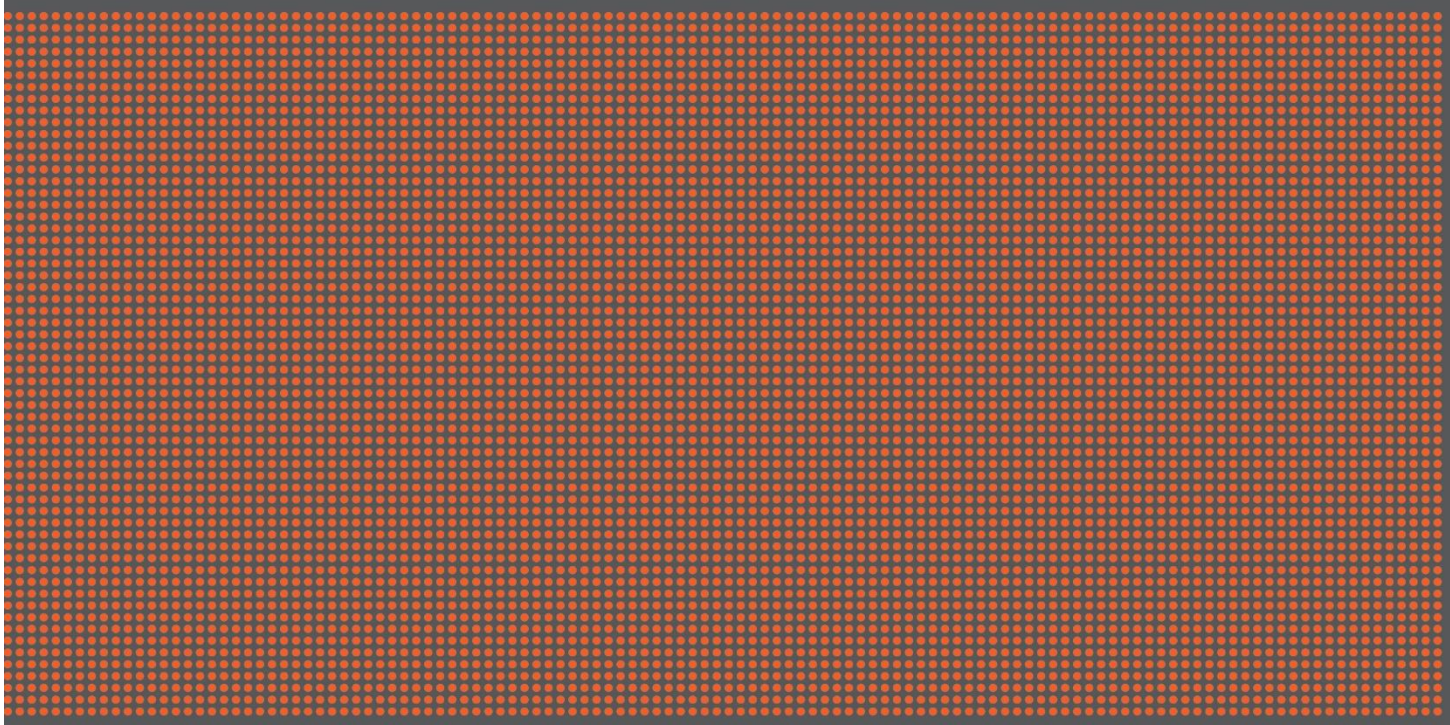
KISCH IP

GUIDE TO THE COMPANIES ACT, 71 OF 2008 ("THE ACT")

2016 EDITION



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FOREWORD

On 1 May 2011, the Companies Act No. 71 of 2008 ("the Act") became effective. The Act has materially amended the Corporate Law in South Africa. This Guide is a summary of certain provisions of the Act and we have only dealt with those provisions of the Act which we consider to be of particular importance. This Guide was prepared in order to furnish a brief and general view of the matters contained herein. We have not dealt with the Regulations to the Act.

IMPORTANT NOTE:

This Guide does not constitute legal advice and due to the fundamental reforms introduced by the Act, we strongly recommend that professional legal advice be sought before making any decision based on this Guide's contents or when dealing with any matters relating thereto.

While every care has been taken in the compilation of this Guide, no responsibility of any nature shall be accepted whatsoever for inaccuracies, errors or omissions.

Should you require further information or advice on specific aspects of the Act, please contact the Commercial Department at DM Kisch Inc or Mr. Kevin Dam on 011 324 3025 or kevind@dmkisch.com.

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CHAPTER 1: INTERPRETATION, PURPOSE AND APPLICATION OF THE ACT

1. INTERPRETATION

Solvency and liquidity test

A company will satisfy the solvency and liquidity test if the fairly valued assets of that company equal or exceed the liabilities of the company and it appears that the company will be able to pay its debts as they become due in the ordinary course of business for a period of 12 (Twelve) months after the date on which the solvency and liquidity test is considered.

2. PURPOSE AND APPLICATION

Purposes of the Act

The purpose of the Act is to, among other things; promote the development of the South African economy by creating flexibility and simplicity in the formation and maintenance of companies. With the commencement of the Act on 1 May 2011, the registration of new close corporations was put to an end. As flexibility and simplicity of formation and maintenance was characteristic of close corporations, it is important that small business owners are still be able to enjoy this flexibility and simplicity when forming a company.

Categories of Companies

There are two broad categories of companies in terms of the Act, namely Profit and Non-profit Companies.

Profit Companies may be State Owned Companies, Private Companies, Personal Liability Companies or Public Companies. Non-profit Companies are the successor to Companies Limited by guarantee and Section 21 Companies in terms of the Companies Act No. 61 of 1973 (“the old Act”).

Features of the Different Types of Profit Companies

1. State Owned Companies

State Owned Companies are companies which fall within the meaning of state owned enterprise in terms of the Public Finance Management Act No. 1 of 1999 or companies which are owned by a

Municipality.

The name of a State Owned Company must end in the words “SOC Limited”.

2. Private Companies

As was the case in terms of the old Act, Private Companies are prohibited from offering shares to the public.

The Act allows Private Companies to have an unlimited number of shareholders, as opposed to the 50 (Fifty) shareholder limit which was placed on these entities by the old Act.

Private Companies must have a minimum of 1 (One) director, unless the Memorandum of Incorporation requires a higher number.

Annual financial statements of Private Companies do not have to be audited, unless these companies have sufficient public interest scores. Public interest scores will be dealt with under the heading “Annual financial statements”. The annual financial statements do, however, have to be independently reviewed, except in the case where all of the shareholders of the company are also directors thereof, or where there is one shareholder of the company who is also the director thereof.

It is not compulsory for Private Companies to have audit committees or to hold annual general meetings.

The name of a Private Company must end in “Proprietary Limited” or “(Pty) Ltd”.

3. Personal Liability Companies

The directors and past directors of Personal Liability Companies are jointly and severally liable, together with the company for any debts and liabilities contracted during their periods of office.

Personal Liability Companies must have at least 1 (One) director.

The name of a Personal Liability Company must end in the expression “Incorporated” or “Inc.”.

4. Public Companies

In terms of the Act, as with the old Act, Public Companies are allowed to offer shares to the public.

Under the Act, only 1 (One) member is required for incorporation as opposed to the 7 (Seven) members which were required by the old Act.

Public Companies require a minimum of 3 (Three) directors.

Financial statements are required to be audited and lodged with the Companies and Intellectual Property Commission.

It is mandatory for Public Companies to have audit committees and to hold annual general meetings.

The name of a Public Company must end in “Limited” or “Ltd”.

5. Non-profit Companies

Non-profit Companies must have at least one public benefit, social/cultural or communal/group interest as their object.

These companies must apply all of their assets and income to their stated objects.

The income and property of Non-profit Companies are not distributable to incorporators, members, directors or officers, except as reasonable compensation for services rendered by these parties.

3 (Three) incorporators are required to incorporate a Non-profit Company.

Non-profit Companies are required to have a minimum of 3 (Three) directors.

The name of a Non-profit Company must end in the letters “NPC”.

6. Foreign and External Companies

Profit and Non-profit Companies alike can also fall into the categories of Foreign Companies and External Companies.

A Foreign Company is an entity incorporated outside of the Republic of South Africa, irrespective of whether it is a Profit or a Non-Profit entity or whether it carries on business or non-profit activities within the Republic of South Africa.

A Foreign Company which carries on business or non-profit activities within the Republic of South Africa must be registered as an External Company with the Companies and Intellectual Property Commission.

CHAPTER 2: FORMATION, ADMINISTRATION AND DISSOLUTION OF COMPANIES

1. RESERVATION AND REGISTRATION OF COMPANY NAMES

Criteria for names of companies:

A. A company name may comprise words in any language, irrespective of whether or not the words are commonly used or contrived for the purpose, together with the following, alone or in any combination:

1. any letters, numbers or punctuation marks;

2. any of the following symbols: +, &, #, , %, =, -. This provision will only come into effect on 1 May 2014;

3. any other symbol permitted by the Minister by Regulation. This provision will only come into effect on 1 May 2014; or

4. round brackets used in pairs to isolate any other part of the name.

B. The name of a profit company may be the registration number of the company, followed by the words “South Africa”.

C. The name (or registration number as in the above case) must contain the “RF” if the ring fencing provisions of the Companies Act, 2008, are applicable, as well as the relevant suffix, from the following list:

1. the word 'Incorporated' or its abbreviation 'Inc.', in the case of a personal liability company;

2. the expression 'Proprietary Limited' or its abbreviation, '(Pty) Ltd.', in the case of a private company;

3. the word 'Limited' or its abbreviation, 'Ltd.', in the case of a public company;

4. the expression 'SOC Ltd.' in the case of a state-owned company; or

5. the expression 'NPC', in the case of a non-profit company.

D. Irrespective of the language of any words used in a proposed company name—

1. every word comprising part of the name must be expressed using the alphabet that is commonly used for writing in any one of the official languages of South Africa; and

2. every number—

(i) signifying a date must be expressed either in words or in Arabic numerals; or

(ii) otherwise forming part of the company's name must be expressed either in words or in Arabic or Roman numerals.

3. If a proposed company name contains any word or words in any language that is not an official language of the Republic of South Africa the application or notice filed to reserve, register or use that name must include either—

(i) a certified translation of that word, or those words, into an official language of the Republic of South Africa; or

(ii) a declaration that the word falls, or the words fall, within the category of words contemplated in paragraph 4 below, and that the person concerned is entitled to use that mark.

4. If a proposed company name contains—

(i) a registered trade mark; or

(ii) a mark in respect of which an application has been filed in the Republic for

(iii) registration as a trade mark; or

(iv) a well known trade mark as contemplated in section 35 of the Trade Marks Act, 1993 (Act No. 194 of 1993),

the application or notice filed to reserve, register or use that name must include satisfactory evidence that the applicant or the company concerned is entitled to use that mark.

E. The name of a company must not be the same as, or confusingly similar to:

1. the name of another company, registered external company, close corporation or co-operative unless the company forms part of a group of companies using similar names;

2. a name registered for the use of a person as a business name in terms of the Consumer Protection Act;

3. a registered trade mark belonging to a person other than the company, or a mark in respect of which an application has been filed in the Republic for registration as a trade mark or a well-known trade mark as contemplated in section 35 of the Trade Marks Act, 1993 (Act 194 of 1993) unless the company provides satisfactory evidence to the Companies and Intellectual Property Commission it is entitled to use that mark; or

4. a mark, word or expression the use of which is restricted or protected in terms of the Merchandise Marks Act, 1941 (Act 17 of 1941), except to the extent permitted by or in terms of that Act.

E. The name of a company must not falsely imply or suggest, or be such as would reasonably mislead a person to believe incorrectly, that the company:

1. is part of, or associated with, any other person or entity;

2. is an organ of state or a court, or is operated, sponsored, supported or endorsed by the State or by any organ of state or a court;

3. is owned, managed or conducted by a person or persons having any particular educational designation or who is a regulated person or entity;

4. is owned, operated, sponsored, supported or endorsed by, or enjoys the patronage of, any-

(i) foreign state, head of state, head of government, government or administration or any department of such a government or administration; or

(ii) international organization.

F. The name of a company must not include any word, expression or symbol that, in isolation or in context within the rest of the name, may reasonably be considered to constitute propaganda for war, incitement of imminent violence, or advocacy of hatred based on race, ethnicity, gender or religion, or incitement to cause harm.

Reservation of name and defensive names

The Companies and Intellectual Property Commission must reserve each name applied for unless it -

(a) is the registered name of another company, close corporation or co-operative;

(b) is the name of a registered external company; or

(c) has already been reserved.

A name is reserved for an initial period of six months and then may be renewed for a further 60 business days at a time. A reserved name may be transferred to another person.

If the Companies and Intellectual Property Commission has reasonable grounds to believe that a name may be inconsistent with the requirements of section D and E under the previous heading, it

may require the applicant to serve a copy of the application to reserve the name on any particular person, or class of persons, on the grounds that the person or persons may have an interest in the use of the name that has been reserved for the applicant.

2. INCORPORATION AND LEGAL STATUS OF COMPANIES

Right to incorporate company

Incorporation of a company is done by the filing, with the Companies and Intellectual Property Commission, of a Notice of Incorporation, together with a Memorandum of Incorporation, and the payment of a filing fee.

One or more persons are required to incorporate a profit company, and three or more persons are required to incorporate a non-profit company

Registration of company

If the application to incorporate a company is in order the Companies and Intellectual Property Commission will assign a unique registration number to the company and will provide the company with a certificate of registration.

Memorandum of Incorporation, shareholder agreements and rules of company

As of 1 May 2011, the memorandum of association and articles of association of pre-existing companies have been required to be replaced with a document known as a Memorandum of Incorporation (MOI).

In addition a company may draft and register a set of Rules, which covers internal governance issues as between the company, its shareholders, members, and directors.

The MOI sets out rights, duties and responsibilities of shareholders, directors and others within and in relation to a company.

Amending the Memorandum of Incorporation

An MOI can be amended:

1. by virtue of a court order as effected by a resolution of the company's board of directors;

2. by the company's board of directors where they have elected to increase or decrease the number of authorised shares, classify or reclassify authorised shares, or amend the rights and limitations attaching to shares; or

3. by passing a special resolution where a director or a shareholder calls for an amendment to the MOI.

Legal status of companies

A company has all of the legal powers and capacity of an individual, except to the extent that a juristic person is incapable of exercising any such power, or having any such capacity, or if the company's MOI provides otherwise.

Some of the provisions set out under the Act and which apply to a company can be altered under the company's MOI, and some provisions are unalterable.

A company's MOI can include any item which it requires as long as it does not conflict with any of the provisions of the Act and as long as it is not contrary to the law.

A rule called the Doctrine of Constructive Notice was established in our common law in 1857, in terms of which persons dealing with a company were deemed to be aware of the contents of the constitution and other public documents of the company that were lodged with the Registrar of Companies and were open to public inspection, whether they had read these documents or not.

The Act abolished the Doctrine of Constructive Notice in respect of all but the following two instances:

1. Where a company's MOI contains "restrictive conditions" (which would include any restrictions placed on the capacity of the company or on the authority of any of its agents) which apply to the company and which can be amended only by a special procedure.

2. A person is deemed to be aware of the effect of the directors' joint and several liability when dealing with a personal liability company.

Companies containing "restrictive conditions" which can be amended only by a special procedure are called "ring-fenced" companies.

Attention is drawn to the "restrictive conditions" by filing a Notice of Incorporation or a Notice of Amendment which includes a prominent statement drawing attention to each such provision, and its location in the company's MOI.

In the case of pre-existing companies with "restrictive conditions", the validity of those provisions is not affected by the failure of the company to draw attention to those provisions; however persons dealing with the company will not be deemed to be aware of those provisions unless such companies file a notice of those provisions.

Validity of company actions

The Act provides that a person (other than a director, prescribed officer or shareholder of a company) dealing with a company in good faith is entitled to presume that the company in making a decision in terms of its powers has complied with all of the formal and procedural requirements in terms of the Act, its MOI and any rules of the company unless the third party knew or ought reasonably to know of any failure by the company to have complied with such requirement. The Act hereby sets out a statutory version of the common law rule known as the *Turquand* Rule

3. TRANSPARENCY, ACCOUNTABILITY AND INTEGRITY OF COMPANIES

Company records

All records and information that a company is required to keep must be held at the company's registered office. Where these records are kept at another office, the company must advise the Companies and Intellectual Property Commission of this address.

All shareholders have a right to inspect and obtain copies of the company's MOI, share register, director's register, annual financial statements and all notices and resolutions passed by shareholders, by completing a request for these documents and filing such request with the company, as per the provisions of the Promotion of Access to Information Act.

Non-shareholders do not have an automatic right to view the abovementioned documents and have to apply to view these documents using the procedure set out under the Promotion of Access to

Information Act.

All documents and other records, which the company is required to retain under the Act or under any other law, must be kept for at least seven years. These records can be retained in electronic format or any other form so long as the documents can subsequently be converted into a written format within a reasonable time period.

Annual financial statements

The auditing of a company's annual financial statements is only compulsory for public companies, state owned companies and companies with a public interest score of 350 or more points in a financial year.

A company with a public interest score of between 100 and 349 points (both inclusive), must have its annual financial statements audited if they were internally compiled.

A company's 'public interest score' is calculated as the sum of the following:

1. a number of points equal to the average number of employees of the company during the financial year;

2. one point for every R 1 million (or portion thereof) in third party liability (outstanding unsecured debt held by creditors) of the company, at the financial year end;

3. one point for every R 1 million (or portion thereof) in turnover during the financial year; and

4. in the case of profit companies, one point for every individual who, at the end of the financial year, is known by the company to directly or indirectly have a beneficial interest in any of the company's issued securities.

If a company is not required to have its annual financial statements audited, it may however elect on a voluntary basis to do so and the provisions of the Act pertaining to audits would then equally apply to this company.

Where a company is not required to have its annual financial statements audited, it will only have to have its financials independently reviewed.

A company which is required to prepare annual financial statements must do so no later than six months after the company's financial year end.

It is the responsibility of all companies to ensure that their financial reporting represents the position of the company accurately. Any person involved in the preparation, approval or publication of false or misleading financial reports by will be guilty of an offence.

Access to financial statements or related information

Shareholders must be informed how they can obtain a copy of a company's annual financial statements financial statements, and must be provided with a copy thereof free of charge upon demand.

Annual returns

All companies must submit an annual return to the Companies and Intellectual Property Commission, within thirty business days of the anniversary of the date of incorporation of the company.

The annual return will have to include various details, including the company's financial statements, a copy of its independently reviewed financial statements where it has not had its financials audited or an accountability and transparency report.

If the company fails to submit a copy of its financials or complete an accountability and transparency report, over a consecutive period of 3 (Three) years, the Companies and Intellectual Property Commission has the right, after due warning, to deregister the company.

4. CAPITALISATION OF PROFIT COMPANIES

Legal nature of company shares and requirement to have shareholders

Shares issued by a company are movable property, and are transferable in any manner provided for or recognised by the Act or any other legislation.

Shares no longer have a nominal or par value; however any shares of a pre-existing company with nominal or par values that have been issued to a shareholder continue to have the nominal or par

value assigned to them when issued.

A company may not issue shares to itself.

Authorisation for shares

A company's MOI:

1. must set out the different classes of shares and the number of shares of each class the company is authorised to issue;

2. must set out the distinguishing designation of each class of shares and the preferences, rights, limitations and other terms associated therewith; and

3. may set out a stated number of unclassified shares, which are subject to classification by the board,

which may only be changed by an amendment of the MOI by special resolution of the shareholders, or the company's board of directors.

Preferences, rights, limitations and other share terms

All of the shares of a particular class authorised by a company have preferences, rights, limitations and other terms that are identical to those of other shares of the same class, except to the extent that the company's Memorandum of Incorporation provides otherwise.

Shareholders have an irrevocable right to vote on any proposal to amend the preferences, rights, limitations and other terms associated with their shares.

Issuing shares

The board of directors of a company may resolve to issue shares of the company at any time, but only within the classes, and to the extent, that the shares have been authorised by or in terms of the company's Memorandum of Incorporation.

Subscription of shares

If a private company proposes to issue any shares, 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.

Financial assistance for subscription of securities

A company's board of directors may authorise the company to provide financial assistance to any person for the purchase of any securities of the company, however the board may not authorise any financial assistance contemplated unless the particular provision of financial assistance is pursuant to:

1. an employee share scheme that satisfies the standards of the Act; or

2. 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 providing the financial assistance, the company would satisfy the solvency and liquidity test and the terms under which the financial assistance is proposed to be given are fair and reasonable to the company.

The board must also ensure that any conditions or restrictions respecting the granting of financial assistance set out in the company's Memorandum of Incorporation have been satisfied.

Loans or other financial assistance to directors

A company may lend money to, guarantee a loan or other obligation of, or secure a debt or obligation of, a director or prescribed officer of the company or of a related or inter-related company, or a related or inter-related company or corporation, or a member of a related or inter-related corporation, or a person related to any such company, corporation, director, prescribed officer or member, unless the company's MOI provides otherwise.

The board may not authorise any financial assistance unless the particular provision of financial assistance is pursuant to an employee share scheme that satisfies the standards of the Act or 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 providing the financial assistance, the company would satisfy the solvency and liquidity test.

Distributions must be authorised by board

A company must not make any proposed distribution unless it is pursuant to an existing legal obligation of the company, a court order or a resolution by the board of directors of the company authorising the distribution.

Further, it must reasonably appear that the company will satisfy the solvency and liquidity test immediately after completing the proposed distribution and the board of directors of the company must acknowledge, by resolution, that it has applied the solvency and liquidity test, and has reasonably concluded that the company will satisfy the solvency and liquidity test immediately after completing the proposed distribution.

5. SECURITIES REGISTRATION AND TRANSFER

Securities to be evidenced by certificates or uncertificated

Securities issued by a company may either be evidenced by certificates (certified), or uncertificated, in which case the company must not issue certificates evidencing title to those securities.

If a company which has issued uncertificated securities a record must be administered and maintained by a participant or central securities depository, as the company's uncertificated securities register.

6. GOVERNANCE OF COMPANIES

Shareholder right to be represented by proxy

A shareholder of a company may appoint an individual or two or more persons concurrently, as a proxy/ies to participate in, and speak and vote at, a shareholders meeting on behalf of the shareholder or to give or withhold written consent on behalf of the shareholder.

The proxy appointment must be in writing and must be submitted to the company prior to the shareholders meeting.

Shareholders acting other than at meeting

A resolution that could be voted on at a shareholders meeting may instead be voted on in writing by shareholders entitled to exercise voting rights in relation to the resolution, outside of a meeting, within 20 business days after the resolution was submitted to them.

Shareholders meetings

Only Public companies and State Owned Corporations are required to hold an Annual General Meeting (AGM) in terms of the Act.

The Act stipulates that the first annual general meeting of a newly registered company must be held no later than eighteen months from date of registration and consequent meetings shall be held no later than fifteen months after the previous annual general meeting.

At least 15 (Fifteen) business days notice of the AGM must be given to all shareholders. This period can be extended to a longer notice period under a company's MOI.

The annual general meeting can be conducted entirely by electronic communication if not specifically prohibited by the company's MOI.

The notice of the meeting must inform shareholders of the use of electronic communication at the meeting.

Notice of meetings

15 (Fifteen) business days notice of a shareholders meeting is required in the case of a public company or a non-profit company and 10 (Ten) business days notice of a shareholders meeting is required in the case of a state-owned company, private company or personal liability company.

Meeting quorum and adjournment

A quorum of shareholders holding at least 25% (Twenty Five Percent) 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 is required in order for a shareholder's meeting to begin. If this quorum requirement has not been satisfied within one hour after the appointed time for a meeting to begin, the meeting will automatically be postponed for one week.

A quorum of shareholders holding at least 25% (Twenty Five Percent) of the voting rights that are entitled to be exercised on a matter at the time the matter is called on the agenda is normally required in order for such matter to begin to be considered at the meeting. If this quorum requirement has not been satisfied within one hour after the appointed time for a meeting to begin, 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 if there is no other business on the agenda of the meeting, the meeting is automatically adjourned for one week.

The maximum period for the adjournment of a meeting is 120 business days after the record date or 60 business days after the date on which the adjournment occurred.

A company's MOI may stipulate different quorum and adjournment provisions.

Shareholder resolutions

An ordinary resolution requires a favourable vote by shareholders holding more than 50% (Fifty Percent) of the shares, and a special resolution requires a favourable vote by shareholders holding 75% (Seventy Five Percent) of the shares in a company.

A company's MOI may set out a higher percentage of voting rights to approve an ordinary resolution than 50% (Fifty Percent) and lower percentage of voting rights to approve a special resolution than 75% (Seventy Five Percent), provided that there must at all times be a margin of at least 10 (Ten) percentage points between the requirements for approval of an ordinary resolution, and a special resolution.

The Act requires that special resolutions are passed in support of the following matters:

1. amendments to the MOI which have been proposed by the shareholders or directors;

2. to dispose of all or the greater part of assets or undertakings of the company;

3. an amalgamation or merger;

4. a voluntary winding-up of the company;

5. a scheme of arrangement;

6. directors remuneration;

7. lending of money to shareholders under section 44 of the Act; and

8. lending of money to directors or related persons under section 45 of the Act.

Save for a special resolution to amend the MOI, special resolutions do not have to be filed with the Companies and Intellectual Property Commission.

Board, directors and prescribed officers

The business and affairs of a company must be managed by or under the direction of its board of directors, 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 Memorandum of Incorporation provides otherwise.

Private companies and personal liability companies must have at least 1 (One) director, and public companies and non-profit companies must have at least 3 (Three) directors.

Shareholders in profit companies, other than state-owned companies, must elect at least 50% (Fifty Percent) of the directors, and the MOI of such companies must provide for this.

Prescribed officers are persons who; exercise or regularly participate 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 a company.

First director or directors

Each incorporator of a company is a first director of the company.

If the number of incorporators of a company, together with any *ex officio* directors, or directors to be appointed directly by any person in terms of the MOI, is fewer than the minimum number of directors required for that company, the board of directors must call a shareholders' meeting within 40 (Forty) business days after incorporation of the company for the purpose of electing sufficient directors to fill all vacancies on the board at the time of the election.

Election of directors

The board of directors of the company has the right to elect and appoint directors. Voting for directors must take place individually.

Note that the blanket appointment of directors by one vote is no longer allowed by the Act.

A director may be appointed:

1. by a majority of votes by the shareholders of the company;
2. on an ordinary resolution adopted at a shareholders meeting; or
3. on an ordinary resolution of the shareholders submitted to the shareholders and voted on by the shareholders within 20 business days of their receipt thereof.

Ineligibility and disqualification of persons to be director or prescribed officer

A person may be ineligible or disqualified to be a director of a company on the following grounds:

1. If they have been placed under probation by a court.
2. If they are ineligible or disqualified based on one of the additional grounds of ineligibility or disqualification of directors stipulated in the company's MOI;
3. If a company's MOI sets out minimum qualifications to be met by directors of that company, and a person does not satisfy a qualification;

4. That person is a juristic person;

5. That person is an unemancipated minor, or is under a similar legal disability;

6. If a court has prohibited that person to be a director, or declared the person to be delinquent;

7. If that person is an unrehabilitated insolvent;

8. If that person is prohibited in terms of any public regulation to be a director of the company;

9. If that person has been removed from an office of trust, on the grounds of misconduct involving dishonesty; or

10. If that person has been convicted and imprisoned without the option of a fine, or fined more than R1 000.00 (One Thousand Rand), for theft, fraud, forgery, perjury or an offence:

    10.1. involving fraud, misrepresentation or dishonesty;

    10.2. in connection with the promotion, formation or management of a company, or in connection with the appointment and acting as a director by a person who is ineligible or disqualified or any act resulting in probation by a court; or

    10.3. under the Act, the Insolvency Act, 1936, the Close Corporations Act, 1984, the Competition Act, the Financial Intelligence Centre Act, 2001, the Securities Services Act, 2004, or Chapter 2 of the Prevention and Combating of Corruption [sic] Activities Act, 2004.

<u>Removal of directors</u>

A director may be removed by an ordinary resolution adopted at a shareholders meeting.

A director who is to be removed at shareholders meeting must be given 10 (Ten) business days notice of the meeting and the resolution, and 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.

If there are at least 3 (Three) directors in a company, and where a shareholder or director alleges that a director has become ineligible or disqualified (on any of the abovementioned grounds other than that a court has prohibited that person to be a director, or has declared the person to be delinquent, incapacitated, or negligent or derelict), the board of directors (other than the director concerned) may remove a director by resolution, if this is determined to be the case. The director concerned, or a person who appointed that director, may apply to a court within 20 (Twenty) business days to review the determination of the board to remove the director.

Before the board of a company may consider a resolution as above, 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 present a response; and a reasonable opportunity to make a presentation, in person or through a representative, to the meeting before the resolution is put to a vote.

If a company has fewer than 3 (Three) directors, any director or shareholder of the company may apply to the Companies Tribunal, to make a determination that a director is ineligible or disqualified, incapacitated, or negligent or derelict.

Board committees

A company's board of directors may appoint committees of directors to whom they may delegate their authority.

It is not compulsory for a company to have any board committee other than a social and ethics committee in the case of state owned companies, listed public companies and other companies having a public interest score of more than 500 points in any two of the last five years.

The functions of the social and ethics committee are to:

1. Monitor the company's activities, having regard to any relevant legislation, other legal requirements or prevailing codes of best practice, with regard to matters relating to:

(a) social and economic development, including the company's standing in terms of the goals and purposes of:

(i) the 10 principles set out in the United Nations Global Compact Principles; and

(ii) the Organisation for Economic Co-operation and Development recommendations regarding corruption;

(iii) the Employment Equity Act; and

(iv) the Broad-Based Black Economic Empowerment Act;

(b) good corporate citizenship, including the company's:

(i) promotion of equality, prevention of unfair discrimination, and reduction of corruption;

(ii) contribution to development of the communities in which its activities are predominantly conducted or within which its products or services are predominantly marketed; and

(iii) record of sponsorship, donations and charitable giving;

(c) the environment, health and public safety, including the impact of the company's activities and of its products or services;

(d) consumer relationships, including the company's advertising, public relations and compliance with consumer protection laws; and

(e) labour and employment, including:

(i) the company's standing in terms of the International Labour Organization Protocol on decent work and working conditions; and

(ii) the company's employment relationships, and its contribution toward the educational development of its employees;

2. Draw matters within its mandate to the attention of the board of directors of the company as occasion requires; and

3. Report, through one of its members, to the shareholders at the company's annual general meeting on the matters within its mandate.

Board meetings

A director authorised by the board of a company may call a meeting of the board at any time and must call such a meeting if required to do so by at least 25% (Twenty Five Percent) of the directors, in the case of a board that has at 12 (Twelve) members or more, or, in any other case, by two directors. A company's MOI may specify a higher or lower percentage or number as this is an alterable.

Board meetings may be conducted by electronic communication unless prohibited by the companies' MOI and as long as the electronic communication enables all persons participating in that meeting to communicate concurrently with each other and without an intermediary.

There is no prescribed manner and form for board meetings. The MOI or the rules of the company should therefore determine the form and time for notice of its board meetings to be given.

Unless the company's MOI provides otherwise, a board meeting may proceed even if the notice period was not followed, provided that all directors either acknowledge receipt of the notice to convene, or specifically waive the required notice of the meeting.

A quorum for the calling of a vote at a board meeting is a majority of the directors on the company's board. Each director has one vote on a matter before the board and a majority vote is required to approve a resolution.

The Act specifically provides that the chairperson of the meeting will have the deciding vote, should the vote be tied but only if he did not take part in the initial voting.
It is compulsory to keep minutes of all the board, which should include any declarations made by directors in terms of their personal financial interests and any resolutions adopted by the board.

The minutes of the meeting must be signed by the chair of the meeting as evidence of that meeting.

Resolutions should be dated and numbered sequentially and are of immediate effect except where it is stipulated that they shall have effect from a different date stipulated in the resolution.

Directors acting other than at meeting

Any decision that could be voted on at a meeting of the board of directors of a 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.

Director's personal financial interests

A director, prescribed officer or member of a board committee or audit committee has a duty to declare any personal financial interest which he may have in any matter before the board at any time.

This is not applicable to companies with only one director who holds all of the beneficial interest in all of the issued securities of the company.

Where a company has only one director who does not hold all of the beneficial interest in all of the issued securities of the company, such director must disclose his personal financial interests to the shareholders of the company.

A director may disclose his personal financial interests in advance to the board (or shareholders) in writing. The disclosure should explain the nature and extent of all of the director’s financial interests. The disclosure can at any time be withdrawn or changed by a further written notice.

If a director of a company, other than a company which is owned by one shareholder or which only has one director, has a personal financial interest in respect of a matter to be considered at a meeting of the board, or knows that a related person has a personal financial interest in the matter, the director must:

1. disclose the interest and its general nature before the matter is considered at the meeting;

2. disclose to the meeting any material information relating to the matter, and known to the director;

3. disclose any observations or pertinent insights relating to the matter if requested to do so by the other directors;

4. if present at the meeting, must leave the meeting immediately after making any disclosure; and

5. not take part in the consideration of the matter, except to disclose to the meeting any material information relating to the matter and disclose any observations or pertinent insights relating to the matter.

While absent from the meeting such director will be regarded as being present at the meeting for the purpose of determining whether sufficient directors are present to constitute the meeting but will not to be regarded as being present at the meeting for the purpose of determining whether a resolution has sufficient support to be adopted.

In addition the director will not be allowed to execute any document on behalf of the company in relation to the matter unless specifically requested or directed to do so by the board.

Decisions by the board or any agreement which has been approved by the board of directors of the company will be binding even if one of the directors did not disclose his personal financial interest.

Furthermore, a court, on application by any interested person, may declare any transaction binding that was approved by the board or shareholders despite the failure of the director to satisfy the requirements of this section.

Failing to do so can lead to the specific director being removed as a director of the company and the company can be held responsible and liable for any contracts signed despite the non-disclosure by the director.

Standards of directors' conduct

All directors, including prescribed officers, have a duty to act in good faith and for a proper purpose, in the best interests of the company and with a reasonable degree of care, skill and diligence.

Liability of directors and prescribed officers

All directors, including prescribed officers, who fail in their fiduciary duties to the company, may be held personally and delictually liable to the company for any loss or damage, which they have caused the company.

Indemnification and directors' insurance

A company may advance expenses to a director to defend litigation in any proceedings arising out of the director's service to the company, indemnify a director for such expenses if the proceedings are abandoned or exculpate the director, or arise in respect of any liability for which the Company may indemnify the director, and may indemnify a director in respect of liability, to the extent that this is not contrary to the Act, unless the company's MOI provides otherwise.

A company may further purchase insurance to protect the company against any of the expenses or liabilities above, or to protect a director against any liability or expenses for which the company is permitted to indemnify a director.

7. WINDING-UP OF SOLVENT COMPANIES AND DEREGISTERING COMPANIES

A solvent company may be wound up by the company itself or its creditors on the passing of a special resolution by the company.

If a company fails to lodge annual returns for 2 (Two) consecutive years, the Companies and Intellectual Property Commission may deliver a demand to the company to give satisfactory reasons for the failure to file the required annual returns or to show satisfactory cause for the company to remain on the register of companies.

The Companies and Intellectual Property Commission may deregister the company if no response is received or if the response is that the company is inactive.

A deregistered company may apply to the Companies and Intellectual Property Commission for re-

instatement.

CHAPTER 3 : ENHANCED ACCOUNTABILITY AND TRANSPARENCY

1. APPLICATION AND GENERAL REQUIREMENTS OF CHAPTER

Registration of company secretary and auditor

Within 10 business days after appointing a company secretary or auditor, or after the termination of the appointment of a company secretary or auditor, a company must file a notice of the appointment or termination with the Companies and Intellectual Property Commission.

Every company must maintain a record of the name, including any former name, of each of its company secretaries and auditors and the date of every such appointment thereof.

2. COMPANY SECRETARY

Mandatory appointment of company secretary

It is mandatory for public companies and state owned companies to appoint company secretaries. Private companies may appoint company secretaries on a voluntary basis.

The Company Secretary must be a South African resident, and must remain a resident while he/she is serving in office as the company secretary.

A juristic person or partnership may be appointed as a company secretary.

Duties of company secretary

A company secretary is accountable to the company's board of directors. The duties of a company secretary include, but are not limited to, the following:

1. Providing the directors of the company collectively and individually with guidance as to their duties, responsibilities and powers;

2. Making the directors aware of any law relevant to or affecting the company;

3. Reporting to the company's board any failure on the part of the company or a director to comply with the Memorandum of Incorporation or rules of the company or the Act;

4. Ensuring that minutes of all shareholders meetings, board meetings and the meetings of any committees of the directors, or of the company's audit committee, are properly recorded in accordance with the Act;

5. Certifying in the company's annual financial statements whether the company has filed required returns and notices in terms of the Act, and whether all such returns and notices appear to be true, correct and up to date;

6. Ensuring that a copy of the company's annual financial statements is sent, in accordance with the Act, to every person who is entitled to it; and

7. Carrying out the functions of a person who is responsible for the company's compliance with the requirements of the Act regarding the filing of annual returns.

Resignation or removal of company secretary

A company secretary may resign from office by giving the company one month’s written notice, unless the company’s board of directors approves a shorter notice period.

3. AUDITORS

Appointment of auditor

It is compulsory for public companies and state owned companies to have auditors. Non-profit companies, private companies and personal liability companies may appoint auditors voluntarily if they wish.

Public companies and state owned companies must appoint auditors upon incorporation and every year at their AGM’s.

If auditors are not appointed upon incorporation of the company, the directors of the company must appoint the first auditor of the company within 40 business days of incorporation.

4. AUDIT COMMITTEES

Audit committees

It is compulsory for public companies and state owned companies to have auditor committees. Non-profit companies, private companies and personal liability companies may appoint audit committees voluntarily if they wish.

An audit committee with at least three members must be appointed or reappointed at every annual general meeting.

The audit committee must have three independent committee members. It is expected from the audit committee to report on the processes they have followed in appointing auditors and carrying out their responsibilities. They must comment on the financial statements and policies and procedures followed by the company and appointed auditors and lastly comment on whether the auditors acted independently in the auditing process.

CHAPTER 4: PUBLIC OFFERINGS OF COMPANY SECURITIES

Only a company may make a public offering of its securities. If a foreign company, it must file its MOI and a list of names and addresses of its directors at least 90 (Ninety) days prior to making the offer.

An initial public offering of securities must be accompanied by a registered prospectus. No prospectus is required for a secondary offer to the public of listed securities which is not an initial public offering.

A primary offer to the public may not be made in respect of:

1. listed securities, unless in accordance with the requirements of the relevant exchange; and

2. unlisted securities, unless accompanied by a registered prospectus.

No secondary offer of any unlisted securities may be made to the public, unless such offer is accompanied by:

1. a copy of the (duly updated) registered prospectus which was used in the primary offering; or

2. a written statement which must:

   (a) be filed for registration;

   (b) be issued within 3 (Three) months of registration;

   (c) be signed by person making offer;

   (d) only contain the particulars required by the Act; and

   (e) be accompanied by a copy of the company's latest financial statements.

A prospectus must contain all information an investor may reasonably require to assess the assets and liabilities, financial position, profits and losses, cash flow and prospects of the company, as well as the securities being offered and rights attached to them. They must be in the prescribed form, or, if there is no prescribed form, in plain language.

CHAPTER 5: FUNDAMENTAL TRANSACTIONS, TAKEOVERS AND OFFERS

This chapter only applies to profit companies, public companies and state-owned companies (unless exempted). It will apply to other profit companies if the issued securities that have been transferred by the company within 24 (Twenty Four) months prior to an offer or transaction under this chapter exceeds 10%, or if the MOI of a particular company states that it will apply to such company.

The three fundamental transactions in terms of the Act are:

1. disposals of the majority of a company's assets or undertaking;

2. amalgamations or mergers; and

3. schemes of arrangement.

A company may not undertake one of the fundamental transactions unless:

1. that transaction has been approved by a special resolution or is pursuant to or contemplated in an approved business rescue plan for the company; and

2. the Takeover Regulations Panel has issued a compliance notice in respect of the transaction or has exempted the transaction from the application of the Act or the Takeover Regulations.

An “affected transaction” is:

1. the three fundamental transactions;

2. an acquisition of, or announcement of an intention to acquire, a beneficial interest in sufficient securities of a class of securities representing a multiple of 5% of that class of securities;

3. an announced intention to acquire the remaining voting securities;

4. a mandatory offer; or

5. a compulsory acquisition.

The Act established the Takeover Regulation Panel whose job it is to regulate affected transactions in order to ensure the integrity of marketplace and fairness to holders of securities, ensure the provision of sufficient information to holders of securities and the provision of adequate time for regulated companies and holders of their securities to obtain and provide advice with respect to offers, and to prevent actions intended to frustrate or defeat an offer or the making thereof.

Mandatory offers are triggered when an offeror acquires securities which enable it to exercise voting rights exceeding 35% of all voting rights attached to securities. Within one day of such acquisition, the offeror must deliver a notice to the holders of the remaining securities which must contain:

1. a statement that offeror can exercise at least 35% of all of the voting rights attached to securities; and

2. an offer to acquire the remaining voting securities.

Within one month of notice, offeror must deliver a written offer to the holders of the remaining securities in the company to acquire their securities.

An offeror who obtains acceptance of an offer to purchase 90% of a class of securities, may compulsorily acquire the remainder of the class of securities on similar terms as.

CHAPTER 6: BUSINESS RESCUE AND COMPROMISE WITH CREDITORS

1. BUSINESS RESCUE PROCEEDINGS

The Act has introduced the concept of Business Rescue, which replaces the old Judicial Management provisions. Where a company is financially distressed, the company's directors or creditors now have the right to place the company under Business Rescue.

The company may resolve to voluntarily begin business rescue proceedings and be placed under supervision if the board of directors of the company has reasonable grounds to believe that the company is financially distressed and there appears to be a reasonable prospect of rescuing the company.

A plan to rescue the company by restructuring 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 is developed and implemented.

Whilst the company is under business rescue, the management of its affairs, business and property are supervised, proceedings against the company are suspended and the business rescue practitioner may suspend in whole or in part any contractual obligations due by the company, to others.

CHAPTER 7: REMEDIES AND ENFORCEMENT

An application can be made to a court, the Companies Tribunal, the Takeover Regulations Panel or the Companies and Intellectual Property Commission by any person:

1. directly contemplated in a particular provision of the Act;

2. acting on behalf of an aggrieved person, who cannot act in their own name;

3. 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

4. acting in the public interest, with leave of the court.

As well as retaining existing remedies, this chapter of the Act introduces:

1. A right to apply to have a director declared delinquent or under probation,

2. A right for dissenting shareholders in a fundamental transaction to have their shares appraised and to be compensated for the fair value of those shares; and

3. The right to commence or pursue legal action in the name of the company, which replaces common law derivative actions.

Following an investigation into a complaint, the Takeover Regulations Panel or the Companies and Intellectual Property Commission may:

1. Excuse the conduct complained of;

2. Refer the complaint to the Companies Tribunal;

3. Advise the complainant of any right they may have to seek a remedy in court;

4. propose that the complainant meet with the Companies and Intellectual Property Commission or with the Companies Tribunal, with a view to resolving the matter by consent order;

5. Commence proceeding in a court on behalf of a complainant, if the complainant so requests;

6. Refer the matter to the National Prosecuting Authority, or other regulatory authority concerned, if there is a possibility that the matter falls with their jurisdiction; or

7. Issue a compliance notice, but only in respect of a matter for which the complainant does not otherwise have a remedy in a court.

A compliance order may be issued against a company or against an individual if the individual was implicated in the contravention of the Act.

A person who has been issued a compliance notice may challenge it before the Companies Tribunal, and in court, but failing that, is obliged to satisfy the conditions of the notice. If they fail to do so, the Companies and Intellectual Property Commission may either apply to a court for the imposition of an administrative fine of the greater of 10% (Ten Percent) of the person's turnover or one million rand, or refer the failure to the National Prosecuting Authority as an offence.

CHAPTER 8: REGULATORY AGENCIES AND ADMINISTRATION OF ACT

The Act established the following agencies to perform the following functions:

1. The Companies and Intellectual Property Commission to enforce the Act;

2. The Companies Tribunal to adjudicate in applications before it and assist in the resolution of disputes;

3. The Takeover Regulation Panel to regulate affected transactions, which are dealt with under Chapter 5; and

4. The Financial Reporting Standards Council to receive and consider any relevant information relating to the reliability of, and compliance with, financial reporting standards and adapt international reporting standards for local circumstances.

CHAPTER 9: OFFENCES, MISCELLANEOUS MATTERS AND GENERAL PROVISIONS

The following are offences in terms of the Act:

1. Disclosure of any confidential information concerning the affairs of any person which was obtained as a result of initiating a complaint, or participating in any proceedings in terms of the Act;

2. The falsification of accounting records;

3. Publishing of untrue or misleading information;

4. Reckless trading;

5. An act or omission by a company calculated to defraud a creditor or employee of a company, or a holder of the company's securities, or with another fraudulent purpose;

6. The preparation, approval, dissemination or publication of a prospectus or a written statement that contains an "untrue statement";

7. The preparation, approval, dissemination or publication of financial statements or summaries which do not comply with the Act's requirements or are materially false or misleading;

8. Failure to satisfy a compliance notice issued in terms of the Act; and

9. Hindering, obstructing or improperly attempting to influence the Companies and Intellectual Property Commission, the Takeover Regulation Panel, the Companies Tribunal, an inspector or investigator, or a court when any of them is exercising a power or performing their duties in terms of the Act.

In the case of a contravention of 1 to 7 above, a person would be liable, upon conviction, to a fine or to imprisonment for a period not exceeding 10 (Ten) years, or to both a fine and imprisonment, and in any other case, to a fine or to imprisonment for a period not exceeding 12 (Twelve) months, or to both a fine and imprisonment.

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