.

Business names are registered by the Companies and Intellectual Property Commission (CIPC) in terms of the Act and any disputes in respect of these names can be heard by the Companies Tribunal.[24]

7 Types of partnerships

Different types of partnerships can be distinguished. Apart from ordinary partnerships, which form the subject of this discussion, there are also universal and extraordinary partnerships.

7.1 Universal partnerships

Universal partnerships differ from other types of partnerships in their ambit. Two types of universal partnerships may generally be distinguished, namely the partnership of all property (the *societas universorum bonorum*) and the partnership of all profit (the *societas universorum quae ex quastu veniunt*). Both types of partnerships were well known in Roman and Roman-Dutch law.

7.1.1 Societas universorum bonorum *(partnership of all property)*

The *societas universorum bonorum* is a partnership in which the partners agree to contribute to that partnership all the property they own, as well as all the property they may own in future. The partnership comprises all the property of the partners, whether acquired through trading or otherwise. Where the partnership extends beyond commercial undertakings, the contribution of the partners need not be confined to the profit making entity. Therefore, a contribution to the estate of a cohabitive relationship will be a contribution to the partnership which also includes a separate commercial undertaking.[25] This partnership structure is usually employed to procure an equitable patrimonial dispensation in a cohabitive relationship and in those cases where the laws of marriage do not bring about the desired patrimonial results for the marriage partners.[26] This type of partnership had certain peculiarities in common law. The partners were, for instance, liable *pro rata* for the debts of the partnership, and the assets of the partnership were distributed equally on dissolution of the partnership. It is uncertain whether these peculiarities are still acknowledged in South African law today.

---

24 See ch 2.

25 *Butters v Mncora* 2012 (4) SA 1 (SCA).

26 *Ponelat v Schrepfer* 2012 (1) SA 206 (SCA).

7.1.2 Societas universorum quae ex quastu veniunt *(partnership of all profits)*

The *societas universorum quae ex quastu veniunt* is a partnership of all profits derived from all business conducted by the partners during the existence of the partnership. This partnership is, contrary to the *societas universorum bonorum*, limited to profits alone. Property acquired by inheritance or donation does not form part of the partnership. The partners in such a partnership do not limit the partnership activities to one specific type of business. They agree to trade as a partnership and to share all profits which the partners make from whatever business during the existence of the partnership. In contrast to the *societas universorum bonorum* where a cohabitive relationship is often involved, the *societas universorum quae ex quastu veniunt* is simply a commercial partnership which is not limited to a specific trade or enterprise. In common law, this type of partnership did not possess the peculiar characteristics of the *societas universorum bonorum*. Although it is generally classified as a universal partnership, it is suggested that it would be more correct to regard it simply as a general trading partnership.

7.2 Extraordinary partnerships

Extraordinary partnerships differ from other types of partnerships in that one or more of the partners, the so-called extraordinary partners, have protection against liability to third parties for the partnership debts. The extraordinary partners are usually only partners in so far as their co-partners are concerned and not also *vis-à-vis* third parties. In general, therefore, there is no legal relationship between these partners and the creditors or debtors of the partnership. Two types of partners can be discerned in an extraordinary partnership, namely extraordinary partners and ordinary partners. In every extraordinary partnership there must be at least one ordinary partner who can act on behalf of the partnership and who can be liable to the partnership creditors without limitation. Extraordinary partners are not allowed to participate actively in the business of the partnership nor may they act or be represented as ordinary partners to outsiders. They enjoy protection for as long as they do not act as ordinary partners; however, if an extraordinary partner starts to act like an ordinary partner, for example by actively participating in the management of the partnership, he loses his special protection and third parties will then be able to treat him as an ordinary partner.

The fact that an extraordinary partner is a partner in a partnership is usually not publicised. However, it is not necessary for the membership of the extraordinary partner to be a secret. Publicity does not affect the protection of the extraordinary partner. Third parties may, therefore, become aware that the person is a partner. His protection is only affected when he starts to act as an ordinary partner. Although the extraordinary partner reflects some characteristics of the ordinary investor or financing creditor, he still remains a partner. Just like an ordinary partner, he may not claim his contribution to the partnership or a share in the income of the partnership in competition with the creditors of the partnership.

Two types of extraordinary partnerships are distinguished, namely the silent partnership and the partnership *en commandite*.

7.2.1 *Silent partnership*

A silent partnership (sometimes also called an 'anonymous partnership') is formed when persons agree to trade as a partnership in the name of only some of the partners. The silent partner is not presented as a partner in the partnership and does not act as a partner *vis-à-vis* the outside world. The special status of the silent partner affords him a measure of protection against personal liability for partnership debts. Normally the creditors of the partnership cannot hold the silent partner liable for the whole of the unpaid debts of the partnership. However, he shares the full risk of the enterprise and remains liable to his co-partners for his proportional share of the partnership losses.

7.2.2 *Partnership* en commandite

There is a large measure of correspondence between the positions of the partner *en commandite* and the silent partner. The partner *en commandite*, however, limits his liability to his co-partners for the losses of the partnership to an agreed amount, on condition that he receives a fixed share of the profits. If the partnership incurs losses, the liability of the partner *en commandite* cannot exceed the fixed amount. By contrast, the silent partner in such a case will be liable to his co-partners for his proportional share in the losses, regardless of their extent.

8 Internal relations

8.1 Rights and duties of partners

Various rights and duties in respect of the partners arise from the partnership agreement. Some rights and duties are inherently interwoven with the essence and *essentialia* of the partnership agreement. Other rights and duties are natural consequences of a partnership. There are, however, also rights and duties which are peculiar to a specific agreement because the partners expressly agreed to them.

The rights and duties of the partners cannot be claimed or enforced by the partnership because the partnership is neither a legal entity nor a party to the legal relationship between the partners. These rights and duties are simply rights which a partner can claim from his co-partners and duties which he owes to them.

The rights and duties of partners are too interwoven to be separated into two clearly distinctive sections. Each right of a partner gives rise to a duty on the part of his co-partners to observe that right. In return, each duty again imposes a right to compliance with that duty. Given this close relationship between the rights and duties of partners, the most important mutual rights and duties will be discussed concurrently below.

8.2 Good faith

A close mutual or reciprocal fiduciary relationship between the partners arises from the formation of the partnership agreement. This special fiduciary relationship between the partners has been described as a relationship of the *utmost* good faith and can be compared to the relationship between brothers.[27] A fiduciary relationship may arise at the outset when the parties are negotiating a partnership agreement. The reciprocal fiduciary relationship between the partners continues after dissolution of the partnership and remains in force until final liquidation of the partnership takes place. This fiduciary relationship is of the utmost importance for the continued existence of the partnership. If the fiduciary relationship is irretrievably destroyed, the court may dissolve the partnership on application by any of the partners.

---

27 *Purdon v Muller* 1961 (2) SA 211 (A). It is doubted whether there is such thing as a 'superlative' good faith: *Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality* 1985 (1) SA 419 (A).

The requirements of the reciprocal fiduciary relationship are not strictly defined. In general, three broad categories of duties may be distinguished, namely that –

- the partner must comply with his duties in terms of the partnership agreement;
- the partner must further the interests of the partnership unselfishly; and
- the partner must disclose to his partners all information pertaining to the partnership.

8.3 Duties in terms of a partnership agreement

A partner must comply with his duties in terms of the partnership agreement. Breach of contract in respect of these duties can constitute a breach of his fiduciary duties. Duties which a partner can incur in terms of a partnership agreement include the delivery of his contribution; the rendering of services as promised to the partnership; refraining from participation in the management of the partnership if the management rights of the partner are restricted; the regular payment of his share in the losses of the partnership, and compliance with the agreed procedure if he wants to retire from the partnership.

8.4 Promotion of the interests of the partnership

The partner must promote the interests of the partnership unselfishly. In general, therefore, a partner must avoid a conflict between his personal interests and the interests of the partnership and, in cases where a conflict arises, subordinate his own interests to the interests of the partnership. This duty comprises, *inter alia*:

- Business opportunities which fall within the scope of the partnership business and which a partner is obliged to secure for the partnership must be acquired for the partnership and may not be exploited by a partner in his personal capacity. If a partner breaches this duty and exploits such an opportunity, he is obliged to disclose the benefits to the partnership and to share them with the partnership. This duty was expressed as follow in *De Jager v Olifants Tin 'B' Syndicate*:[28]

  'No partner may acquire and retain for himself any benefit or advantage which was within the scope of the partnership business, and which it was his duty to acquire for the partnership. All such benefits must be shared with and accounted for to his fellow members.'

---

28 1912 AD 505.

- A partner may not, without permission, carry on a business in competition with the partnership. He may not lure away partnership clients, use partnership information for his own account, or compete in any other way with his partners.

8.5 Disclosure

A partner must disclose all information which affects the partnership to his co-partners. If a partner possesses information regarding a business opportunity which falls within the scope of the partnership business, he must disclose the information. Information which a partner possesses and which can influence a decision of the partners must also be disclosed.

8.6 Contribution

One of the *essentialia* of the partnership agreement is that each partner has to contribute something to the partnership. Consequently, the co-partners are entitled to claim that a partner delivers his contribution to the partnership as promised. If a partner undertakes to contribute an asset to the partnership and fails to do so, he will also become liable to deliver to the partnership any fruits which the asset bore with effect from the date on which the duty to deliver the asset arose. For example, if a partner undertook to deliver R10 000 to the partnership and the interest during the period that he fails to make the contribution is R1 000, he owes R11 000 to the partnership. The partner's duty to make a contribution to the partnership is limited by the terms of the partnership agreement. A partner cannot be forced by his co-partners to contribute more than he agreed to contribute.

8.7 Sharing of profits and losses

Each partner has the right to share in the profits of the partnership. This right is one of the *essentialia* of the partnership agreement. A partner is obliged to share the net loss of the partnership, unless he has been relieved from this duty by agreement. Therefore, partners have the right to expect each partner to bear a proportional share of the net loss. The rules regarding the size of each partner's share in the profits and losses were discussed above under *essentialia*.

8.8 Compensation

Generally, a partner must discharge his duties in terms of the partnership agreement without any compensation. It is one of the *naturalia* of the partnership

agreement that partners are not automatically entitled to compensation for their contributions, and was discussed above. A partner is therefore not automatically entitled to rent in respect of goods which he contributed or interest in respect of capital which he paid into the partnership or payment in respect of services which he ought to render as a partner. However, when partners agree to pay compensation or the contribution of a partner exceeds the limits of his duties, he is indeed entitled to compensation. If no agreement is reached on the *extent* of the compensation, he is entitled to reasonable compensation for that contribution.

Although a partner is not automatically entitled to compensation, he is entitled to a proportional refund for expenses which he personally incurred, and indemnification for damages which he personally sustained whilst performing his partnership duties. If five partners hold equal shares in a partnership which runs a taxi business and a partner pays R2 000 for emergency repairs to the taxi after it was involved in an accident, he will be entitled to recover the *pro rata* portion of the expenses, being R1 600, from the other partners.

8.9 Use of partnership assets

It was pointed out that partners own the partnership assets jointly in undivided shares. Therefore, each partner is entitled to access to and the use of partnership assets as a co-owner. His right of use is however limited, because the partnership assets must be used, in principle, only to further the aims of the partnership. A partner may use partnership property for his own personal purposes if his co-partners have consented to him doing so or if his limited use of the property will not conflict with the interests of the partnership.

A partner's general right of use of partnership assets does not include the right to sell or to mortgage such assets, unless they form part of the trading stock of the partnership. The partners must usually decide jointly on the alienation or mortgaging of partnership assets. A majority decision will presumably suffice in most cases.

8.10 Division of partnership assets

A partner holds an undivided share in the partnership assets until the partnership dissolves and the partnership estate is liquidated. After all the debts of the

partnership have been paid, a partner has the right to claim his share of the surplus assets of the partnership. During liquidation, the assets of the partnership are usually converted into cash and the partner's share in the remainder (if any) is paid out to him.

8.11 Management of the partnership

Each partner has a right to participate in the management of the partnership and to perform any management functions on behalf of the partnership. Partners have equal management powers irrespective of the size of their respective shares in the partnership. Partners can restrict management powers of any partner or partners. They may, for example, agree that certain partners will possess no management powers. They can also entrust all their management powers to one partner, a so-called managing partner. In the absence of this type of restriction agreement, a partner may exercise his management powers freely.

The general management rights and duties include the power of representation, access to management information and the rendering of accounts.

8.11.1 *Representation*

In the absence of an agreement to the contrary, each partner automatically possesses the power to represent the partnership and his co-partners in transactions which fall within the scope of the partnership business. This power of partners is called a mutual mandate (*mutua praepositio*).

8.11.2 *Access to management information*

Each partner is entitled to access to the accounting records of the partnership. Access to financial information is necessary to enable a partner to make management decisions. In the absence of any restrictive agreements between the partners, a partner may inspect the records at all reasonable times. He may also appoint another person, for instance a chartered accountant, to analyse and explain the records to him, unless the involvement of such a third party will lead to a breach of confidentiality which will injure the partnership. The partner is also entitled, within reasonable limits, to make extracts from and copies of the records. In order to exercise his powers of access, a partner may insist that the records be kept at the partnership's principal place of business.

8.11.3 *Rendering of accounts*

There is a general duty on all partners to keep proper accounts of all partnership transactions. In practice, the duty to keep the accounts of the partnership business is often entrusted to one partner. Although such a partner may appoint personnel, for instance an accountant, to assist him, he retains the responsibility for the correctness of the bookkeeping. In such a case, his co-partners have the duty to make available to that partner the information which must be reflected by the books of the partnership.

A partner who manages any particular business of the partnership has a duty to render an account to his co-partners in respect of the partnership business under his management. Account is given by rendering formal and comprehensive accounts periodically. Partners must account for all assets acquired and expenses incurred whilst acting within the scope of the partnership business. Partners are generally not allowed to excuse themselves by agreement from this duty, since such a contract may amount to an agreement not to expose fraud.

Comprehensive accounts do not usually have to be rendered on request; instead, they are only required at fixed intervals. If partners have not reached agreement about the dates and periods for the rendering of accounts, the accounts must be rendered annually or in accordance with those periods which are usual within that specific type of business. In addition, accounts must be rendered upon dissolution of the partnership. The court is reluctant to order the rendering of accounts at times other than those cited above because this can place an intolerable administrative burden on the partners.

8.12 Reasonable care

Each partner is bound to exercise reasonable care and expertise in the management of the business of the partnership. In order to ascertain the reasonableness of any specific act by a partner, regard is given to the degree of care which a partner displays in the management of his own affairs. It is clear that this test is not particularly strict. No basic level of expertise or any qualifications are required. The fundamental philosophy is that the partners chose each other. They have, therefore, only themselves to blame if they took into the partnership an incompetent partner without restricting his management powers. However, if a partner undertakes to contribute any particular skill or expertise to the partnership, he will be liable for loss caused by any failure to display such

skill or expertise. For instance, if he undertakes to render professional services to the partnership, he will be liable for any losses to the partnership if his services fail to comply with applicable professional standards.

When a partnership incurs losses or damages because a partner failed to display reasonable care, the partnership is entitled to recover damages from the partner concerned.

9 The enforcement of rights

There are two specific actions with which a partner can enforce his rights as a partner against any of his co-partners, namely the *actio pro socio* and the *actio communi dividundo*. The *actio pro socio* is the general partnership action. This is a multi-purpose action with which partners can enforce their mutual rights.[29] It can be used, for example, to enforce specific compliance with the partnership agreement; to request an interdict against a partner; to request a declaratory order regarding the partnership; to obtain the return of a partnership asset; to claim dissolution of the partnership; to enforce the partners' respective rights after dissolution of the partnership, and to procure liquidation of the partnership estate.

The *actio communi dividundo* is an action with which co-owners effect physical division of tangible things which they hold in joint ownership. For instance, after dissolution of the partnership, a partner can bring this action to obtain physical division of jointly owned partnership assets. The effect of the *actio communi dividundo* has been extended to intangible things such as copyright, patents and goodwill by means of *utilis actio communi dividundo*.

The *actio pro socio* is the action which is mostly used by partners and is a personal action with which an aggrieved partner enforces his rights against his co-partners. The action is not instituted by or against the partnership, but by the aggrieved partner against his co-partner or partners.

Where the co-partners are the aggrieved parties (because one partner, for example, did not honour his duties), it is appropriate that they should institute the claim in their own names. If the action should be instituted in the name of

---

29 *Robson v Theron* 1978 (1) SA 841 (A).

the partnership against the partner concerned, that partner will find himself in the untenable position of being both co-plaintiff and defendant in the same action. Although the action is instituted by the co-partners, any damages will be payable to the partnership and must be paid into the partnership fund. Usually all the partners must appear before the court, whether as plaintiffs or defendants, unless a particular partner has no interest in the matter.

9.1 Settlement of accounts

Generally, a partner cannot institute a claim against his co-partner for the payment of any amounts in respect of partnership business before accounts in respect of partnership business have been drawn up, settlement has taken place and a balance remains due to him. Settling of accounts is necessary to determine the size and value of a partner's share in the partnership. When settlement of accounts takes place, it can be ascertained whether the partnership made a net profit or loss. Only once the state of the business of the partnership has been determined will it be clear whether a partner is entitled to claim an amount in respect of the partnership and, if so, what the amount of his claim is. It may appear in a given case that a partner is not entitled to institute a claim for his share in the profits of the partnership, but is in fact liable to pay his share in the net losses of the partnership.

Settlement of accounts is only required when a partner wants to claim his share in the assets or profits of the partnership from his co-partners. If he desires another type of relief, such as enforcing his right of participation in the management of the partnership, settlement of account will not be necessary. The partners may also waive their rights to settlement of account in a given case and agree that a certain amount is payable to a partner irrespective of the state of the partnership's business.

A partner is not entitled to claim rendering and settlement of the partnership's accounts whenever he likes. The court, however, has the inherent power to order a settlement of accounts when it is just and equitable to enforce settlement. In certain cases where a claim is instituted, the correctness of the accounts will also be disputed by the partners. In such a case, the plaintiff may proceed with his claim on the basis of his version of the accounts. Should the correctness of the accounts be disputed by the defendant, the plaintiff carries the burden of proof of the correctness of his version.

9.2 Specific performance

If a partner claims specific performance of the partnership agreement, that is to say if he wants to force the other partner to actually comply with his obligations in terms of the contract, the ordinary rules governing specific performance apply. Generally, a plaintiff will obtain a court order for specific performance unless the court judges such an order to be inequitable or contrary to legal or public policy. An order for specific performance will, for instance, be denied when it is impossible to comply with the duty or unreasonable to force the defendant to comply with his contractual obligations. However, special considerations also play a role in the law of partnership. A court will not give an order which will have a negatory effect or which will force an unwilling partner to remain a partner. In view of the intimate fiduciary relationship between partners, it is clear that the latter type of order would be extremely undesirable. It is therefore not possible to obtain a court order compelling a person to enter into a partnership or prohibiting an unwilling partner from retiring from the partnership. A plaintiff who cannot enforce specific performance is not without remedy, because he can still recover damages for breach of contract from the defendant.

If, however, in view of all relevant considerations and the specific circumstances, it would not be ineffective or inequitable to make an order for specific compliance, a partner can institute such a claim with the *actio pro socio*.

9.3 Prescription

Section 13(1) of the Prescription Act[30] stipulates that the period of prescription in respect of a claim between partners arising out of the partnership will not be completed after one year from the date of dissolution of their partnership. A claim that would otherwise have become prescribed may, therefore, still be enforced within that period.[31]

10 External relations

10.1 Introduction

The partnership agreement establishes a mutual relationship between the partners. While the business of the partnership is carried on, other relationships

30 Act 68 of 1969.

31 *Van Staden v Venter* 1992 (1) SA 552 (A).

arise with third parties with whom the partnership does business. As the partnership is not a legal entity, those relationships are not established between the partnership and the third parties but between the partners and such parties. The partners therefore bear the rights and duties which arise from these relationships. The relationships are usually established by way of contract, delict or crime.

10.2 Contractual liability

10.2.1 *General principles*

A partnership is usually bound by contract when a valid agreement is concluded by an authorised 'representative' of the partnership. Three main requirements must generally be complied with, namely –

- the agreement must be valid;
- the representative must be authorised; and
- the agreement must be concluded in the name or on behalf of the partnership.

10.3 Representation

A partnership can never conclude a contract on its own. It is not physically or legally able to negotiate an agreement and to conclude it with a third party. Therefore a partnership is always represented by another party, who could be a partner or a third party (that is, not a partner), when a contract is concluded. Usually that representative must have the necessary power (authority) to act on behalf of the partnership in order to conclude an agreement which is binding on the partnership agreement.

10.3.1 *Power of representation*

A partnership will generally be bound by a contract that was concluded on behalf of the partnership –

- if the representative had the necessary authority; or
- if a partner entered into the transaction on the strength of his mutual mandate; or
- because the partnership ratified the transaction; or
- through the operation of the doctrine of estoppel.[32]

---

32 See also ch 7.

10.3.2 *Authority*

According to the general rules of agency, a partnership will be liable in terms of a contract which a person concludes on behalf of the partnership if that person had the necessary authority to do so. Authority is essentially the power to perform binding legal acts on behalf of another. Authority can, *inter alia*, be given explicitly, for instance orally or in writing, or even tacitly, for example by conduct. The partnership can confer such authority, both on partners and on non-partners such as employees. It is usually the duty of the third (other contracting) party to ascertain that any agent has the necessary authority.[33]

10.3.3 *The principle of mutual mandate*

In terms of the principle of mutual mandate (*mutua praepositio*), each partner has the power to bind the partnership in transactions which fall within the scope of the partnership business. If a third party wishes to hold the partnership liable in terms of a contract concluded by a partner, it is sufficient for him to prove that the contract fell within the scope of the partnership business.

The mutual mandate of partners is restricted by the scope of the partnership business. A partner has this power to represent the partnership only in respect of those transactions which fall within the ordinary scope of the business of the partnership. It is a question of fact whether a specific act or transaction falls within the scope of the partnership's business. The answer depends on the nature and purpose of the partnership concerned and the rules of general commercial practice. If, for example, the partnership is carrying on a property development business, the purchase of land (that can be developed) will normally fall within the scope of its business, but not the purchase of yachts, as an example. None of the partners in that partnership will, therefore, be able to buy yachts on behalf of their partnership in terms of their *mutual mandate*.

However, this does not mean that such a partnership will never be able to buy yachts. The question about the scope of the partnership business is only relevant for establishing the ambit of the partners' *mutual mandate*. Partners are entitled to give a partner explicit authority to conclude a contract which

33 See ch 5 in respect of these principles which also apply in company law.

falls outside the ordinary scope of business. In this manner, a partner may obtain the necessary power to buy yachts on behalf of such a partnership.

This power of partners to represent each other in partnership business is one of the *naturalia* of the partnership. As this power is a natural consequence of a partnership and not an essential element, partners can vary it amongst themselves, for instance by limiting a partner's power of representation.

A third party who wishes to rely on the mutual mandate, must be *bona fide*, that is to say he must not have been aware that the partner was acting without the necessary power of representation because it was, for example, excluded in the partnership agreement.

10.3.4 *Doctrine of estoppel*

The doctrine of estoppel affords a remedy to a *bona fide* person who was injured through deceit. By means of the defence of estoppel, the deceived person can prevent (that is, 'estop') the deceiver from relying on the true state of affairs, to the prejudice of the deceived party. In other words, the deception is deemed to be the true state of affairs. In order to succeed with the defence of estoppel, the deceived person must prove that there was an unlawful and culpable representation by the deceiver on which the deceived relied to his detriment.

Our courts usually use the doctrine of estoppel to explain the liability of a partnership in the event of a partner acting within the scope of the partnership business but without the necessary authority. The English law doctrine of estoppel was, however, received into our law when the principles of mutual mandate had already become firmly rooted in our common law. Nevertheless, estoppel can be available in the law of partnership, but only if the prerequisites which are set for its application can be proved. If, for example, the partners falsely represented that a partner has the necessary power of representation and a *bona fide* third party concludes an agreement with that partner on the strength of such representation, the third party will, by means of estoppel, be able to prevent the partners from averring, to the prejudice of the third party, that the partner concerned did not have the necessary power of representation.[34]

---

34 See also ch 5.

10.3.5 *In the name or on behalf of the partnership*

In common law, a partner must not only possess the power to conclude the agreement on behalf of the partnership, but must in fact conclude the agreement in the name of, or on behalf of, the partnership. A partnership will usually not be party to an agreement if the person who had the necessary authority and the third party did not intend the partnership to be party to that agreement. A partner can, for instance, ignore his power of representation and conclude the agreement in his personal capacity and for his own benefit with the third party. If a partner neglects his duty in this manner, he breaches his fiduciary duty to the partnership and will be liable to compensate the partnership for any damages. Amongst the partners, any benefits which he acquires in terms of that contract will be deemed to be mutual benefits of the partnership. However, the partnership will not be a party to that agreement. It will therefore neither acquire rights against, nor incur obligations to, the third party in respect of that agreement.

The intention of the parties to the agreement usually determines whether the partnership is a party to that agreement. If the parties intended that the partnership should be a party to the agreement, the partnership will be bound by the contract. The partnership will be liable in terms of such an agreement even if it does not obtain any benefits from the agreement and even if only the name of the representative appears on the agreement. Usually, however, parties to such an agreement take care to make it clear that the contract is concluded on behalf of the partnership. Both the name of the partnership and the representative capacity of its agent are generally clearly stated. The general rule that the intention of the parties is conclusive, does not necessarily apply when an authorised representative concludes an agreement on behalf of the partnership without disclosing to the third party that he is acting as a representative. In terms of the general rules of agency, the partnership will not be liable, since the third party will be under the impression that the representative will be party to the contract in his personal capacity.

However, the English law doctrine of the undisclosed principal was accepted as part of our law in *Cullinan v Noordkaaplandse Aartappelkernmoer-kwekers Koöperasie Bpk*.[35] This doctrine stipulates that in a situation where a representative concludes an agreement with a third party in his own name, whilst

35 1972 (1) SA 761 (A).

concealing that he is in fact acting as an agent on behalf of a principal, a contractual relationship arises between the principal and the third party and between the third party and the representative. The practical consequence is that the third party has the choice to hold either the principal or the representative liable. The question of whether this doctrine also applies in respect of partnerships (where there is in fact more than one undisclosed principal) has not been answered by our courts.[36]

10.3.6 *Ratification*

If a partner concluded an agreement without the necessary authority and the agreement is acceptable to his co-partners, the partnership can ratify the agreement. Ratification confers legal validity (authority) on the act of the partner with retroactive effect. The contract therefore acquires legal force as if the partner had the necessary authority when the agreement was concluded.

10.4 Delictual liability

Partners can incur vicarious liability for delicts committed by a co-partner whilst acting *within the scope of his authority* or *within the scope of the partnership business*.[37] Vicarious liability is a form of liability which one person can incur for the acts of another by virtue of the special legal relationship which exists between them, such as a relationship of agency or service. An injured party who can prove that the partner acted as an agent or employee of the partnership when he committed the delict will be able to hold the partnership liable for the damages. The capacity in which the partner performed the act and the extent of independence with which he acted will determine whether his co-partners incur delictual liability.

10.5 Criminal liability

As the partnership is not a legal entity, it cannot commit a crime or be prosecuted or punished for it. Any partner who commits a crime in the course of the partnership business will consequently be personally liable for it. However, under certain circumstances his partners will also incur liability. At common law, the other partners will be held criminally liable if they colluded with the particular partner in the commission of the crime or if it is a type of crime for which they incur vicarious liability.

---

36 *Karstein v Moribe* 1982 (2) SA 282 (T).

37 *Rodrigues v Alves* 1978 (4) SA 834 (A); *Lindsay v Stofberg NO* 1988 (2) SA 462 (C).

Section 332(7) of the Criminal Procedure Act,[38] however, extends their liability. This section provides that, whenever a partner commits an offence while carrying on the business of the partnership or furthering the interest of the partnership, the other partners shall be deemed to be guilty of that offence too. It is an adequate defence for a partner to prove that he did not take part in the commission of the offence and that he could not have prevented it. If the business of the partnership is governed or controlled by a committee or similar governing body, this section does not apply to a partner who was not a member of that committee or body at the time of the commission of the offence.

Section 332(7) of the Criminal Procedure Act is an onerous provision as it creates a presumption of guilt that must be disproved by the relevant persons. Since 1994, the South African courts have ruled in a number of judgments that provisions giving rise to such presumptions are unconstitutional and in *S v Coetzee*[39] it was decided that section 332(5) of the Criminal Procedure Act, which created a similar presumption in respect of directors and employees of corporate bodies, was unconstitutional because it violated the right of an accused person to be presumed innocent. The constitutionality of section 332(7) of the Criminal Procedure Act is therefore questionable.

10.6 Liability of partners

It is chiefly due to the rules of procedure that, under the present legal dispensation, partners are co-creditors and co-debtors in respect of the rights and obligations of the partnership during the existence of the partnership. A partner is, therefore, not entitled to institute an action for the recovery of a debt owed to the partnership on his own. That action must be brought by all the partners jointly. The contrary also holds true: Should the partnership be in default, the creditor is not entitled to sue a single partner for the debt; he may only institute an action against all the partners jointly.[40]

After dissolution of the partnership, the legal position changes. The partners then become joint and several co-debtors in respect of any of the unpaid debts of the partnership. A creditor of the partnership may then claim the whole

38 Act 51 of 1977.

39 1997 (3) SA 527 (CC).

40 *Muller v Pienaar* 1968 (3) SA 195 (A).

amount from any of the partners individually. The creditor acquires this right upon dissolution of the partnership, that is to say, before liquidation of the partnership estate has been completed.[41] If that partner pays more than his proportional share of the debt, he may recover the excess payment from his former partners. The partners remain, however, ordinary co-creditors in respect of the claim of their former partnership. An action against a debtor of the former partnership must, therefore, be instituted jointly. The partners *and* the third party are entitled to alter the above rules by agreement. They may, for instance, agree that the partners will be jointly and severally liable to the third party for specific debts during the existence of the partnership.

Usually, only ordinary partners will be liable for partnership debts. Extraordinary partners, such as silent partners and partners *en commandite*, will not incur liability to third parties as long as they refrain from acting as ordinary partners.

11 Dissolution of the partnership

11.1 Mutual agreement

In general, any agreement may be terminated by a subsequent termination agreement between the parties. The partnership agreement can therefore be terminated by agreement between all the partners. When the agreement is terminated in this manner, the partnership dissolves. The dissolution agreement may be concluded expressly, for instance in writing or orally, or tacitly, for example when all the partners indicate by their conduct that they deem their partnership to be dissolved.

In many cases, the manner in which the partnership will dissolve is determined by the partners in their partnership agreement. If they provide in their agreement for a specific procedure for dissolution, for example written notice to be delivered to the other partners, that procedure must be followed. Partners are, however, entitled to deviate from such a procedure by mutual agreement.

---

41 *Lee v Maraisdrif (Edms) Bpk* 1976 (2) SA 536 (A).

11.2 Expiration of term

A partnership may be established for a specific term, for instance 12 months. When the term expires, the partnership dissolves automatically. During the existence of the partnership, the partners are entitled to extend, shorten or waive the initial term by agreement. In the latter case, the partnership will be continued without any limitation in term and the partners will still retain the same rights and obligations, unless the partners conclude an agreement to the contrary.

11.3 Completion of partnership business

A partnership can be established in respect of a specific project, for example the construction of an office building. When the project is completed and final distribution of profit or loss has taken place, the partnership dissolves automatically. The partnership also dissolves when the purpose for which the partnership was formed falls away, for example if the building project cannot proceed due to a lack of financing.

11.4 Change in membership

A partnership is an association of specific persons who established their partnership relationship by mutual agreement. Each partner enters into the partnership on the condition and assurance that each of the other parties to the agreement will be a partner and that, collectively, they will be the only partners in that partnership. Each of the partners stands in an individual contractual relationship to each of the other partners. Should any of the partners retire or any other change in membership take place, the whole network of partnership relationships between the partners is terminated and the partnership dissolves altogether.

A change in membership can occur because of the death or retirement of a partner or the admission of a new partner.

11.4.1 *Death of a partner*

The partnership dissolves immediately upon the death of a partner. The partnership relationship between the surviving members is therefore also terminated and there is no duty on them to continue the partnership. The partners are, however, entitled to agree, in their partnership agreement, that the surviving partners will continue the partnership should one of them die or even tacitly

(by continuing with a new partnership).[42] As the old partnership is irrevocably dissolved upon the death of the partner, such a partnership will constitute a new partnership. A partner cannot validly appoint an heir as his successor in that new partnership. A partnership can only be created by agreement and a partner cannot, therefore, unilaterally force a partnership on his heir and his former co-partners. The partners may, however, also agree that the partnership business will be continued for a specific period for the benefit of the estate of the deceased. In such a case, the partnership dissolves but the partnership business is temporarily carried on, and the liquidation of the partnership estate is simply postponed. The detrimental effects of an unexpected and immediate liquidation of the partnership estate are thus limited.

11.4.2 *Retirement*

In the absence of an agreement between the partners that the partnership will only exist for a specific period, it will continue until one of the partners indicates that he wishes to retire. Normally any one of the partners in such a partnership is entitled to retire by giving unilateral notice. This right of a partner can, however, be restricted in the partnership agreement. This notice of retirement dissolves the partnership. It can be given at any time, provided that the partner is acting in good faith and the time is not inopportune or unreasonable. If the partnership agreement makes provision for a specific procedure for notice, the partner must comply with that procedure. Unreasonable notice or any failure to comply with the agreed procedure will still dissolve the partnership, but may constitute a breach of fiduciary duty. A partner may not retire from the partnership in order to evade his duties as a partner or to procure partnership benefits or partnership business for himself. Such retirement and conduct will constitute a breach of his fiduciary duty to his partners. If the co-partners are prejudiced by such a breach, they may recover damages from the partner and may claim a share of the benefits of which the partnership was deprived.

In theory, the dissolution upon retirement would be followed by the termination of business and the liquidation of the partnership estate. In practice, however, the remaining partners often take over the business and continue it

---

42 See par 11.4.2.

in a new partnership formed by the remaining partners. Generally, such an acquisition and continuation of business will be regulated either by the partnership agreement or by means of an express or tacit agreement among the partners at the time of dissolution.[43]

11.4.3 *Admission of a new partner*

The admission of a new partner constitutes a change in membership of the partnership and automatically dissolves the old partnership. The agreement to admit a new partner to the partnership is an agreement between the partners and the prospective partner to form a new partnership jointly. The new partnership does not necessarily have the same rights and obligations as the old partnership.

11.5 Order of court

A partner may apply to the court for an order which dissolves the partnership. A court will grant such an order if there are sufficient grounds to make dissolution just and equitable. The court will exercise its discretion in the light of the interests of all the partners.

A court order will be granted under, *inter alia*, the following circumstances:

11.5.1 *Breach of fiduciary relationship*

If the fiduciary relationship between the partners is irreparably destroyed and further co-operation between the partners is impossible, it will be just and equitable to grant a dissolution order. Such an irreparable breach can arise from a variety of causes, for example, the undermining of one partner by another; adultery by a partner with another partner's wife;[44] or the breach of essential obligations in terms of the partnership agreement.

11.5.2 *Changes in personal circumstances*

A court order can also be granted where it is justified by a change in the personal circumstances of a partner. Such changes include the long-term illness of

---

43 *Berco Sameday Express v McNeil* [1996] 4 All SA 100 (W).

44 *Salter v Haskins* 1914 TPD 264. See also ch 13.

a partner; the certification of a partner as mentally ill; the long-term internment or imprisonment of a partner; or a declaration of war.[45]

11.6 Sequestration

The partnership dissolves when the partnership estate or the estate of any of the partners is sequestrated or, should the partner be a company or close corporation, when its estate is liquidated. In terms of section 13 of the Insolvency Act, the sequestration of the partnership estate leads to the sequestration of the personal estates of each of the partners, with the exclusion of the estates of extraordinary partners.[46] A partner can, however, avoid sequestration of his estate by furnishing an undertaking that he will pay the partnership debts and by giving security for such payment. Where companies or close corporations are partners, section 13 does not apply and the partnership estate cannot be *sequestrated* in terms of that provision, as those partners are *wound-up*.[47] However, if only some partners are companies or close corporations, section 13 can be applied in respect of the estates of the partners that can be sequestrated.[48]

11.7 Procedure

The procedure for 'liquidation' (used here in the generic sense of the word),[49] may be determined in the partnership agreement, or the partners may agree to a particular procedure on dissolution of the partnership. If any agreement existed about the procedure of liquidation, a partner can enforce this by means of the *actio pro socio*, but a liquidator cannot institute the *actio pro socio.*[50]

---

45 When war is declared and one of the partners is an alien subject domiciled or resident in enemy territory, the partnership dissolves automatically. If he is not domiciled or resident in enemy territory, the other partners may apply to the court for a dissolution order.

46 *P de V Reklame (Edms) Bpk v Gesamentlike Onderneming van SA Numismatiese Buro (Edms) Bpk en Vitaware (Edms) Bpk* 1985 (4) SA 876 (C).

47 See ch 13.

48 *Commissioner, South African Revenue Service v Hawker Air Services (Pty) Ltd* 2006 (4) SA 292 (SCA).

49 As opposed to the liquidation or winding-up of a legal person such as in Ch 14 of the 1973 Act.

50 *Morar NO v Akoo* 2011 (6) SA 311 (SCA).

The partners can conduct the liquidation themselves, or can appoint a liquidator to administer the process. The liquidator can be one of the partners or a third party. The partners can also appoint two or more people to act jointly as liquidators if the partnership estate is extensive. If the partners are unable to reach agreement on the appointment of a liquidator, the court may be requested to make an appointment. The rights and duties of the liquidator depend on the terms of his appointment. He is usually authorised to take charge of the business of the partnership; sell the partnership assets; collect the debts due to the partnership; pay the debts owed by the partnership; prepare accounts and divide the remaining assets or liabilities among the partners. As payment for his services, the liquidator is entitled to remuneration as arranged. The remuneration is usually a fixed percentage of the gross value of the estate.

The liquidator owes a fiduciary duty to the partners. He must manage the process of liquidation in the best interests of all the partners and may obtain for himself only the agreed benefits from the liquidation. In general, he may therefore not acquire partnership assets for his own account. The liquidator must manage the process of liquidation in accordance with the instructions contained in his terms of appointment. Should unforeseen problems occur, they must be dealt with in accordance with the joint instructions of the partners. If the partners cannot reach agreement, the liquidator may approach the court for instructions. The liquidator is entitled to be discharged after he has duly accounted to the partners.

11.8 Formalities for dissolution

There are no statutory formalities for the dissolution of a partnership. Wide publicity should, however, be given to the dissolution, to prevent third parties from gaining the erroneous impression that the partnership is still in existence. If partners allow such an erroneous impression to arise, they may be held liable by means of the doctrine of estoppel for any unauthorised acts committed by a former partner in the name of the former partnership. Publication can be made by informing clients and creditors of the partnership and by placing notices in local papers and the *Government Gazette*.

11.9 General consequences of dissolution

11.9.1 *Relationship between partners*

The dissolution of the partnership does not terminate the relationship between the partners, but does alter it drastically. Particular aspects of the partners' mutual relationship continue after dissolution of the partnership. This relationship comes to an end only when the liquidation of the partnership estate has been completed and final settlement has taken place between the partners.

While the partnership estate is being liquidated, the partners, for example, still owe their fiduciary duties to one another. A partner may, for instance, not acquire partnership assets in an improper way. If he does, he breaches his fiduciary duty and will be liable to share the profits it yields with his former partners. The partners also remain obliged to account to one another during the duration of liquidation and also retain their right to inspect the books of the partnership.

11.9.2 *Termination of the partnership agreement*

The partnership agreement is terminated and, unless the partners agree to the contrary, all its terms lapse. Partnership agreements sometimes contain terms which regulate aspects of the relationship between the partners after dissolution of the partnership. If the partners intended these terms to be binding after dissolution of the partnership as well, they will still be enforceable.

11.9.3 *Termination of the mutual mandate*

The mutual mandate of the partners is terminated and a partner no longer has the power to conclude binding agreements on behalf of his former partners, unless the transaction is aimed at the completion of uncompleted partnership business or at the liquidation of the partnership estate. Partners who fail to give adequate notice of the dissolution of the partnership, may, due to the doctrine of estoppel, find themselves liable for unauthorised acts which are committed by a former partner without any authorisation in the name of the former partnership.[51]

---

51 See par 10.3.4.

11.9.4 *Relationship between partners and third parties*

When a partnership dissolves, the rights and obligations of the partnership remain valid and binding. Debtors of the partnership still remain liable to the partnership in terms of their obligations. If a debtor fails, all the partners must join in a claim to enforce the partnership's rights against the debtor. Partners can limit the practical problems adherent to such a claim by ceding the partnership's claim to one of the partners or by granting him authority to enforce the claim on behalf of the partnership.

The partnership remains liable to perform in terms of its obligations to the creditors of the partnership. There is, however, a change in the nature of the personal liability of the partners. When the partnership dissolves, the ordinary partners generally become jointly and severally liable for the obligations of the partnership.[52] The creditors of the partnership can therefore hold any of the partners liable for the total amount of their claims after dissolution of the partnership. A partner who pays the total amount of a claim, can, after payment, recover from his former co-partners that portion of the payment which exceeds his proportional share of the obligation.

11.9.5 *Liquidation of the partnership estate*

Liquidation results in the realisation of the assets of the partnership, the payment of the partnership debts and the distribution of the remaining assets or liabilities among the partners. All the assets of the partnership are usually converted into money by means of sale. Such conversion is, however, not imperative. The partnership may, for instance, have enough cash to pay all its debts and the partners may be willing to accept property instead of cash.

11.9.6 *Payment of creditors and surplus*

The liquidator uses the proceeds of the sale of partnership assets to pay the partnership debts. If there is a shortfall in the partnership estate, the partners must contribute to the estate in the proportion in which they are obliged to share the losses of the partnership. If any assets remain after payment of all the creditors, the capital which the partners contributed to the partnership is repaid. Any remaining assets are then distributed among the partners in the proportion

---

52 *Bester v Van Niekerk* 1960 (2) SA 779 (A); *Lee v Maraisdrif (Edms) Bpk* 1976 (2) SA 536 (A).

in which they are entitled to share in the remaining assets on dissolution of the partnership. A partner can enforce his rights of distribution against his co-partners by means of the *actio pro socio*. If partners find themselves joint owners of tangible or intangible things, they can procure their physical division by means of the *actio communi dividundo* or the *utilis actio communi dividundo*.

Chapter 16 Close corporations

1 General

In the past, a close corporation (CC) acquired legal personality and corporate status by its registration in terms of the Close Corporations Act.[1] From the date that section 13 of the Companies Act[2] came into operation, however, CCs can no longer be incorporated under the CC Act and thereafter no company can be converted into a CC.[3] Existing CCs will continue to exist under the CC Act (as amended by Schedule 3 of the Companies Act). The winding-up of CCs will still be in terms of Part 9 of the CC Act and Chapter 14 of the Companies Act 61 of 1973[4] and thereafter in terms of the new (company) winding-up legislation.[5]

2 Conversion of close corporations

A CC may file a notice of conversion into a company in the prescribed manner and form and upon payment of the filing fee. The notice must be accompanied

1 Act 69 of 1984 (the Act/CC Act).
2 Act 71 of 2008 (Companies Act).
3 Item 3(3) of Sch 5.
4 1973 Companies Act.
5 Sch 3 and item 9 of Sch 5, which has the effect that Ch 14 of the 1973 Companies Act (Winding-up) will (with certain exceptions) continue to be in force until other legislation is in place. See chs 7 and 12.

by a written statement of consent approving the conversion of the CC signed by members of the CC holding in aggregate, at least 75% of the members' interest in the CC, plus a new Memorandum of Incorporation (MOI) consistent with the requirements of the Act.[6]

Section 14 of the Companies Act applies with respect to the filing of a notice of conversion, as if it were a Notice of Incorporation in terms of the Act.

The Companies and Intellectual Property Commission (CIPC) must then cancel the registration of that CC in terms of the CC Act and give notice in the *Government Gazette* of the conversion of a CC into a company and 'enable' the Registrar of Deeds to effect the necessary changes resulting from conversions and name changes.[7]

Every member of a CC converted after the effective date of the Companies Act is entitled to become a shareholder of the company resulting from that conversion. The shares to be held in the company by the individual shareholders need not necessarily be in proportion to the members' interests as stated in the founding statement of the CC concerned.[8]

On the registration of a company converted from a CC, the juristic person that existed as a CC before the conversion continues to exist as a juristic person, but in the form of a company, and all the assets, liabilities, rights and obligations of the CC vest in the company. Any legal proceedings instituted before the registration by or against the CC may be continued by or against the company, and any other thing done by or in respect of the CC, is deemed to have been done by or in respect of the company. Any enforcement measures that could have been commenced with respect to the CC in terms of the CC Act for conduct occurring before the date of registration may be brought against the company on the same basis, as if the conversion had not occurred, and any liability of a member of the CC for the CC's debts that had arisen in terms of

---

6 Item 1(2) of Sch 2.

7 Item 1(4) of Sch 2.

8 Item 2(1) of Sch 2. It would appear that it is optional for the member of the CC to become a shareholder of the company. Conversion into a non-profit company (NPC) does not seem possible, due to the use of the word 'shareholder'.

the CC Act and existed immediately before the date of registration, survives the conversion and continues as a liability of that person, as if the conversion had not occurred.[9]

3 Membership

3.1 General

At no time may there be more than ten members in a CC.[10] Members are not even entitled to be joint holders of the same member's interest in the CC.[11]

Subject to some exceptions, only *natural persons* may be members of a CC.[12] No juristic person may directly or indirectly hold a member's interest in a CC. Consequently, a company or a CC may not, for example, become a member of a CC; if it does, it risks personal liability for the debts of the CC.[13] However, a CC may be a shareholder in a company and may even control it. A CC may also enter into partnerships with companies or other CCs.

A natural person will qualify for membership of a CC under the following circumstances –

- if he is entitled to a member's interest;[14]
- *in his official capacity* as a trustee of a testamentary trust (a trust *mortis causa*) provided that no juristic person is a beneficiary of such trust;[15]
- *in his official capacity* as a trustee, administrator, executor or curator of an insolvent, deceased or mentally-disordered member's estate or his duly appointed or authorised legal representative.[16] If the member's interest is not transferred within 28 days of his assuming office, he must request the existing members to lodge an amended founding statement designating him *in his*

---

9 Item 2(2) of Sch 2. See s 12 of the CC Act in respect of the founding statement.
10 S 28.
11 S 30(2).
12 S 29(1). A CC cannot be a subsidiary but it can be a related party (s 2 and ch 1).
13 S 63(d).
14 S 29(2)(a).
15 S 29(2)(b).
16 S 29(2)(c).

official capacity as representative of the member in question.[17] However, even in the absence of an amended founding statement, such a representative will have the power to represent the member until his member's interest has been transferred to a qualified person;[18]

- *in his official capacity* as trustee for a trust *inter vivos* (a trust that is created between people who are still alive), provided that –
  - no juristic person shall directly or indirectly be a beneficiary of that trust;
  - the member concerned shall, as between himself and the CC, personally have all the obligations and rights of a member;
  - the CC shall not be obliged to observe or have any obligation in respect of any provision of or affecting the trust or any agreement between the trust and the member concerned; and
  - if at any time the number of natural persons entitled at that time to receive any benefit from the trust shall, when added to the number of members of the CC at that time, not exceed ten.[19]

Minors, insolvents or other legally disabled persons may become members of a CC if they are qualified to hold a member's interest if represented or assisted by their legal guardians, legal representatives or trustees. However, subject to a few qualifications, such persons are disqualified from taking part in the management of the CC[20] and must be represented in the CC by their guardians or legal representatives.[21]

Membership commenced on the date of the registration of the founding statement reflecting particulars of the membership.[22] On the admission of a new member, or if the need arises to register someone in his official capacity as representative, an amended founding statement must be registered within 28

---

17 S 29(3)(c).
18 S 29(3)(e).
19 S 29(1A).
20 S 47.
21 S 32.
22 S 29(3)(a).

days. It is the duty of the existing members to ensure that the amended founding statement is registered. The amended founding statement must be signed by or on behalf of each member and by or on behalf of any person who will become a member of the CC on registration thereof.[23] Form CK 2 only provides for the personal signature of a member who resigns. Membership of a new member commences on registration of the amended founding statement.[24]

3.2 Additional members

A person who qualifies for membership may become a member by making a contribution to the CC in pursuance of which a percentage of the members' interest is allotted to him. The percentage to which he is entitled is agreed between him and the existing members, as their members' interests will have to be reduced in order to retain the aggregate members' interest at 100%.[25] Contributions to an existing CC may be in the form of money or property, but not in the form of services rendered or to be rendered.[26]

3.3 Cessation of membership

A member may cease to be a member of a CC under one of the following circumstances –

- voluntary disposal of a member's interest;[27]
- forced disposal of his member's interest due to insolvency;[28]
- disposal of a deceased member's interest in terms of his will;[29]
- forced disposal of his member's interest after attachment and sale of the interest in execution;[30]
- on the deregistration or liquidation and consequent dissolution of the CC;[31] or

---

23 S 15(1).
24 S 29(3)(a).
25 Ss 33(1)(b) and 38.
26 S 33(2).
27 S 37.
28 S 34.
29 S 35.
30 S 34A.
31 Ss 26 and 66.

- by an order of the court.[32]

On application by any member, the court may, on one of the following grounds, order that a member shall cease to be a member of the CC –

- permanent inability to perform his part in carrying on the business;
- conduct which is likely to have a prejudicial effect on the carrying on of the business;
- conduct making it reasonably impossible for the other members to associate with him in carrying on the business; or
- it being just and equitable in the view of the court that he should cease to be a member.

3.4 Member's interest

In consideration for his contribution, each member acquires a member's interest in the CC. Such an interest must be a single interest expressed as a percentage of the total. Two or more persons may not be joint holders of the same member's interest.[33] The *quantum* of the interest is set out in the founding statement and in the certificate of member's interest.[34] A member's interest, although it must be expressed as a percentage, does not necessarily have to correspond with the percentage which his contribution bears to the total contributions of all members. The fact that it is stated that the member's interest must be a single interest implies that a person cannot acquire more than one member's interest in a single CC. The aggregate of all members' interests in a CC, expressed as a percentage, must be 100% at all times. On the admission of a new member or the retirement of an existing member, the percentage of the respective members' interests must therefore be adjusted to retain an aggregate of 100%. If the CC acquires a member's interest from one of the existing members, this must be added proportionally to the members' interests of the remaining members.[35]

---

32 S 36.
33 S 30.
34 S 21(e) read with s 31.
35 S 38(c).

Each member must be issued with a certificate, signed by or on behalf of every member, stating the current percentage of such member's interest in the CC.[36]

3.5 Nature of a member's interest

A member's interest can, like a share in a company, be described as a personal right as against the CC, entitling the holder to a *pro rata* share in the aggregate of members' interests and to participate in a distribution of profits and, on liquidation, in a distribution of the remaining assets after all creditors have been paid.

Furthermore, section 30 of the CC Act now provides that a member's interest shall be 'movable property'. Movable property may be corporeal or incorporeal. A member's interest is not a corporeal object but represents a complex of rights and duties (that is, it is incorporeal) which is transferred, subject to the provisions of the Act, through cession.[37] The certificate of member's interest is a tangible document evidencing the legal relationship existing between the CC and the member. As 'movable property', the member's interest is capable of attachment by an execution creditor.

3.6 Acquisition of a member's interest

A member's interest can be acquired directly from the CC or from an existing member or his estate.[38]

A person may acquire a member's interest from an existing member. The *causa* may be a purchase, a donation, an exchange or any other transaction. Every such disposition must be in accordance with the association agreement; in the absence thereof the consent of every other member of the CC is required.[39]

3.7 Cessation of membership: other

3.7.1 *Order of court*

In terms of sections 36 and 49, the court may, under certain circumstances, order the cessation of a member's membership and make such order as it deems necessary in regard to the disposition of the member's interest.

---

36 S 38.

37 See ch 3 in respect of the general principles in respect of the transfer of company securities, which would also apply here.

38 S 33(1).

39 S 37.

3.7.2 *Insolvency or death of member*

In case of the insolvency of a member or upon his death, his trustee or executor is compelled to sell his member's interest. Notwithstanding any contrary provision in the association agreement, the member's interest must, in case of insolvency, be sold to the CC, the remaining members, or an outsider who qualifies for membership.[40] A sale to an outsider can only be effected after the trustee has given the remaining members and the CC written notice of the name and address of the proposed purchaser and of the purchase price and terms of payment, and has given them a 28 day option to buy the whole of the member's interest at the same price and on the same terms.[41]

The duties of the executor of a deceased estate to dispose of the member's interest of the deceased member must be exercised subject to the provisions of the association agreement. In the absence thereof, the executor of a deceased estate may only transfer the member's interest to an heir or legatee if he qualifies to become a member and if the remaining members have given their consent. If they fail to consent within 28 days, the executor must sell the member's interest of the deceased member to the CC, the remaining members or an outsider on the same terms as in the case of insolvency.[42]

3.8 Attachment and sale in execution of a member's interest

Where a member's interest in a CC has been attached by an execution creditor, the sheriff can sell the interest in execution. Notwithstanding any contrary provision in the association agreement, the member's interest must be sold to the CC, or to the remaining members, or to an outsider who qualifies for membership.[43] A sale to an outsider can only be effected after the sheriff has given the remaining members and the CC written notice of the name and address of the proposed purchaser and of the purchase price and terms of payment and has given them a 28 day option to buy the whole of the member's interest at the same price and on the same terms.[44]

---

40 S 34(1).
41 S 34(2).
42 S 35.
43 S 34(1).
44 S 34(2).

3.9 Transfer of a member's interest

Any transfer of a member's interest should be reflected in an amended founding statement. The Act does not stipulate the method of transfer of a member's interest and matters relating thereto should accordingly be dealt with in the association agreement. In the absence of such provisions, basic principles (and the analogy of company law) would dictate that –

- the instrument of transfer must be in a form approved by the members, preferably analogous to a share transfer form; and
- the instrument of transfer must be executed by both transferor and transferee; and
- the instrument of transfer accompanied by the certificate stating the percentage of interest held by the transferor must be lodged at the registered office of the CC.

3.10 Restrictions on transfer

The association agreement may well contain provisions restricting the transfer of interest in any of the numerous ways commonly found in the memoranda of incorporation of companies (for example that it may not be transferred to any non-member as long as there are existing members wishing to acquire the interest).[45]

3.10.1 *Signature of amended founding statement*

The transfer of an interest necessitates the registration of an amended founding statement in terms of section 15. The amended founding statement has to be signed by or on behalf of every member and by or on behalf of any person who will become a member on such registration. To prevent the recording of an incorrect amended founding statement (unbeknown to a member whose interest is fraudulently or erroneously left out), the prescribed form for the amended founding statement[46] provides for signatures of both continuing and resigning members.

---

45 See also s 8 of the Companies Act and chs 2 and 3.

46 Form CK 2.

4 Fiduciary duties and duties of care and skill

4.1 Fiduciary position of members

Members of a CC often stand in a close relationship towards each other and may then in this respect be akin to partners. However, they owe their fiduciary duties to the CC as a separate legal *persona* and not to each other, as is the case with partners.

The Act sets out to define some of these fiduciary duties of members 'without prejudice to the generality of the expression *fiduciary relationship*'.[47]

In terms of section 42(2) of the Act, each member must act honestly and in good faith and must exercise the powers he has to manage or represent the CC in its interests and for its benefit. A member may also not exceed these powers. A member must, furthermore, avoid a conflict between his interests and those of the CC and, in particular, may not derive unwarranted personal economic benefit from the CC or someone else, nor compete with it in its business activities. Where a member fails in his duty to disclose, at the earliest possible opportunity, any material interest, directly or indirectly, in any contract of the CC to every other member, the contract is voidable at the option of the CC. Where the CC elects not to be bound by the contract, the court may, on application by an interested party (if the court is of the opinion that it is equitable in the circumstances) order that the contract be nonetheless binding on the parties.[48]

A member who has breached his fiduciary duty is liable to the CC for any loss suffered by the CC as a result thereof or for any economic benefit derived by the member as a result of the breach. Except as regards the so-called unratifiable wrong contained in section 42(2)(a)(i), breaches may be ratified by the written approval of all the members *provided they are fully cognisant of all the material facts*. As the written approval of the members presupposes an appraisal of the facts at the time of the approval, it is submitted that a blanket approval given in advance in the association agreement will not suffice as approval of the breach of his duty towards the CC.

---

47 S 42(2).

48 S 42(2) and (3).

4.2 Duties of care and skill

Section 43 of the Act establishes the duty of members of CCs to act with due care and skill. A member is accordingly liable to the CC for loss caused by his failure to carry on the business with the degree of care and skill that may reasonably be expected from a person of his knowledge and experience. Two aspects should be noted in particular.

Firstly, it is a requirement that *loss to the CC* be proven. This is not a requirement for liability in terms of section 42 of the Act. Secondly, the person will only be liable if he did not act with the 'degree of care and skill that may reasonably be expected from a person of his knowledge and experience'. This requirement introduces an element of subjective (personal) judgment, which means that members would only be liable for a breach of this duty in exceptional cases.[49]

Breaches of this duty may be ratified by the written approval of all the members where they are cognisant of all the material facts. This implies, once again, that any blanket approval in an association agreement will not suffice to protect members against liability.[50]

5 Association agreement

5.1 General

An association agreement may be described as a written agreement between the members of a CC regulating the internal relations between them *inter se*, and between them and the CC. Although it is advisable to enter into an association agreement, it is not a prerequisite for the formation or running of a CC. By utilising an association agreement, the necessary flexibility, tailored to the needs of the particular undertaking, can be obtained. In the absence of such an association agreement, the provisions of the Act regarding internal relationships and management would apply.

---

49 See, however, s 76 of the Companies Act and ch 7.

50 S 43.

5.1.1 *General principles applicable in the absence of an association agreement*

In terms of section 46, the following principles apply *unless altered or varied by the association agreement* –

- every member shall be entitled to participate in the carrying on of the business of the CC;
- members shall have equal rights in regard to the management of the business and in the representation of the CC;
- differences between members in connection with the business of the CC shall be decided by majority vote;
- a member shall have the number of votes corresponding to his percentage interest;
- every member shall be indemnified in respect of expenditure incurred in connection with the conducting of the business and the preservation of the business or assets of the CC; and
- payments by the CC to its members by reason only of their membership shall be in proportion to their respective interests in the CC.

When a CC has two or more members, they can enter into a written association agreement. This must be signed by or on behalf of each member. The agreement may regulate any matter regarding the internal relationship between the members, or the members and the CC, as long as it is not inconsistent with the unalterable provisions of the Act or other provisions of the law. A copy of the association agreement must be kept at the registered office where it may be inspected by any member.[51] A person who is not a member is not entitled to inspect the association agreement and the doctrine of constructive notice does not apply to the association agreement. Therefore, a person (who is not a member) who does business with the CC is not deemed to have knowledge of the association agreement or its context.[52]

---

51 S 44(2).

52 See ch 2 in respect the doctrine of constructive notice.

The association agreement constitutes a contract between the CC and the members and between the members *inter se*. New members automatically become bound by a formal association agreement without having to sign it and remain bound even after they have ceased to be members of the CC. Amendments to and cancellation of an association agreement must be in writing and signed by or on behalf of every member, including new members.

Members can conclude other contracts or agreements that regulate their relationships. The advantage of this is that these agreements, as ordinary contracts, are not subject to the formal requirements of an association agreement. The disadvantage is that it will only apply *inter partes* and new members will not be automatically bound by it.

5.2 Matters that may be regulated by association agreement

An association agreement may, for example, regulate the following matters –

- participation of members in the management of the CC;
- settling of disputes between members;
- voting at meetings and proxy votes;
- repayment of contributions;
- procedure at meetings;
- sale or transfer of a member's interest by a member;
- financing of the CC; or
- any other matter which would ordinarily be dealt with in a shareholders' agreement in respect of a company.[53]

5.3 Unalterable provisions

The following matters cannot, however, be altered by an association agreement –

- the manner in which an insolvent member's interest may be disposed of;[54]

---

53 See ch 2 in respect of shareholders' agreements.

54 S 34.

- persons who are disqualified from taking part in the management of the CC;[55]
- the power of a member to call a meeting of members;[56] and
- a blanket approval of a member's breach of duties in terms of sections 42 and 43 of the Act.

Certain matters require the written consent of each member. These include the following –

- the acquisition of a member's interest;[57]
- financial assistance in respect of the acquisition of a member's interest;[58]
- the granting of loans and furnishing of security;[59]
- the ratification of pre-incorporation contracts;[60]
- the ratification of a breach of fiduciary duties or of a breach of the duty to act with the necessary care and skill;[61] and
- the appointment of an accounting officer.[62]

The first three categories require the previously obtained written consent of each member. These categories relate to the maintenance of capital, and personal liability may follow if financial assistance jeopardises the solvency and liquidity of the CC.

6 Management

The members may elect whether to conduct the management of the CC in accordance with the provisions of the Act or within the formal framework of an association agreement.

---

55 S 47.
56 S 48(1).
57 S 39.
58 S 40.
59 S 52.
60 S 53.
61 Ss 42 and 43.
62 S 60(3).

The CC Act contains the following provisions in regard to the management of the CC, which apply *unless varied or altered by an association agreement*:

- Every member is entitled to participate in the carrying on of the business of the CC, to exercise equal rights in regard to the management of the business of the CC and to represent the CC in carrying on its business.[63] In terms of section 47, certain persons are, however, disqualified from participating in the management of the CC. These persons include people under legal disability, with the exception of 'minors'[64] who have obtained the written consent of their guardians to participate in the management. Disqualification of a person to act as director in terms of the Companies Act also excludes that person from managing a CC.[65] If the person is under probation, that person can only manage the CC to the extent that the court order allows it.[66] A disqualified person may participate in the management of a CC if that person holds 100% of the members' interest, or that person and other persons, all of whom are related to that disqualified person, and each of whom must have consented in writing to that disqualified person participating in the management of the CC, together hold 100% of the members' interest.[67]

  The following persons can only take part in the management of a CC if authorised by the court –

  – an unrehabilitated insolvent;
  – persons removed from an office of trust on account of misconduct;
  – persons convicted of certain crimes involving dishonesty, or of crimes in connection with the formation or management of a company or CC, and who have been sentenced to imprisonment for at least six months without the option of a fine.

63 S 46(a) and (b).

64 See s 17 of the Children's Act 38 of 2005 that provides the persons of 18 years are majors.

65 See ch 7.

66 See ch 7 par 3.3.

67 S 47 of the CC Act and item 5(2) of Sch 3 of the Companies Act. The equivalent in s 69(12) of the Companies Act was deleted by s 46(c) of the 2011 Companies Amendment Act.

A section 47(1) disqualification now applies irrespective of membership of the CC, therefore persons who are not members are also included in this disqualification.

- Unless the association agreement provides otherwise, matters concerning the CC are decided by majority vote at meetings of the CC, each member having the number of votes corresponding to the percentage of his interest in the CC. The following matters, however, require the written consent of a member, or members holding at least 75% of the total members' interests in the CC –
  - a change in the principal business carried on by the CC;
  - a disposal of the whole or substantially the whole undertaking of the CC;
  - a disposal of all or the greater portion of the assets of the CC; or
  - any acquisition or disposal of immovable property by the CC.[68]
- In terms of section 48(1), any member of a CC may, by notice to every other member and every other person entitled to attend a meeting of members, call a meeting of members for any purpose disclosed in the notice. Unless an association agreement provides otherwise –
  - such notice must, as regards the date, time and venue of the meeting, fix a reasonable date and time and a venue which is reasonably suitable for all persons entitled to attend the particular meeting;
  - three-fourths of the members present in person at the meeting, constitute a quorum; and
  - only members present in person at the meeting may vote at the meeting.
- Unless an association agreement provides otherwise, a meeting at which a quorum is not present within half an hour after the time appointed for the meeting shall be adjourned to a day not earlier than seven days and not later than 21 days after the date of that meeting, and if at such adjourned meeting a quorum is not present within half an hour after the time appointed for the meeting, the members present in person shall constitute a quorum.[69] Where a meeting has been adjourned as contemplated above, the

68 S 46(b).

69 S 48(2A).

member who adjourned the meeting shall, upon a date not more than three days after the adjournment, send a written notice to each member of the CC stating –

- the date, time and place to which the meeting has been adjourned;
- the matters before the meeting when it was adjourned; and
- the grounds for the adjournment.[70]

- A CC must minute the proceedings at a meeting of its members in a minute book within 14 days after the date on which the meeting was held. This minute book must be kept at the registered office of the CC.[71]
- A resolution in writing, signed by all the members and entered into the minute book, is as valid and effective as if it were passed at a meeting of the members duly convened and held.[72]

Resolutions by formal or informal unanimous consent should also apply.[73]

7 External relations

7.1 Pre-incorporation contracts

7.1.1 *Statutory*

Section 53 allows a CC to ratify a pre-incorporation contract concluded by an agent if certain requirements are met. This constitutes an exception to the common law principle that there can be no representation of a person not yet in existence.[74]

---

70 S 48(2B).
71 S 48(3)(a).
72 S 48(3)(b).
73 See ch 6.
74 *Build-a-Brick BK v ESKOM* 1996 (1) SA 115 (O).

In terms of section 53, a CC can ratify or adopt as its own, after its incorporation,[75] a written contract[76] entered into by someone purporting to act as the CC's agent or trustee[77] before its incorporation, as if the CC had been duly incorporated at the time the contract was entered into.

If all the requirements are complied with, the contract comes into existence between the CC and the other party. The CC is, however, under no obligation to ratify or adopt the contract. If the CC does not ratify the contract, it lapses, and in principle the agent incurs no personal liability unless the contract provides the opposite.

7.1.2 *Common law*

Section 53 is permissive, and not peremptory. Other arrangements[78] may therefore also be used, such as a contract in favour of a third party (*stipulatio alteri*). Since the third party need not be in existence at the time the agreement is concluded between the *stipulans* and the *promittens*, the contract in favour of a third party can conveniently be used in the case of a CC not yet incorporated.

Section 53 is also not applicable if a person contracts in his personal capacity before the incorporation of the CC and then after its incorporation, for example –

- cedes his rights under the contract to the CC, or nominates the CC as purchaser; or
- transfers assets he acquired to the CC; or
- cedes his rights under an option (which he acquired on the basis that he can either exercise it himself or transfer it to another) to the CC which can then exercise the option.

---

75 This must be done by the consent in writing of all the members of the corporation within the time specified in the contract. If no time is specified, the consent must be given within a reasonable time after incorporation.

76 Also oral contracts subsequently reduced to writing. *Pledge Investments (Pty) Ltd v Kramer NO: In re Estate Selesnik* 1975 (3) SA 696 (A); *Ivoral Properties (Pty) Ltd v Sheriff of Cape Town* [2005] 3 All SA 178 (C).

77 'Trustee' in this context can be equated with 'agent'. It can also bear its ordinary meaning of principal, thus enabling the parties to make use of the *stipulatio alteri* within the context of s 53. Compliance with the prescribed requirements is only imperative if the person contracted as agent, irrespective of whether he depicted himself as agent or trustee.

78 See also ch 2.

7.2 Capacity and representation of a close corporation

7.2.1 *Capacity and powers of a close corporation*

A CC has the capacity and powers of a natural person of full capacity in so far as a juristic person is capable of having such capacity or exercising such powers.[79] The statement of the principal business of the CC[80] in the founding statement does not affect (in respect of third parties) the CC's capacity and powers. There is no constructive notice of any particulars stated in a founding statement.[81]

The capacity and powers of a CC are not totally unlimited for all intents and purposes. A CC is, like a company, incapable of acts intimately associated with the physical being of a natural person, such as contracting a marriage or making a will.

7.2.2 *Representation of a close corporation*

7.2.2.1 Agents

Section 54 provides that every member of the CC is an agent of the CC in relation to a person who is not a member of the CC and who is dealing with the CC. Any act of a member binds the CC to such a third party, irrespective of whether the act was performed for the carrying on of the business of the CC or not. If the member so acting in fact had no power to act for the CC in the particular matter, he will still bind the CC in respect of a third party dealing with the CC, unless the outsider has, or ought reasonably to have, knowledge of the fact that the member has no such power. The reference to 'any act' in section 54 includes the appointment of an agent on behalf of the CC.[82]

Since there is no constructive notice of the provisions of an association agreement, knowledge of internal restrictions on members' powers contained therein is not imputed to outsiders. They are entitled to assume that each member has the necessary authority to act on behalf of the CC in a transaction,

---

79 S 2(4).

80 S 12(b).

81 S 17. See also ch 2 in respect of constructive notice.

82 *J&K Timbers (Pty) Ltd t/a Tegs Timbers v GL & S Furniture Enterprises CC* 2005 (3) SA 223 (N).

irrespective of whether the particular transaction was entered into by the member for the carrying on of the business of the CC.[83]

As in the law of partnership, a *bona fide* outsider who does not know of internal restrictions of power is, in principle, not affected by it. Contrary to the position under partnership law, a CC may be bound to a contract falling outside its scope of business, even if it was not actually or ostensibly authorised or ratified by the CC. This will, however, only be the case if the outsider did not have, or ought reasonably to have had, knowledge of the member's lack of authority.[84]

A CC may authorise a person who is not a member to act as its agent, either generally or in a particular matter. In such an event, section 54 is not applicable. On the basis of the general principles of representation, the CC will be bound by an agreement entered into on its behalf by a non-member if the non-member had express or implied authority from the CC to enter into the agreement on the CC's behalf, or if the CC subsequently ratified the agreement, or if the CC is precluded from denying authority or ratification by virtue of the doctrine of estoppel.[85]

7.2.2.2 Contracts with members

A contract between a member and a CC clearly falls outside the scope of section 54. The contract will also be voidable at the option of the CC, by reason of a breach of the member's fiduciary duties, if the member failed to disclose his interest in the contract at the earliest opportunity.[86] In addition, without the prior written consent of all the members, loans and the provision of security by a CC to its members or to juristic persons controlled by them are prohibited.[87]

---

83 *Point 2 Point Same Day Express CC v Stewart* 2009 (2) SA 414 (W).

84 *J&K Timbers (Pty) Ltd t/a Tegs Timbers v GL & S Furniture Enterprises CC* 2005 (3) SA 223 (N); *Point 2 Point Same Day Express CC v Stewart* 2009 (2) SA 414 (W).

85 *Inter-Continental Finance and Leasing Corporation (Pty) Ltd v Stands 56 and 57 Industria Ltd* 1979 (3) SA 740 (W). See also ch 5.

86 S 42(3)(b).

87 S 52.

8 Remedies for members and the close corporation

8.1 Section 49: statutory personal action

Any member of a CC who alleges that any particular act or omission of the CC or of one or more other members is unfairly prejudicial, unjust or inequitable to him, or to some of the members including himself; or that the affairs of the CC are being conducted in a manner unfairly prejudicial, unjust or inequitable to him, or to some members including him, may apply to a court for an order to rectify the matter. If the court considers it just and equitable, the court may, with a view to settling the dispute, make such order as it thinks fit, whether for regulating the future conducting of the affairs of the CC or for the purchase of the interest of any member of the CC by the other members thereof or by the CC.[88]

In *Gatenby v Gatenby*[89] the ambit of section 49 was defined as follows:

> 'The object of section 49 is to come to the relief of the victim of oppressive conduct. The section gives the Court the power to make orders "with a view to settling the dispute" between the members of a close corporation if it is just and equitable to do so. To this end the Court is given a wide discretion. It may "make such order as it thinks fit", within the framework of either "regulating the future conduct of the affairs of the corporation" or "the purchase of the interest of any member of the corporation by other members thereof or by the corporation". These are far-reaching powers. One member can be compelled to purchase the interest of another at a fair price, whether he wants to or not.'

It was held that section 49(2) gives the court the power to order the sale of a corporation asset in order to enable a member who is being prejudiced to be paid out for his interest and thereby to bring about a termination of his membership.[90] In *De Franca v Exhaust Pro CC*,[91] the court said it has a discretion to order the purchase of the interest of any member of the corporation by other members thereof, or by the corporation, if the court finds it just and equitable to make such an order. The court does, however, need particulars of the value of a member's interest in order to establish 'a fair price' for such an interest. Without such particulars of claim, the court cannot on its own account

---

88 S 49.

89 1996 (3) SA 118 (E).

90 See also *Kanakia v Ritzshelf 1004 CC t/a Passage to India* 2003 (2) SA 39 (D).

91 [1996] 4 All SA 503 (SE).

determine such a 'fair price' and was precluded by section 39 of the Act (payment by corporation for members interest acquired if the solvency and liquidity of the corporation are maintained) from making an order compelling the close corporation to buy a member's interest if insufficient information was before the court for determining 'the fair value' of a member's interest. In company law context, it was held, in *Irvin and Johnson Ltd v Oelofse Fisheries Ltd*,[92] that a court will not readily infer a power to affect the rights of creditors in trying to solve an internal matter among shareholders and that the court will not give an order for the corporation to buy a member's interest without full particulars of the fair value of the member's interest being available to the court.

8.2 Section 50: statutory derivative action

Where a member or a former member of a CC is liable to the CC to make an initial or additional contribution as agreed by the members, or on account of a breach of a duty arising from his fiduciary relationship with the CC or of negligence in the handling of the affairs of the CC, any other member of the CC may institute proceedings in respect of any such liability on behalf of the CC against such member or former member, after notifying all the other members of the CC of his intention to do so.[93]

The member institutes the action on behalf of the CC. Therefore judgment is in favour of the CC and the CC (not the member acting on its behalf) is liable for the costs. There is nothing in the Act prohibiting the CC itself from instituting the action if the majority members are in favour.

As any member is entitled to institute action on behalf of the CC and as the consent of all the members is required before the conduct giving rise to the action can be ratified, there is no danger of the majority abusing their position and thereby stifling an action against them.

This section differs from section 49 in that section 49 refers to the situation where the member's own rights are affected, whereas section 50 relates to situations where the CC's rights are at issue.

---

92 1954 (1) SA 231 (E), but in terms of the 1973 Act.

93 S 50.

9 Capital

9.1 Payments to members

The following rules govern payments to members in order to maintain solvency:

- Any payment by a CC to any member by reason of his membership, including a distribution (of income) or a repayment of any contribution or part thereof may be made only –
  - if, after such payment is made, the CC's assets fairly valued, exceed all its liabilities (the *solvency criterion*); and
  - if the CC is able to pay its debts as they become due in the ordinary course of business (the *liquidity criterion*); and
  - if such payment will in the particular circumstances not in fact render the CC unable to pay its debts as they become due in the ordinary course of its business.[94]

A member is liable to a CC for any payment received contrary to these requirements.[95]

Without the prior express consent in writing of all its members, a CC may not, directly or indirectly, make a loan –

- to any of its members; or
- to any other CC in which one or more of its members together hold more than 50% interest; or
- to any company or other juristic person (except a CC) controlled[96] by one or more of the members of the CC; and

---

94 The solvency and liquidity test.

95 S 51. These restrictions do not apply to any payment to a member in his capacity as a creditor of the particular corporation, or a payment as remuneration for services rendered as an employee or officer of the corporation, or a repayment of a loan or interest thereon or a payment of rental. 'Payment' includes the delivery or transfer of any property.

96 'Control' is as defined in s 226(1A) of the 1973 Act and would have been if a person was a member of the company and had the power to appoint or dismiss the majority of the directors of the company, or if a person held the majority of the equity shares in the company. 'Equity share capital' is shares in the company, excluding any shares which, neither as

(*continued*)

- may not provide any security to any person in connection with any obligation of any such member, or other CC, company or other juristic person.[97]

9.2 Distribution of net income

The interest of members in a CC may comprise –

- contributions by members;
- surplus on the revaluation of fixed assets; and
- undistributed (retained) income (termed 'undrawn profits' in the Act).

Any payment by the CC to a member (by reason only of his membership), whether by way of a *distribution (of net income)* or a repayment (wholly or in part) of the members' contribution, may only be made provided such payment does not impair the solvency and liquidity of the CC.

The percentage of members' interest held by a member may determine his *pro rata* share in the distribution of net income. No member is entitled to any payment out of income available for distribution until such payment has been approved by a formal resolution or validated by the approval of annual financial statements in which such distribution of income is proposed.

9.3 Financial assistance

A CC may provide financial assistance to enable another to acquire a member's interest in that CC if the requirements of section 40 are met. This section requires the prior written consent of every member in respect of the assistance and maintenance of the solvency and liquidity of the CC.

10 Personal liability

The CC Act creates personal liability on members and certain other persons for the debts of the CC in the event of a contravention of certain important provisions of the Act.

---

respects dividend nor as respects capital, has any right to participate beyond a specified amount in any distribution.

97 S 52. In *Hanekom v Builders Market Klerksdorp (Pty) Ltd* 2007 (3) SA 95 (SCA) it was decided that in the case of a CC with one member, s 52(2) serves no purpose, as it would lead to an absurdity if it was required of the sole member to give himself written permission before signing a deed of suretyship.

The main provisions giving rise to personal liability are –

- section 63 – joint and several liability for the debts of the CC in the event of specific contraventions;
- section 64 – liability for reckless and fraudulent trading; and
- section 65 – abuse of corporate juristic personality.

10.1 Section 63: joint and several liability for corporate debts

Section 63 contains a number of provisions giving rise to civil liability. The subsections of this section render persons who contravened specific provisions of the Act jointly and severally liable, with the CC, for specified debts of the CC. Liability in terms of section 63 arises automatically from the contravention of the particular statutory provision. The statutory liability of an offender for a particular debt does not relieve the CC of its primary liability for that debt. The offender simply becomes jointly and severally liable, with the CC, for payment of the debt. The creditor in question may therefore sue either the CC or the offender for payment of the whole of the debt or may proceed against the debtors jointly.

Joint and several liability arises in terms of section 63 in the following instances:

10.1.1 *Use of the identifying abbreviation*

If the name of the CC is used in any way without the abbreviation 'CC' in English, or its equivalent in any other official language, subjoined thereto, any member of the CC who is responsible for, or who authorised or knowingly permitted the omission of the abbreviation, is liable for any debt incurred by the CC in consequence of a transaction with a person who, due to the omission of the abbreviation, was unaware that he was dealing with a CC.[98]

98 S 63(a); *Stafford t/a Natal Agricultural Co v Lions River Saw Mills* 1999 (2) SA 1077 (N).

10.1.2 *Delivery of contribution*

If a member fails to contribute his initial or additional contribution to the CC, he is liable for every debt of the CC incurred from the date of registration of the founding statement in which the particulars of the contribution concerned are stated.[99] In addition, any other member of the CC may institute action to recover such contribution after notifying the other members of his proposed action.[100]

10.1.3 *Membership*

If a juristic person or a trustee of a trust *inter vivos* purports to hold a member's interest in circumstances other than those provided for in section 29, the juristic person or trustee of a trust *inter vivos* and their nominee is, notwithstanding the invalidity of the holding of such interest, liable for the debts of the CC incurred during the time of purported membership.[101]

10.1.4 *Payment in respect of acquisition of member's interest*

Where the CC makes a payment or delivers or transfers property in respect of its acquisition of a member's interest, it must comply with section 39. That section requires the prior written consent of every member for the specific payment and the maintenance of solvency and liquidity of the CC. If the payment is made in contravention of section 39, every member who is aware of the payment, including any member or former member who receives such payment, is liable for every debt incurred prior to the payment. A member who can prove that he took all reasonable steps to prevent payment will escape liability.[102]

10.1.5 *Financial assistance*

A CC may provide financial assistance to enable another to acquire a member's interest in that CC if the requirements of section 40 are met.[103] If such assistance is provided in contravention of section 40, every member who is aware of the giving of such assistance, including the person who received such assistance, is liable for every debt incurred prior to the giving of such assistance.

---

99 S 63(b).
100 S 50.
101 S 63(d).
102 S 63(e).
103 Sien par 9.3.

A member who can prove that he took all reasonable steps to prevent the assistance will not be liable.[104]

10.1.6 *Management by disqualified person*

If a person (member or non-member) takes part in the management of the business of the CC while disqualified from doing so in terms of section 47(1)(b) or (c), that person is liable for every debt incurred as a result of his participation in the management.[105]

10.1.7 *Accounting officer*

If the office of accounting officer is vacant for a period of six months, every member who at any time during that period is aware of the vacancy and who, at the expiration of that period is still a member, is liable for every debt of the CC incurred during the existence of the vacancy, as well as for every debt incurred thereafter while the vacancy and his membership continues.[106]

10.2 Section 64: reckless or fraudulent trading

Section 64 provides that if it appears that any business of a CC was carried on recklessly, with gross negligence or fraudulently, the court may declare that any person who was knowingly a party to the carrying on of the business in such a manner will be personally liable for such debts or other liabilities of the CC as the court may direct.[107] The section also provides that the court may give such further orders as it considers proper for giving effect to and enforcing such liability. The application may be brought by the Master, any creditor, member or the liquidator of the CC. The carrying on of business in such a manner is also a criminal offence, apart from any other criminal liability resulting from such conduct.

Section 64 closely resembles section 424 of the 1973 Companies Act. Although the latter section provides for liability in respect of reckless and fraudulent trading, while section 64 also provides for liability in the case of grossly negligent trading, the difference is not material, because the courts have held

---

104 S 63(f).

105 S 63(g); *Marpro Trawling (Pty) Ltd v Cencelli* 1992 (1) SA 407 (C).

106 S 63(h).

107 See also ch 7.

that recklessness in the context of section 424 includes gross negligence.[108] The provisions therefore have the same ambit. The case law in respect of section 424 is consequently instructive and can serve as authority in respect of the analysis of section 64.[109]

Sections 64 and 424 should not be viewed as merely presenting a partial codification of the previously existing common law action based on fraud. These provisions actually create a new remedy or 'right', which becomes available to a creditor in the circumstances set out in the provisions.[110] Prescription does not, therefore, start to run when the underlying debt is contracted, but rather at the moment when the creditor gains knowledge of the fact that the business of the CC was conducted fraudulently or recklessly and that it had outstanding debts.

10.2.1 *Test for recklessness*

The test for recklessness is primarily objective, because the defendant's conduct is measured against the standard of conduct of a notional reasonable person. However, the test also has a subjective element, because the notional reasonable person is placed in the same group or class as the defendant and endowed with his knowledge or means to knowledge. In *Philotex (Pty) Ltd v Snyman; Braitex (Pty) Ltd v Snyman*,[111] the court had to consider the conduct of directors. The particular board comprised of directors with diverse professional backgrounds. Some of the directors were chartered accountants and others had a business or farming background. The court held that '[t]he enquiry will therefore be: what would the reasonable businessman having that additional knowledge, or having ready access to that knowledge, have done in the circumstances?'

---

108 *L & P Plant Hire BK v Bosch* 2002 (2) SA 662 (SCA). The same principles in respect of recklessness will also apply to s 22 of the Companies Act. See ch 7 and ch 12.

109 Item 9 of Sch 5 of the Companies Act has the effect that Ch 14 of the 1973 Companies Act (Winding-up) will (with certain exceptions) continue to be in force until, *inter alia*, other legislation is in place. S 424 is in Ch 14 and will continue to apply in respect of winding-up. See also chs 7 and 12 in respect of s 22 of the Companies Act and the interaction with s 424 of the 1973 Companies Act.

110 See *Burley Appliances Ltd v Grobbelaar* [2003] JOL 11335 (C).

111 1998 (2) SA 138 (SCA).

When applying the test for recklessness, the court also takes into regard factors such as the scope of operations of the CC, the role, function and powers of its members, and the financial position of the CC.[112]

10.2.2 *Reckless trading*

A CC will normally be deemed to be trading recklessly if it continues to incur debt when reasonable businessmen in the position of the members of that CC would believe that there is no reasonable prospect of the creditors receiving payment when due.[113] If the debt is incurred dishonestly, for instance without an intention to repay it on the due date, the conduct would normally constitute fraudulent trading.

In *L & P Plant Hire BK v Bosch*,[114] the Supreme Court of Appeal held that, as far as reckless trading is concerned, the aim of section 64 is to protect creditors against the prejudice caused by the alleged recklessness. A creditor can therefore only proceed in terms of section 64 if the alleged reckless conduct has a negative effect on his claim against the CC. If the CC can still meet the creditor's claim, in spite of the reckless trading, the creditor cannot rely on section 64.

10.3 Section 65: Abuse of corporate juristic personality

Section 65[115] provides that if a court finds that the incorporation of the CC or any act by or on behalf of it constitutes a gross abuse of its juristic personality as a separate entity, it may declare that the CC is deemed not to be a juristic person as regards the rights, obligations or liabilities of the CC or of any of its members or of any person specifically referred to in such an order. The court may also give such further orders as it may deem fit in order to give effect to its declaration.[116]

---

112 *Philotex (Pty) Ltd v Snyman; Braitex (Pty) Ltd v Snyman* 1998 (2) SA 138 (SCA); *TJ Jonck BK h/a Botha-ville Vleismark v Du Plessis* 1998 (1) SA 971 (O); *MA Vleisagentskap CC v Shaw* 2003 (6) SA 714 (C).

113 *Ozinsky v Lloyd* 1995 (2) SA 915 (A).

114 2002 (2) SA 662 (SCA).

115 See also s 20(9) of the Companies Act and ch 2.

116 *Haygro Catering BK v Van der Merwe* 1996 (4) SA 1063 (C); *TJ Jonck BK h/a Bothaville Vleismark v Du Plessis* 1998 (1) SA 971 (O) and *Ex parte application of Gore NO* 2013 JOL 30155 (WCC) for a comparison with s 20(9) of the Companies Act.

Courts may, in their judicial discretion, disregard the separate existence of a CC or company if the distinction between the corporate entity and its controllers is being fraudulently, dishonestly or improperly abused to the unfair advantage of the controllers,[117] where, for instance, a natural person who is subject to a restraint of trade, uses the CC as a front to engage in activity that is prohibited by the agreement in restraint of trade[118] or uses it as an instrument to promote own interests.[119]

10.4 Other instances of personal liability

The name and registration number must be included on all notices and official publications, electronic or otherwise, including orders, invoices, cheques and receipts.[120] The CC must not misstate its name and must provide the full registration number on demand by any person. A person must not use the name or registration number to give the false impression that she is communicating on behalf of the CC or that the name is the name of a CC.[121]

Under certain circumstances, the members may become liable to compensate the CC. Examples of such circumstances include:

- If a member breaches a fiduciary duty or his duty of care and skill towards the CC, he can be held liable by the CC, except if this right has been waived by other members on behalf of the CC.[122]
- If loans are made or security is given by the CC in contravention of section 52, any member who authorises, permits or is a party to the transaction is liable to indemnify the CC as well as other innocent persons who suffered loss directly resulting from the invalidity of the loan or security.

---

117 *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd* 1995 (4) SA 790 (A); *Hülse-Reutter v Gödde* 2001 (4) SA 1336 (SCA).

118 *Le'Bergo Fashions CC v Lee* 1998 (2) SA 608 (C); *Die Dros (Pty) Ltd v Telefon Beverages CC* [2003] 1 All SA 164 (C).

119 *Ebrahim v Airport Cold Storage (Pty) Ltd* 2008 (6) SA 620 (SCA).

120 S 23, which applies s 32 of the Companies Act (item 5(1) of Sch 3 of the Companies Act).

121 Liability is now, however, not personal, but criminal (s 23 read with s 32 of the Companies Act).

122 Ss 42 and 43.

- A CC may distribute net income to its members only if it is solvent and sufficiently liquid. A distribution in breach of these requirements may be recovered from members.

11 Transparency, accountability and audit[123]

The regulations in terms of sections 29(4) and (5), and 30(7) of the Companies Act apply to a CC as if those regulations had been made in terms of the CC Act, but any reference in those regulations to a company must be read as a reference to a CC.[124]

The members of a CC shall within six months after the end of every financial year of the CC cause annual financial statements in respect of that financial year to be made out in one of the official languages of the Republic.[125] In respect of an audit, the same provisions apply as in respect of (private) companies.[126] The approval and signature by or on behalf of the holder(s) of at least 51% of total members' interest is necessary to confirm (validate) the annual financial statements.

If the CC chooses to apply Chapter 3 of the Companies Act (Enhanced accountability), then those provisions apply instead of the CC Act.[127]

Every CC must appoint an accounting officer[128] and no person may be appointed as or hold the office of an accounting officer of a CC, unless he is a member of a recognised profession named by the minister in a notice in the *Government Gazette*.[129]

---

123 See especially ch 9.

124 S 10(3) of the CC Act and item 5(2) of Sch 3 of the Companies Act. See also ch 9.

125 S 58(1) of the CC Act and item 5(4)(a) of Sch 3 of the Companies Act. In terms of s 43(2), which applies also to CCs (s 62A(1) of the CC Act and item 5(5) of Sch 3 of the Companies Act).

126 The provisions of s 30(2)(b) and (3)–(6) of the Companies Act, read with the changes required by the context, apply to a corporation that is required by the regulations made in terms of s 30(7) of the Companies Act, to have its annual financial statements audited (item 5(4)(b) of Sch 3 of the Companies Act).

127 S 62A(2) of the CC Act and item 3(5) of Sch 3 of the Companies Act.

128 S 59.

129 S 60. See s 59(4) on removal and s 59(5) on duties of the accounting officer on removal or resignation.

Some of the professions so approved are the South African Institute of Chartered Accountants, Accountants and auditors registered in terms of the provisions of the Auditing Profession Act,[130] the Southern African Institute of Chartered Secretaries and Administrators, the Institute of Cost and Management Accountants, the Institute of Commercial and Financial Accountants SA, senior members of the Southern African Institute of Business Accountants and members of the Chartered Association of Certified Accountants.

An accounting officer of a CC has a right of access to the accounting records and all the books and documents of the CC at all times, and to require from members such information and explanations as he considers necessary for the performance of his duties as an accounting officer.[131]

The statutory duties of an accounting officer are, *inter alia*:

- The accounting officer must, not later than six months after completion of the annual financial statements –
  - determine whether the annual financial statements are in agreement with the accounting records of the CC;
  - review the appropriateness of the accounting policies represented to the accounting officer as having been applied in the preparation of the annual financial statements; and
  - report to members in respect of these matters.[132]
- If during the performance of his duties an accounting officer becomes aware of any contravention of a provision of the Act, he must describe the nature of such contravention in his report.
- An accounting officer of a CC must by certified post report to the CIPC if he –
  - at any time knows, or has reason to believe, that the CC is not carrying on business or is not in operation and has no intention of resuming operations in the foreseeable future; or

130 Act 26 of 2005.

131 S 61.

132 See ch 9 for the format of financial statements and audit.

– during the performance of the accounting officer's duties finds –
  * that any change, during a relevant financial year, in respect of any particulars mentioned in the founding statement has not been registered;
  * that the CC does not conform to the solvency requirement in so far as –
    o the annual financial statements indicate that as at the end of the financial year concerned the CC's liabilities exceed its assets;
    o the annual financial statements incorrectly indicate that at the end of the financial year concerned the assets of the CC exceed its liabilities, or has reason to believe that such an incorrect indication is given.[133]

133 S 62.

Appendix A Forms

Notes

The wording of the following standard forms, which are deemed to be the most important, are included in this appendix:

Form CoR 15.1A: Short Standard Form for Private Companies

Form CoR 15.1B: Long Standard Form for Profit Companies

Form CoR 15.1D: Long Standard Form Non-profit Companies without Members

Form CoR 15.1E: Long Standard Form Non-profit Companies with Members

It should be noted that the forms, in many instances, do not correctly reflect the requirements of a particular section of the Act. Some of the more important of these are such as section 8 in respect of the restriction on the transfer of securities in a private company, and not shares as it is stated in Form 15.1A and Form 15.1B, and the requirements for a personal liability company in terms of section 19, as stated in Form CoR 15.1B.

Form CoR 15.1A: Short Standard Form for Private Companies

Memorandum of Incorporation of

[*Insert Name of Company*] _____,

which is a private company, has _____ director(s) and _____ alternate directors, is authorised to issue no more than _____ shares of a single class of common shares as described in Article 2, and is referred to in the rest of this Memorandum of Incorporation as 'the Company'.

In this Memorandum of Incorporation –

(a) a reference to a section by number refers to the corresponding section of the Companies Act, 2008;

(b) words that are defined in the Companies Act, 2008, bear the same meaning in this Memorandum as in that Act.

Adoption of Memorandum of Incorporation

This Memorandum of Incorporation was adopted by the incorporators of the Company, in accordance with section 13(1), as evidenced by the following signatures made by each of them, or on their behalf (only required in the case of new company registrations):

Name and Address	Identity or Registration#	Signature	Dated

Article 1 – Incorporation and Nature of the Company

1.1 Incorporation

(1) The Company is incorporated as a private company, as defined in the Companies Act, 2008.

(2) The Company is incorporated in accordance with, and governed by –

(a) the provisions of the Companies Act 2008, without any limitation, extension, variation or substitution; and

(b) the provisions of this Memorandum of Incorporation.

1.2 Powers of the Company

(1) The Company is not subject to any provision contemplated in section 15(2)(b) or (c).

(2) The purposes and powers of the Company are not subject to any restriction, limitation or qualification, as contemplated in section 19(1)(b)(ii).

1.3 Memorandum of Incorporation and Company rules

(1) This Memorandum of Incorporation of the Company may be altered or amended only in the manner set out in sections 16, 17 or 152(6)(b).

(2) The authority of the Company's Board of Directors to make rules for the Company, as contemplated in section 15(3)–(5), is not limited or restricted in any manner by this Memorandum of Incorporation.

(3) The Board must publish any rules made in terms of section 15(3)–(5) by delivering a copy of those rules to each shareholder by ordinary mail.

(4) The Company must publish a notice of any alteration of the Memorandum of Incorporation or the Rules, made in terms of section 17(1), by delivering a copy of the notice to each shareholder by ordinary mail.

1.4 Optional provisions of Companies Act, 2008 do not apply

(1) The Company does not elect, in terms of section 34(2), to comply voluntarily with the provisions of Chapter 3 of the Companies Act, 2008.

(2) The Company does not elect, in terms of section 118(1)(c)(ii), to submit voluntarily to the provisions of Parts B and C of Chapter 5 of the Companies Act, 2008, and to the Takeover Regulations provided for in that Act.

Article 2 – Securities of the Company

2.1 Securities

(1) The Company is authorised to issue no more than the number of shares of a single class of common shares with no nominal or par value as shown on the cover sheet, and each such issued share entitles the holder to –

(a) vote on any matter to be decided by a vote of shareholders of the company;

(b) participate in any distribution of profit to the shareholders; and

(c) participate in the distribution of the residual value of the company upon its dissolution.

(2) The Company must not make an offer to the public of any of its securities and an issued share must not be transferred to any person other than –

(a) the Company, or a related person;

(b) a shareholder of the Company, or a person related to a shareholder of the Company;

(c) a personal representative of the shareholder or the shareholder's estate;

(d) a beneficiary of the shareholder's estate; or

(e) another person approved by the Company before the transfer is effected.

(3) The pre-emptive right of the Company's shareholders to be offered and to subscribe for additional shares, as set out in section 39, is not limited, negated or restricted in any manner contemplated in section 39(2), or subject to any conditions contemplated in that section.

(4) This Memorandum of incorporation does not limit or restrict the authority of the Company's Board of Directors to –

(a) authorise the Company to issue secured or unsecured debt instruments, as set out in section 43(2); or

(b) grant special privileges associated with any debt instruments to be issued by the Company, as set out in section 43(3);

(c) authorise the Company to provide financial assistance to any person in relation to the subscription of any option or securities of the Company or a related or inter-related Company, as set out in section 44;

(d) approve the issuing of any authorised shares of the Company as capitalisation shares, as set out in section 47(1); or

(e) resolve to permit shareholders to elect to receive a cash payment in lieu of a capitalisation share, as set out in section 47(11).

2.2 Registration of beneficial interests

The authority of the Company's Board of Directors to allow the Company's issued securities to be held by and registered in the name of one person for the beneficial interest of another person, as set out in section 56(1), is not limited or restricted by this Memorandum of Incorporation.

Article 3 – Shareholders and Meetings

3.1 Shareholders' right to information

Every person who has a beneficial interest in any of the Company's securities has the rights to access information set out in section 26(1).

3.2 Shareholders' authority to act

(1) If, at any time, there is only one shareholder of the Company, the authority of that shareholder to act without notice or compliance with any other internal formalities, as set out in section 57(2), is not limited or restricted by this Memorandum of Incorporation.

(2) If, at any time, every shareholder of the Company is also a director of the Company, as contemplated in section 57(4), the authority of the shareholder(s) (sic) to act without notice or compliance with any other internal formalities, as set out in that section is not limited or restricted by this Memorandum of incorporation.

3.3 Shareholder representation by proxies

(1) This Memorandum of incorporation does not limit, restrict or vary the right of a shareholder of the Company –

(a) to appoint two or more persons concurrently as proxies, as set out in section 58 (3)(a); or

(b) to delegate the proxy's powers to another person, as set out in section 58(3)(b).

(2) The requirement that a shareholder must deliver to the Company a copy of the instrument appointing a proxy before that proxy may exercise the shareholder's rights at a shareholders' meeting, as set out in section 58(3)(c) is not varied by this Memorandum of Incorporation.

(3) The authority of a shareholder's proxy to decide without direction from the shareholder whether to exercise, or abstain from exercising, any voting right of the shareholder, as set out in section 58(7) is not limited or restricted by this Memorandum of Incorporation.

3.4 Record date for exercise of shareholder rights

If, at any time, the Company's Board of Directors fails to determine a record date, as contemplated in section 59, the record date for the relevant matter is as determined in accordance with section 59(3).

3.5 Shareholders' meetings

(1) The Company is not required to hold any shareholders' meetings other than those specifically required by the Companies Act, 2008.

(2) The right of shareholders to requisition a meeting, as set out in section 61(3), may be exercised by the holders of at least 10% of the

voting rights entitled to be exercised in relation to the matter to be considered at the meeting.

(3) The authority of the Company's Board of Directors to determine the location of any shareholders' meeting, and the authority of the Company to hold any such meeting in the Republic or in any foreign country, as set out in section 61(9) is not limited or restricted by this Memorandum of incorporation.

(4) The minimum number of days for the Company to deliver a notice of a shareholders' meeting to the shareholders, is as provided for in section 62(1).

(5) The authority of the Company to conduct a meeting entirely by electronic communication, or to provide for participation in a meeting by electronic communication, as set out in section 63 is not limited or restricted by this Memorandum of Incorporation.

(6) The quorum requirement for a shareholders' meeting to begin, or for a matter to be considered is as set out in section 64(1) without variation.

(7) The time periods allowed in section 64(4) and (5) apply to the Company without variation.

(8) The authority of a meeting to continue to consider a matter, as set out in section 64(9) is not limited or restricted by this Memorandum of incorporation.

(9) The maximum period allowable for an adjournment of a shareholders' meeting is as set out in section 64(12), without variation.

3.6 Shareholders' resolutions

(1) For an ordinary resolution to be adopted at a shareholders' meeting, it must be supported by the holders of more than 50% of the voting rights exercised on the resolution, as provided in section 65(7).

(2) For a special resolution to be adopted at a shareholders' meeting, it must be supported by the holders of at least 75% of the voting rights exercised on the resolution, as provided in section 65(9).

(3) A special resolution adopted at a shareholders' meeting is not required for a matter to be determined by the Company, except those matters set out in section 65(11), or elsewhere in the Act.

Article 4 – Directors and Officers

4.1 Composition of the Board of Directors

(1) The Board of Directors of the Company comprises at least the number of directors, and alternate directors shown on the cover sheet, each of whom is to be elected by the holders of the Company's securities as contemplated in section 68.

(2) The manner of electing directors of the Company is as set out in section 68(2), and each elected director of the Company serves for an indefinite term, as contemplated in section 68(1).

(3) The Company's Board of Directors must not register the transfer of any shares unless the conditions for the transfer contemplated in article 2.1 (2) have been met.

4.2 Authority of the Board of Directors

(1) The authority of the Company's Board of Directors to manage and direct the business and affairs of the Company, as set out in section 66(1) is not limited or restricted by this Memorandum of Incorporation.

(2) If, at any time, the Company has only one director, as contemplated in section 57(3), the authority of that director to act without notice or compliance with any other internal formalities, as set out in that section is not limited or restricted by this Memorandum of incorporation.

4.3 Directors' Meetings

(1) The right of the Company's directors to requisition a meeting of the Board, as set out in section 73(1), may be exercised by at least 25% of the directors, if the board has 12 or more members, or by 2 (two) directors, in any other case.

(2) This memorandum of incorporation does not limit or restrict the authority of the Company's Board of Directors to –

(a) conduct a meeting entirely by electronic communication, or to provide for participation in a meeting by electronic communication, as set out in section 73(3); or

(b) determine the manner and form of providing notice of its meetings, as set out in section 73(4); or

(c) proceed with a meeting despite a failure or defect in giving notice of the meeting, as set out in section 73(5); or

(d) consider a matter other than at a meeting, as set out in section 74.

4.4 Directors' compensation and financial assistance

This Memorandum of Incorporation does not limit the authority of the Company to –

(a) pay remuneration to the Company's directors, in accordance with a special resolution approved by the Company's shareholders within the previous two years, as set out in section 66(9) and (10);

(b) advance expenses to a director, or indemnify a director, in respect of the defence of legal proceedings, as set out in section 78(4);

(c) indemnify a director in respect of liability, as set out in section 78(5); or

(d) purchase insurance to protect the Company, or a director, as set out in section 78(7).

Form CoR 15.1 B: Long Standard Form for Profit Companies

Memorandum of Incorporation of

[*Insert Name of Company*] _____,

which is a profit company, has at least _____ director(s) and _____ alternate directors, is authorised to issue securities as described in Article 2, and is referred to in the rest of this Memorandum of Incorporation as 'the Company'.

Adoption of Memorandum of Incorporation

This Memorandum of Incorporation was adopted by the incorporators of the Company, in accordance with section 13(1), as evidenced by the following signatures made by each of them, or on their behalf (only required in the case of new company registrations):

Name and Address	Identity or Registration#	Signature	Dated

Article 1 – Incorporation and Nature of the Company

In this Memorandum of Incorporation –

(a) a reference to a section by number refers to the corresponding section of the Companies Act, 2008;

(b) words that are defined in the Companies Act 2008, bear the same meaning in this Memorandum as in that Act; and

(c) words appearing to the right of an optional check line are void unless that line contains a mark to indicate that it has been chosen as the applicable option.

The Schedules attached to this Memorandum of Incorporation are a part of this Memorandum of Incorporation.

1.1 Incorporation

(1) The Company is incorporated as from _____ as a

_____ state owned company, as defined in section 8(2)(a).

_____ private company, as defined in section 8(2)(b).

_____ personal liability company, as defined in section 8(2)(c).

_____ public company, as defined in section 8(2)(d).

as defined in the Companies Act, 2008.

(2) The Company is incorporated in accordance with and governed by –

(a) the unalterable provisions of the Companies Act, 2008; and

(b) the alterable provisions of the Companies Act, 2008, subject to the limitations, extensions, variations or substitutions set out in this Memorandum; and

(c) the provisions of this Memorandum of Incorporation.

1.2 Powers of the Company

(1) The Company –

_____ is not subject to any provisions contemplated in section 15(2)(b) or (c).

_____ is subject to provisions contemplated in section 15(2)(b) or (c), as set out in Part A of Schedule 1.

(2) The purposes and powers of the Company –

_____ are not subject to any restrictions, limitations or qualifications, as contemplated in section 19(1)(b)(ii).

_____ are subject to the restrictions, limitations or qualifications contemplated in section 19(1)(b)(ii), as set out in Part A of Schedule 1.

1.3 Memorandum of Incorporation and Company rules

(1) This Memorandum of Incorporation of the Company –

_____ may be altered or amended only in the manner set out in sections 16, 17 or 152(6)(b).

_____ may be altered or amended in the manner set out in sections 16, 17 or 152(6)(b), subject to the provisions contemplated in section 16(2), as set out in Part B of Schedule 1.

(2) The authority of the Company's Board of Directors to make rules for the Company, as contemplated in section 15(3)–(5) –

_____ is not limited or restricted in any manner by this Memorandum of Incorporation.

_____ is limited or restricted to the extent set out in Part B of Schedule 1.

(3) The Board must publish any rules made in terms of section 15(3)–(5) –

_____ by delivering a copy of those rules to each shareholder by ordinary mail.

_____ in accordance with the requirements set out in Part B of Schedule 1.

(4) The Company must publish a notice of any alteration of the Memorandum of Incorporation or the Rules, made in terms of section 17(1) –

_____ by delivering a copy of those rules to each shareholder by ordinary mail.

_____ in accordance with the requirements set out in Part B of Schedule 1.

1.4 Application of optional provisions of Companies Act, 2008

[*This sub-article is not to be used in the case of a public company*]

(1) The Company –

_____ does not elect, in terms of section 34(2), to comply voluntarily with the provisions of Chapter 3 of the Companies Act, 2008.

_____ does elect, in terms of section 34(2), to comply voluntarily with the provisions of Chapter 3 of the Companies Act, 2008, to the extent set out in Part C of Schedule 1.

(2) The Company –

_____ does not elect, in terms of section 118(1)(c)(ii), to submit voluntarily to the provisions of Parts B and C of Chapter 5 of the Companies Act, 2008, and to the Takeover Regulations provided for in that Act.

_____ elects in terms of section 118(1)(c)(ii) to submit voluntarily to the provisions of Parts B and C of Chapter 5 of the Companies Act, 2008, and to the Takeover Regulations in terms of that Act, to the extent set out in Part C of Schedule 1.

Article 2 – Securities of the Company

2.1 Shares

(1) The Company is authorised to issue no more than –

_____ shares of a single class of shares with no nominal or par value, each of which entitles the holder to –

(a) vote on any matter to be decided by a vote of shareholders of the company;

(b) participate in any distribution of profit to shareholders; and

(c) share in the distribution of the company's residual value upon its dissolution.

_____ the maximum number of each of the classes of shares set out in Part A of Schedule 2, subject to the preferences, rights, limitations and other terms associated with each such class, as set out in Part A of Schedule 2.

(2) The authority of the Company's Board of Directors to increase or decrease the number of authorised shares of any class of the Company's shares, to reclassify any shares that have been authorised but not issued, to classify any unclassified shares, or to determine the preferences, rights, limitations or other terms of any class of shares, as set out in section 36(2)(b) and (3) –

_____ is not limited or restricted by this Memorandum of Incorporation.

_____ is limited or restricted to the extent set out in Part A of Schedule 2.

[*In the case of a public company*]

(2A) The Company

_____ must not make an offer to the public of any of its securities.

[*In the case of a private or personal liability company*]

_____ may make an offer to the public of any of its securities.

(2B) The transferability of the shares of the Company –

_____ is not restricted.

_____ is restricted as set out in Part F of Schedule 2.

[*In the case of a private or personal liability company*]

(3) The shareholders of the Company –

_____ do not have any pre-emptive right to be offered and to subscribe additional shares of the company.

_____ have a common pre-emptive right to be offered and to subscribe additional shares of the company, as set out in Part A of Schedule 2.

_____ have only such pre-emptive rights to be offered and to subscribe additional shares of the company, if any, as are set out in the preferences, rights, limitations and other terms associated with their respective classes of shares.

(4) The pre-emptive right of the Company's shareholders to be offered and to subscribe additional shares, as set out in section 39 –

_____ is unconditional, and is not limited, negated or restricted in any manner contemplated in subsection (3) of section 39.

_____ is subject to the conditions, limitations, or restrictions set out in Part A of Schedule 3.

_____ does not apply with respect to any shares of the Company.

[*In the case of a private or personal liability company*]

(5) The authority of the Company's Board of Directors to authorise the Company to provide financial assistance to any person in relation to

the subscription of any option or securities of the Company or a related or inter-related company, as set out in section 44 –

_____ is not limited or restricted by this Memorandum of Incorporation.

_____ is limited or restricted to the extent set out in Part B of Schedule 2.

(6) The authority of the Company's Board of Directors to approve the issuing of any authorised shares of the Company as capitalisation shares, to issue shares of one class as capitalisation shares in respect of shares of another class, and to resolve to permit shareholders to elect to receive a cash payment in lieu of a capitalisation share, as set out in section 47(1) –

_____ is not limited or restricted by this Memorandum of Incorporation.

_____ is limited or restricted to the extent set out in Part C of Schedule 2.

(7) Securities of the Company are to be issued -

_____ in uncertificated form, as contemplated in section 49 (2)(b).

_____ in either certificated or uncertificated form, as the Board may determine.

2.2 Debt instruments

(1) The authority of the Company's Board of Directors to authorise the company to issue secured or unsecured debt instruments, as set out in section 43(2) –

_____ is not limited or restricted by this Memorandum of Incorporation.

_____ is limited or restricted to the extent set out in Part D of Schedule 2.

(2) The authority of the Company's Board of Directors to grant special privileges associated with any debt instruments to be issued by the company, as set out in section 43(3) –

_____ is not limited or restricted by this Memorandum of Incorporation.

_____ is limited or restricted to the extent set out in Part D of Schedule 2.

2.3 Registration of beneficial interests

The authority of the Company to allow the Company's issued securities to be held by, and registered in the name of, one person for the beneficial interest of another person, as set out in section 56(1) –

_____ is not limited or restricted by this Memorandum of Incorporation.

_____ is limited or restricted to the extent set out in Part E of Schedule 2.

Article 3 – Shareholders

3.1 Shareholders' right to information

In addition to the rights to access information set out in section 26(1), every person who has a beneficial interests (sic) in any of the Company's securities or any other specified person, has the further rights to information, if any, set out in Part A of Schedule 3 of this Memorandum of Incorporation.

3.2 Shareholders' authority to act

If, at any time, there is only one shareholder of the Company, the authority of that shareholder to act without notice or compliance with any other internal formalities, as set out in section 57(2) –

_____ is not limited or restricted by this Memorandum of Incorporation.

_____ is limited or restricted to the extent set out in Part A of Schedule 3.

3.3 Representation by concurrent proxies

The right of a shareholder of the Company to appoint two or more persons concurrently as proxies, as set out in section 58(3)(a) –

_____ is not limited, restricted or varied by this Memorandum of Incorporation.

_____ is limited, restricted or varied to the extent set out in Part B of Schedule 3.

3.4 Authority of proxy to delegate

The authority of a shareholder's proxy to delegate the proxy's powers to another person, as set out in section 58(3)(c) –

_____ is not limited or restricted by this Memorandum of Incorporation.

_____ is limited or restricted to the extent set out in Part B of Schedule 3.

3.5 Requirement to deliver proxy instrument to the Company

The requirement that a shareholder must deliver to the Company a copy of the instrument appointing a proxy before that proxy may exercise the shareholder's rights at a shareholders meeting, as set out in section 58(3)(c) –

_____ is not varied by this Memorandum of Incorporation.

_____ is varied to the extent set out in Part B of Schedule 3.

3.6 Deliberative authority of proxy

The authority of a shareholder's proxy to decide without direction from the shareholder whether to exercise, or abstain from exercising any voting right of the shareholder, as set out in section 58(7) –

_____ is not limited or restricted by this Memorandum of Incorporation.

_____ is limited or restricted to the extent set out in Part B of Schedule 3.

3.7 Record date for exercise of shareholder rights

If, at any time, the Company's Board of Directors fails to determine a record date, as contemplated in section 59, the record date for the relevant matter is –

_____ as determined in accordance with section 59(3).

_____ as determined in the manner set out in Part C of Schedule 3.

Article 4 – Shareholders' Meetings

4.1 Requirement to hold meetings

The Company –

_____ is not required to hold any shareholders' meetings other than those specifically required by the Companies Act, 2008.

_____ is required to hold shareholders' meetings, in addition to those specifically required by the Companies Act, 2008, as set out in Part A of Schedule 4.

4.2 Shareholders' right to requisition a meeting

The right of shareholders to requisition a meeting, as set out in section 61(3), may be exercised –

_____ by the holders of at least 10% of the voting rights entitled to be exercised in relation to the matter to be considered at the meeting, as provided for in that section.

_____ by the holders of at least _____ % of the voting rights entitled to be exercised in relation to the matter to be considered at the meeting, despite the provisions of that section [*in the case of a percentage lower than 10*].

4.3 Location of shareholders' meetings

The authority of the Company's Board of Directors to determine the location of any shareholders' meeting, and the authority of the Company to hold any such meeting in the Republic or in any foreign country, as set out in section 61(9) –

_____ is not limited or restricted by this Memorandum of Incorporation.

_____ is limited or restricted to the extent set out in Part B of Schedule 4.

4.4 Notice of shareholders' meetings

The minimum number of days for the Company to deliver a notice of a shareholders' meeting to the shareholders, as required by section 62 –

_____ is as provided for in section 62(1).

_____ is _____ business days before the meeting is to begin.

4.5 Electronic participation in shareholders' meetings

The authority of the Company to conduct a meeting entirely by electronic communication, or to provide for participation in a meeting by electronic communication, as set out in section 63 –

_____ is not limited or restricted by this Memorandum of Incorporation.

_____ is limited or restricted to the extent set out in Part C of Schedule 4.

4.6 Quorum for shareholders' meetings

(1) The quorum requirement for a shareholders' meeting to begin, or for a matter to be considered are –

_____ as set out in section 64(1) without variation.

_____ as set out in section 64(1) subject to a minimum of _____ % in substitution for the 25% required by that section.

(2) The time periods allowed in section 64(4) and (5) –

_____ apply to the Company without variation.

_____ apply to the Company, subject to the variations set out in Part D of Schedule 4.

(3) The authority of a meeting to continue to consider a matter, as set out in section 64(9) –

_____ is not limited or restricted by this Memorandum of Incorporation.

_____ is limited or restricted to the extent set out in Part D of Schedule 4.

4.7 Adjournment of shareholders' meetings

The maximum period allowable for an adjournment of a shareholders meeting is –

_____ as set out in section 64(12), without variation.

_____ as set out in section 64(12), subject to the variations set out in Part E of Schedule 4.

4.8 Shareholders' resolutions

(1) For an ordinary resolution to be adopted at a shareholders' meeting, it must be supported by the holders of –

_____ more than 50% of the voting rights exercised on the resolution, as provided in section 65(7).

_____ at least _____% of the voting rights exercised on the resolution, despite section 65(7).

_____ at least the minimum percentage of the voting rights exercised on the resolution, as set out in Part F of Schedule 4.

(2) For a special resolution to be adopted at a shareholders' meeting, it must be supported by the holders of at least –

_____ 75% of the voting rights exercised on the resolution, as provided in section 65(9).

_____ % of the voting rights exercised on the resolution, despite section 65(7).

_____ the minimum percentage of the voting rights exercised on the resolution, as set out in Part F of Schedule 4.

(3) A special resolution adopted at a shareholders' meeting is –

_____ not required for a matter to be determined by the Company, except those matters set out in section 65(11), or elsewhere in the Act.

_____ required, in addition to the matters set out in section 65(11), for the matters set out in Part G of Schedule 4.

Article 5 – Directors and Officers

5.1 Composition of the Board of Directors

(1) The Board of Directors of the Company comprises of _____ directors, and _____ alternate directors, to be elected by the shareholders as contemplated in section 68.

(2) In addition to the elected directors –

_____ there are no appointed or *ex officio* directors of the Company, as contemplated in section 66(4).

_____ there are _____ appointed, and _____ *ex officio* directors of the Company, as contemplated in section 68, to be designated in the manner specified in Part A of Schedule 5.

(3) In addition to satisfying the qualification and eligibility requirements set out in section 69, to become or remain a director or a prescribed officer of the Company, a person –

_____ need not satisfy any further eligibility requirements or qualifications.

_____ must satisfy the additional eligibility requirements and qualifications set out in Part B of Schedule 5.

(4) Each elected director of the Company serves for –

_____ an indefinite term, as contemplated in section 68(1).

_____ a term of _____ years.

_____ a term determined in the manner set out in Part C of Schedule 5.

(5) The manner of electing directors of the Company is –

_____ as set out in section 68(2).

_____ as set out in Part C of Schedule 5.

(6) The authority of the Company's Board of Directors to fill any vacancy on the Board on a temporary basis, as set out in section 68(3) –

_____ is not limited or restricted by this Memorandum of Incorporation.

_____ is limited or restricted to the extent set out in Part D of Schedule 5.

5.2 Authority of the Board of Directors

(1) The authority of the Company's Board of Directors to manage and direct the business and affairs of the Company, as set out in section 66(1) –

_____ is not limited or restricted by this Memorandum of Incorporation.

_____ is limited or restricted to the extent set out in Part E of Schedule 5.

(2) If, at any time, the Company has only one director, as contemplated in section 57(3), the authority of that director to act without notice or compliance with any other internal formalities, as set out in that section –

_____ is not limited or restricted by this Memorandum of Incorporation.

_____ is limited or restricted to the extent set out in Part F of Schedule 5.

5.2A Liability of Directors

_____The company is a personal liability company and the directors and past directors are jointly and severally liable for the debts and liabilities of the company as contemplated in section 19 (3).

5.3 Directors' Meetings

(1) The authority of the Company's Board of Directors to consider a matter other than at a meeting, as set out in section 74 –

_____ is not limited or restricted by this Memorandum of Incorporation.

_____ is limited or restricted to the extent set out in Part G of Schedule 5.

(2) The right of the Company's directors to requisition a meeting of the Board, as set out in section 73(1), may be exercised –

_____ by at least 25% of the directors, if the board has 12 or more members, or by 2 (two) directors in any other case, as provided in that section; or

_____ by at least _____ % of the directors, _____ by at least _____ directors, despite the provisions of that section.

(3) The authority of the Company's Board of Directors to conduct a meeting entirely by electronic communication, or to provide for participation in a meeting by electronic communication, as set out in section 73(3) –

_____ is not limited or restricted by this Memorandum of Incorporation.

_____ is limited or restricted to the extent set out in Part H of Schedule 5.

(4) The authority of the Company's Board of Directors to determine the manner and form of providing notice of its meetings, as set out in section 73(4) –

_____ is not limited or restricted by this Memorandum of Incorporation.

_____ is limited or restricted to the extent set out in Part H of Schedule 5.

(5) The authority of the Company's Board of Directors to proceed with a meeting despite a failure or defect in giving notice of the meeting, as set out in section 73(5) –

_____ is not limited or restricted by this Memorandum of Incorporation.

_____ is limited or restricted to the extent set out in Part H of Schedule 5.

(6) The quorum requirement for a directors meeting to begin, the voting rights at such a meeting, and the requirements for approval of a resolution at such a meeting, are –

_____ as set out in section 73(5), without variation.

_____ as set out in section 73(5) subject to the variations set out in Part H of Schedule 5.

5.4 Directors compensation and financial assistance

(1) The authority of the Company to pay remuneration to the Company's directors, in accordance with a special resolution approved by the Company's shareholders within the previous two years, as set out in section 66(8) and (9) –

_____ is not limited or restricted by this Memorandum of Incorporation.

_____ is limited or restricted to the extent set out in Part I of Schedule 5.

(2) The authority of the Company's Board of Directors, as set out in section 45, to authorise the Company to provide financial assistance to a director, prescribed officer or other person referred to in section 45(2) –

_____ is not limited or restricted by this Memorandum of Incorporation.

_____ is limited or restricted to the extent set out in Part I of Schedule 5.

5.5 Indemnification of Directors

(1) The authority of the Company to advance expenses to a director, or indemnify a director, in respect of the defence of legal proceedings, as set out in section 78(4) –

_____ is not limited, restricted or extended by this Memorandum of Incorporation.

_____ is limited, restricted or extended to the extent set out in Part J of Schedule 5.

(2) The authority of the Company to indemnify a director in respect of liability, as set out in section 78(5) –

_____ is not limited or restricted by this Memorandum of Incorporation.

_____ is limited or restricted to the extent set out in Part J of Schedule 5.

(3) The authority of the Company to purchase insurance to protect the Company, or a director, as set out in section 78(7) –

_____ is not limited, restricted or extended by this Memorandum of Incorporation.

_____ is limited, restricted or extended to the extent set out in Part J of Schedule 5.

5.6 Committees of the Board

(1) The authority of the Company's Board of Directors to appoint committees of directors, and to delegate to any such committee any of the authority of the Board, as set out in section 72(1), and to include in any such committee persons who are not directors, as set out in section 72(2)(a) –

_____ is not limited or restricted by this Memorandum of Incorporation.

_____ is limited or restricted to the extent set out in Part K of Schedule 5.

(2) The authority of a committee appointed by the Company's Board of Directors, as set out in section 72(2)(b) and (c) –

_____ is not limited or restricted by this Memorandum of Incorporation.

_____ is limited or restricted to the extent set out in Part K of Schedule 5.

Article 6 – General Provisions

Insert any further provisions desired in this or additional Articles.

Schedule 1 – Incorporation and nature of the Company

Schedule 2 – Company Securities

Schedule 3 – Shareholders

Schedule 4 – Shareholders Meetings

Schedule 5 – Directors of the Company

FORM CoR 15.1D: Long Standard Form Non-profit Companies without Members

Memorandum of Incorporation of

[Insert name of Company] _____,

which is referred to in the rest of this Memorandum of Incorporation as 'the Company'.

The Company is a Non-profit company without members, with the following objects:

The Company has at least _____ directors and _____ alternate director(s), to be appointed in the following manner:

Adoption of Memorandum of Incorporation

This Memorandum of Incorporation was adopted by the incorporators of the Company, in accordance with section 13(1), as evidenced by the following signatures made by each of them, or on their behalf (only required in th ecase of new company registrations).

Name and Address	Identity or Registration#	Signature	Dated

In this Memorandum of Incorporation –

(a) a reference to a section by number refers to the corresponding section of the Companies Act, 2008;

(b) words that are defined in the Companies Act, 2008 bear the same meaning in this Memorandum as in that Act; and

(c) words appearing to the right of an optional check line are void unless that line contains a mark to indicate that it has been chosen as the applicable option.

The Schedules attached to this Memorandum of Incorporation are a part of this Memorandum of Incorporation.

Article 1 – Incorporation and Nature of the Company

1.1 Incorporation

(1) The Company is incorporated as a non-profit company as defined in the Companies Act, 2008.

(2) The Company is incorporated in accordance with and governed by –

(a) the unalterable provisions of the Companies Act, 2008 that are applicable to non-profit companies;

(b) the alterable provisions of the Companies Act, 2008 that are applicable to non-profit companies, subject to the limitations, extensions, variations or substitutions set out in this Memorandum; and

(c) the provisions of this Memorandum of Incorporation.

1.2 Objects and Powers of the Company

(1) The objects of the Company are set out on the cover sheet and, except to the extent necessarily implied by the stated objects, the purposes and powers of the Company –

_____ are not subject to any provisions contemplated in section 19(1)(b)(ii).

_____ is subject to provisions contemplated in section 19(1)(b)(ii), as set out in Part A of Schedule 1.

(2) The Company –

_____ is not subject to any provision contemplated in section 15(2)(b) or (c).

_____ is subject to the provision contemplated in section 15(2)(b) or (c), as set out in Part B of Schedule 1.

(3) Upon dissolution of the Company, its net assets must be distributed in the manner determined in accordance with –

(a) Item 1(4)(b) of Schedule 1 of the Companies Act, 2008; and

(b) the provisions, if any, set out in Part D of Schedule 1 of this Memorandum.

1.3 Memorandum of Incorporation and Company rules

(1) This Memorandum of Incorporation of the Company –

_____ may be altered or amended only in the manner set out in sections 16, 17 or 152(6)(b).

_____ may be altered or amended in the manner set out in sections 16, 17 or 152(6)(b), subject to the provisions contemplated in section 162, as set out in Part D of Schedule 1.

(2) The authority of the Company's Board of Directors to make rules for the Company, as contemplated in section 15(3)–(5) –

_____ is not limited or restricted in any manner by this Memorandum of Incorporation.

_____ is limited or restricted to the extent set out in Part C of Schedule 1.

(3) The Board must publish any rules made in terms of section 15(3)–(5) –

_____ by delivering a copy of those rules to each director by ordinary mail.

_____ in accordance with the requirements set out in Part C of Schedule 1.

(4) The Company must publish a notice of any alteration of the Memorandum of Incorporation or the Rules, made in terms of section 17(1) –

_____ by delivering a copy of those rules to each director by ordinary mail.

_____ in accordance with the requirements set out in Part C of Schedule 1.

1.4 Optional provisions of Companies Act, 2008 do not apply

The Company –

_____ does not elect, in terms of section 34(2), to comply voluntarily to the provisions of Chapter 3 of the Companies Act, 2008.

_____ does elect, in terms of section 34(2), to comply voluntarily to the provisions of Chapter 3 of the Companies Act, 2008.

1.5 Company not to have members

As contemplated in Item 4(1) of Schedule 1 of the Companies Act, 2008, the Company has no members.

Article 2 – Directors and Officers

2.1 Composition of the Board of Directors

(1) The Board of Directors of the Company comprises the number of directors, and alternate directors shown on the cover sheet, each of whom –

(a) is to be appointed in the manner set out on the cover sheet; and

(b) serves for –

_____ an indefinite term until substituted by the person or entity that appointed the director.

_____ a term of _____ years.

_____ a term determined in the manner set out on the cover sheet.

(2) In addition to the appointed directors –

_____ there are no *ex officio* directors of the Company, as contemplated in section 66(4).

_____ there are _____ *ex officio* directors of the Company, as contemplated in section 66, to be designated in the manner specified in Part A of Schedule 2.

(3) In addition to satisfying the qualification and eligibility requirements set out in section 69, to become or remain a director or a prescribed officer of the Company, a person –

_____ need not satisfy any further eligibility requirements or qualifications.

_____ must satisfy the additional eligibility requirements and qualifications set out in Part B of Schedule 2.

2.2 Authority of the Board of Directors

The authority of the Company's Board of Directors to manage and direct the business and affairs of the Company, as set out in section 66(1) –

_____ is not limited or restricted by this Memorandum of Incorporation.

_____ is limited or restricted to the extent set out in Part C of Schedule 2.

2.2[1] **Board of Directors meetings**

(1) The authority of the Company's Board of Directors to consider a matter other than at a meeting, as set out in section 74 –

_____ is not limited or restricted by this Memorandum of Incorporation.

_____ is limited or restricted to the extent set out in Part D of Schedule 2.

(2) The right of the Company's directors to requisition a meeting of the Board, as set out in section 73(1), may be exercised –

_____ by at least 25% of the directors if the board has 12 or more members or by 2 (two) directors in any other case, as provided in that section; or

_____ by at least _____ % of the directors, or by at least _____ directors, despite the provisions of that section.

(3) The authority of the Company's Board of Directors to conduct a meeting entirely by electronic communication, or to provide for participation in a meeting by electronic communication, as set out in section 73(3) –

_____ is not limited or restricted by this Memorandum of Incorporation.

_____ is limited or restricted to the extent set out in Part E of Schedule 2.

(4) The authority of the Company's Board of Directors to determine the manner and form of providing notice of its meetings, as set out in section 73(4) –

_____ is not limited or restricted by this Memorandum of Incorporation.

_____ is limited or restricted to the extent set out in Part E of Schedule 2.

1 Numbered as in the regulations.

(5) The authority of the Company's Board of Directors to proceed with a meeting despite a failure or defect in giving notice of the meeting, as set out in section 73(5) –

_____ is not limited or restricted by this Memorandum of Incorporation.

_____ is limited or restricted to the extent set out in Part E of Schedule 2.

(6) The quorum requirement for a directors meeting to begin, the voting rights at such a meeting, and the requirements for approval of a resolution at such a meeting, are –

_____ as set out in section 73(5).

_____ as set out in section 73(5) subject to the variations set out in Part E of Schedule 2.

2.3 Indemnification of Directors

(1) The authority of the Company to advance expenses to a director, or indemnify a director, in respect of the defence of legal proceedings, as set out in section 78(3) –

_____ is not limited, restricted or extended by this Memorandum of Incorporation.

_____ is limited, restricted or extended to the extent set out in Part F of Schedule 2.

(2) The authority of the Company to indemnify a director in respect of liability, as set out in section 78(5) –

_____ is not limited or restricted by this Memorandum of Incorporation.

_____ is limited or restricted to the extent set out in Part F of Schedule 2.

(3) The authority of the Company to purchase insurance to protect the Company, or a director, as set out in section 78(6) –

_____ is not limited, restricted or extended by this Memorandum of Incorporation.

_____ is limited, restricted or extended to the extent set out in Part F of Schedule 2.

2.4 Officers and Committees

(1) The Board of Directors may appoint any officers it considers necessary to better achieve the objects of the Company.

(2) The authority of the Company's Board of Directors to appoint committees of directors, and to delegate to any such committee any of the authority of the Board, as set out in section 72(1), and to include in any such committee persons who are not directors, as set out in section 72(2)(a) –

_____ is not limited or restricted by this Memorandum of Incorporation.

_____ is limited or restricted to the extent set out in Part G of Schedule 2.

(3) The authority of a committee appointed by the Company's Board of Directors, as set out in section 72(2)(b) and (c) –

_____ is not limited or restricted by this Memorandum of Incorporation.

_____ is limited or restricted to the extent set out in Part G of Schedule 2.

Article 3 – General Provisions

Insert any further provisions desired in this or additional Articles.

Schedule 1 – Incorporation and nature of the Company

Schedule 2 – Directors of the Company

FORM CoR 15.1E Long Standard Form Non-profit Companies with Members

Memorandum of Incorporation of

[*Insert name of Company*] _____,

which is referred to in the rest of this Memorandum of Incorporation as 'the Company'.

The Company is a Non-profit company with members, with the following objects:

Adoption of Memorandum of Incorporation

This Memorandum of Incorporation was adopted by the incorporators of the Company, in accordance with section 13(1), as evidenced by the following signatures made by each of them, or on their behalf (only required in the case of new company registrations):

Name and Address	Identity or Registration#	Signature	Dated

In this Memorandum of Incorporation –

(a) a reference to a section by number refers to the corresponding section of the Companies Act, 2008;

(b) words that are defined in the Companies Act, 2008 bear the same meaning in this Memorandum as in that Act; and

(c) words appearing to the right of an optional check line are void unless that line contains a mark to indicate that it has been chosen as the applicable option.

The Schedules attached to this Memorandum of Incorporation are a part of this Memorandum of Incorporation.

Article 1 – Incorporation and Nature of the Company

1.1 Incorporation

(1) The Company is incorporated as a Non-profit company as defined in the Companies Act, 2008.

(2) The Company is incorporated in accordance with and governed by –

(a) the unalterable provisions of the Companies Act, 2008 that are applicable to Non-profit companies;

(b) the alterable provisions of the Companies Act, 2008 that are applicable to Non-profit companies, subject to the limitations, extensions, variations or substitutions set out in this Memorandum; and

(c) the provisions of this Memorandum of Incorporation.

1.2 Objects and Powers of the Company

(1) The objects of the Company are set out in on the cover sheet and, except to the extent necessarily implied by the stated objects, the purposes and powers of the Company –

_____ are not subject to any restriction, limitation or qualification, as contemplated in section 19(1)(b)(ii).

_____ are subject to any restriction, limitation or qualification, as contemplated in section 19(1)(b)(ii), as set out in Part A of Schedule 1.

(2) The Company –

_____ is not subject to any provision contemplated in section 15(2)(b) or (c).

_____ is subject to the provision contemplated in section 15(2)(b) or (c), as set out in Part B of Schedule 1.

(3) Upon dissolution of the Company, its net assets must be distributed in the manner determined in accordance with –

(a) Item 1(4)(b) of Schedule 1 of the Companies Act, 2008; and

(b) the provisions, if any, set out in Part C of Schedule 1 of this Memorandum.

1.3 Memorandum of Incorporation and Company rules

(1) This Memorandum of Incorporation of the Company –

_____ may be altered or amended only in the manner set out in sections 16, 17 or 152(6)(b).

_____ may be altered or amended in the manner set out in sections 16, 17 or 152(6)(b), subject to the provisions contemplated in section 16(2), as set out in Part D of Schedule 1.

(2) The authority of the Company's Board of Directors to make rules for the Company, as contemplated in section 15(3)–(5) –

_____ is not limited or restricted in any manner by this Memorandum of Incorporation.

_____ is limited or restricted to the extent set out in Part D of Schedule 1.

(3) The Board must publish any rules made in terms of section 15(3)–(5) –

_____ by delivering a copy of those rules to each director and member by ordinary mail.

_____ in accordance with the requirements set out in Part D of Schedule 1.

(4) The Company must publish a notice of any alteration of the Memorandum of Incorporation or the Rules, made in terms of section 17(1) –

_____ by delivering a copy of those rules to each director and member by ordinary mail.

_____ in accordance with the requirements set out in Part D of Schedule 1.

1.4 Optional provisions of Companies Act, 2008 do not apply

The Company –

_____ does not elect, in terms of section 34(2), to comply voluntarily with the provisions of Chapter 3 of the Companies Act, 2008.

_____ does elect, in terms of section 34(2), to comply voluntarily with the provisions of Chapter 3 of the Companies Act, 2008.

1.5 Members of the Company

(1) As contemplated in item 4(1) of Schedule 1 of the Companies Act, 2008, the Company has members, who –

_____ are all in a single class, being voting members, each of whom has an equal vote in any matter to be decided by the members of the Company.

_____ are in either of two classes, being voting and non-voting members' respectively.

(2) The terms and conditions of membership in the Company are as set out in Part E of Schedule 1 of this Memorandum.

Article 2 – Rights of Members

2.1 Members' authority to act

If, at any time, every member of the Company is also a director of the Company, as contemplated in section 57(4), the authority of the members to act without notice or compliance with any other internal formalities, as set out in that section –

_____ is not limited or restricted by this Memorandum of Incorporation.

_____ is limited or restricted to the extent set out in Part A of Schedule 2.

2.2 Members' right to Information

In addition to the rights to access information set out in section 26(1), a member of the Company has the further rights to information, if any, set out in Part B of Schedule 2 of this Memorandum of Incorporation.

2.3 Representation by concurrent proxies

The right of a member of the Company to appoint 2 or more persons concurrently as proxies, as set out in section 58(3)(a) –

_____ is not limited, restricted or varied by this Memorandum of Incorporation.

_____ is limited, restricted or varied to the extent set out in Part C of Schedule 2.

2.4 Authority of proxy to delegate

The authority of a member's proxy to delegate the proxy's powers to another person, as set out in section 58(3)(b) –

_____ is not limited or restricted by this Memorandum of Incorporation.

_____ is limited or restricted to the extent set out in Part C of Schedule 2.

2.5 Requirement to deliver proxy instrument to the Company

The requirement that a member must deliver to the Company a copy of the instrument appointing a proxy before that proxy may exercise the member's rights at a members' meeting, as set out in section 58(3)(c) –

_____ is not varied by this Memorandum of Incorporation.

_____ is varied to the extent set out in Part C of Schedule 2.

2.6 Deliberative authority of proxy

The authority of a member's proxy to decide without direction from the member whether to exercise, or abstain from exercising any voting right of the member, as set out in section 58(7) –

_____ is not limited or restricted by this Memorandum of Incorporation.

_____ is limited or restricted to the extent set out in Part C of Schedule 2.

2.7 Record date for exercise of member rights

If, at any time, the Company's Board of Directors fails to determine a record date, as contemplated in section 59, the record date for the relevant matter is –

_____ as determined in accordance with section 59(3).

_____ as determined in the manner set out in Part D of Schedule 2.

Article 3 – Members' meetings

3.1 Requirement to hold meetings

The Company –

_____ is not required to hold any members' meetings other than those specifically required by the Companies Act, 2008.

_____ is required to hold members' meetings, in addition to those specifically required by the Companies Act, 2008, as set out in Part A of Schedule 3.

3.2 Members' right to requisition a meeting

The right of members to requisition a meeting, as set out in section 61(3), may be exercised –

_____ by at least 10% of the voting members, as provided for in that section.

_____ by at least _____ % of the voting members. [*in the case of a percentage lower than 10*]

3.3 Location of members' meetings

The authority of the Company's Board of Directors to determine the location of any members' meeting, and the authority of the Company to hold any such meeting in the Republic or in any foreign country, as set out in section 61(9) –

_____ is not limited or restricted by this Memorandum of Incorporation.

_____ is limited or restricted to the extent set out in Part B of Schedule 3.

3.4 Notice of members' meetings

The minimum number of days for the Company to deliver a notice of a members' meeting to the members, as required by section 62 –

_____ is as provided for in section 62(1).

_____ is _____ business days before the meeting is to begin.

3.5 Electronic participation in members' meetings

The authority of the Company to conduct a meeting entirely by electronic communication, or to provide for participation in a meeting by electronic communication, as set out in section 63 –

_____ is not limited or restricted by this Memorandum of Incorporation.

_____ is limited or restricted to the extent set out in Part C of Schedule 3.

3.6 Quorum for members' meetings

(1) The quorum requirement for a members' meeting to begin, or for a matter to be considered are –

_____ as set out in section 64(1) without variation.

_____ as set out in section 64(1) subject to a minimum of _____ % in substitution for the 25% required by that section.

(2) The time periods allowed in section 64(4) and (5) –

_____ apply to the Company without variation.

_____ apply to the Company, subject to the variations set out in Part D of Schedule 3.

(3) The authority of a meeting to continue to consider a matter, as set out in section 64(9) –

_____ is not limited or restricted by this Memorandum of Incorporation.

_____ is limited or restricted to the extent set out in Part D of Schedule 3.

3.7 Adjournment of members' meetings

The maximum period allowable for an adjournment of a members' meeting is –

_____ as set out in section 64(12), without variation.

_____ as set out in section 64(12), subject to the variations set out in Part E of Schedule 3.

3.8 Members' resolutions

(1) For an ordinary resolution to be adopted at a members' meeting, it must be supported by at least –

_____ more than 50 % of the members who voted on the resolution, as provided in section 65(7).

_____ at least ___% of the members who voted on the resolution, despite section 65(7).

_____ at least the minimum percentage of members voting on the resolution, as set out in Part F of Schedule 3.

(2) For a special resolution to be adopted at a members' meeting, it must be supported by at least –

_____ 75 % of the members who voted on the resolution, as provided in section 65 (7).

_____ ___% of the members who voted on the resolution, despite section 65(7).

_____ the minimum percentage of the members who voted on the resolution, as set out in Part F of Schedule 3.

(3) A special resolution adopted at a members' meeting is –

_____ not required for a matter to be determined by the Company, except those matters set out in section 65(11);

_____ required, in addition to the matters set out in section 65(11), for the matters set out in Part F of Schedule 3.

Article 4 – Directors and Officers

4.1 Composition of the Board of Directors

(1) The Board of Directors of the Company comprises of _____ directors, and _____ alternate directors, each of whom –

(a) is to elected in the manner as set out in Part A of Schedule 4; and

(b) serves for a term of ____ years.

(2) In addition to the elected directors –

_____ there are no appointed or *ex officio* directors of the Company, as contemplated in section 66(4).

_____ there are _____ appointed, and _____ *ex officio* directors of the Company, as contemplated in section 66(4), to be designated in the manner specified in Part B of Schedule 4.

(3) In addition to satisfying the qualification and eligibility requirements set out in section 69, to become or remain a director or a prescribed officer of the Company, a person –

_____ need not satisfy any further eligibility requirements or qualifications.

_____ must satisfy the additional eligibility requirements and qualifications set out in Part C of Schedule 4.

(4) Each appointed director of the Company serves for an indefinite term, until substituted by the person or entity that made the appointment.

4.2 Authority of the Board of Directors

The authority of the Company's Board of Directors to manage and direct the business and affairs of the Company, as set out in section 66(1) –

_____ is not limited or restricted by this Memorandum of Incorporation.

_____ is limited or restricted to the extent set out in Part D of Schedule 4.

4.3 Directors' Meetings

(1) The authority of the Company's Board of Directors to consider a matter other than at a meeting, as set out in section 74 –

_____ is not limited or restricted by this Memorandum of Incorporation.

_____ is limited or restricted to the extent set out in Part E of Schedule 4.

(2) The right of the Company's directors to requisition a meeting of the Board, as set out in section 73(1), may be exercised –

_____ by at least 25% of the directors, if the board has 12 or more members, or by 2 (two) directors, in any other case, as provided in that section.

_____ by at least _____ % of the directors, or by at least _____ directors despite the provisions of that section.

(3) The authority of the Company's Board of Directors to conduct a meeting entirely by electronic communication, or to provide for participation in a meeting by electronic communication, as set out in section 73(4) –

_____ is not limited or restricted by this Memorandum of Incorporation.

_____ is limited or restricted to the extent set out in Part F of Schedule 4.

(4) The authority of the Company's Board of Directors to determine the manner and form of providing notice of its meetings, as set out in section 73(4) –

_____ is not limited or restricted by this Memorandum of Incorporation.

_____ is limited or restricted to the extent set out in Part F of Schedule 4.

(5) The authority of the Company's Board of Directors to proceed with a meeting despite a failure or defect in giving notice of the meeting, as set out in section 73(5) –

_____ is not limited or restricted by this Memorandum of Incorporation.

_____ is limited or restricted to the extent set out in Part F of Schedule 4.

(6) The quorum requirement for a directors meeting to begin, the voting rights at such a meeting, and the requirements for approval of a resolution at such a meeting, are –

_____ as set out in section 73(5).

_____ as set out in section 73(5) subject to the variations set out in Part F of Schedule 4.

4.4 Indemnification of Directors

(1) The authority of the Company to advance expenses to a director, or indemnify a director, in respect of the defence of legal proceedings, as set out in section 78(3) –

_____ is not limited, restricted or extended by this Memorandum of Incorporation.

_____ is limited, restricted or extended to the extent set out in Part G of Schedule 4.

(2) The authority of the Company to indemnify a director in respect of liability, as set out in section 78(5) –

_____ is not limited or restricted by this Memorandum of Incorporation.

_____ is limited or restricted to the extent set out in Part G of Schedule 4.

(3) The authority of the Company to purchase insurance to protect the Company, or a director, as set out in section 78(6) –

_____ is not limited, restricted or extended by this Memorandum of Incorporation.

_____ is limited, restricted or extended to the extent set out in Part G of Schedule 2.

4.5 Officers and Committees

(1) The Board of Directors may appoint any officers it considers necessary to better achieve the objects of the Company.

(2) The authority of the Company's Board of Directors to appoint committees of directors, and to delegate to any such committee any of the authority of the Board, as set out in section 72(1), and to include in any such committee persons who are not directors, as set out in section 72(2)(a) –

_____ is not limited or restricted by this Memorandum of Incorporation.

_____ is limited or restricted to the extent set out in Part H of Schedule 4.

(3) The authority of a committee appointed by the Company's Board of Directors, as set out in section 72(2)(b) and (c) –

_____ is not limited or restricted by this Memorandum of Incorporation.

_____ is limited or restricted to the extent set out in Part H of Schedule 4.

Article 5 – General Provisions

Insert any further provisions desired in this or additional Articles.

Schedule 1 – Incorporation and nature of the Company

Schedule 2 – Rights of Members

Schedule 3 – Members Meetings

Schedule 4 – Directors of the Company

Appendix B Alterable provisions

COMPANIES ACT 71 OF 2008

EXAMPLES OF ALTERABLE PROVISIONS

4. Solvency and liquidity test

(1) For any purpose of this Act, a company satisfies the solvency and liquidity test at a particular time if, considering all reasonably foreseeable financial circumstances of the company at that time –

. . .

(2) For the purposes contemplated in subsection (1) –

. . .

(c) unless the **Memorandum of Incorporation** of the company **provides otherwise**, when applying the test in respect of a distribution contemplated in paragraph (a) of the definition of "distribution" in section 1, a person is not to include as a liability any amount that would be required, if the company were to be liquidated at the time of the distribution, to satisfy the preferential rights upon liquidation of shareholders whose preferential rights upon liquidation are superior to the preferential rights upon liquidation of those receiving the distribution.

15. Memorandum of Incorporation, shareholder agreements and rules of company

(1) Each provision of a company's Memorandum of Incorporation –

(a) must be consistent with this Act; and

(b) is void to the extent that it contravenes, or is inconsistent with, this Act, subject to section 6(15).

(2) The Memorandum of Incorporation of any company may –

(a) include any provision –

(i) dealing with a matter that this Act does not address;

(ii) altering the effect of any alterable provision of this Act; or

(iii) imposing on the company a higher standard, greater restriction, longer period of time or any similarly more onerous requirement, than would otherwise apply to the company in terms of an unalterable provision of this Act;

(b) contain any restrictive conditions applicable to the company, and any requirement for the amendment of any such condition in addition to the requirements set out in section 16;

(c) prohibit the amendment of any particular provision of the Memorandum of Incorporation; or

(d) not include any provision that negates, restricts, limits, qualifies, extends or otherwise alters the substance or effect of an unalterable provision of this Act, except to the extent contemplated in paragraph (a)(iii).

(3) Except to the extent that a company's **Memorandum of Incorporation provides otherwise**, the board of the company may make, amend or repeal any necessary or incidental rules relating to the governance of the company in respect of matters that are not addressed in this Act or the Memorandum of Incorporation, by –

(a) publishing a copy of those rules, in any manner required or permitted by the Memorandum of Incorporation, or the rules of the company; and

(b) filing a copy of those rules.

. . .

16. Amending Memorandum of Incorporation

(1) A company's Memorandum of Incorporation may be amended –

(a) in compliance with a court order in the manner contemplated in subsection (4);

(b) in the manner contemplated in section 36(3) and (4); or

(c) at any other time if a special resolution to amend it –

(i) is proposed by –

(aa) the board of the company; or

(bb) shareholders entitled to exercise at least 10% of the *voting rights* that may be exercised on such a resolution; and

(ii) is adopted at a shareholders meeting, or in accordance with section 60, subject to subsection (3).

(2) A company's **Memorandum of Incorporation may provide different requirements** than those set out in subsection (1)(c)(i) with respect to proposals for amendments.

. . .

17. Alterations, translations and consolidations of Memorandum of Incorporation

(1) The board of a company, or an individual authorised by the board, may alter the company's rules, or its Memorandum of Incorporation, in any manner necessary to correct a patent error in spelling, punctuation, reference, grammar or similar defect on the face of the document, by –

(a) publishing a notice of the alteration, in any manner **required or permitted by the Memorandum of Incorporation** or the rules of the company; and

(b) filing a notice of the alteration.

. . .

19. Legal status of companies

(1) From the date and time that the incorporation of a company is registered, as stated in its registration certificate, the company –

(b) has all of the legal powers and capacity of an individual, except to the extent that –

(i) a juristic person is incapable of exercising any such power, or having any such capacity; or

(ii) the company's **Memorandum of Incorporation** provides otherwise;

. . .

26. Access to company records

. . .

(2) In addition to the information rights set out in subsections (1) and (2), the **Memorandum of Incorporation** of a company may establish additional information rights of any person, with respect to any information pertaining to the company, but no such right may negate or diminish any mandatory protection of any record required by or in terms of Part 3 of the Promotion of Access to Information Act, 2000 (Act No. 2 of 2000).

. . .

34. Additional accountability requirements for certain companies

(1) In addition to complying with the requirements of this Part, a public company or state-owned company must also comply with the extended accountability requirements set out in Chapter 3.

(2) A private company, personal liability company or non-profit company is not required to comply with the extended accountability requirements set out in Chapter 3, except to the extent contemplated in section 84(1)(c), or as required by the company's **Memorandum of Incorporation**.

36. Authorisation for shares

. . .

(2) The authorisation and classification of shares, the numbers of authorised shares of each class, and the preferences, rights, limitations and other terms associated with each class of shares, as set out in a company's Memorandum of Incorporation, may be changed only by –

(a) an amendment of the Memorandum of Incorporation by special resolution of the shareholders; or

(b) the board of the company, in the manner contemplated in subsection (3), except to the extent that the Memorandum of Incorporation provides otherwise.

(3) Except to the extent that a company's **Memorandum of Incorporation provides otherwise**, the company's board may –

(a) increase or decrease the number of authorised shares of any class of shares;

(b) reclassify any classified shares that have been authorised but not issued;

(c) classify any unclassified shares that have been authorised as contemplated in subsection (1)(c), but are not issued; or

(d) determine the preferences, rights, limitations or other terms of shares in a class contemplated in subsection (1)(d).

. . .

39. Subscription of shares

. . .

(2) If a private company proposes to issue any shares, other than as contemplated in subsection (1)(b), each shareholder of that private company has a right, before any other person who is not a shareholder of that company, to be offered and, within a reasonable time to subscribe for, a percentage of the shares to be issued equal to the voting power of that shareholder's general voting rights immediately before the offer was made.

(3) A private or personal liability company's Memorandum of Incorporation may limit, negate, restrict or place conditions upon the right set out in subsection (2), with respect to any or all classes of shares of that company.

(4) Except to the extent that a private or personal liability company's **Memorandum of Incorporation** provides otherwise –

(a) in exercising a right in terms of subsection (2), a shareholder may subscribe fewer shares than the shareholder would be entitled to subscribe under that subsection; and

(b) shares not subscribed by a shareholder within the reasonable time contemplated in subsection (2), may be offered to other persons to the extent permitted by the Memorandum of Incorporation.

43. Securities other than shares

. . .

(2) The board of a company –

(a) may authorise the company to issue a secured or unsecured debt instrument at any time, except to the extent provided by that the company's **Memorandum of Incorporation**; and

(b) must determine whether each such debt instrument is secured or unsecured.

(3) Except to the extent that a company's **Memorandum of Incorporation** provides otherwise, a debt instrument issued by the company may grant special privileges regarding –

(a) attending and voting at general meetings and the appointment of directors; or

(b) allotment of securities, redemption by the company, or substitution of the debt instrument for shares of the company, provided that the securities to be allotted or substituted in terms of any such privilege, are authorised by or in terms of the company's Memorandum of Incorporation in accordance with section 36.

. . .

44. Financial assistance for subscription of securities

. . .

(2) Except to the extent that the **Memorandum of Incorporation** of a company provides otherwise, the board may authorise the company to provide financial assistance by way of a loan, guarantee, the provision of security or otherwise to any person for the purpose of, or in connection with, the subscription of any option, or any securities, issued or to be issued by the company or a related or inter-related company, or for the purchase of any securities of the company or a related or inter-related company, subject to subsections (3) and (4).

. . .

45. Loans or other financial assistance to directors

. . .

(2) Except to the extent that the **Memorandum of Incorporation** of a company provides otherwise, the board may authorise the company to provide financial assistance by way of a loan, guarantee, the provision of security or otherwise to any person for the purpose of, or in connection with, the subscription of any option, or any securities, issued or to be issued by the company or a related or inter-related company, or for the purchase of any securities of the company or a related or inter-related company, subject to subsections (3) and (4).

. . .

NOTE: Section 46 – distributions – cannot be excluded – and therefore section 48 – repurchases – cannot be excluded. For both all that is needed is a Board resolution.

47. Capitalisation shares

(1) Except to the extent that a company's **Memorandum of Incorporation** provides otherwise –

(a) the board of that company, by resolution, may approve the issuing of any authorised shares of the company, as capitalisation shares, on a *pro rata* basis to the shareholders of one or more classes of shares;

(b) shares of one class may be issued as a capitalisation share in respect of shares of another class; and

(c) subject to subsection (2), when resolving to award a capitalisation share, the board may at the same time resolve to permit any shareholder entitled to receive such an award to elect instead to receive a cash payment, at a value determined by the board.

. . .

56. Beneficial interest in securities

(1) Except to the extent that a company's **Memorandum of Incorporation** provides otherwise, the company's issued securities may be

held by, and registered in the name of, one person for the beneficial interest of another person.

. . .

57. Interpretation and application of Part [*sic*]

. . .

(2) If a profit company, other than a state-owned company, has only one shareholder –

(a) that shareholder may exercise any or all of the *voting rights* pertaining to that company on any matter, at any time, without notice or compliance with any other internal formalities, except to the extent that the company's **Memorandum of Incorporation** provides otherwise; and

(b) sections 59–65 do not apply to the governance of that company.

(3) If a profit company, other than a state-owned company, has only one director –

(a) that director may exercise any power or perform any function of the board at any time, without notice or compliance with any other internal formalities, except to the extent that the company's **Memorandum of Incorporation** provides otherwise; and

(b) sections 71(3)–(7), 73 and 74 do not apply to the governance of that company.

. . .

58. Shareholder right to be represented by proxy

. . .

(3) Except to the extent that the **Memorandum of Incorporation** of a company provides otherwise –

(a) a shareholder of that company may appoint two or more persons concurrently as proxies, and may appoint more than one proxy to exercise voting rights attached to different securities held by the shareholder;

(b) a proxy may delegate the proxy's authority to act on behalf of the shareholder to another person, subject to any restriction set out in the instrument appointing the proxy; and

(c) a copy of the instrument appointing a proxy must be delivered to the company, or to any other person on behalf of the company, before the proxy exercises any rights of the shareholder at a shareholders meeting.

. . .

(7) A proxy is entitled to exercise, or abstain from exercising, any voting right of the shareholder without direction, except to the extent that the **Memorandum of Incorporation**, or the instrument appointing the proxy, provides otherwise.

. . .

59. Record date for determining shareholder rights

. . .

(3) If the board does not determine a record date for any action or event, the record date is –

(a) in the case of a meeting, the latest date by which the company is required to give shareholders notice of that meeting; or

(b) the date of the action or event, in any other case, unless the **Memorandum of Incorporation** or rules of the company **provide otherwise**.

61. Shareholders' meetings

(1) The board of a company, or any other person specified in the company's Memorandum of Incorporation or rules, may call a shareholders' meeting at any time.

(2) Subject to section 60, a company must hold a shareholders' meeting –

(a) at any time that the board is required by this Act or the Memorandum of Incorporation to refer a matter to shareholders for decision;

(b) whenever required in terms of section 70(3) to fill a vacancy on the board; and

(c) when otherwise required –

(i) in terms of subsection (3) or (7); or

(ii) by the company's Memorandum of Incorporation.

(3) Subject to subsection (5) and (6), the board of a company, or any other person specified in the company's Memorandum of Incorporation or rules, must call a shareholders' meeting if one or more written and signed demands for such a meeting are delivered to the company, and –

(a) each such demand describes the specific purpose for which the meeting is proposed; and

(b) in aggregate, demands for substantially the same purpose are made and signed by the holders, as the earliest time specified in any of those demands, of at least 10% of the *voting rights* entitled to be exercised in relation to the matter proposed to be considered at the meeting.

(4) A company's **Memorandum of Incorporation** *may specify a lower percentage* in substitution for that set out in subsection (3)(b).

. . .

(9) Except to the extent that the **Memorandum of Incorporation** of a company provides otherwise –

(a) the board of the company may determine the location for any shareholders meeting of the company; and

(b) a shareholders' meeting of the company may be held in the Republic or in any foreign country.

(10) Every shareholders' meeting of a *public company* must be reasonably accessible within the Republic for electronic participation by shareholders in the manner contemplated in section 63(2), irrespective of whether the meeting is held in the Republic or elsewhere.

. . .

62. Notice of meetings

(1) The company must deliver a notice of each shareholders meeting in the prescribed manner and form to all of the shareholders of the company as of the record date for the meeting, at least –

(a) fifteen business days before the meeting is to begin, in the case of a public company or a non-profit company that has voting members; or

(b) ten business days before the meeting is to begin, in any other case.

(2) A company's **Memorandum of Incorporation** may provide for longer or shorter minimum notice periods than required by subsection (1).

. . .

63. Conduct of meetings

(1) Before any person may attend or participate in a shareholders meeting –

(a) that person must present reasonably satisfactory identification; and

(b) the person presiding at the meeting must be reasonably satisfied that the right of that person to participate and vote, either as a shareholder, or as a proxy for a shareholder, has been reasonably verified.

(2) Unless prohibited by its **Memorandum of Incorporation**, a company may provide for –

(a) a shareholders' meeting to be conducted entirely by electronic communication; or

(b) one or more shareholders, or proxies for shareholders, to participate by electronic communication in all or part of a shareholders meeting that is being held in person, so long as the electronic communication employed ordinarily enables all persons participating in that meeting to communicate concurrently with each other without an intermediary, and to participate reasonably effectively in the meeting.

. . .

64. Meeting quorum and adjournment

(1) Subject to subsections (2)–(8) –

(a) a shareholders' meeting may not begin until sufficient persons are present at the meeting to exercise, in aggregate, at least 25% of all of the *voting rights* that are entitled to be exercised in respect of at least one matter to be decided at the meeting; and

(b) a matter to be decided at the meeting may not begin to be considered unless sufficient persons are present at the meeting to exercise, in aggregate, at least 25% of all of the *voting rights* that are entitled to be exercised on that matter at the time the matter is called on the agenda.

(2) A company's **Memorandum of Incorporation** may specify a lower or higher percentage in place of the 25% required in either or both of subsection (1)(a) or (b).

. . .

(4) If, within one hour after the appointed time for a meeting to begin, the requirements of subsections (1), or (3) if applicable,

(a) for that meeting to begin have not been satisfied, the meeting is postponed without motion, vote or further notice, for one week;

(b) for consideration of a particular matter to begin have not been satisfied –

(i) if there is other business on the agenda of the meeting, consideration of that matter may be postponed to a later time in the meeting without motion or vote; or

(ii) if there is no other business on the agenda of the meeting, the meeting is adjourned for one week, without motion or vote.

(5) The person intended to preside at a meeting that cannot begin due to the operation of subsection (1)(a), or (3) if applicable, may extend

the one-hour limit allowed in subsection (4) for a reasonable period on the grounds that –

(a) exceptional circumstances affecting weather, transportation or electronic communication have generally impeded or are generally impeding the ability of shareholders to be present at the meeting; or

(b) one or more particular shareholders, having been delayed, have communicated an intention to attend the meeting, and those shareholders, together with others in attendance, would satisfy the requirements of subsection (1), or (3) if applicable.

(6) A company's **Memorandum of Incorporation or rules** may specify a different time in substitution for –

(a) the period of one hour contemplated in subsections (4) and (5), respectively; or

(b) the period of one week contemplated in subsection (4).

. . .

(9) Unless the company's **Memorandum of Incorporation or rules provide otherwise**, after a quorum has been established for a meeting, or for a matter to be considered at a meeting, the meeting may continue, or the matter may be considered, so long as at least one shareholder with *voting rights* entitled to be exercised at the meeting, or on that matter, is present at the meeting.

. . .

(12) Subject to subsection (13), a meeting may not be adjourned beyond the earlier of –

(a) the date that is one hundred and twenty business days after the record date determined in accordance with section 59; or

(b) the date that is sixty business days after the date on which the adjournment occurred.

(13) A company's **Memorandum of Incorporation** may provide for different maximum periods of adjournment of meetings than those set out in subsection (12), or for unlimited adjournment of meetings.

65. Shareholder resolutions

. . .

(8) Except for an ordinary resolution for the removal of a director under section 71, a company's **Memorandum of Incorporation** may require –

(a) a higher percentage of *voting rights* to approve an ordinary resolution; or

(b) one or more higher percentages of *voting rights* to approve ordinary resolutions concerning one or more particular matters, respectively,

provided that there must at all times be a margin of at least ten percentage points between the highest established requirement for approval of an ordinary resolution on any matter, and and the lowest established requirement for approval of a special resolution on any matter.

(9) For a special resolution to be approved by shareholders, it must be supported by at least 75% of the *voting rights* exercised on the resolution.

(10) A company's **Memorandum of Incorporation** may permit –

(a) a different percentage of voting rights to approve any special resolution; or

(b) one or more different percentages of voting rights to approve special resolutions concerning one or more particular matters, respectively,

provided that there must at all times be a margin of at least ten percentage points between the requirements for approval of an ordinary resolution, and a special resolution, on any matter.

(11) A special resolution is required to –

. . .

(12) A company's **Memorandum of Incorporation** may require a special resolution to approve any other matter not contemplated in subsection (11).

66. Board, directors and prescribed officers

(1) The business and affairs of a company must be managed by or under the direction of its board, which has the authority to exercise all of the powers and perform any of the functions of the company, except to the extent that this Act or the company's **Memorandum of Incorporation** provides otherwise.

. . .

(3) A company's **Memorandum of Incorporation** may specify a higher number in substitution for the minimum number of directors required by subsection (2).

(4) A company's **Memorandum of Incorporation** –

(a) **may provide** for –

(i) the direct appointment and removal of one or more directors by any person who is named in, or determined in terms of, the Memorandum of Incorporation;

(ii) a person to be an *ex officio* director of the company as a consequence of that person holding some other office, title, designation or similar status, subject to subsection (5)(a); or

(iii) the appointment or election of one or more persons as alternate directors of the company; and

(b) in the case of a profit company other than a state-owned company, must provide for the election by shareholders of at least 50% of the directors, and 50% of any alternate directors.

(5) A person contemplated in subsection (4)(a)(ii) –

(a) may not serve or continue to serve as an *ex officio* director of a company, despite holding the relevant office, title, designation or similar status, if that person is or becomes ineligible or disqualified in terms of section 69; and

(b) who holds office or acts in the capacity of an *ex officio* director of a company has all the –

(i) powers and functions of any other director of the company, except to the extent that the company's Memorandum of Incorporation restricts the powers, functions or duties of an *ex officio* director; and

(ii) duties, and is subject to all of the liabilities, of any other director of the company.

. . .

(8) Except to the extent that the **Memorandum of Incorporation** of a company provides otherwise, the company may pay remuneration to its directors for their service as directors, subject to subsection (9).

(9) Remuneration contemplated in subsection (8) may be paid only in accordance with a special resolution approved by the shareholders within the previous two years.

. . .

68. Election of directors profit companies

(1) Subject to subsection (3), each director of a profit company, other than the first directors or a director contemplated in section 66(4)(a)(i) or (ii), must be elected by the persons entitled to exercise *voting rights* in such an election, to serve for an indefinite term, or for a term as set out in the **Memorandum of Incorporation**.

(2) **Unless a profit company's Memorandum of Incorporation** provides otherwise, in any election of directors –

(a) the election is to be conducted as a series of votes, each of which is on the candidacy of a single individual to fill a single vacancy, with the series of votes continuing until all vacancies on the board at that time have been filled; and

(b) in each vote to fill a vacancy –

(i) each voting right entitled to be exercised may be exercised once; and

(ii) the vacancy is filled only if a majority of the voting rights exercised support the candidate.

(3) **Unless the Memorandum of Incorporation** of a profit company provides otherwise, the board may appoint a person who satisfies the requirements for election as a director to fill any vacancy and serve as a director of the company on a temporary basis until the vacancy has been filled by election in terms of subsection (2), and during that period any person so appointed has all of the powers, functions and duties, and is subject to all of the liabilities, of any other director of the company.

69. Ineligibility and disqualification of persons to be director or prescribed officer

. . .

(6) In addition to the provisions of this section, the **Memorandum of Incorporation** of a company may impose –

(a) additional grounds of ineligibility or disqualification of directors; or

(b) minimum qualifications to be met by directors of that company.

. . .

72. Board committees

(1) Except to the extent that the **Memorandum of Incorporation** of a company provides otherwise, the board of a company may –

(a) appoint any number of committees of directors; and

(b) delegate to any committee any of the authority of the board.

(2) Except to the extent that the **Memorandum of Incorporation** of a company, or a resolution establishing a committee, provides otherwise, the committee –

(a) may include persons who are not directors of the company, but –

(i) any such person must not be ineligible or disqualified to be a director in terms of section 69; and

(ii) no such person has a vote on a matter to be decided by the committee;

(b) may consult with or receive advice from any person; and

(c) has the full authority of the board in respect of a matter referred to it.

. . .

73. Board meetings

(1) A director authorised by the board of a company –

(a) may call a meeting of the board at any time; and

(b) must call such a meeting if required to do so by at least –

(i) 25% of the directors, in the case of a board that has at least twelve members; or

(ii) two directors, in any other case.

(2) A company's **Memorandum of Incorporation** may specify a higher or lower percentage or number in substitution for those set out in subsection (1)(b).

(3) Except to the extent that this Act or a company's **Memorandum of Incorporation** provides otherwise –

(a) a meeting of the board may be conducted by electronic communication; or

(b) one or more directors may participate in a meeting by electronic communication,

so long as the electronic communication facility employed ordinarily enables all persons participating in that meeting to communicate concurrently with each other without an intermediary, and to participate effectively in the meeting.

(4) The board of a company may determine the form and time for giving notice of its meetings, but –

(a) such a determination must comply with any requirements set out in the Memorandum of Incorporation, or rules, of the company; and

(b) no meeting of a board may be convened without notice to all of the directors, subject to subsection (5).

(5) Except to the extent that the company's **Memorandum of Incorporation** provides otherwise –

(a) if all of the directors of the company –

(i) acknowledge actual receipt of the notice;

(ii) are present at a meeting; or

(iii) waive notice of the meeting,

the meeting may proceed even if the company failed to give the required notice of that meeting, or there was a defect in the giving of the notice;

(b) a majority of the directors must be present at a meeting before a vote may be called at a meeting of the directors;

(c) each director has one vote on a matter before the board;

(d) a majority of the votes cast on a resolution is sufficient to approve that resolution; and

(e) in the case of a tied vote –

(i) the chair may cast a deciding vote, if the chair did not initially have or cast a vote; or

(ii) the matter being voted on fails, in any other case.

. . .

74. Directors acting other than at meeting

(1) Except to the extent that the **Memorandum of Incorporation** of a company provides otherwise, a decision that could be voted on at a meeting of the board of that company may instead be adopted by written consent of a majority of the directors, given in person, or by electronic communication, provided that each director has received notice of the matter to be decided.

. . .

78. Indemnification and directors' insurance

. . .

(4) Except to the extent that a company's **Memorandum of Incorporation** provides otherwise, the company –

(a) may advance expenses to a director to defend litigation in any proceedings arising out of the director's service to the company; and

(b) may directly or indirectly indemnify a director for expenses contemplated in paragraph (a), irrespective of whether it has advanced those expenses, if the proceedings –

(i) are abandoned or exculpate the director; or

(ii) arise in respect of any liability for which the company may indemnify the director, in terms of subsections (5) and (6).

(5) Except to the extent that the **Memorandum of Incorporation** of a company provides otherwise, a company may indemnify a director in respect of any liability arising other than as contemplated in subsection (6).

(6) A company may not indemnify a director in respect of –

(a) any liability arising –

(i) in terms of section 77(3)(a), (b) or (c); or

(ii) from wilful misconduct or wilful breach of trust on the part of the director; or

(b) any fine contemplated in subsection (3).

(7) Except to the extent that the **Memorandum of Incorporation** of a company provides otherwise, a company may purchase insurance to protect –

(a) a director against any liability or expenses for which the company is permitted to indemnify a director in accordance with subsection (5); or

(b) the company against any contingency including, but not limited to –

(i) any expenses –

(aa) that the company is permitted to advance in accordance with subsection (4)(a); or

(bb) for which the company is permitted to indemnify a director in accordance with subsection (4)(b); or

(ii) any liability for which the company is permitted to indemnify a director in accordance with subsection (5).

. . .

118. Application of this Part, Part C and Takeover Regulations

(1) Subject to subsections (2)–(4), this Part, Part C and the *Takeover Regulations* apply with respect to an affected transaction or offer involving a profit company or its securities if the company is –

. . . or

(ii) the **Memorandum of Incorporation** of that company expressly provides that the *company and its securities* are subject to this Part, Part C and the *Takeover Regulations*, irrespective of whether the company falls within the criteria set out in subparagraph (i).

. . .

Bibliography

Books

Benade ML, Henning JJ, Du Plessis JJ, Delport PA, De Koker L, Pretorius JT *Entrepreneurial Law* (2008) LexisNexis: Durban.

Cilliers HS, Benade ML, Henning JJ, Du Plessis JJ, Delport PA, De Koker L, and Pretorius JT *Cilliers & Benade Corporate Law* (2000) LexisNexis: Durban.

Nagel CJ (ed) *Commercial Law* (2011) LexisNexis: Durban.

Welling BL *Corporate Law in Canada* (2006) Scribblers Publishing.

Journal articles

De Jager J *Comments on the effects of section 40 of the Banks Amendment Act 19 of 2003 on section 60 of the Banks Act 94 of 1990* 2005 *SA Merc LJ* 170.

Katz MM *Governance under the Companies Act 2008 – Flexibility Is the Key-word* 2010 *Acta Juridica* 262.

Van der Linde K T*he solvency and liquidity approach in the Companies Act 2008* 2009 *TSAR* 224.

Van der Linde K *Share repurchases and the protection of shareholders* 2010 *TSAR* 288.

Official publications

South African Company law for the 21st century – Guidelines for Corporate Law Reform (policy paper) (*Government Gazette* 26493 of 23 June 2004).

Table of cases

Page

Page

Page

Page

Page

Page

Page

Page

Page

Page

Table of statutes

Index