AUE1601

Definitions

1	Securities	Any shares, debentures or other instruments, irrespective of their form or title, issued or authorized to be issued by a profit company
2	Incorporator	With respect to a company incorporated in terms of this Act, means a person who incorporated that company, as contemplated in **section 13** ; with respect to pre-existing company, means a person who took the relevant actions comparable to those contemplated in **section 13** to bring about the incorporation of that company
3	MOI	Means the document, as amended from time to time that sets out rights, duties and responsibilities of shareholders, directors and others within and in relation to a company, and other matters as contemplated in section 15
4	Public Interest score	▪ Is the sum of the points allocated to certain attributes applicable to all companies, for example, one point is allocated to every R1m, or part thereof, of turnover ▪ Is used as a gauge of the interest the public at large (society) has in the company ▪ The company will be required to satisfy various conditions, dependent upon its public interest, for example, a company with the score of at least 350 points will have to be audited externally
5	Security	Is a share, debenture or other instrument that is issued by the company
6	Shares	Are units into which company divides its profit
7	Resolution	decision

8	Rights	Control rights – which relate to voting rights at meetings Financial rights – which relate to the right to dividends and the right to any excess upon liquidation
9	Distribution	Includes payment for share buy-back; and The payment of dividends
10	Ordinary shareholders' resolution	A resolution adopted with the support of more than 50% of the voting rights exercised on the resolution or a higher percentage
11	Special shareholders' resolution	In the case of a company, a resolution adopted with support of at least 75% of the voting rights exercised on the resolution
12	Director	Is a member of the body of people that manages a company
13	Rescue	Means that the company is reorganized in order to restore it to a profitable entity and thereby avoid liquidation

TOPIC 2

INTERPRETATION, PURPOSE, APPLICATION AND FORMATION OF A COMPANY

Relationships

Consanguinity "blood relationship"	**Affinity** "relationship that exists due to a valid marriage
1st degree consanguinity • Parents • Children	• a husband and wife are related in the 1st degree by marriage.

2nd degree consanguinity • Brothers/sisters • Grandparents • grandchildren	

Section 4: Solvency and Liquidity Test

Solvency Test = assets, fairly valued, **are equal to, or exceeds**, liabilities of the company fairly valued. **(Sec 4(a))**

Liquidity Test

- means that the company will be able to pay its debts
- as they become due (Sec 4(b))
- in the ordinary course of business
- for a period of 12 months after the date of the test
- current assets fairly valued are **equal to, or exceed** current liabilities fairly valued
-

Solvency and liquidity tests are used when

- when buying back shares
- granting financial assistance
- declaring a dividend (distributions)

When declaring a dividend

1. in terms of section 46, a company must not make any proposed distribution unless the distribution
   - is pursuant to an existing legal obligation of the company, or a court order

- the board of the company, by resolution, has authorized the distribution

2. it must reasonably appear that the company has performed the solvency and liquidity test before the distribution.
3. According to section 77(3), A director is liable for any loss, damages or costs sustained by the company if the board approved a distribution and failed to vote against the distribution, despite knowing that the distribution was contrary to section 46. In such a case, the directors did not perform their duties regarding the application of the solvency and liquidity test properly; otherwise they would never have approved the distribution.

Categories of companies

Non-profit companies

Characteristics of NPC

- They are formed for a public benefit purpose
- Except for reasonable compensation for services rendered, the income of and property of these companies are not distributable to incorporators/members/directors/officers
- They apply their assets and income to advance their objectives
- They have a minimum of **3 incorporators**
- They have a minimum of **3 directors**

Profit companies

State-owned companies (sec 1) **Characteristics**	Public companies **Characteristics**	Private companies (sec 8(2)(b)) **Characteristics**	Personal liability companies (sec 8 (2)(c)) **Characteristics**
• A state-owned	• Offers to public	• Transferability of	• MOI states that it is

enterprise • A company owned by a municipality • Minimum of **3 directors**	permissible • Unrestricted transferability of shares • Minimum of **1 incorporator** • Minimum of **3 directors**	securities restricted • Less disclosure and transparency requirements than those for public companies • Minimum of **1 incorporator** • Minimum of **1 directors**	a personal liability company • Meets the criteria of a private company • Minimum of **1 director**

Differences between Public and Private Company in respect of the following:

	Private Company	**Public Company**
Name	• It must include the words "proprietary" and "limited" or (Pty) Ltd	• It must include the word "limited" or Ltd
Number	• Has a minimum of 1 director. No maximum is stipulated in the Act	• Has a minimum of 3 directors. No maximum is stipulated. However, the company's MOI may stipulate a higher number
Offer of share to the public	• May not offer its shares for sale to the public under any circumstances and the transferability of its share is restricted	• May offer its shares for sale to the public under the conditions stipulated in the Act in terms of its MOI

Company secretary	• It is not required to have a company secretary but may appoint one	• It must appoint a company secretary
Audit committees	• It not required to appoint an audit committee unless its MOI indicates that the company elects to comply voluntarily with the provisions of **chapter 3** of the companies act, 2008 which deals inter alia with, the appointment of an audit committee	• It must appoint an audit committee annually

INCORPORATION AND LEGAL STATUS OF COMPANIES

Memorandum of Incorporation (Sec 15 – 16)

- It is the founding document of a company. It is subject to the ACT and it must be consistent with the provisions of the ACT
- The MOI may include:
  - Include matters that are not dealt with in the ACT
  - Alter the effect of any "alterable" provision
  - Imposing on company a higher standard, greater restriction, longer period or any similarly more onerous requirement, than would otherwise apply to the company in terms of an unalterable provision of the act
- Contain any restrictive conditions applicable to the company or changes to any such conditions, in addition to the requirements for amendments of MOIs set out in section 16
- Prohibit the amendment of any particular provision of the MOI

- Not include any provision that negates , restricts, limits, qualifies, extends or otherwise alters the substance or effect of an unalterable provision of the ACT

Examples of alterable provisions

- Annual financial statements (the AFS must be audited voluntarily if the company's MOI or a shareholders' resolution, so requires of the Company's board has so determined)
- Notice of shareholders meetings (a company's MOI may provide for longer or shorter minimum notice periods than required by subsection(1)(sec 62(2))
- Special resolutions – (A company's MOI may permit)
  - A lower percentage of voting rights to approve any special resolution
  - One or more lower 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 **10 percentage** points between the highest established requirement for approval of an ordinary resolution on any matter, and the lowest established requirement for approval of a special resolution on any matter. (Sec 65(10))

PRE-INCORPORATION CONTRACTS (SEC 21 – ALSO REC 35)

- 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 to be incorporated in terms of this Act, but does not yet exist at the time
- If for some reason , the company is not incorporated, the person any other person will be jointly and severally liable for all liabilities for example ----------
- If the agreement is ratified, it is enforceable against the company and the liabilities of the individuals are discharged

- Within **3 months** after the date on which the company is incorporated, the board must ratify(confirm) the contract
- If within **3 months** after the date on which the company was incorporated, the board has neither ratified or rejected the contract, the contract will be deemed to have been ratified
- If a company rejects an agreement or action, a person who bears any liability in terms of subsection (2) for that rejected agreement or action may assert a claim against the company for any benefit it has received, or is entitled to receive, in terms of the agreement or action
- The pre-incorporation contract must be in writing

RECKLESS TRAIDING

In terms of Section 22, a company may not

- Trade recklessly
- With gross negligence
- With the purpose of defrauding any person
- For fraudulent purposes
- Or under insolvent circumstances

A director may be liable to the company for any loss suffered by the company while trading under insolvent circumstances **(sec 77(3)),** and a director may also be liable to third parties who have had dealings with company and suffered a loss.

NB!! The question here is whether a reasonable e person would have acted in the same manner in a situation of factual insolvency

Examples of reckless trading – thus a breach of section 22

- If you believe that the company is factually insolvent, would it be necessary for it to enter into a lease agreement for a very expensive fleet of company vehicles for its directors?
- Alternatively, would it be reasonable for 3 or 4 directors to embark on an extensive overseas trip to visit trade fairs when 1 director could have undertaken the trip?
- Would it be reasonable for the directors to vote in favour of large bonuses for themselves or substantial salary increases?
- Would it be reasonable for the directors to continue incurring debt when there is, to the knowledge of the directors, no reasonable prospect of the creditors ever receiving payment for those debts?

Activity 2

The following is an extract from Distillique Limited's annual financial statements as at 30 June 2012:

	2012 R
ASSETS	
Total non-current assets	4 000 000
Total current assets	2 000 000
	6 000 000
LIABILITIES	
Total non-current liabilities	6 000 000
Total current liabilities	5 000 000

11 000 000

REQUIRED

Marks

With reference to the extract from Distillique Limited's annual financial statements as at 30 June 2012, evaluate if Distillique Limited is trading recklessly in terms of the requirements of the Companies Act. (6)

Feedback

Theory

- According to section 22, a company may not carry on its business recklessly, with gross negligence, with intent to defraud any person or for fraudulent purpose.
- If the commission has reasonable grounds to believe that a company is engaging in prohibited conduct as stated, or is **unable to pay its debts as they become due and payable in the normal course of business,** the commission may issue a notice to the company. The company will then have to give reasons why it should be permitted to continue with its business or with its trade, as the case may be.
- Should the company fail to satisfy the commission with **20 business days** that is not engaging in conduct prohibited by the first paragraph above or that it is able to pay its as they become due and payable in the normal course of business, the commission may issue a compliance notice to the company requiring it to cease carrying on its business or trading, as the case may be
-

Practical

- The company does not satisfy the solvency test, since after considering all reasonable foreseeable financial circumstances of the company, the assets (--) of the company valued , do not exceed the liabilities (--) of the company valued
- The company is not liquid, since the current liabilities (--) exceed the current assets (--)
- The company is trading recklessly; it is therefore in contravention of the Act

TOPIC 3

Company Records

- Companies must prepare annual financial statements (usually) within 6 months after the end of its financial year.
- This is a specific requirement of the Companies Act, which has nothing to do with whether or not AFS are audited.

With regard to company records, **section 24 and 28** of the Companies Act state that the company must keep or maintain:

- Accurate and complete accounting records in one of the official languages
- A copy of the Memorandum of Incorporation (and any amendments, etc. thereto)

- A record of its directors details
- Copies of:
  - Reports presented at an annual general meeting for 7 years
  - Annual financial statements for 7 years
  - Accounting records (for the current year and the seven years prior to the current year)
  - Notices and minutes of all shareholders' meeting for 7 years
  - Copies of communications to shareholders for 7 years
  - Minutes of all meetings and resolutions of directors' meetings for 7 years
- A register of shareholders (security register) of the company

Form and standards for company records (sec 24) and Accounting records (sec 28)

- Any documents, accounts, books, writing, records or other information that a company is required to keep in terms of this Act or any other public regulation must be kept
  - In written form or any other form or manner that allows that information to be converted into written form within a reasonable time
  - For a period of 7 years
- If a company has existed for a shorter time than contemplated the company is required to retain records that shorter time
- Every company must maintain
  - a copy of its MOI, and any other amendments or alteration to it, and any rules of the company made in terms of section 15(3) to (5)
  - A record of its directors, including

        - All the information required in terms of subsection (5) in respect of each current director at any particular time
        - With respect to each past director, the information required in terms of subparagraph (i), which must be retained for 7 years after the past director retired from the company
    - Copies of all
        - Reports presented at an annual general meeting of the company, for a period of 7 years after the date of any such meeting
        - Annual financial statements required by this Act, for 7 years after the date on which each such particular statements were issued
        - Accounting records required by this Act, for the current financial year and for the previous 7 completed financial years of the company
- Notice and minutes of all shareholders meetings; including
    - All resolutions adopted by them
    - Any document that was made available by the company to the holders of securities in relation to each such resolution for 7 years after the date each such resolution was adopted.
- Copies of any written communications sent generally by the company to all holders of any class of the company's securities, for a period of 7 years after the date on which each such communication was issued
- Minutes of all meetings and resolutions of directors, or directors' committees, or the audit committee, if any for a period of 7 years after the date
    - Of each such meeting
    - On which each such resolution was adopted

- Every company must maintain a securities register or its equivalent as required by section 50 in the case of a profit company or a member's register in case of a non-profit company that has members; and the records required in terms of section 85, it that section applies to the company
- A company's record of directors must include, in respect of each director the:
  - Full name, and any former names
  - Identity number or the person does not have an identity number, the person's date of birth
  - Nationality and passport number, if the person is not South African
  - Occupation
  - Date of their most recent election or appointment as director of the company
  - Name and registration number of every other company or foreign company of which the person is a director, and in the case of a foreign company, the nationality of that company
  - Any other prescribed information

Accounting Records

- A company must keep accurate and complete accounting records in one of the official languages of the Republic-
  - As necessary to enable the company to satisfy its obligations in terms of this Act or any other law with respect to the preparation of financial statements; and

- Including prescribed accounting records, which must be kept in the prescribed manner and form

- A company's accounting records must be kept at, or be accessible from, the registered office of the company
- It is an offence for a company with an intention to deceive or mislead any person by failing to keep accurate or complete accounting records; to keep records other than in the prescribed manner and form, if any; or to falsify any of its accounting records, or permit any person to do so ;
- It is an offence for any person to falsify a company's accounting records
- For greater certainty, the commission may issue a compliance notice, as contemplated in section 171 to a company in respect of any failure by the company to comply with the requirement of this section, irrespective whether that failure constitutes an offence in terms of subsection (3)

Financial Statements

- Each company must prepare annual financial statements within 6 months after each year end
- Must satisfy financial reporting standards
- Represent the state of business and affairs of the company fairly
- Explain the transactions and financial position of the company
- Indicate whether the statements have been audited/independently reviewed/neither
- State the name and designation of the preparer of the statements
- Not be incomplete, false or misleading

- Be audited, in the case of a public company; or
- In the case of any other profit or non-profit company-
  - Be audited if so required by the regulations made in terms of subsection (7) taking into account whether it is desirable in the public interest as indicated by any relevant factors, including
    - Its annual turnover
    - The size of its workforce
    - The nature and extent of its activities
- Be either
  - Audited voluntarily if the company's MOI or shareholders resolution, so requires or if the company's board has so determined
  - Independently reviewed in a manner that satisfies the regulations made in terms of subsection (7)
- With respect to a particular company, every person who is a holder, or has a beneficial interest in, any securities issued by that company, is also a director of that company, that company is exempt from the requirements to have its annual financial statements audited or independently reviewed,
- The annual financial statements of a company must
  - Include an auditor's report, if the statements are audited
  - Include a report by the directors with respect to the state of affairs, the business and profit or loss of the company, or the group of companies, if the company is a part of a group, including
    - Any material for the shareholders to appreciate the company's state of affairs
    - Any prescribed information
- The AFS of each company that is required in terms of this Act to have its financial statements audited must include particulars showing –

- The remuneration and benefits received by each director, or individual holding any prescribed office in the company
- The amount of-
  - Any pensions paid by the company to or receivable by current or past directors or individuals who hold or have held any prescribed office in the company
  - Any amount paid or payable by the company to a pension scheme with respect to current or past directors or individuals who hold or have held any prescribed office in the company
- The amount of any compensation paid in respect of loss of office to current or past directors or individuals who hold or have held any prescribed office in the company
- The number and class of any securities issued to a director or person holding any prescribed office in the company, or to any person related to any of them, and the consideration received by the company for those securities ; and
- Details of contracts of current directors and individuals who hold any prescribed office in the company

- For the purposes of subsections (4) and (5), remuneration includes-
  - Fees paid to directors for services rendered by them or on behalf of the company, including any amount paid to a person in respect of the person's accepting the office of director
  - Salary, bonuses and performance-related payments
  - Expense allowances, to the extent that the director is not required to account for the allowance
  - Contributions paid under any pension scheme not otherwise required to be disclosed in terms of subsection (4)(b)

- Financial assistance to a director, past director or future director, or person related to any of them for the subscription of options or securities or the purchase of securities
- With respect to any loan or other financial assistance by the company to a director, past director or future director, or a person related to any of them or any loan made by a third party to any such person

- The minister may make regulations, including different requirements for different categories of companies prescribing the categories of any profit or non-profit companies that are required to have their respective annual financial statements audited

Requirements to be audited or independently reviewed

The following must always be audited by a registered auditor

- All state owned companies (SOC)
- Non-profit companies (incorporated by state)
- All public companies (Ltd)
- All companies who holds assets in fiduciary capacity that exceeds R5 million

Activity 2

1. What is Public Interest Score?

- Is the sum of the points allocated to certain attributes applicable to all companies, for example, one point is allocated to every R1m, or part thereof, of turnover

- Is used as a gauge of the interest the public at large (society) has in the company
- The company will be required to satisfy various conditions, dependent upon its public interest, for example, a company with the score of at least 350 points will have to be audited externally

2. 3 matters that will be affected by a company's public score

- Whether the company is audited or reviewed and who must carry out the independent review
- Which financial reporting standards the company must use to prepare its AFS
- The level of the financial rescue practitioner who would be engaged if the company needed financial rescue

3. Is it true that public companies, both listed and unlisted must calculate their public interest score?

- True, all companies must calculate their public interest score, regardless whether they are public or private, listed companies

4. What are the various thresholds?

- Equal to or above 350
- Equal to 100 or above, but less than 350
- Below 100

All other companies should calculate their public interest score

- 1 point for every R1m in turnover or part thereof
- 1 point for every R1m in 3rd party liabilities, or part thereof
- 1 point for every known security holder
- 1 point for every 1 employee employed on average during the year

Public interest score of 350 or more

- Must be audited by a registered auditor
- All other companies that elect to have a voluntary audit as per their MOI requirement, shareholders' resolution or board resolution

Public interest score of 100 or more but less than 350

Is the financial statements compiled by a person that works for the company?

- If yes, then must be audited
- If no then
  - Are all the shareholders also directors?
    - If no, then they must be independently reviewed
    - If yes. then there is no audit/review requirement

Public interest score of less than 100

Are all the shareholders also directors?

- If no then they must be independently reviewed
- If yes, then there is no audit/review requirement

TOPIC 4

Shareholders and shares (**just one of the most important topics for my studies**)

Legal nature of company shares and requirements to have shareholders (sec 35)

- A share issued by a company is movable property, transferable in any manner provided for or recognized by this Act or other legislation
- A shore does not have a nominal or par value
- A company may not issue shares to itself
- An authorized share of a company has no rights associated with it until it has been issued
- Shares of a company that have been issued and subsequently acquired by that company or surrendered to that company in the exercise of appraisal rights have the same status as shares that have been authorized but not issued

Authorization of Shares (sec 36)

- A company's MOI should describe the name of each different class of share in order to distinguish it from other classes of shares, as well as indicate the preferences, rights (such as voting rights) and limitations of these shares
- It is important to note that an authorized share has no rights associated with it until the share has been issued

Amendments of the MOI regarding shares (Sec 36)

- The amendment of MOI to change the authorization, classification or number of shares can be done by means of:

A special resolution	**or**	**A decision by the company's board** **The board may (unless prohibited by the MOI)** ▪ Make changes to a number of authorized shares

		▪ Reclassify unissued, authorized shares ▪ Classify unclassified shares ▪ Determine preferences, rights and limitations of authorized shares **NB!! A notice of the amendment of the MOI must be filed**

Activity 2 pg. 39

ABC (Pty) Ltd currently has 1 000 authorized ordinary shares. The director of ABC (Pty) Ltd, Mr Joe Soap, wants to convert 100 of these ordinary shares to preference shares. Explain to Mr Soap how the requirements of the Companies Act relate to this matter?

Answer

- In terms of **section 36** of the Act, the board of the company may decide to change the classification of these shares (unless stated otherwise in the MOI)
- The board must file a notice of amendment of the MOI

OR

- In terms of section 36 of the Act, the MOI may be amended to change the classification of these shares by means of a special resolution.

Preferences, Rights, Limitations and other share terms (sec 37)

In terms of section 37(2), every share, irrespective of its class, has associated with it one voting right, subject to the provisions of the Companies Act and the MOI

The MOI may determine the preferences, rights and limitations. This means that a voting right can be limited, but not excluded

The “provisions of the Act” mentioned above are as follows:

- 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
- If there is more one class of share the MOI must provide that at least one class of shares must have voting rights in respect of all matters on which can be voted. Furthermore, a class of share (not necessarily voting class), must be entitled to the surplus at liquidation
- Shares with limited voting rights will, irrespective of the provisions of the MOI, nevertheless have voting rights on any proposal to amend the rights associated with that share
- All the shares of a particular class must have the same preferences, rights, limitations and other terms

Activity 3pg. 41

ABC (Pty) Ltd is in the process of liquidating. Mr Joe Soap, a shareholder of ABC (Pty) Ltd, wants to know if he will be equally entitled to the surplus net assets of the company upon its liquidation, distributed to all the other shareholders. ABC (Pty) Ltd has only once lass of shares

Answer

In terms of **section 37** of the Act, if a company has only one class of shares, all these shares have equal preferences, rights and limitations, unless stated otherwise in the MOI.

Issuing shares (sec 38)

- The board of directors has the authority to issue shares in terms of **section 38(1)**
- This decision is exercised by means of a board resolution
- However, such a share issue must be approved by a section resolution if these issue is to a director or prescribed officer (or a person related to or interrelated to the director, prescribed office or the company)
- Notice and quorum requirements must be adhered to regarding the board meeting and resolution

Retroactive authorization of shares

Share issues can be retroactively authorised in accordance with **section 38(2)** by means of a special resolution.

If the resolution is not passed then:

- Contract will be null and void to the extent of exceeded authorization
- Subscribers must be repaid (including interest)
- Share certificates will be nullified
- Entries in share register will be nullified
- And any director who was party to such an issue may be held liable for losses suffered by the company due to the invalid issue **(sec 38(3)(d))**

Subscription of shares (sec 39)

Except to the extent the MOI of a private or personal liability company provides otherwise:

- A shareholder may, in exercising the pre-emptive right, subscribe to fewer share than he/she would be entitled to subscribe for
- Shares not subscribed for by a shareholder within a reasonable time may be offered to other persons to the extent permitted by MOI

Distributions to be authorised by the Board (sec 46)

- In terms of section **46((1)(a)(i),** It is pursuant to an existing legal obligation or court order
- In terms of section **46(1)(a)(ii),** all distributions must be authorised by a special resolution of the board of directors.
- It must reasonably appear that the company will satisfy the solvency and liquidity test immediately after the distribution
- The company then has 120 days to make the distribution
- If it is not done within 120 days, the solvency and liquidity tests should be repeated
- If any of these requirements are not met, the directors may be held liable for any losses suffered by the company
- The transaction will be void

Activity 4 pg.44

During the financial year, smugglers (Pty) Ltd had revalue a certain part of the company's property portfolio upward by R3 million. Shortly thereafter, its board of directors distributed the R3 million as a dividend

Required

Discuss the legality of the dividend distributed by smugglers (Pty) Ltd in respect of the fixed asset revaluation **(10 marks)**

Answer

- **In terms of legal concept of divisible profits**, the revaluations of the fixed assets may be distributed, provided valuers made the valuation in good faith. In this case, it appears that the revaluation was not carried out in the required manner. The increase is of a permanent nature and the company's MOI does not prohibit the distribution
- **In terms of section 46**, a company must not make any proposed distribution unless:
  - It was pursuant to an existing legal obligation or court order (in this case it was not)
  - The board has authorised the distribution
  - It appears that the company will satisfy the solvency and liquidity test immediately after making the distribution

- The board must state in the resolution that they have considered the solvency and liquidity test and reasonably conclude that the company would satisfy the requirement after the distribution

- The distribution must have taken place in full with **120 business days** of the resolution, or the directors must reperform and acknowledge the performance of the solvency and liquidity test

- As it appears as though the holding company may be putting pressure on its subsidiary smugglers (Pty) Ltd. The directors of the subsidiary should act with caution. They need to be absolutely certain that they are acting in the best interests of the subsidiary and in good faith, and that they are complying with

the requirements of **section 46,** particularly in performing the solvency and liquidity test

- A director who was present at that meeting, or took part in the decision-making will be liable for losses suffered by the company if that director failed to vote against the resolution knowing that the distribution was contrary to **section 46**

Company or subsidiary acquiring company shares (sec 48)

- A company and/or its subsidiary may buy back the shares of the company

- This is authorized by a board resolution of the company and/or a board resolution of the subsidiary
- Unless: if the shares are bought back from a director or prescribed officer, or a person related to a director or prescribed officer – then a special resolution of shareholders will be required
- After the shares are bought back, there must still be share in issue of the same class and type (for example, if there was 100 000 issued shares, the company may not buy back the full 100 000 shares, leaving 0 shares in issue)
- All the subsidiaries of the company may not, in aggregate, hold **more than 10%** of the share of the company
- Subsidiaries **may not exercise voting rights** in terms of these shares

Securities registration and transfer (sec 49-56)

Section 49 provided that securities must be evidenced by certificates, but they may also be without any certificates.

Section 50 provides that every company must establish a register of its issued securities in the prescribed for and maintain such register according to prescribed standards

Section 51 stipulates the information that must be included in a certified security certificate and the information that must be entered in the security register when a transfer takes place

Section 56 provided for a company's issued securities to be held and registered in the name of one person for the beneficial interest of another person

Regulation 32: prescribed form and standard

1. the security register of a profit company must be kept in one of the official languages
   a. for every class of authorized securities, a record of
      - the number of securities authorised, and the date of authorization
      - the total number of securities of that class that are held in uncertificated form
      - the number
   b. in respect of every insurance, re-acquisition or surrender of securities of any particular class, entries showing –
      - the date on which the securities were issued, re-acquired or surrendered to the company
      - the name of the person to, from or by whom the securities were issued, re-acquired or surrendered, as the case may be
2. the contact details of the person who bought those securities
3. any entry in a security register pertaining to a person who has ceased to hold securities of the company may be disposed of seven years after that person last held any securities of the company

Shareholders and voting rights (sec 57)

- A shareholder is entitled to exercise any voting rights in relation to a company, irrespective of the form, title, or nature of the securities(shares) to which those voting rights are attached
- The board of a company that holds any securities of a second company may authorize any person to act as its representative at any shareholders meeting of that second company
- A person authorized to act as a company's representative, as contemplated, may exercise the same powers as the authorizing company could have exercised it were an individual holder of securities
- **Section 57** furthermore provides for the way in which voting rights will be exercised in instances where, in a profit company (other than a state-owned company), there is only one shareholder on only one director, and another instance where every shareholder is also a director of the company
- It also provides that the governance requirements in section 59-65 do not apply where a profit company (other than a state-owned company), **has only one shareholder. For example, the requirements for notice, quorum and conduct at meetings will not apply**

Activity 5 pg. 48

Required: discuss the sections of the companies act**, but only in terms of the requirements application to the shareholders' meetings to be held (21 Marks)**

Answer

- As there is a need to hold a shareholders' meeting, the board will have to provide all shareholders' with written notice
  - Of the date, time and place of the meeting
  - Of the specific purpose of the meeting
  - Copy of proposed resolutions
  - The percentage of votes required for the resolution (special)
  - The rights of the shareholders who are entitled to vote, that they may appoint a proxy
  - That the shareholders must provide identification at the meeting
- This notice must be given at **least 10 days before** the meeting will be held. (the MOI may stipulate a longer or shorter notice period)
- The meeting to pass this resolution may only begin if **25%** of the voting rights entitled to be voted in respect of at least one matter to be decided at the meeting (there may be other matters to be covered at the meeting) are present
- For the debate to commence on the share issue resolution, holders of at **least 25%** of the shares entitled to vote in respect of the share issue must be present when the matter is called on the agenda.
- The previous paragraph deals with a voters' quorum. In addition, as this company has more than **2 shareholders**, the meeting may not begin or a matter be debated, **unless at least 3 shareholders** are present at the meeting.

- At the commencement of the meeting, shareholders' identity as well as their right to attend or participate must be verified. The person presiding over the meeting must be satisfied with the validity of the shareholders' identity
- The proposed resolution must be sufficiently clear and specific. It must also be accompanied by sufficient information to enable a shareholder to decide whether to participate in the meeting and "influence the outcome" of the vote on the resolution or not
- Voting should be by poll (not by a show of hands). Voting by poll enables those shareholders with larger shareholdings to exercise greater influence on the vote
- For the (special) resolution on the share issue to be passed, at least 75% of the voting rights exercised on the resolution must support it. (**the MOI may stipulate a lower or higher percentage, but the difference between the percentage for an ordinary and a special resolution must be at least 10%**)

Shareholders resolution (sec 65)

Ordinary resolutions

- In terms of the definition in section1, an ordinary resolution means a resolution adopted with the support of more than 50% of the voting rights exercised on the resolution, or a higher percentage

Special resolution

- in terms of definition in section 1, a special resolution means a resolution adopted with the support of at least 75% of the voting rights exercised on the resolution, or a different percentage

  a company's MOI may permit a different percentage of voting rights to approve a special resolution

When is a special resolution required?

- Amend the company's MOI
- Ratify a consolidated revision of a company's MOI
- Ratify actions by the company or directors in excess of their authority
- Approve an issue of share or securities
- Authorize the board to grant financial assistance
- Approve a decision of the board for re-acquiring of shares
- Authorize the basis for compensation to directors of profit company
- Approve the voluntary winding-up of the company
- Approve the winding-up of the company in the circumstances contemplated in sec 81(1)
- Approve an application to transfer the registration of the company to a foreign jurisdiction
- Revoke a resolution

Public offerings of company securities: **sec 96, 97, 98, and 100-111 (on level 1)**

Offers that are not offers to the public

1. An offer is not an offer to the public
   a. If the offer is made only to:-
      i. Persons whose ordinary business, or part of whose ordinary business is to deal in securities, whether as principles or agents
      ii. Person or entity is regulated by the Reserve Bank of South Africa
      iii. A financial institution, as defined in the Financial Services Board Act, (Act 97 of 1990)
      iv. An authorized financial services provider, as defined in the Financial Advisory and Intermediary Services Act (Act 37 of 2002)

b. If the total contemplated acquisition cost of the securities, for any single addressee acting as principal, is equal to or greater than the amount prescribed in terms of subsection (2)(a)
c. If it is a non-renounceable offer made only to:-
    i. Existing holders of the company's securities; or
    ii. Persons related to existing holders of the company's securities
d. If it is a rights offer that satisfies the prescribed requirements
e. If the offer is made only to a director or prescribed officer of the company or a person related to a director or prescribed officer, unless the offer is renounceable in favour of a person who is not a director or prescribed officer of the company or a person related to a director or prescribed officer
f. If it pertains to an employee share scheme that satisfies the requirements of **section 97**
g. If it is an offer, or one of a series of offers, for subscription, made in writing, and
    i. 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 of these series.
    ii. The issue of securities under any one offer in the series is finalized **within 6 months** after the date the offer was first made

Standards for qualifying employee share scheme

1. An employee share scheme qualifies for exemptions contemplated in this **Chapter 97** if

    a. the company has

        i. Appointed a compliance officer for the scheme to be accountable to the directors of the company

ii. states in its annual financial statements the number of specified shares that it has allotted during that financial year in terms of its employee scheme

c. the compliance officer has complied with the requirements of subsection (2)

2. a compliance officer who is appointed in respect of any employee share scheme:-
   a. is responsible for the administration of that scheme
   b. must provide a written statement to any employee who receives an offer of specified shares in terms of that employee scheme, setting out
      i. full particular of the nature of the transaction, including the risks associated with it
      ii. Information relating to the company, including its latest annual financial statements, the general nature of its business and its profit history over the **last 3 years**
   c. must ensure that copies of the documents containing the information relation to in paragraph (b) are filed **within 20 business** days after the employee share scheme has been established.
   d. Must file a certificate within 60 business days after the end of each financial year, certifying that the compliance officer has complied with the obligations in terms of this section during the past financial year

Topic 5

Directors

The Board, Directors and prescribed Officers (Sec 66)

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 board except to the extent that this Act or the company's MOI provides otherwise.

2. The board of a company must comprise:-
   a. In the case of a private company or a personal liability company, **at least 1 director; or**
   b. In the case of a public company, or a non-profit company, **at least 3 directors.**
3. A company's MOI may specify a higher number in substitution for the minimum number of directors required.
4. A company's MOI
   a. May provide for:-
      - The direct appointment and removal of one or more directors by any person who is named in, or determined in terms, of the MOI
      -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
      -The appointment or election of one or more persons as alternate directors of the company
5. A person contemplated in **subsection 4(a)(ii):-**
   a. May not serve or continue to serve 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**
   b. Who holds office or act in the capacity of an ex officio director of a company 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;
      - Duties, duties, and is subject to all of the liabilities, of any other director of the company

6. The election or appointment of a person as a director is nullity if, at the time of the election or appointment, that person is ineligible or disqualified in terms of **section 69**
7. A person becomes entitled to serve as a director of a company when that person
   a. Has been appointed or elected in accordance with this part, or holds an office, tittle, designation or similar status entitling hat person to be an ex officio of the company, subject to **subsection 5(a),** and
   b. Has delivered to the company a written consent to serve as its director
8. Except to the extent of the MOI of a company provides otherwise, the company may pay remuneration to its directors for their services rendered, 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 2 years**
10. The minister may make regulations designating any specific function or functions within a company to constitute a prescribe office for the purposes of this Act
11. Any failure by a company at any time to have the minimum number of directors required by this Act or the company's MOI, **does not limit or negate** the authority of the board, or invalidate anything done by the board of company
12. Save as otherwise provided elsewhere in this Act or in the company's MOI, any particular director may be appointed to more than one committee of the company, and when calculating the minimum number of directors required for a company in terms of **subsection (2) and (3),** any such director who has been appointed to more than one committee must be counted only once.

Requirements for number of directors

Type of Company	Minimum number of directors
Private Company (Pty) Ltd	1
Incorporated company (Inc.)	1
Public Company (Limited)	3
State-owned company (SOC)	3
Not-for-profit company (NPC)	3

The MOI of a company may specify a higher number of directors. The MOI of a **profit company** (other than a state-owned company) require that the shareholders should elect at **least 50%** of the directors (including alternates)

A director's remuneration for services rendered as a director must be approved by a **special resolution adopted within the previous 2 years**

Election and removal of directors (Sec 67 – 71)

Appointment of directors (Sec 68)

- Appointed by shareholders
- Voted on separately
- Serve for indefinite term or as set out by MOI

Disqualified to be appointed (Sec 68)

- A person prohibited by court
- A person declared delinquent by court
- Unrehabilitated insolvent
- A person removed from previous position due to misconduct

- A person convicted without the option of a fine for theft, fraud, forgery, perjury or other offences

Ineligible (disallowed) to be appointed (sec 69 (7)

- An unemancipated minor
- A juristic person (e.g. a company)
- Any person not meeting the requirements of the MOI

NB!! The MOI may set out additional grounds for ineligibility or disqualification

Removal of directors (sec 71)

- May be removed by ordinary resolution unless stated otherwise in the MOI
- Director must be given notice of the meeting and resolution to remove him
- Director must be afforded opportunity to make a presentation to the meeting before voting takes place **(sec 71 (2)(b)**

However, where a shareholder or director alleges that a fellow director:-

- Become ineligible or disqualified
- Is incapacitated to perform as a director
- Neglected his/her duties or have been derelict as director

Then

- The board must consider this allegation
- The board may vote on the removal of the director
- The director may not vote on his removal
- Director must still be given notice and an opportunity for representation

- If removed by the board after the said allegation, the director may apply **with 20 business days** to court for a review
- If he was not removed after the said allegation, the person who made the allegation or voted for his removal may apply to court for a review within **20 business days**

NB!!! This cannot apply to companies with fewer than 3 directors

Activity 1

Canyon (Pty) Ltd is a private company in the paint wholesaling business. John Wayne, the newly appointed chief executive officer, is keen to improve the company's corporate governance. He has approached you for some advice on various aspects of the Companies Act, 2008, which directly affect governance.

John Wayne informs you that since he has joined the company, he has been Somewhat concerned about the attitude and performance of one of the directors, Doc Hudson. He wants to know whether Doc Hudson can be removed from his position as a director and if so, what procedures will have to be followed. John Wayne is aware that Doc Hudson will not resign his directorship. The company has six directors in total.
Canyon (Pty) Ltd.'s Memorandum of Incorporation is consistent with the Companies Act, 2008, and contains no variations regarding quorums, notice periods, approval of resolutions, appointments of directors, etc. The company has twenty shareholders.

REQUIRED

Advise John Wayne on whether Doc Hudson can be removed from his position as a director of Canyon (Pty) Ltd. Do not include meeting requirements in your answer.

Answer

- If the MOI contained a clause that designated an individual such as John Wayne, in his capacity as CEO, the power to remove a director (like Doc Hudson) from the board of the company, that power could be exercised.

- Doc Hudson can also be removed by an ordinary resolution of the shareholders at any general meeting.

- Doc Hudson may also be removed if a shareholder or fellow director (for example, John Wayne) alleges, inter alia, that he has been negligent or derelict in his duties as a director. The board must consider the allegation and vote on his removal.

- Irrespective of the "method" used to remove Doc Hudson, he must be afforded the chance to defend himself, and
  - he must be given notice of the meeting **(10 business days**) and a copy of the resolution to remove him
  - he must be afforded a reasonable opportunity to make a presentation (in person or through a representative) before voting takes place

- If the board has to remove Doc Hudson, he may not vote on his removal. For the removal resolution to be accepted, the majority of directors voting would need to vote in favour.

- If Doc Hudson is removed by the board, he has 20 business days to go to court for a review.

- If he is **not** removed, any director or shareholder who voted to have him removed, may go to court for a review (20 business days).

Board committees, meeting and directors acting other than at meetings (sec 72)

- In terms of the section 94 of the companies act, it is compulsory for a public company and a state-owned company to have an audit committee
- Except to the extent that the MOI of a company provides otherwise, the board of a company may
  - Appoint a number of committees of directors; and
  - Delegate to any committee any of the authority of the board
- Except to the extent that the MOI of a company, or a resolution establishing a committee, provides otherwise, the committee:-
  - May include persons who are not directors of the company, but
    - Any such person must be ineligible or disqualified to be a director; and
    - No such person has a vote on a matter to be decided by the committee
  - May consult with or receive advice from any person; and
  - Has the full authority of the board in respect of a matter referred to it.
- 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

Board meetings/ directors' meetings (sec 73)

- Director may call a meeting of the board of directors at any time ; or

- A meeting may be called if required by **25%** of the board (if there is at least 12 directors) or
- If there is less than 12 directors, a meeting must be called if 2 directors request a meeting
- All directors must receive notice of the meeting (or acknowledge notice or waive the notice)
- Voting may commence if majority of directors are present
- Majority of directors must vote in favour for resolution to be passed

Section 73 also provides that, unless the Companies Act or MOI provides otherwise:-

• A meeting of the board may be conducted by electronic communication
• One or more directors may participate in a meeting by means of electronic communication, as long as all persons participating in that meeting are able to communicate effectively and concurrently with each other without an intermediary.
- **A meeting of the board must be convened by means of a notice to all directors**.
- The company's board may determine the form of and time for giving notice
- **Directors should keep a written record of how and why they voted for matters at board meetings**

Activity 2

Answer the following questions:

1. Is the following statement true or false? A resolution at a directors' meeting will be approved if 50% of the directors vote in favour of the resolution. (1½)

2. What is the quorum for a directors' meeting where the company has

(i) two directors?
(ii) three directors?
(iii) nine directors?
(iv) twelve directors? (2)

3. When the directors of a public company have a meeting, the following individuals cannot be included in determining the quorum for that meeting. Indicate “true” or “false”, and give a reason for your choice.
(i) Company secretary
(ii) Independent non-executive chairperson
(iii) Other non-executive directors
(iv) The chief audit executive (head of internal audit) (4)

Feedback on activity 2

1 False: For a resolution to be approved at a directors’ meeting, a majority of the votes cast must be in favour. If **50%** of the directors’ vote in favour and **50%** vote against, the vote is tied. If this occurs, the chairperson will have a casting vote **but only** if he or she (the chairperson) initially did not have a vote or did not cast a vote. (The chairperson does not get 2 votes.)

2 (i) two directors
(ii) two directors
(iii) five directors
(iv) seven directors
3 (i) True: Not a director
(ii) False: The chairman is a director (non-executive directors have the same status as executive directors)

(iii) False: All (properly appointed) directors, executive or otherwise, can form part of the quorum

(iv) True: The chief audit executive is not a director

Directors acting other than at board meetings (sec 74)

Except where the MOI of a company provides otherwise, **section 74** provides that a decision, on which could be voted at a board meeting, **may instead be adopted by the written consent of a majority of the directors, given in person, or by electronic communication,** provided that each director received notice of the matter to be decided.

A decision taken in such way has the same effect as if it had been approved by voting at a meeting.

Director's interest in contrast

- If a director or person related to a director has a financial interest
- Must disclose the general nature of the interest
- Must disclose any material information
- If requested, must disclose other observations or insights
- Must leave the meeting before voting commence
- Must not vote
- Must not form part of the voting quorum
- Must not form part of the meeting quorum
- Must not execute documents relating to the matter on behalf of the company

Activity 3

You are the auditor of Craft (Pty) Ltd, a manufacturing company in the marine engineering sector. The Memorandum of Incorporation contains, inter alia, the following clause:

Any director or prescribed officer of the company who has a personal financial interest in a contract into which this company has entered or will enter, either directly or indirectly, shall comply with the Companies Act, 2008. The contract will be binding, provided that the authority of the company in general meetings is obtained by poll for the contract, prior to the contract being entered into.

Your scrutiny of the minutes of directors' meetings reveals that the company entered into a contract with Marine (Pty) Ltd for the purchase of 10 highly sophisticated and expensive radar systems valued at approximately R1 million each. Tony Teak is a director of Craft (Pty) Ltd and his brother Terry is the majority shareholder of Marine (Pty) Ltd.

REQUIRED
Discuss the requirements of the Companies Act, 2008, relating to the contract that Craft (Pty) Ltd entered into with Marine (Pty) Ltd, particularly in view of the relationship between Tony and Terry Teak. (12)

Feedback on activity 3

In terms of the Companies Act (*sec 76*), the following holds true:

- Tony Teak, as a director of Marine (Pty) Ltd, should not have used his position of director, or any information obtained while acting as a director, to gain advantage for himself or for another party (his brother Terry). He must act **for the company** for example, he should not pass confidential information

on to Terry about the price that Marine (Pty) Ltd is prepared to pay for the radar systems.

- Tony Teak should have communicated to the board of Craft (Pty) Ltd at the earliest practicable opportunity, any information that was material to Marine (Pty) Ltd. (For example, it would be important for the board to know that Tony and Terry are related, as a R10 million deal could be influenced by their relationship.)
- Tony Teak must perform his function and exercise his powers as a director at all times
  - in good faith; and
  - in the best interests of the company.

In effect, Tony Teak has a conflict of interest (the company or his brother?)

In terms of the Companies Act **(sec 75),** if Tony Teak had a personal financial interest in the matter to be considered at a meeting of the board (purchase of the radar systems), or had known that a **related** person had a personal financial interest, he should have

- disclosed the interest and its general nature before the matter was considered at the meeting

- disclosed to the meeting any material information relating to the purchase, which was known to him
- disclosed any observations of or pertinent insights into the matter if he had been requested to do so by the other directors
- left the meeting (if he was present) immediately after having made the disclosures to the meeting
- taken no further part in the meeting
- had no right to vote on the decision

As Tony and Terry Teak are brothers and they are within two degrees of consanguinity, they are regarded as related for the purposes of the Companies Act (see section 2).

The information need only be disclosed if it is **material (sec 76(2)(b)).** A R10 million contract would most probably be regarded as material.

Standards of directors' conduct (sec 76)

A director of a company must exercise the powers and the functions of a director in good faith and in the best interest of the company, and must act with a certain degree of care, diligence and skill. The section also extends the duty to apply to a subsidiary.

The most important statutory duties that directors owe to their company, are to

•• act in good faith and for a proper purpose

•• act in the best interests of the company

•• avoid using their position as director or using corporate information to their own advantage or knowingly cause harm to the company or its subsidiary

•• convey the company information that may be of importance to the company

•• exercise reasonable care, skill and diligence in the performance of their duties

•• declare any personal financial interest in a matter in which the company is interested (refer to sec 75).

Study section 76 of the Companies Act.

Activity 4

The shareholders of Tracshion Ltd, a large electronics company specializing in tracking systems in vehicles, have recently appointed a friend of yours named Carmen de Villiers. The company is not listed. Carmen de Villiers is technically well qualified and is considered an important individual with regard to the future of the company, particularly its research and development programmes.

However, Carmen de Villiers has not filled the role of a company director before, and although she is excited about her promotion, she is concerned about her responsibilities as a director, particularly in terms of the Companies Act, 2008. She has heard that the Act contains sections dealing with standards of directors 'conduct and is afraid that if she does not perform, she will be removed from the board and dismissed from the company. She has also heard that the chairperson of the board can put her on probation as a director or that she can be declared delinquent. She has put the following questions to you:

1. Can I be removed from the board and dismissed from the company if I do not perform as a director? (6)

2. If I think things are not going well, may I resign as a director without leaving the company? (2)

3. What are the standards of conduct with which I must comply as a director?(13)

4. Can the chairperson put me on probation? (3)

5. Is there anyone in the company that I can officially approach to help me understand my duties and responsibilities? (3)

REQUIRED

Respond to Carmen de Villiers' questions. (27)

Feedback on activity 4

You should have responded as follows:

1. Yes, you can be removed from the board. However, this does not mean that you will be dismissed from the company – being on the board is a role to which you are elected over and above your employment by the company for your skills in the electronics field. As Tracshion Ltd regards your research and development skills as important, it is highly unlikely that the company will dismiss you.

Certain Companies Act requirements must also first be satisfied before the board may remove you as a director.

•• If the shareholders wish to remove you, they must pass an ordinary resolution to do so. This means that a majority of the voting rights held by the shareholders, who had the right to vote on your appointment, must support your removal.

•• However, if the shareholders intend to remove you, they must give at least 10 business days' notice of the meeting and that they are intending to remove you.

•• Before the meeting votes on your removal, the shareholders should give you or your representative a reasonable opportunity to make a presentation on your removal. (Note: The MOI may stipulate a longer or shorter notice period.)

The shareholders will not take a decision lightly to remove you. Remember, they have appointed you. You should perhaps also bear in mind that if you are

negligent or derelict in your duties, the board might resolve to remove you. Negligence or dereliction of your duties is a serious matter, but if you comply with the standards of director conduct, there is no chance of this happening. Even in this situation, you would still be allowed to make representations, and a majority of the directors would have to support your removal.

2. Yes. Your appointment as a director is an action separate from your employment contract.

You may resign at any time by giving written notice to the board.

Your company's Memorandum of Incorporation may have other requirements for resignation of a director, but these are unlikely to be very onerous, for example, minimum notice periods.

Within 10 business days of your resignation, the company (not you) will need to notify the Commission (CIPC) of your resignation.

3. **The standards are laid out in section 76:**

3.1 Firstly, you may not use the position of director, or any information obtained while acting in the capacity of director, to

•• gain an advantage for yourself or any other person; or

•• knowingly cause harm to the company (For example, when hearing at a board meeting that the company is going to call for tenders for a large contract, you may not pass any confidential information about the tender to a friend who is tendering for that contract).

3.2 Secondly, you must communicate to the board at the earliest practical opportunity, any information that comes to your attention (about the company), unless you

•• believe the information is immaterial to the company

•• believe the information is generally known to the public or other directors

•• would be breaching a legal or ethical obligation of confidentiality (for example, you may have information about technical developments in your field, which might affect Tracshion Ltd.'s business strategy).

3.3 Thirdly, you are required to exercise the powers and perform the duties of a director

•• in good faith and for proper purpose

•• in the best interests of the company

•• with the degree of care, skill and diligence that may be reasonably expected of a person performing the same functions as a director

•• having a general knowledge, skill and experience of that director

3.4 Essentially this will require you to

•• take reasonably diligent steps to become informed about matters serving before the board

•• have a rational basis for supporting a board decision and believing it was in the best interests of the company (in other words, you must be able to justify your decision when voting on a matter before the board).

3.5 You are not expected to be "experienced". You are a new director but you will need to be conscientious, diligent, enquiring, and willing to learn.

3.6 A particularly important aspect of point 3.3 is that if you or anyone related to you (as defined), for example, your husband, has any personal financial interest in any matter brought to the board, or which you think the company should know

about anyway, you should notify the board of the nature of the interest. For example, if Tracshion Ltd was proposing to enter into a contract with a company in which your husband is a shareholder, the board must be informed.

3.7 As a director, in making decisions, you are entitled to rely on other people who provide information, reports, or opinions to the board, for example, employees, accountants, and legal counsel, unless you have reason to believe they are not reliable or competent.

4. No, it is only the court that can declare a director under probation. No chairperson may take this decision.

However, the company, a shareholder, a director, company secretary, or a trade union representative (or similar representative) can apply to the court to have a director declared “on probation”.

Certain company regulatory bodies can also make such an application to the court.

Being declared “on probation” is not an everyday occurrence for directors and is not something you need to worry about if you comply with the required standards. In any event, if things are not going well, you can resign! In a sense, probation is a last option.

5. You are fully entitled to seek advice from the chairperson of the board, or from any other director.

You are also entitled to seek assistance from individuals not on the board, as long as you do not breach confidentiality.

However, the best person to assist you in this regard will be the company secretary of Tracshion Ltd. One of the functions of the company secretary

stipulated in the Companies Act is to advise directors on their rights, duties and responsibilities.

Liabilities of directors and prescribed officers (sec 77)

1. A director of a company may be held liable:-
   - in accordance with the principles of the common law relating to **breach of a fiduciary duty**, for loss, damages or costs sustained by the company as a consequence of any breach by the director of a duty.
2. 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 of any breach by the director of:-
   - A duty contemplated in **section 76**
   - Any provision of this act not otherwise mentioned in this section
   - Any provision of the company's MOI
3. A director of a company is liable for any loss, damages or costs sustained by the company as a direct or indirect consequence of the director having:-
   - Acted in the name of the company, signed anything on behalf of the company, or purported to bind the company or authorize the taking of any action by or on behalf of the company, **despite knowing that the director lacked authority to do so**.
   - 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

In addition to the list of prescribed officers outlined in this section, directors could also be liable to shareholders for fraudulent acts or acts of gross negligence or to any third party who has suffered a loss because of directors breaching the Companies Act [refer to sec 218(2)].

Activity 5

May a company recover loss, damages or costs sustained by the company from the director under the following circumstances? Give reasons for your answer:

The director participated in a resolution approving a distribution (dividends) despite knowing that the distribution was contrary to the provisions of section 46 of the Companies Act.

Feedback on activity 5

Reference: Section 77(3)(e)(vi) of the Companies Act

Yes, the company may recover loss, damages or costs sustained by the company from a director, in view of the section mentioned above. This section specifically provides that where directors participated in a resolution approving a distribution (dividends) despite knowing that the distribution was contrary to the provisions of section 46 of the Companies Act, they will be held liable.

Indemnification and directors' insurance (sec 78)

A company may not indemnify (protect against loss or damage) a director against a liability arising from

•• willful misconduct or breach of trust by the director

•• the director acting without the necessary authority

•• reckless trading

•• trading under insolvent circumstances

•• fraudulent acts of the director

•• a fine relating to an offence committed by the director

In terms of section 78(7), a company may also purchase insurance to protect a director of the company against any liability in respect of which the company is permitted to indemnify a director.

Topic 6

Registration of secretaries and auditors (**sec 84 & 85 and Regulation 28**)

Sections 84 and 85 of the Companies Act apply to

- every public and state-owned company (SOC)
- a private, non-profit and personal-liability company

— if required by the Companies Act or the Regulations to be audited, but where the appointment of a company secretary and an audit committee are not required, or

— to the extent that the company's MOI stipulates that the company comply with this requirement

Regulation 28, which forms part of the Companies Act, requires the following in respect of the categories of companies that have to be audited:

(a) any profit or non-profit company 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

(b) Any non-profit company, if it was incorporated:-

- Directly or indirectly by the state, an organ of state, a state owned company, an international entity, a foreign state entity or a foreign company

- any other company whose public interest score in that financial year, as calculated in accordance with Regulation 26(2)

(iii) is 350 or more; or

(iv) is at least 100, if its annual financial statements for that year were internally compiled

Appointment of Company Secretary

- All public, state-owned or companies required by MOI must appoint a company secretary
  - A private company may also require an audit if it is in public interest. The decision will be influenced by the:-
    - Annual turnover of the company
    - Size of its labour force
    - Nature and extent of its services

- Must be appointed within 40 days of incorporation or 60 days from vacancy
- Notice of appointment must be filed within 10 days
- Must be a resident of RSA
- Must not be disqualified to be a director
- Can be a juristic person or partnership if:
  - No partner or employee is disqualified to be a director
  - At one employee or partner is a resident
  - At least one employee or partner has requisite knowledge and experience

NB!! Every company which appoints a company secretary or Auditor

- Must maintain a record of the:-
  - Name of the person
  - Date of the appointment
- If it is a firm or juristic person, must maintain a record of the:-
  - Name, registration and registered office address

Resignation or removal of Company Secretary

- Must give 1 month notice
- Notice must be in writing
- It may be less than 1 month if the board of directors approves
- Notice of removal must be filed within 10 days
- If removed from the office, may require the company to include a statement of reasonable length in the AFS setting out the secretary's "opinion" on the circumstances that resulted in his/her removal

Duties of a company secretary

- Provide directors with guidance with regard to their duties, responsibilities and powers.
- Make directors aware of any relevant law.
- Report any failure of company or director to comply with the ACT or MOI
- Ensure that minutes of all meetings are properly recorded.
- Certify in annual financial statements that necessary returns and notices in terms of the Act have been filed and that they appear to be true, correct and up to date.
- Distribute copy of AFS to all entitled to receive it.

Look at activity on pg. 81 on the matter

You need to answer the following question:

Wendell Webb heard about something called a public interest score (PIS) and that if your business had such a score, it had to be audited externally. He wanted to know more about the public interest score. Lionel Lester added that he had heard that an auditor would have to review their company independently. (8)

Feedback on activity1

Reference: Sections 84 and 85, and Regulations 26 and 28 of the Companies Act

All businesses have a public interest score. A public interest score is the sum of the points allocated to four stipulated criteria that apply to every company (and CC) in the financial year. The criteria are as follows:

- A number of points are allocated equal to the maximum number of employees in the business.
- One point is allocated for every R1 million of turnover or part thereof.
- One point is allocated for every individual who has a direct or indirect interest in the shares of the company.
- One point is allocated for every R1 million (or portion thereof) in outstanding unsecured debt of the company held by creditors at year end.

Once a company has calculated its public interest score, it must meet certain requirements, depending on the number of points. For example, a private company with a public interest score of 350 or more will have to be audited externally.

An independent review of the company's AFSs would normally apply to a company with a public interest score of less than 100 points. However, this will not apply to Sew-Sew (Pty) Ltd because owner-managed companies, that is, those in which the shareholders and the directors are the same individuals, are exempt from this requirement

Appointment of auditors

A public or state-owned company or a company required in terms of its MOI or its public interest score must appoint an individual or firm as an auditor at their AGM (**must be a registered auditor**)

- Must be appointed within 40 days form incorporation
- Must be appointed within 40 days of vacancy
- Directors must nominate at least one auditor within 15 days from vacancy
- Audit committee has 5 business days to reject the auditor in writing.
- If a person has been disqualified to serve as a director, he/she is also disqualified as an auditor
- **A retiring auditor may be re-appointed automatically without a resolution being passed at the AGM, unless**

  - The auditor is no longer qualified for appointment
  - The auditor is no longer willing to accept the appointment and has notified the company
  - The auditor is required to be "rotated" in terms of the act
  - The audit committee rejects the appointment
  - The company has given notice of an intended resolution to appoint some other person/firm as auditor

Activity 2

Now try to answer the following question:

One of your audit clients, XYZ Limited, is a public company that owns a number of warehouses. The CEO of XYZ Limited asks you the following questions via e-mail:

(a) Apparently, your audit firm can only be our auditors for five consecutive years, after which time your firm must step down. This seems quite harsh. Is there any truth in it? (3)

(b) Is your firm what one could call a “designated auditor”? (2)

Feedback

(a) This is not entirely correct. The Act has introduced auditor rotation for public (and certain other) companies. (1)

The following applies to public companies:

- The same individual (not firm) may not serve as a designated auditor for more than five consecutive years. (1)
- If an individual has served for two consecutive years and then ceases to fill the role, he or she may not be reappointed until two financial years have elapsed. (1)

(b) No. The designated auditor is the individual partner responsible for XYZ Limited’s audit. Our audit firm is appointed as your company’s auditors in terms of the Companies Act, and the designated auditor will be the individual auditor (usually a partner) who takes charge of the audit. (2)

Activity 3

Read the scenario presented in activity 4 coming next under audit committees

REQUIRED

Explain to John Wayne how the external audit of Canyon (Pty) Ltd.'s annual financial statements can become a requirement in terms of the company's Memorandum of Incorporation. Your answer must include details of meetings that may have to be held, for example, notice, quorums, etc.(12)

Feedback on activity 3

If John Wayne wants to include the audit requirement in the company's MOI, the MOI will have to be amended in terms of the Act.

A special resolution to amend the MOI is required.

The board (or shareholders) can call a meeting of shareholders to exercise 10% of the votes. John Wayne will therefore need the approval of his board or the relevant shareholders to call the meeting.

As Canyon (Pty) Ltd is a private company, the following will apply to the meeting:

- A notice period of 10 business days must elapse before the meeting is to begin.
- Notices must include the date, time and location of the meeting.
- The specific purpose for which the meeting has been called (to amend the MOI) must be stated.
- A copy of the proposed resolution and the percentage of voting rights needed to pass the resolution must be included, that is, the resolution to amend the MOI for an annual audit requirement, and 75% of voting rights.

The notice must also include a reasonably prominent statement that

- **a shareholder may appoint a proxy (who does not have to be a shareholder**)
- personal identification is required to attend the meeting

To obtain a quorum, the meeting must have

- at least three shareholders present
- shareholders holding 25% of the voting rights, which can be exercised on the amendment, in attendance before the meeting can begin or the matter be discussed

Voting of the matter may be done by a show of hands or by polling those present and entitled to vote.

If the resolution is passed, a Notice of Amendment (with the prescribed fee) must be filed with CIPC (the registrar).

Audit committees

- at least 3 members
- must be directors
- must adhere to the minimum qualifications prescribed
- must have adequate financial knowledge and experience

Must not be

- involved in day to day management (or have been during the past year)
- a prescribed officer, full time executive of the company or of a related person of the company (or have been during the past 3 years)

- a material supplier or customer of the company
- a person related to any of the above

Duties of the Audit committees

- nominate auditor for appointment, determine fees and conditions of audit
- ensure appointment of auditor meets legal requirements
- approve agreement with auditor for performing audit services
- determine extent and nature of non-audit services
- compile report to be included in the AFS including:-
  - how services were performed
  - Whether they are satisfied that the auditor was independent
  - Comment on the financial statements, accounting practices and internal control
- Deal with any concerns/complaints regarding:-
  - Accounting practices and internal audit
  - Contents of the AFS
  -Internal controls
  -Other related matters
- Make presentations to the directors regarding accounting practice, financial records and reports
- Perform other functions as required by the board of directors

Resignation of Auditors and vacancies

Resignation

- Resignation becomes effective when the notice is filed

Vacancies

- The new auditor must be appointed within 40 business days of vacancy
- Within 15 days, the board must propose the name of at least one auditor to the audit committee
- The audit committee has 5 business days after a proposal has been delivered to reject it in writing or else the board may make the appointment

Rotation

- The same person may not serve as an auditor for more than 5 con-secutive years
- If an individual has served as an auditor for two or more con-secutive financial years **and then ceases to be auditor**, the individual may not be appointed again as an auditor until the expiry of at least 2 further financial years

Activity 4

Canyon (Pty) Ltd is a private company in the paint wholesaling business. John

Wayne, the newly appointed chief executive officer, is keen to improve the company's corporate governance. He has subsequently approached you for some advice on various aspects of the Companies Act, 2008, which directly affect governance. Currently, the company's public interest score is about ninety and the company's annual financial statements are subject to independent review.

However, John Wayne informs you that he would like the company's annual financial statements to be audited externally annually, and an audit committee to be appointed. He tells you that the directors have agreed to have the financial statements of the current year audited voluntarily, but that he wants to make the annual external audit a requirement in terms of the company's Memorandum of

Incorporation. He believes that an external audit is very beneficial and that it should not be dependent on the company's public interest score.

With regard to appointing an audit committee, John Wayne requires that the audit committee be constituted as required by the Companies Act, 2008, and that its duties be at least those that are required by the Act.

For the voluntary audit of the current financial statements, the board of directors will appoint the auditor but for future years, the auditor will be appointed as laid down in the Companies Act. This is of course, assuming that the annual audit becomes mandatory in terms of the Memorandum of Incorporation.

Canyon (Pty) Ltd's Memorandum of Incorporation is consistent with the Companies Act, 2008, and contains no variations on quorums, notice periods, approval of resolutions, appointments of directors, etc. The company has twenty shareholders.

REQUIRED

Describe to John Wayne the requirements applicable to appointing an audit committee and outline the duties of the audit committee in terms of the Companies Act, 2008 (do not concern yourself with the King III report). (15)Feedback on activity 4

Reference: Section 94 and Regulation 42 of the Companies Act

To comply with the requirements regarding the appointment of an audit committee in terms of the Companies Act

- shareholders must appoint the audit committee at each annual general meeting
- it must consist of at least three members
- each member must be a director of the company

- each member must satisfy the minimum qualifications prescribed by the minister to ensure that the audit committee as a whole comprises persons with adequate financial knowledge and experience (Regulation 42 requires that at least one third of the members of the audit committee have academic qualifications or experience in economics, law, accounting, corporate governance, etc.)
- members of the audit committee must not be
  - involved in the day-to-day running of the company or have been so involved at any time during the previous financial year
  - prescribed officers, or full-time executive employees of Canyon (Pty) Ltd (or any related or interrelated company), or have held such post at any time during the previous three financial years
  - material suppliers or customers of the company, such that a reasonable and informed third party would conclude that, in the circumstances, the integrity, impartiality or objectivity of that member of the audit committee would be compromised
  - "related persons" to any person subject to these prohibitions, for example, the wife of a full-time executive employee of Canyon (Pty) Ltd

The duties of the audit committee are to

- Nominate a registered auditor in order that the shareholders appoint him/her as auditor (The shareholders must be satisfied that the nominated person/ firm is independent of Canyon (Pty) Ltd.)
- determine the auditor's fees and terms of engagement
- ensure the appointment of the auditor complies with the Companies Act and the Auditing Profession Act
- determine the nature and extent of any non-audit services the auditor may provide to Canyon (Pty) Ltd and pre-approve any agreement with the auditor for the provision of these services

- **prepare a report to be included in the AFS, which**
  - describes how the audit committee performed its functions
  - states whether the auditor was independent of the company
  - includes comments that the committee considers appropriate of the financial statements, the accounting practices and internal controls of the company
- **receive and manage appropriately any concerns or complaints relating to**
  - the accounting practices and internal audit of the company
  - the content or audit of the AFS
  - internal financial controls
  - any other related matters
- make a presentation to the directors regarding accounting practices, financial controls, records and reporting
- perform other functions determined by the board

Topic 7

Financial assistance for subscription of securities (sec 44)

- it should be approved by the board (directors' resolution)
- any restrictions in the company's MOI must be complied with
- a special resolution should have been passed within the previous two years
- the board should be satisfied that the solvency and liquidity tests have been satisfied immediately after providing the financial assistance
- the board should be satisfied that the terms for the financial assistance are fair and reasonable to the company

- if these requirements are not adhered to, the transaction will be void
- the directors can be held liable for losses suffered by the company
- must meet the MOI requirements
- must meet quorum and notice requirements

Exclusions (does not apply when)

- does not apply if the primary business of the company is the lending of money

Activity 1

You have knowledge of the Companies Act.

Relevant details of the Loftus Group are as follows:

Holding company: Loftus (Pty) Ltd
Shareholders of Loftus (Pty) Ltd: Victor Hatfield 40%
Hein Meyer 15%
Smiley Human 15%
15 minor shareholders 30%

Loftus (Pty) Ltd holds 75% of the shares in Bulle (Pty) Ltd. Frontrow CC holds the other 25% of the shares in Bulle (Pty) Ltd. The members of Frontrow CC are Hotboy Rapele, Barry Boota and Wynand Oliver, each of whom has an equal members' interest.

Loftus (Pty) Ltd also holds 55% of the shares in Sundown (Pty) Ltd; numerous individuals, who are not connected with the Loftus Group at all, hold the other 45% of the shares.

The directors of the various companies are as follows:

Loftus (Pty)	Ltd Bulle (Pty) Ltd	Sundown (Pty) Ltd
Victor Hatfield	Hotboy Rapele	Brave Baloyi
Lane Kershner	Wynand Oliver	Danny Mudow
Hotboy Rapele	Jon Mametsi	Patrick Motsepa
Frans Hougie	Dupree Fourie	Frans Hougie

The following matters with possible legal implications have been referred to you:

Matter 1

Sundown (Pty) Ltd intends issuing shares to all its current shareholders. Bulle (Pty) Ltd agreed to finance the shareholders of Sundown (Pty) Ltd to enable them to purchase those shares. This is not financial assistance pursuant to an employee share scheme.

REQUIRED

In respect of matter 1, discuss the requirements of the Companies Act, 2008, which must be complied with in respect of the loan to the shareholders of Sundown (Pty) Ltd. (12)

Feedback on activity 1

Reference: Section 44 of the Companies Act

Matter 1

Bulle (Pty) Ltd may make this loan, provided

- any conditions or restrictions in respect of the granting of "financial assistance" set out in the MOI are adhered to
- the board is satisfied that immediately after providing the loan, Bulle (Pty) Ltd satisfied the liquidity/solvency test

- considering all reasonably foreseeable financial circumstances of the company
  - the assets of the company, fairly valued, equalled or exceeded the liabilities of the company, fairly valued
  - it appears as if the company would be able to pay its debts as they become due in the ordinary course of business for a period of 12 months from the date of considering the liquidity and solvency of the company
- the board is also satisfied that the terms of the loan are fair and reasonable to the company
- a special resolution was obtained

The special resolution must have been obtained within the previous two years and could have been for a specific loan to the shareholders of Sundown (Pty) Ltd, or generally for a category of potential recipients, and the specific recipient falls into that category (sec 44(3)(a)(ii).

The MOI cannot permit the granting of a loan in contravention of this section, or example, that it provides that the loan does not require a special resolution.

Loans or other financial assistance to directors (sec 45)

- it must be approved by directors
- must meet the MOI requirements
- special resolution obtained within the previous 2 years
- must determine beforehand whether solvency and liquidity tests will be met after the assistance was granted
- must be fair and reasonable towards the company
- must meet quorum and notice requirements
- must give notice to unions
- must give notice to shareholders

- if these requirements are not adhered to, the transaction will be void
- the directors can be held liable for losses suffered by the company

Exclusions (does not apply when)

- primary business is lending of money
- the loan is to cover legal costs relating to the company
- the loan is to cover expenses paid on behalf of the company
- the loan is to cover costs relating to the removal of the director

Activity 2

After you have studied the relevant sections from your prescribed textbook, you should try to answer the following questions to test your knowledge.

You are a member of the audit team working on the 30 June 2012 audit of Smugglers (Pty) Limited, an export/import company. Borders Limited holds 70% of Smugglers (Pty) Limited's capital, while other companies in the group are Guards (Pty) Limited (of which Borders Limited holds 100%) and Contraband (Pty) Limited (of which 60% is held by Smugglers (Pty) Limited). Eleven private investors hold the remaining shares in Smugglers (Pty) Limited.

Of the four companies within the group, you are responsible for the audit appointment of Smugglers (Pty) Limited only. The three remaining companies are audited by other firms.

Borders Limited purchased 30% of its shares in Guards Proprietary Limited on 31 October 2011. Prior to this, it already owned 70% of the shares.

Your permanent audit file revealed the following:

Directors of:

Borders Limited	Billy Kidd Roy Rogers Davy Crockett Horst Trigger
Smugglers (Pty) Limited	J T Edson Louis L 'amour Bill Ocean
Contraband (Pty) Limited	Roy Rogers Willy Nelson
Guards (Pty) Limited	Bill Haley Chuck Berry

You have been assigned to the audit of statutory matters and as part of the procedures you will need to perform; you have extracted the following matter for consideration:

A loan of R1.5 million made to Roy Rogers for his personal use.

REQUIRED

Discuss the loan made by Smugglers (Pty) Limited in terms of the Companies Act, 2008. (8)

Feedback on activity 2

Reference: Section 45 of the Companies Act

In terms of section 45 of the Companies Act, the board of Smugglers (Pty) Limited may authorize the loan to a director of itself (not the case) or the director of a related company. Roy Rogers is a director of Smugglers (Pty) Limited's

holding company and of its own subsidiary Contraband (Pty) Limited. Roy Rogers therefore qualifies as “related”.

In making any loans to directors, the board has to comply with any conditions or restrictions contained in the MOI.

In making the loan, the board must

- ensure the loan is pursuant to a special resolution of the shareholders, adopted within the previous two years and which approved the loan specifically to Roy Rogers or generally to a category of potential recipients into which Roy Rogers would fall (for example, directors)
- be satisfied that immediately after providing the financial assistance, Smugglers (Pty) Limited would satisfy the solvency and liquidity test
- be satisfied that the terms and conditions of the loan are fair

The MOI cannot overrule the above conditions.

The board must provide written notice of this resolution to the shareholders and any trade union representing its (Smugglers (Pty) Limited’s) employees. If the total value of all financial assistance (contemplated under this section) given within the financial year exceeds one-tenth of 1% of the company’s net worth at the time of the resolution, this notice must be given within 10 business days of the resolution. If the total value does not exceed one-tenth of 1% of the net worth, the notice period will be 30 days from year end.

If the board approves the loan in contravention of section 45 or the MOI, it willbe void.

Activity 3

Using the information provided in activity 1 (study unit 7.1) and the following matters, answer the question below.

Matter 1

The board of Loftus (Pty) Ltd approved low-interest unsecured loans of R500 000 each to Frans Hougie and Brave Baloyi to enable them to invest (in their private capacities) in a newly formed company that manufactures rugby and soccer balls.

The loans were approved based on a unanimous decision the four directors of the board made after the board had considered the liquidity and solvency of Loftus (Pty) Ltd and found it to be satisfactory.

REQUIRED

In respect of matter 1, discuss the possible consequences of granting the loans to Frans Hougie and Brave Baloyi. (15)

Feedback on activity 3

Reference: Sections 45, 76 and 77 of the Companies Act

Matter 1

These loans were granted in contravention of the Companies Act, 2008. The loans were granted on the strength of the board's approval that required a special resolution of the shareholders. A special resolution was required, as the loans were granted to a director (Frans Hougie) of the company itself and a company related to Loftus (Pty) Ltd (Sundown [Pty] Ltd) and another director, Brave Baloyi, of the same related company. Sundown (Pty) Ltd is a subsidiary of Loftus (Pty) Ltd.

It is also evident that Frans Hougie voted on a transaction in which he had a direct financial interest. He is not entitled to vote on the matter or even participate in the consideration of the loan.

The board of directors also failed to ensure that the conditions of the loan were fair to the company. Providing unsecured low-interest loans, which they should have known were to be invested in a newly formed company, is not fair to the company (Loftus [Pty] Ltd).

It is further evident that these loans were given in contravention of section 45; they will therefore be void. As all four directors voted in favour of the loan, they will be jointly and severally liable for any losses that Loftus (Pty) Ltd may suffer because of, say, the loans not being repaid.

Then there is the matter of the directors' standards of conduct. In terms of section 76, a director must exercise the powers and functions of a director

- in good faith and for a proper purpose
- in the best interest of the company
- with the degree of care, skill and diligence reasonably expected of a director

This means that the director should take reasonable, diligent steps to be informed about the matter at hand. A diligent director would definitely have been aware of the authority and procedures required for the proper authorisation of a loan to a director. Thus, the directors have not acted in accordance with the above guidelines.

In terms of section 77, the directors of Loftus (Pty) Ltd may be held liable for any loss, damages or costs the company sustained because of a breach of fiduciary duty. Did they, for example, act in bad faith when approving the loans, or did they commit a delict regarding any breach of the directors' duty to act with the necessary degree of care, skill and diligence?

Proposals to dispose of all or the greater part of assets or undertaking (sec 112 & 115) Section 112(2) provides that [except for those instances mentioned in sec 112(1)]

- a special resolution of the shareholders must be obtained
- that the company has satisfied all other requirements are met
- the notice of the shareholder's meeting to consider a resolution to approve the special resolution, which must
  - be delivered in terms of section 62 (meeting and quorum requirements)
- A written summary of the transaction
- Sale value must be fair towards the company

Activity 4

Block (Pty) Ltd is a company that manufactures brass-plumbing requisites. The company has five directors. The most senior directors of Block (Pty) Ltd, John Joint and Eric Elbow, have been concerned about the falling sales of brassplumbing requisites and the appearance on the market of a new plastic range of plumbing requisites imported from Taiwan. They intend taking the following action:

They are planning to sell all the company's manufacturing equipment, thus getting out of the brass-plumbing requisites market.

A scrutiny of the company's statutory records has revealed that the company has 150 000 authorised shares, 100 000 of which are in issue. John Joint and Eric Elbow hold minor shareholdings, while no other directors hold shares. The authorised shares are no par value shares.

REQUIRED

Discuss the intentions of John Joint and Eric Elbow regarding the selling of all the company's manufacturing equipment in terms of the Companies Act.

Feedback on activity 4

Reference: Sections 112 and 115 of the Companies Act

Disposal of the greater part of the assets

1. The directors may not dispose of the greater part of the assets of Block (Pty) Ltd without a special resolution taken by the shareholders.
2. As the two directors are "minor" shareholders, they will not have sufficient voting rights on their own.
3. The directors need to give 10 business days' notice of the meeting to the shareholders.
4. The notice must include a written summary of the terms of the transactions (selling the assets).
5. To form a quorum, sufficient persons (shareholders/proxies) must attend the meeting to exercise at least 25% of the voting rights that are entitled to be exercised on the matter.
6. Unless the MOI stipulates a different percentage, the resolution must be passed by 75% of the voting rights (exercisable on the matter) present in person or by proxy.

Proposals for amalgamation or merger (sec 113) must have broader idea

1. Two or more profit companies, including holding and subsidiary companies, may amalgamate or merge if, upon implementation of the amalgamation or merger, each amalgamated or merged company will satisfy the solvency and liquidity test.
2. Two or more companies proposing to amalgamate or merge must enter into a written agreement setting out the terms and means of effecting the amalgamation or merger and, in particular, setting out:-
   - The proposed MOI of any new company to be formed by the amalgamation or merger
   - The name and identity number of each proposed director of any proposed amalgamated or merged company
   - The estimated cost of the proposed amalgamation or merger
   - Details of the proposed allocation of the assets and liabilities of the amalgamating or merging companies
   - Details of any arrangement or strategy necessary to complete the amalgamation or merger
   - the manner in which the securities of each amalgamating or merging company are to be converted into securities of any proposed amalgamated or merged company, or exchanged for the property
   - if any securities of any of the amalgamating or merging companies are not to be converted into securities of any proposed amalgamated or merged company, the consideration that the holders of those securities are to receive in addition to or instead of securities of any proposed amalgamated or merged company

- The manner of payment of any consideration instead of the issue of fractional securities of an amalgamated or merged company or of any of other amalgamation or merger.

3. if the securities of one of the amalgamating or merging companies are held by or on behalf of another of the amalgamating or merging companies, the agreement required by **subsection 2** must provide for the cancellation of those securities when the amalgamation or merger becomes effective, without any repayment of capital in respect thereof, and no agreement may be made in the agreement for the conversion of those securities of an amalgamated or merged company

4. subject to **subsection (6)**, the board of each amalgamation or merging company:-

   - must consider whether, upon implementation of the agreement, each proposed amalgamated or merged company will satisfy the solvency and liquidity test

   - if the board reasonably believes that each proposed amalgamated or merged company will satisfy the solvency and liquidity test, it may submit the agreement for consideration at a shareholders meeting of that amalgamating or merging company, in accordance with **section 115**

5. subject to subsection (6), a notice of a shareholders meeting contemplated in subsection (4)(b) must be delivered to each shareholder of each respective amalgamating or merging company, and must include:-

   - The amalgamation or merger agreement

   - The provisions of sections 115 and 164 in a manner that satisfies prescribed standards

6. the requirements of subsections (4) and (5) do not apply to a company engaged in business rescue proceedings, in respect of any transaction that is pursuant to or contemplated in the company's business rescue plan that has been adopt in accordance with **chapter 6**

Proposals for scheme of arrangement (sec 117) must have broader idea

1. Unless it is in liquidation or in the course of business rescue proceedings in terms of chapter 6, the board of a company may propose and, subject to subsection (4) and approval in terms of this part, implement any arrangement between the company and holders of any class of its securities by way of, among other things:-
   - A consolidation of securities of different class
   - A division of securities into different classes
   - Exchanging any of its securities for other securities
2. The company must retain an independent expert, who meets the following requirements, to compile a report as requested by subsection (3):-
   a. The person to be retained must be:-
   - Qualified, and have the competence and experience necessary to
     - Understand the type of arrangement proposed
     - Evaluate the consequences of the arrangement
   - Able to express opinions, exercise judgment and make decisions impartially

   b. The person retained must not
   - Have any other relationship with the company or with a proponent of the arrangement, 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
   - Have had any relationship contemplated in **subparagraph (i)** within the immediately preceding two years; or

- Be related to a person who has or has had a relationship contemplated in **subparagraph (i) or (ii).**

3. The person retained in terms of **subsection (2)** must prepare a report to the board, and cause it to be distributed to all holders of the company's securities, concerning the proposes arrangement, which must, at a minimum:-
   - State all prescribed information relevant to the value of the securities affected by the proposed arrangement
   - Identify every type and class of holders of the company's securities affected by the proposed arrangement
   - State any material interest of any director of the company or trustee for security holders
4. **Section 48** applied to a proposed arrangement contemplated in this section to the extent that the arrangement would result in any re-acquisition by a company of any of its previously issued securities

Pg 111