

Section 2: Related and Interrelated Persons, and Control



Topic 2

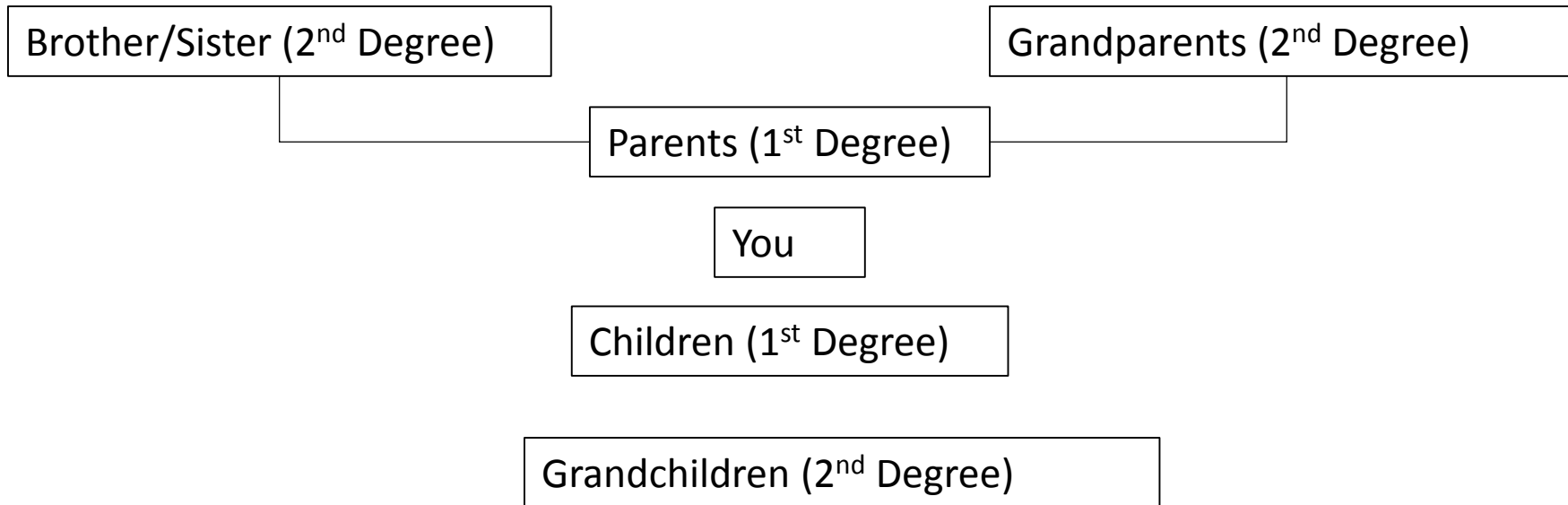
- Consanguinity – Blood Relationship
- Affinity – Due to Marriage

A person is related to another if such a person is related to the other person within the second degree of consanguinity or affinity

A individual is related to a juristic person if the individual directly or indirectly controls the juristic person

A juristic person is related to another juristic person:

- Either directly or indirectly controls the other
(a person controls a juristic person:
if the juristic person is a subsidiary of that first person
if the first person together with any related or interrelated person is directly/indirectly able to exercise/control the majority voting rights associated with securities of the company OR has the right to appoint or elect directors of the company)
- Either is a subsidiary of the other
- Person directly or indirectly controls each of them or the business of each of them



Examples of relations:

- Don and Sandra have been married for several years. Even though Don works in Johannesburg Monday to Friday and lives in a separate apartment during these days Don and Sandra are still related.
- Lynette owned 100% of the shares in Master Locks(Pty) Ltd and recently transferred all her share to her adopted son. Lynette and the company is still related as she is related to her son even though he is adopted.
- Blue Hills (Pty) Ltd appointed Mr Patrice Lumumba and Mr Eugene Wollongong as the directors of Wollongong (Pty) Ltd. They control the majority of the votes at board meetings. Both companies are related as Blue Hills (Pty) Ltd has indirect control over Wollongong (Pty) Ltd
- Sonny and Cher are not married, but because they have been living together for several years with two children similar to marriage they are related

Section 3: Subsidiary Relationships

A company is a subsidiary of another juristic person if that juristic person is directly or indirectly able to exercise a majority of the general voting rights associated with issued securities of that company OR Has the right to appoint or elect, or control the appointment or election of directors of that company who control a majority of the votes at a meeting of the board

Determining whether a person controls all or a majority of the general voting rights:

- Voting rights that are exercisable only in certain circumstances are to be taken into account only when those circumstances have risen and only when those circumstances are under the control of the person holding the voting rights

Section 4: Solvency and Liquidity Test

Solvency Test:

- Assets, fairly valued must be equal or exceed the liabilities of the company to pass the solvency test

Liquidity Test:

- Current Assets must equal or exceed current liabilities
- Company must be able to pay its debts as they become due in the ordinary course of business for a period of 12 months after the date of the test

These tests are used for the following:

- Share capital reduction
- Share capitalization
- Financial assistance for purchase of own shares
- Financial assistance to directors or related persons
- Issue of dividends
- Other compensations

Any director will be held liable if approving any situation while not satisfying the solvency and liquidity test

Section 5: General interpretation of Act:

- A court interpreting or applying this act may consider foreign company law
- Calculation of days using this act
 - Excluding the day on which the first such event occurs
 - Including the day on or by which the second event is to occur
 - Excluding any public holiday, Saturday or Sunday
- If there is inconsistency between this act and any other both acts apply concurrently as far as possible

Section 8: Categories of companies

Non profit companies: (NPC)

- Public benefit purpose
- Income and property are not distributable to incorporators/members/directors/officers
- Apply their assets and income to advance their objectives
- Minimum of 3 incorporators
- Minimum of 3 directors

Profit companies:

- **State-owned companies (SOC Ltd)**
- **Public Companies (Limited, Ltd)**
- **Private Companies (Proprietary Limited, (Pty) Ltd)**
- **Personal Liability companies (Incorporated, Inc)**

State Owned	Public Company	Private Company	Personal liability
Company owned by a municipality	Unrestricted transferability of shares Offers to public permissible Minimum of one incorporator Minimum of three directors	Less disclosure and transparency than public Transferability of securities restricted Minimum of one incorporator Minimum of one director	Meets criteria of private company MOI states that it is a personal liability company

Section 10: Modified application with respect to non-profit companies

Following does not apply to non-profit company

- Capitalisation of profit companies
- Securites registration and transfer
- Remuniration and election of directors
- Company secretaries and audit committees, except when it is an obligation
- Public offerings of company securities
- Takeovers, offers and fundamental transactions
- Rights of shareholders to approve a business plan
- Dissenting shareholders appraisal rights

Section 11: Criteria for name of companies

May comprise of

- one or more word in any language with any letters, numbers or punctuation marks
- Any of the following symbols: +, &, #, @, %, =
- Round brackets used in pairs to isolate any other part of the name

May not

- Be the same as any other company
- Be the name registered for a person other than the company itself or a person controlling the company
- Be a registered trade mark belonging to a person other than a company
- A mark, word or expression that is restricted or protected in terms of merchandising marks act
- Not be confusingly similar to a name, trade mark, mark word or expression unless
 - it's a member of the same group of companies
 - The company or a person who controls the company is the registered owner of that defensive name
 - The company is the registered owner of the business name, trade mark, or mark or is authorized by the registered owner
 - The use of the mark, word or expression is permitted by the merchandise marks act
- Falsely imply or suggest a person to believe incorrectly that the company is part of any other persons or entity, is an organ of the state or a court, is owned, operated or sponsored by any foreign state or international organization
- May not include any word, expression or symbol constituting propaganda for war, incitement of imminent violence, advocacy of hatred based on race, ethnicity, gender or religion

Section 13: Rights to incorporate company or transfer registration of foreign company

One or more persons, or an organ of a state may incorporate a profit company

An organ of state, juristic person or three or more persons acting in concert, may incorporate a non profit company

By completing and each signing in person or by proxy a Memorandum of Incorporation and filing a Notice of Incorporation

If MOI includes any provisions the Notice of incorporation filed by the company must include a prominent statement drawing attention to each such provision and its location in the MOI

The commission:

- May reject a Notice of Incorporation if incomplete
- Must reject a Notice of Incorporation if the initial directors of the company are fewer than required or the commission believes that any of the initial directors of the company are disqualified and the remaining are fewer than required

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

May transfer if:

- Law of jurisdiction in which the company is registered permits such a transfer and the company has complied with the requirements
- Transfer has been approved by the company's shareholders in accordance with the law of the jurisdiction in which the company is registered or by the equivalent of a special resolution
- The whole or greater part of its assets and undertaking are within the republic, other than the assets and undertaking of any subsidiary that is incorporated outside the republic
- The majority of the shareholders are resident in the republic
- The majority of its directors are or will be SA citizens
- Immediately following the transfer the company will satisfy the solvency and liquidity test

May not transfer if:

- The foreign company is permitted to issue bearer of shares or has issued any bearer shares that remain issued
- Is in liquidation
- A receiver or manager has been appointed in relation to the property of the foreign company
- The foreign company is engaged in proceeding comparable to business rescue proceedings or is subject to an approved plan or has entered into a compromise with a creditor and it is in force
- An application has been made to a court in any jurisdiction and not fully disposed of to put the foreign company into liquidation, to wind it up or to have it declared insolvent/ for the approval of a compromise between the foreign company and creditor/ for the appointment of a receiver or administrator in relation to any property of the foreign company

Section 15: Memorandum of Incorporation, shareholder agreement and rules of company

MOI of any company may:

- May include any provision dealing with a matter that this act does not address and altering the effect of any alterable provision of this act, imposing on the company a higher standard, greater restriction, longer period of time or any similarly more onerous requirement
- Contain any restrictive conditions applicable to the company and any requirement for the amendment of any such condition
- 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 this act

The Board of the company may make, amend or repeal any necessary or incidental rules relating to the governance of the company in respect of matters that are not addressed in this act or the MOI by

- Publishing a copy of these rules in any manner required or permitted by the MOI
- Filing a copy of those rules

This rule must:

- Be consistent with this act and the MOI or it will be void
- Take effect on a date that is the later of 10 business days after the rule is filed or date specified
- Is binding on the interim basis until it is put to a vote at the next general shareholders meeting or on a permanent basis if it has been ratified by an ordinary resolution at such meeting

Rule is ratified:

- File a notice of ratification within 5 business days

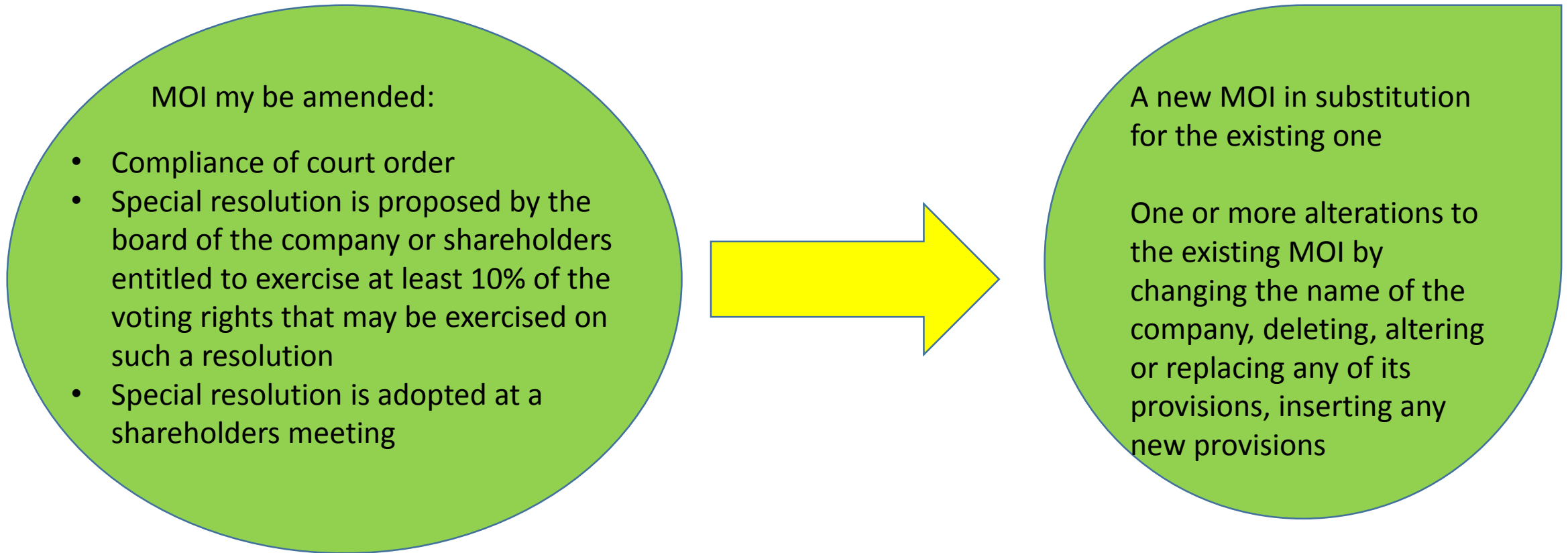
Rule is not ratified:

- File a notice of non-ratification within 5 business days after the vote
- Company may not make a substantially similar rule within the next 12 months unless it has been approved in advance by ordinary resolution

A company MOI and any rules are binding between:

- Company and each shareholder
- Shareholders of the company
- Company and each director, prescribed officer of the company
- Any other person serving the company as a member of a committee of the board

Section 16: Amending Memorandum of Incorporation



An amendment to a company's MOI takes effect:

- In the case of an amendment that changes the name – on the date set out in the amended registration certificate issued by the commission
- In any other case – the date on and time at which the Notice of Amendment is filed or the date set out if any

Section 21 & Regulation 35: Pre-incorporation contracts

A contract entered into with or by a company who is not yet incorporated.

A person may enter into a **written** agreement in the name of an entity that is contemplated to be incorporated in terms of this act but does not yet exist. This person with any such other person (“partner”) is jointly and severally liable for liabilities created as provided for in the pre-incorporation contract while acting so if the contemplated entity is not subsequently incorporated or after being incorporated the company rejects any part of such an agreement or action.

Regulation 35:

A person may give notice to a company of a pre-incorporation contract or action by filing and delivering a notice in Form CoR 35.1

If the company has rejected or ratified an agreement the company must with 5 business days:

- File a notice of its decision with respect to that contract or action in Form CoR 35.2
- Deliver a copy of that notice to each person who is a party to the contract or materially affected by the action

Within 3 months after the date on which a company was incorporated the board of that company may completely, partially or conditionally ratify or reject any pre-incorporation contract or other action purported to have been made or done in its name or on its behalf. If within 3 months the board has neither ratified nor rejected a particular pre-incorporation contract the company will be regarded as ratified that agreement or action.

Pre-incorporation contract that has been ratified:

- Agreement is enforceable against the company as if the company had been a party to the agreement when it was made
- The liability of a person in respect of the ratified agreement or action is discharged

Section 22: Reckless Trading

- A company must not carry on its business recklessly, with gross negligence, with intent to defraud any person or for any fraudulent purpose; or trade under insolvent circumstances
- If the commission has reasonable grounds to believe that a company is engaging in conduct prohibited by this act 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 to show cause why the company should be permitted to continue carrying on its business or to trade as the case may be
- If a company to whom a notice has been issued fails within 20 business days to satisfy the commission they may issue a compliance notice to the company requiring it to cease carrying carrying on its business or trading

Section 77

A director may be liable to the company for any loss suffered by the company while trading under insolvent circumstances and a director may also be liable to third parties who have had dealing with the company and suffered a loss

Section 24: Form and standards for company records

Topic 3

Any documents, accounts, books, writing, records or other information that is required to be kept by a company must be:

- In written form or other form that can be converted into written form within a reasonable time
- Kept for a period of 7 years or any longer period as specified

Every company must maintain:

- A copy of its MOI and any amendments or alterations to it
- Copies of all reports presented at an annual meeting of the company, annual financial statements and accounting records for the current and previous financial years
- Notice of minutes of all shareholders meetings including resolutions adopted by them and any documentation

- Copies of any written communications sent generally by the company to all holders of any class of the company's securities
- Minutes of all meeting 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, or on which each such resolution was adopted
- A securities register – profit company

- A member's register – non profit company
- A record of its directors including each past director

A company's record of directors must include in respect of each director that person's

- Full name and any former names
- Identity number or date of birth
- Nationality and passport number if that person is not SA
- Occupation
- Date of their most recent election or appointment as director
- Name and registration number of every other company or foreign company of which the person is a director

Section 28: 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 term of this Act or any other law with respect to the preparation of financial statements, and
- Including any prescribed accounting records, which must be kept in the prescribed manner and form

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 the intention to deceive or mislead any person to fail to keep accurate or complete accounting records or to keep records other than in the prescribed manner and form

It is an offence for a company with an intention to deceive or mislead any person to falsify any of its account records or permit any person to do so

Section 29: Financial Statements

Financial statements must:

- Satisfy the financial reporting standards as to form and content if any such standards are prescribed
- Present fairly the state of affairs and business of the company and explain the transactions and financial position of the business of the company
- Show the company's assets, liabilities and equity as well as its income and expenses
- Set out the date on which the statements were published and the accounting period to which the statements apply
- Bear on the first page of the statements a prominent notice indicating whether the statements have been audited, not audited but independently reviewed or have not been audited or independently reviewed as well as the name and professional designation of the individual who prepared or supervised the preparation of those statements
- Any financial statements prepared by the company must not be false or misleading in any material respect or incomplete in any material particular
- A company may provide any person with a summary of any particular financial statement but the first page of the summary must bear a prominent notice that it is a summary and have all above info also added

A person is guilty of an offence if the person is a party to the preparation, approval, dissemination or publication of:

- Any financial statements including any annual financial statements as well as a summary, knowing that those statements
 - Fail in a material way to comply with the requirements
 - Are materially false or misleading

Section 30: Annual Financial Statements & Regulation 26

Each year a company must prepare annual financial statements within 6 month after the end of its financial year

Audited/ Independently Reviewed/ Neither

- Public companies and state owned companies
- Non Profit companies (incorporated by state) Profit companies and non profit companies and CC that holds assets in a fiduciary capacity which exceed R5 mil at any time during the financial year
- Other companies with public interest scores of 350 or higher or at least 100 but less than 350 and with financial statements that are Internally compiled
- Public interest score at least 100 but less than 350 and with financial
- Statements that are not internally compiled
- Interest score of less than 100
- Directors hold or have all the beneficial interest in the securities issued By the company and CC and do not fall under either above

Any company can elect to have a voluntary audit done by means of: MOI, Shareholders resolution or board resolution

If every person who is a holder of or has beneficial interest in any securities issued by that company is also a director of the company it is exempt from audit

Audit
Audit

Audit

Audit

Reviewed
Reviewed

No Audit

Regulation 26:

Public Interest Score

- 1 Point for Every 1 mil turnover
- 1 Point for every 1 mil third party liabilities
- 1 Point for Every security holder
- 1 Point for every employee

Financial statements must:

- Include an auditors report if audited
- Include a report by directors with respect to the state of affairs , the business and profit or loss of the company
- Be approved by the board and signed by an authorised director
- Be presented to the first shareholders meeting after the statements have been approved by the board

Financial statements to be audited must include:

- Amount of pensions paid by company to current or past directors or individual holding prescribed office
- Amount of any compensation paid in respect of loss of office to current/ past directors or individual holding prescribed office
- Number and class of any securities issued to a director or individual holding prescribed office or to any person related to any of them and the consideration received for those securities
- Details of service contracts of current directors and individuals holding prescribed office
- Remuneration and benefits received by each director or individual holding any prescribed office

Remuneration includes:

- ❖ Fees paid to directors for services rendered
- ❖ Salary, bonus and performance-related payments
- ❖ Expense allowance
- ❖ Contributions paid to any pension scheme not stated above
- ❖ Value of any option or right given directly/indirectly to a director, past or future, or person related to any of them
- ❖ Financial assistance to a director, past or future, or any person related for the subscription of options or securities or the purchase of securities
- ❖ Company is guarantor of any loan
 - Any interest deferred, waived or forgiven
 - Difference in value between the interest that would reasonably be charged in comparable circumstances at fair market rates in an arms length transaction and the interest actually charged to the borrower

Section 35: Legal nature of company shares and requirement to have shareholder

Topic 4

A company may not issue shares to itself

A share has no par value

Authorised share has no right until it has been issued

Section 36: Authorisation for shares:

In its MOI a company must set out the different classes and number of share that a company is authorized to issue – authorized shares of a company

MOI should describe the name of each different class of share in order to distinguish it from other classes and shares as well as indicate preferences, rights and limitation of these shares

Amendment of the Memorandum of Incorporation regarding shares:

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

A Special Resolution

A decision by the companys board

The board may (unless prohibited by MOI)

- Make changes to a number of authorized shares
- Reclassify unissued, authorized shares
- Classify unclassified shares
- Determine the preferences, rights and limitations of authorized shares

Notice of amendment of the MOI must be filed

Section 37: Preferences, Rights, limitations and other share terms:

Every share, irrespective of its class, has associated with it one voting right. The MOI can limit the voting right but not exclude it

- 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 (Net assets)
- If there is more than class of share the MOI must provide that at least one class of share must have voting rights in respect of all matters on which can be voted
- Shares with limited voting rights will, irrespective of the provisions of the MOI nevertheless have voting right on any proposal to amend the rights associated with that share
- All the shares of a particular class must have the same preferences, rights, limitation and other terms

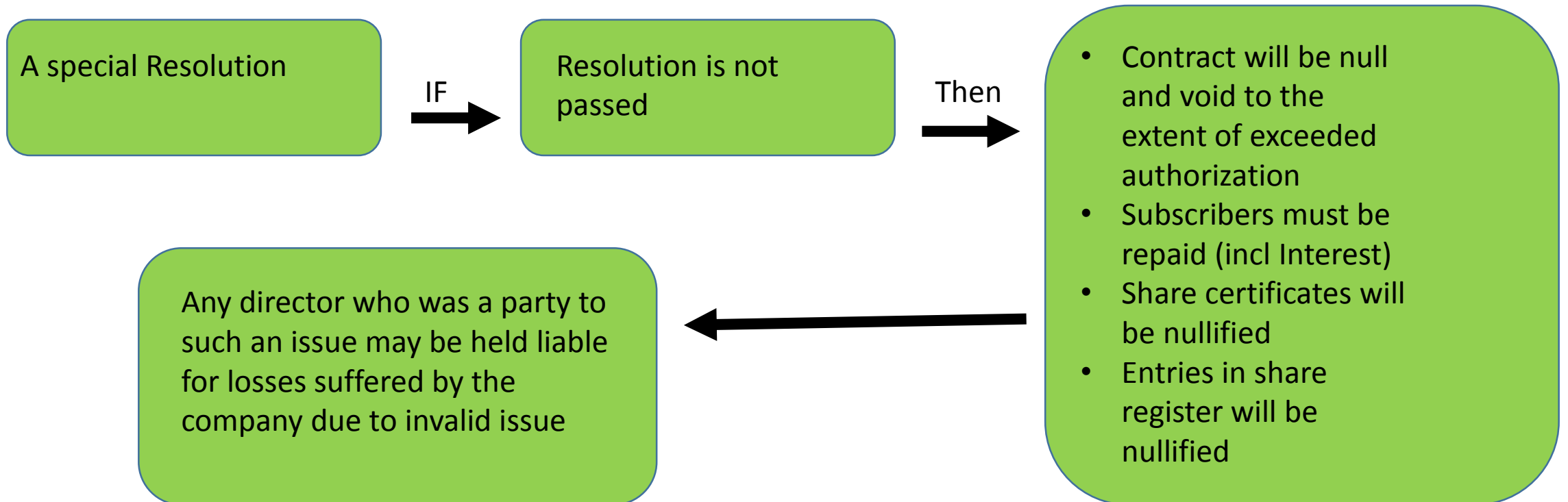
MOI of a company has been amended to materially and adversely alter the preference, rights and limitations of a class of shares, any holder of those shares is entitled to seek relief if that shareholder

- Notified the company in advance of the intention to oppose
- Was present at the meeting and voted against the resolution

Section 38: Issuing shares:

- The board of directors has the power to issue share
- Such a share issue must be approved by a special resolution if the issue is to a director or prescribed officer (or a person related) or to a future director or prescribed officer.
- Board may resolve to issue shares at any time but only within the classes and extent to which authorised

Share issues can be retroactively authorized within 60 days after the date issued with



Section 39: Subscription of Shares

Does not apply to state owned or public companies except if provided otherwise in the MOI

In case of a private or personal liability company (unless the MOI stipulates differently):

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

Private Company or Public liability company proposes to issue shares:

Existing shareholder has a pre-emptive right before others to subscribe for a percentage of the shares offered

- Equal to the voting power immediately before the offer
- Within reasonable time

SUBJECT TO:

Any limitations, negations, restrictions or other conditions as provided for in the MOI

Section 46: Distributions to be authorized by the board

Distributions include payments for share buy-back (company buys back its own shares) and payment of dividends. All distributions must be authorized by a resolution of the board of directors. Shareholders' approval is not required unless it is prescribed by the MOI.

It must also reasonably appear that the company will satisfy the solvency and liquidity test immediately after the distribution.

The board must acknowledge by resolution that it has applied the test and has reasonably concluded that the company will satisfy the test immediately after and completing the distribution.

Directors, despite knowing that the requirements for a valid distribution were not satisfied, had nevertheless either voted for or had assented to the authorization of the distribution, would be personally liable jointly and severally to restore the company of the unlawful distribution less the amount if any that is recovered by the company from the persons to whom the distribution was made.

Creditors are not given the right to institute legal action against the directors for an unlawful distribution. The errant directors are liable to the company – not its creditors.

Distribution

Is it pursuant to an existing legal obligation or court order

The distribution should be authorized by resolution

Solvency/ Liquidity Test must be satisfied and acknowledged by the board
(repeated if distribution is not completed within 120 days)

If these requirements are not adhered to:

- Directors can be held liable for losses the company incurred
- The transaction will be void

Section 48: Company or subsidiary acquiring company shares

(3)

Despite any provision of any law, agreement, order of MOI of a company, the company may not acquire its own shares and a subsidiary of a company may not acquire shares of that company if as a result of that acquisition there would no longer be any shares of the company in issue other than

- Shares held by one or more subsidiaries of the company or
- Convertible or redeemable shares

(2)

Subject to the above and section 46 the board of a company may determine that the company will acquire of its own shares

A decision by the board:

- Must be approved by a special resolution of the share holders of the company if any shares are to be acquired by the company from a director or prescribed officer (any related)
- Subject to requirements of sections 114 and 115

Subject to the above and section 46 the board of a subsidiary company may determine that it will acquire shares of its holding company but:

- Not more than 10% of the number of issued shares of any class of shares of a company may be held
- No voting rights attached to those shares may be exercised while the shares are held by the subsidiary and it remains a subsidiary of the company whose shares it hold

(4)

An agreement with a company providing for the acquisition by the company of shares issued by it is enforceable against the company subject to the above

If a company alleges that, as a result of the operation of subsection 2 and 3 it is unable to fulfil its obligations in terms of an agreement contemplated in subsection 4:

- The company must apply to a court for an order
- The company has the burden of proving that fulfilment of its obligations would put it in breach of subsections 2 and 3
- If the court is satisfied that the company is prevented from fulfilling its obligations pursuant to the agreement the court may make an order that
 - Is just and equitable, having regard to the financial circumstances of the company
 - Ensures that the person to whom the company is required to make payment in terms of the agreement is paid at the earliest possible date compatible with the company satisfying its other financial obligations as they fall due and payable

If a company acquires any shares contrary to section 46 and this section the company must not, more than two years after the acquisition apply to a court for an order reversing the acquisition and the court may order:

- The person whom the shares were acquired to return the amount paid by the company
- The company to issue to that person an equivalent number of shares of the same class as those acquired

A director of a company is liable:

- Was present at the meeting when the board approved an acquisition of shares contemplated in this section or participated in making such a decision
- Failed to vote against the acquisition of shares despite knowing it is contrary

Section 49: Securities to be evidenced by certificates or uncertificates

Certificated means evidenced by a certification while uncertified means that no certificates have been issued

Any securities issued by a company must be either

- Evidenced by certificates or
- Uncertificated

Except to the extent that this act provides otherwise:

- The rights and obligations of security holders are not different solely on the basis of their respective securities being certified or uncertified

Any certificated securities may cease to be evidenced by certificates and thereafter be uncertified

Any uncertified securities may be withdrawn from the uncertificated securities register and certificates issued evidencing those securities

Section 50: Securities Register and Numbering

Every company must establish or cause to be established a register of its issued securities and maintain its securities register in accordance with the prescribed form and standards

As soon as practicable after issuing any securities a company must enter or cause to be entered in its securities register in respect of every class of securities that it has issued:

- Total number of those securities that are held in uncertificated form
- Certificated securities:
 - The names and addresses of the persons to whom the securities were issued
 - The number of securities issued to each of them
 - The number of and prescribed circumstances relating to any securities that have been placed in trust or whose transfer has been restricted

If a company has issued uncertificated securities or has issued securities that have ceased to be certificated a record must be administered and maintained by a participant or central securities depository in the prescribed form as the company's uncertificated securities register which

- Forms part of the company's securities register

Unless all the shares of a company rank equally for all purposes the company's shares or each class of shares and any other securities must be distinguished by an appropriate numbering system

Section 51: Registration and transfer of certified securities

A certificate evidencing any certificated securities:

- Must on its face

Name of the issuing company

Name of the person to whom the securities were issued

Number and class of shares and the designation of the series if any

Any restriction on the transfer of the securities

- Must be signed by two persons authorized by the company's board (affixed to, or placed on by autographic, mechanical or electronic means)
- Is proof that the named security holder owns the securities

Certificate remains valid despite the departure from office of any person who signed it

If all of a company's shares rank equally and not distinguished by a numbering system:

- Each certificate issued in respect of those shares must be distinguished by a numbering system
- If the share has been transferred the certificate must be endorsed with a reference number that will enable each preceding holder of the share in succession to be identified

A company must enter in its securities register every transfer of any certificated securities including in the entry:

- Name and address of the transferee
- The description of the securities or interest transferred
- The date of the transfer
- The value of any consideration still to be received by the company on each share or interest

May make this entry only if the transfer is evidenced by a proper instrument of transfer that has been delivered to the company and was effected by operation of law

Section 52: Registration of uncertificated securities

At the request of a company and a payment of a prescribed fee if any a participant or central securities depository must furnish that company with all details of that company's uncertificated securities reflected in the uncertificated securities register

A person who wishes to inspect an uncertificated securities register may do so only:

- Through the relevant company
- In accordance with the rules of the central securities depository

Within 5 business days after the date of a request for inspection, a company must produce a record of uncertificated securities register

A participant or central securities depository:

- Must provide a regular statement at prescribed interval to each person for whom any uncertificated securities are held in an uncertificated securities register, setting out the number and identity of the uncertified securities held on the persons behalf
- Must not impose a charge for a statement on the person entitled to the statement
- May impose a charge or service fee for such a statement on the relevant company

Section 53: Transfer of uncertified securities

The transfer of uncertificated securities in an uncertificated securities register may only be effected

- By a participant or central securities depository
- On receipt of an instruction to transfer sent and properly authenticated in terms of the rules of the central securities depository or an order of a court
- In accordance with this section and the rules of the central securities depository

Transfer of ownership in any uncertificated securities must be effect by:

- Debiting the account in the uncertificated securities register from which the transfer is effected
- Crediting the account in the uncertificated securities register to which the transfer is effected

Transfer of ownership occurs despite any fraud, illegality or insolvency that may affect the relevant uncertificated securities or have resulted in the transfer being effected

Section 54: Substitution of certificated or uncertificated securities

A person who wishes to withdraw all or part of the uncertificated securities held by that person in an uncertificated securities register to obtain a certificate in respect of those withdrawn securities may so notify the relevant participant or central securities depository which must within 5 business days:

- Notify the relevant company to provide the requested certificate and
- Remove the details of the uncertificated securities from the uncertificated securities register

After the company have received this notice the company must:

- Immediately enter the relevant persons name and details of that persons holding of securities in the company's securities register and indicate on the register that the securities so withdrawn are no longer held in uncertificated form
- Within 10 business days (or 20 in the case of a holder of securities who is not resident within the republic)
 - Prepare and deliver to the relevant person a certificate in respect of the securities
 - Notify the central securities depository that the securities are no longer held in uncertificated form

A company may charge a holder of its securities a reasonable fee to cover the actual costs of issuing a certificate

Section 55: Liability relating to uncertified securities

A person who takes any unlawful action in the following cases is liable to any person who has suffered any direct loss or damage arising from that action:

- The name of any person remains in, entered in or is removed or omitted
- The number of uncertificated securities is increased, reduced or remains unaltered
- The description of any uncertificated securities is changed

A person who gives an instruction to transfer uncertificated securities must:

- Warrant the legality and correctness of that instruction and
- Indemnify the company and the participant or central securities depository required to effect the transfer in accordance with the rules of the central securities depository against any claim and against any direct loss or damage suffered by them arising out of such a transfer by virtue of an instruction referred to in the subsection

A participant or central securities depository who may effect the transfer of uncertificated securities in accordance with the rules of the central securities depository must indemnify:

- A company against any claim made upon it and against any direct loss or damage suffered by it arising out of a transfer of any uncertified securities
- Any other person against any direct loss or damage arising out of a transfer of any uncertified securities

If that transfer was effected by the participant or central securities depository without instruction, or in accordance with an instruction that was not sent and properly authenticated or in a manner inconsistent with an instruction that was sent and properly authenticated

Section 56: Beneficial interest in securities

Except to the extent that a MOI provides otherwise the company's issued securities may be held by and registered in the name of one person for the beneficial interest of another person.

Must be in writing to the company within 5 days after the end of every month
Otherwise be provided on payment of a prescribed fee charged by the registered holder of securities

A person is regarded to have beneficial interest in a security of a public company if the security is held nomine officii by another person on that first persons behalf or if that first person:

- Is married in community of property to a person who has beneficial interest
- Is the parent of a minor who has beneficial interest
- Acts in terms of an agreement with another person who has a beneficial interest
- Is the holding company of a company that has a beneficial interest
- Is entitled to exercise or control the exercise of the majority of the voting rights at a general meeting of a juristic person that has a beneficial interest
- Gives directions or instructions to a juristic person that has a beneficial interest (Directors or trustees are accustomed to act in accordance with that persons directions or instructions)

If a security of a public company is registered in the name of a person who is not the holder of the beneficial interest in all of the securities in the same company held by that person that holder must disclose:

- The identity of the person on whose behalf that security is held
- The identity of each person with beneficial interest in the securities so held and the number and class of securities held for each person with a beneficial interest and the extent of each beneficial interest

A company that knows or has reasonable cause to believe that any of its securities are held by one person for the beneficial interest of another, by notice in writing may require either of those persons to:

- Confirm or deny the fact
- Provide particulars of the extent of the beneficial interest held during the 3 years preceding the date of the notice
- Disclose the identity of each person with a beneficial interest in the securities held by that person

This information must not be provided later than 10 business days after receipt of notice

A person who holds a beneficial interest in any securities may vote in a matter at a meeting of shareholders on to the extent that:

- The beneficial interest includes the right to vote on the matter
- Persons name is on the company's register of disclosures as the holder of a beneficial interest or the person holds a proxy appointment in respect of that matter from the registered holder of those securities

The registered holder of any securities in which any person has beneficial interest must deliver to each such person:

- A notice of any meeting of a company at which those securities may be voted on within 2 business days after receiving such notice from the company
- A proxy appointment to the extent of that persons beneficial interest, if the person so demands

Section 57: Shareholder and voting rights

If a profit company, other than state owned, has only 1 shareholder:

- That shareholder may exercise any or all of the voting rights pertaining to that company on any matter at any time, without notice or compliance with any other internal formalities except if the MOI states differently
- Sections 59 – 65 do not apply

If a profit company, other than state owned, has only 1 director:

- That director may exercise any power or perform any function of the board at any time, without notice or compliance with any other internal formalities, except if the MOI states differently
- Sections 71, 73 and 74 do not apply

If every shareholder of a particular company other than a state owned company is also a director of that company:

- Any matter that is required to be referred by the board to the shareholders for decision may be decided by the shareholders at any time after being referred by the board without notice or compliance with any other internal formalities, except to the extent that the MOI provides otherwise provided that
 - Every such person was present at the board meeting when the matter was referred to them in their capacity as shareholders
 - Sufficient persons are present in their capacity as shareholders to satisfy the quorum requirements
 - A resolution adopted by those persons in their capacity as shareholders has at least the support that would have been required for it to be adopted as an ordinary or special resolution at a properly constituted shareholders meeting

When acting as shareholders those persons are not subject to the provisions relating to duties, obligations, liabilities and indemnification of directors

```
graph LR; A([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]) --> B([This person acting as representative may exercise the same powers as the authorizing company could have exercised if it were an individual holder of securities]);
```

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

This person acting as representative may exercise the same powers as the authorizing company could have exercised if it were an individual holder of securities

Section 58: Shareholder right to be represented by proxy

At any time a shareholder of a company may appoint any individual (even if not a shareholder) as proxy to:

- Participate in, and speak and vote at a shareholders meeting on behalf of the shareholder
- Give or withhold written consent on behalf of the shareholder to a decision



A proxy appointment:

- Must be in writing, dated and signed by the shareholder
- Remains valid for one year after the date on which it was signed or any longer or shorter period expressly set out in the appointment, unless it is revoked

A shareholder may appoint two or more persons concurrently as proxies and may appoint more than one proxy to exercise voting rights attached to different securities

A proxy may delegate the proxy's authority to act on behalf of the shareholder to another person subject to any restriction

Copy of the instrument appointing a proxy must be delivered to the company or to any other person on behalf of the company before the proxy exercises any rights

Suspension and revocation of proxy

The appointment is suspended at any time and to the extent that the shareholder chooses to act directly and in person in exercise of any rights as shareholder

The appointment is revocable unless the proxy appointment expressly states otherwise

If the appointment is revocable a shareholder may revoke the proxy appointment by:

- Cancelling it in writing or making a later inconsistent appointment of a proxy
- Delivering a copy of the revocation instrument to the proxy and to the company

A revocation of a proxy appointment constitutes a complete and final cancellation of the proxy's authority to act on behalf of the shareholder as of the later of

- Date stated in the revocation instrument if any
- Date on which the revocation instrument was delivered

If the instrument appointing a proxy or proxies has been delivered to a company any notice that is required by this act or the MOI is to be delivered by the company to the shareholder and must be:

- Delivered to the shareholder
- The proxy if the shareholder has directed the company to do so in writing and paid any reasonable fee charged by the company for doing so

If a company issues an invitation to shareholders to appoint one or more persons named by the company as proxy or supplies a form of instrument for appointing a proxy

- The invitation must be sent to every shareholder who is entitled to notice of the meeting at which the proxy is intended to be exercised
- The invitation or form of instrument supplied by the company for the purpose of appointing a proxy must
 - Bear a reasonable prominent summary of the rights established by this section
 - Contain adequate blank space immediately preceding the name or names of any person or persons named in it – Allows shareholder to write in a different name of a proxy if the shareholder wishes to do so
 - Provide adequate space for the shareholder to indicate whether the appointed proxy is to vote in favour or against any resolution or resolutions to be put at the meeting or is to abstain from voting

The proxy appointment remains valid only until the end of the meeting at which it was intended to be used

Section 62: Notice of meetings

A company must deliver a notice of each shareholder meeting in the prescribed manner and form to all of the shareholders of the company as of the record date for the meeting at least:

- 15 business days before the meeting is to begin – public company or a non profit company that has voting members
- 10 business days before the meeting is to begin in any other case
- Company MOI can stipulate longer or shorter periods

Shorter or longer periods can occur but such a meeting may proceed only if every person who is entitled to exercise voting rights in respect of any item on the meeting agenda:

- Is present at the meeting
- Votes to waive the required minimum notice of the meeting

Notice must be in writing and must include:

- Date, time and place for the meeting and the record date for the meeting
- General purpose of the meeting
- Copy of any proposed resolution of which the company has received notice and which is to be considered at the meeting and a notice of the percentage of voting rights that will be required for that resolution to be adopted
- In the case of annual general meeting of a company

The financial statements to be presented or a summarized form there of
Directions for obtaining a copy of the complete annual financial statements for the preceding financial year

- A reasonably prominent statement that

A shareholder entitled to attend and vote at the meeting is entitled to appoint a proxy to attend

A proxy need not also be a shareholder of the company

Meeting participants provide satisfactory identification

If a material defect in the form or manner of giving notice of a meeting relates only to one or more particular matters on the agenda for the meeting:

- Any such matter may be severed from the agenda and the notice remains valid with respect to any remaining matters on the agenda
- The meeting may proceed to consider a severed matter, if the defective notice in respect of that matter has been ratified

A material defect in the giving notice of a shareholders meeting, the meeting may proceed subject to the above, only if every person who is entitled to exercise voting rights in respect of any item on the meeting agenda is present at the meeting and the votes to approve the ratification of the defective notice

A shareholder who is present at a meeting, either in person or by proxy –

- Is regarded as having received or waived notice of the meeting, if at least the required minimum notice was given
- Has a right to –
 - Allege a material defect in the form of notice for a particular item on the agenda for the meeting
 - Participate in the determination whether to waive the requirements for notice if less than the required minimum notice was given or to ratify a defective notice

Section 63: Conduct of meetings

Before any person may attend or participate in a shareholders meeting:

- That person must present reasonable satisfactory identification
- The person presiding at the meeting must be reasonably satisfied that the right of that person to participate and vote, either as shareholder or as a proxy has been reasonably verified

Unless provided differently in the MOI and as long as electronic communication enables all persons participating to communicate concurrently with each other without intermediary:

- A shareholders meeting may be conducted entirely by electronic communication or
- One or more shareholder, or proxies to participate by electronic communication in all or part of a shareholders meeting

If this is the case the notice of meeting must stipulate that this form of communication is possible and it must be made available. This will be at the expense of the shareholder except if stated differently

Voting by show of hands:

- Shareholder has one vote irrespective of the number of voting rights that person would otherwise be entitled to exercise

Voting by polling:

- Number of votes determined in accordance with the voting rights associated with the securities held by that shareholder



A polled vote must be held if a demand for such a meeting is made by:

- At least 5 persons having the right to vote on that matter
- A person who is or persons who together, as a shareholder or proxy representing a shareholder, to exercise at least 10% of the voting rights entitled to be voted on that matter

Section 65: Shareholders Resolutions

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 as stated (not in the case of a resolution for the removal of a director)

Special Resolution –

Means a resolution adopted with the support of at least 75% of the voting rights exercised on the resolution or a higher percentage stated

MOI can stipulate a different percentage as long as the difference between ordinary and special resolution is no less than 10%

Needed to:

- Amend MOI
- Ratify a consolidated revision of MOI
- Ratify action in excess of their authority
- Approve an issue of shares or grant of rights
- Authorise the board to grant financial assistance

- Reacquisition of shares
- Compensation to directors
- Winding up of the company
- Transfer to foreign jurisdiction

Once a resolution has been approved it may not be challenged or impugned by any person in any forum on the grounds of not satisfying requirements

Any two shareholders of a company:

- May propose a resolution concerning any matter in respect of which they are each entitled to exercise voting rights and
- When proposing a resolution, may require that the resolution be submitted to shareholders for consideration at a meeting demanded, at the next shareholders meeting or by written vote

A proposed resolution must be:

- Expressed with sufficient clarity and specificity
- Accompanied by sufficient information or explanatory material
- This is to enable a shareholder who is entitled to vote on the resolution to determine whether to participate in the meeting and to seek to influence the outcome of the vote on the resolution

If a shareholder or director believes that it does not satisfy the above they can apply to a court for an order – restraining the company from voting until requirements are met or requiring the person who proposed the resolution to take appropriate steps to alter the resolution to satisfy these requirements/ compensate the applicant for costs of the proceedings if successful

Section 96: Offers that are not offers to public

- ❖ If the offer is made only to:
 - Persons whose ordinary business, or part of whose ordinary business is to deal in securities whether as principals or agents
 - The public Investment Corporation
 - A person or entity regulated by the Reserve Bank of S
 - An authorized financial services provider
 - A financial institution
 - A wholly owned subsidiary of a person acting as agent in the capacity of an authorized portfolio manager for a pension fund

- ❖ 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
- ❖ If it is a non-renounceable offer made only to existing holders of the company's securities or persons related to existing holders of the company's securities
- ❖ If the offer is made only to a director or prescribed officer or any relations
- ❖ If it pertains to an employee share scheme
- ❖ If it is an offer, or one of a series of offers, for subscription, made in writing and:
 - No offer is accompanied by or made by means of an advertisement and no selling expenses are incurred in connection with any offer in the series
 - The issue of securities under any one offer in the series is finalized with 6 months after the of the offer made
 - The offer is accepted by a maximum of fifty persons acting as principals

Section 97: Standards for qualifying employee share schemes

Qualifies if the company has:

- Appointed a compliance officer for the scheme to be accountable to the directors of the company
- States in its annual financial statements the number of specified shares that it has allotted during that financial year in terms of its employee share scheme
- Compliance officer has complied with the requirements

A compliance officer who is appointed in respect of any employee share capital scheme:

- Is responsible for the administration of that scheme
- Must provide a written statement to any employee who receives an offer of specified shares setting out full particulars of the nature of the transaction including the risks associated, information relating to the company including its latest annual financial statements/ general nature of its business/ profit history over the last 3 years, full particulars of any material changes that occur of these points
- Must ensure that copies of the documents containing the information are filed within 20 business days after the employee share scheme has been established
- 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 during the past financial year

Section 99: General restriction on offers to public

A person must not make an initial public offering unless that offer is accompanied by a registered prospectus

A person must not make a

- Primary offer to the public of any
 - Listed securities of a company otherwise than in accordance with the requirements of the relevant exchange
 - Unlisted securities of a company unless the offer is accompanied by a registered prospectus that satisfies the requirements of section 100
- Secondary offer to the public of any securities of a company unless the offer satisfies the requirements of 101

A person must not issue, distribute, deliver a letter of allocation unless it is accompanied by all documents that are required and have been filed in case of unlisted securities or approved by the relevant exchange in the case of listed securities as well as a registered prospectus in the case of a primary offering or a written statement that satisfies requirements in case of a secondary offering. It must bear on the face the date on which the prospectus in respect of those securities filed

A person must not offer to the public any securities of any person unless that second person is a company

A person may not issue a prospectus or a document that purports to be a prospectus or a document that may reasonably be misread to be intended as a prospectus unless it is a registered prospectus

A prospectus may not be registered if it has not complied with this act and it has been filed for registration with all documents within 10 business days after the date of that prospectus

Section 100: Requirements concerning prospectus

This section does not apply to listed securities except listed securities that are subject of an initial public offering

Every prospectus must:

- Contain all the information that an investor may require to assess the assets and liabilities, financial position, profit and losses, cash flow and prospects of the company in which a right or interest is to be acquired/ and the securities being offered and the rights attached to them
- Adhere to the prescribed specifications

The date of registration of the prospectus is the date of the issue of the prospectus unless the contrary is proven

A prospectus must not be registered unless there is attached to it:

- A copy of any material agreement
- In the case of an unwritten agreement a memorandum giving full particulars of the agreement

If any section is not in an official language a certified translation in an official language must be attached

Information may be omitted if the commission is satisfied:

- That publication of the information would be unnecessarily burdensome for the applicant, seriously detrimental to the company whose securities are the subject of the prospectus or against public interest

Section 66: Board, Directors and Prescribed Officers

A director is a member of the body of people that manages a company – together they are called the board of directors

Unless stated differently in the MOI the minimum directors are as follows and the shareholders should elect at least 50% of the directors. Any other person stipulated in the MOI may appoint the remaining directors

Private Company – 1
Incorporated Company – 1
Public Company – 3
State-owned Company – 3
Non profit company - 3

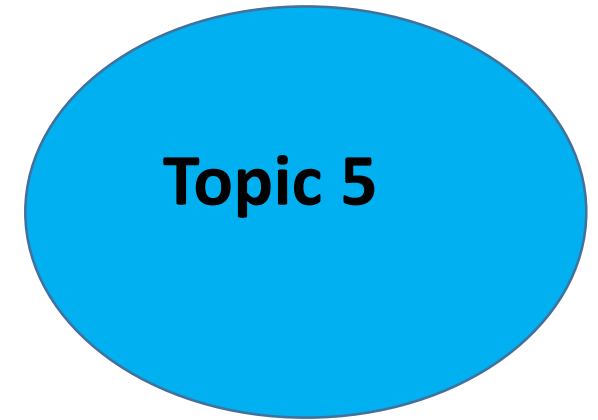
Any failure by the company to have the minimum number of directors does not limit or negate the authority of the board or invalidate anything done by the board of the company

A Company's MOI may provide for:

- The direct appointment and removal of one or more director by any person who is named in 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

(this person has all the powers and functions of any other director of the company unless the MOI restricts this and is subject to all the liabilities of any other director of the company)

- The appointment or election of one or more persons as alternate directors of the company



A person becomes entitled to serve as a director of a company when that person:

- Has been appointed or elected in accordance with this part or holds an office, title, designation or similar status entitling that person to be an ex officio director of the company
- Has delivered to the company a written consent to serve as its director

Except if stated differently in the MOI the company may pay remuneration to its directors for their service as directors but only in accordance with a special resolution approved by the shareholders within the previous two years

Section 67: First director or directors, Section 68: Election of directors, Section 69: Ineligibility and disqualification of persons to be director or prescribed officer, Section 70: Vacancies on board & Section 71: Removal of directors

Incorporators = First directors (if the number of incorporators is fewer than the minimum required the board must call a shareholders meeting within 40 business days after incorporation of the company for the purpose of electing sufficient directors to fill all vacancies on the board at the time of election)

Will serve until sufficient other directors have been appointed

Appointment of Directors



- Elected by shareholders
- Voted on separately
- Serve for indefinite term

Ineligible

- A juristic person
- An unemployed minor
- A person not meeting the requirements of the MOI

Disqualified

- Prohibited by a court
- Declared delinquent by a court
- Unrehabilitated in terms of public regulation
- Removed from office due to misconduct that involved dishonesty
- Convicted and imprisoned without option of a fine for theft, defraud, forgery, perjury or other offences

Election:

- The election is to be conducted as a series of votes, each of which is on the candidacy of a single individual to fill a single vacancy with the series of votes continuing until all vacancies on the board at that time have been filled.
- In each vote to fill a vacancy each voting right is entitled to be exercised once
- In each vote to fill a vacancy the vacancy is only filled if a majority of the voting rights exercised support the candidate

Disqualification:

- Ends at the later of:
 - Five years after the date of removal from office or the completion of the sentence imposed for the relevant offence
 - At the end of one or more extensions as determined by a court from time to time on application by the commission
- At any time before the expiry of a person's disqualification the commission may apply to a court for an extension and the court may extend the disqualification for no more than 5 years at a time if the court is satisfied that an extension is necessary to protect the public, having regard to the conduct of the disqualified person up to the time of application

Vacancies on board arise:

Every company must file a notice within 10 business days after a person becomes or ceases to be a director

- When a person's term of office as director expires in the case of MOI providing a fixed term
- A person resigns or dies
- An ex officio director ceases to hold the office, title, designation or similar status that entitled the person to be an ex officio director
- A person becomes incapacitated to the extent that the person is unable to perform the functions of a director and is unlikely to regain that capacity within a reasonable time
- A person is declared delinquent by a court or placed on probation under conditions that are inconsistent with continuing to be a director
- A person becomes ineligible or disqualified
- A person is removed by resolution of the shareholder/ by resolution of the board or by order of the court

If the board of a company has removed a director a vacancy does not arise until the expiry date of the time for filing an application for review or the granting of an order by the court on such an application but the director is suspended from office during this time

If a vacancy arises other than as a result of an ex officio director ceasing to hold that office it must be filled by:

- A new appointment or
- A new election conducted at the next annual general meeting or within 6 months after the vacancy arose

Removal of directors

- May be removed by ordinary resolution despite any MOI
- Must be given notice of the meeting and resolution to remove
- Must be afforded the opportunity to make a presentation to the meeting before voting takes place

Where a shareholder or director alleges that a fellow director:

- Has become ineligible or disqualified
- Is incapacitated to perform as a director
- Neglected his/her duty or have been derelict as director

- The board must consider this allegation
- The board may vote on the removal of the director
- The director may not vote on the his removal
- Director must still be given notice and on opportunity for representation
- The director may apply (within 20 days) to a court for review

This cannot apply to companies with fewer than three directors

Section 72: Board committees

Except when the MOI provides otherwise the board of directors may appoint any number of committees and may delegate any of the authority of the board to a committee. The board however is responsible for performing its duties properly and a director or the board cannot use the appointment of a committee as a shield against their own responsibility

The committee:

- May include persons who are not directors but any such person must not be ineligible or disqualified 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
- Has the full authority of the board in respect of a matter referred to it

Section 73: Board Meetings

A director may call a meeting of the board at any time by at least 25% of the directors (where the board consists of at least 12 members) or two directors in any other case

The board of a company may determine the form and time for giving a notice of its meetings but

- Such a determination must comply with any requirements set out in the MOI
- No meeting of a board may be convened without notice to all of the directors subject to the below

Except to the extent that the MOI provides otherwise:

- ❖ If all the directors of the company acknowledge actual receipt of the notice, are present at a meeting or waive notice of the meeting, the meeting may proceed even if the company failed to give the required notice of that meeting or there was a defect in the giving of the notice
- ❖ A majority of the directors must be present at a meeting before a vote may be called at a meeting of the directors
- ❖ Each director has one vote on a matter before the board
- ❖ A majority of the votes cast on a resolution is sufficient to approve that resolution
- ❖ In case of a tied vote the chair may cast a deciding vote if the chair did not initially have a vote or the matter being voted on fails in any other case

Minutes:

Company must keep minutes of the board and any of its committees and include in the minutes:

- Any declaration given by notice or made by a director
- Every resolution adopted by the board

These resolution must be dated and sequentially numbered and are effective as of the date of the resolution unless the resolution states otherwise

Section 74: Directors acting other than at board meetings

Except for the MOI stating differently a decision that could be voted on at a meeting of the board may instead be adopted by written consent of a majority of the directors, given in person, or by electronic communication provided that each director has received notice of the matter to be decided on.

Section 75: Directors personal financial interest:

Personal financial interest

A direct material interest of that person of a financial, monetary or economic nature or to which a monetary value may be attributed

Does not include any interest held by a person in a unit trust or collective investment scheme unless that person has direct control over the investment decisions of that fund or investment

If a person is the only director but does not hold all of the beneficial interest of all the issued securities of the company that person may not:

- Approve or enter into any agreement in which the person or a related person has a personal financial interest
- As a director determine any other matter in which the person or a related person has a personal financial interest
- Unless the agreement or determination is approved by an ordinary resolution of the shareholders after the director has disclosed the nature and extent of that interest to the shareholders

At any time a director may disclose any personal financial interest in advance by delivering to the board or shareholder a notice in writing setting out the nature and extent of that interest

If a director has a personal financial interest in respect of a matter to be considered at a meeting or knows that a related person has a personal financial interest in the matter the director:

- Must disclose the interest and its general nature before the matter is considered at the meeting
- Must disclose to the meeting any material information relating to the matter and know to the director
- May disclose any observations or pertinent insights relating to the matter if requested to do so by other directors
- If present at the meeting, must leave the meeting immediately after making any disclosure
- Must not take part in the consideration of the matter
- While absent from the meeting is to be regarded as being present for the purpose of determining whether sufficient directors are present to constitute the meeting and is not to be regarded as being present at the meeting for the purpose of determining whether a resolution has sufficient support to be adopted
- Must not execute any document on behalf of the company in relation to the matter unless specifically requested or directed to do so

If the director or related person attains a personal interest after an agreement has been decided on he/she must disclose this information promptly

A decision by the board is valid despite any personal financial interest of a director or person related to the director only if:

- It was approved following disclosure of that interest in the manner contemplated
- Despite having been approved without disclosure of that interest it
 - Has subsequently been ratified by an ordinary resolution of the shareholders following disclosure of that interest or
 - Has been declared to be valid by a court

A court may declare a valid transaction or agreement despite the failure of disclosure from the director

Section 76: Standards of directors conduct

A director 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

Duties to the company:

- Act In good faith and for a proper purpose
- Act in the best interest 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

Section 77: Liability of directors and prescribed officers

Director may be held liable:

- In accordance with the principles of common law relating to breach of a fiduciary duty for any loss, damages or costs sustained by the company as a consequence of any breach by the director of a duty
- In accordance with the principles of 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; any provision of this act not otherwise mentioned in this section and any provision of the MOI

A director of a company is liable for any loss, damages or costs sustained by the company as 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 the authority to do so
- **Despite knowing the director still:**
- Acquiesced in the carrying on of the company's business in manner prohibited by section 22
- Been present or participated in voting for or not voting against the issuing of any unauthorized shares not authorized in accordance with section 36 / the issuing of any authorized securities inconsistent with section 41/
- An allotment by the company contrary to any provisions

- The provision of financial assistance to any persons that was inconsistent with section 44
- A resolution approving distribution contemplated with section 46
- Been a party to an act or omission by the company of which the act or omission was calculated to defraud a creditor, employee or shareholder of the company or had another fraudulent purpose
- Signed, consented to or authorized the publication of any financial statements that were false or misleading in a material respect or a prospectus or a written statement that contained an untrue statement or a statement to the effect that a person had consented to be a director of the company when such consent had been given

A liability arises only if:

- Immediately after making all the distribution contemplated in a resolution in terms of section 46 the company does not satisfy the solvency and liquidity test
- It was unreasonable at the time of the decision to conclude that the company would satisfy the solvency and liquidity test after making the relevant distribution

A liability does not exceed

- The amount by which the value of the distribution exceeded the amount that could have been distributed without causing the company to fail to satisfy the solvency and liquidity test
- The amount if any recovered by the company from persons to whom the distribution was made

If the board of a company has made a decision in a manner that contravened this Act – the company or any director who has been or may be held liable may apply to a court for an order setting aside the decision of the board and the court may make an order setting aside the decision in whole or in part and any further order that is just and equitable in the circumstances

Proceedings to recover any loss, damages or cost for which a person is or may be held liable in terms of this section may not be commenced more than 3 years after the act or omission that gave rise to that liability

Section 78: Indemnification and directors insurance

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

- Wilful 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

A company may not directly or indirectly pay any fine that may be imposed on a director of the company or on a director of a related company as a consequence of that director having been convicted of an offence unless the conviction was based on strict liability

This does not apply to a private or personal liability company if:

- A single individual is the sole shareholder and sole director of that company or
- Two or more related individuals are the only shareholders of that company and there are no director of the company other than one or more of those individuals

Except if the MOI states differently:

- The company may advance expenses to a director to defend litigation in any proceedings arising out of the directors service to the company
- the company may directly or indirectly indemnify a director for expenses if the proceedings are abandoned or exculpate the director or arise in respect of any liability for which the company may indemnify the director
- A company may purchase insurance to protect
 - A director against any liability or expenses for which the company is permitted to indemnify the director
 - The company against any contingency included any expenses that the company is permitted to advance or for which the company is permitted to indemnify a director

Section 84 & 85: Registration of secretaries and auditors

Topic 6

These sections apply to:

- Every public and state-owned company
- A private company, non-profit company and personal liability company

If required by the companies act and 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

A person who has been disqualified to serve as a director may not be appointed as a company secretary, an auditor or an audit committee even if done so voluntarily

Is the company a public company or state-owned company

Yes

No

Must appoint:

- A company secretary
- An Auditor
- An audit committee

Note 1: Where the Auditor General has elected to conduct an audit, the company may not appoint an (external) auditor for that year

Note 2: Any person who is disqualified from acting as a director may not be appointed as a company secretary, an auditor or as a member of the audit committee of that company

Not required to have financial statements audited BUT stakeholders (shareholders, providers of finance) may require that the company be audited.

Therefore, take note:

- The MOI may make it a requirement
- A private company may also require an audit if it is in public interest. The decision will be influenced by:
 - Annual turnover of the company
 - Size of its labour force
 - Nature and extent of its activities

Every company which appoints a company secretary or auditor:

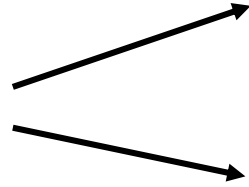
- Must maintain a record of the name of the person and the date of the appointment
- If it is a firm or juristic person, must maintain a record of the name, registration and registered office address

Within 10 days of making an appointment of or after termination of the services of an auditor or secretary, the company must file a notice of appointment or termination

Section 86 & 87: Mandatory appointment of a company secretary

Mandatory appointment:

- Public Company
- State-owned Company
- Or MOI requirement



Note 1: The company secretary must be a resident of the Republic of South Africa and must remain so while serving in that capacity

Note 2: He/She can be a juristic person or partnership provided:

- No partner of partnership or employee is disqualified from acting as a director of that company
- At least one of the employees
 - Is a resident of the RSA
 - Has the requisite knowledge and experience

Note 3: Within 60 days after the vacancy has arisen, the vacancy must be filled by a person who has “requisite knowledge and experience” (no formal qualification or membership of a professional body is required)

Change in membership/partners/ employees of juristic person/ partnership does not constitute a casual vacancy as long as the above requirements is satisfied

The first company secretary may be appointed by the incorporators or the company or within 40 business days after the incorporation of the company by either the directors or an ordinary resolution of the holders of the company's securities

Section 88: Duties of a company secretary

A company's secretary is accountable to the company's board

Duties include by are not restricted to:

- Providing the directors of the company collectively and individually with guidance as to their duties, responsibilities and powers
- Making the directors aware of any law relevant to or affecting the company
- Reporting to the company's board any failure on the part of the company or a director to comply with the MOI or rules of the company or this act
- Ensuring that minutes of all shareholders meetings, board meeting and the meetings of any committees of the directors or of the company's audit committee are properly recorded
- Certifying in the company's annual financial statements whether the company has filed required returns and notices in terms of this act and whether all such returns and notices appear to be true, correct and up to date
- Ensuring that a copy of the company's annual financial statements is sent to every person who is entitled to it
- Carrying out the functions of a person designated in terms of section 33

Section 89: Resignation or removal of company secretary

May resign by giving:

- One month's written notice
- Less than one month's written notice with the approval of the board

If removed from office, may require the company to include a statement of reasonable length in the annual financial statements setting out the secretary's opinion on the circumstances that resulted in his/her removal

Section 90: Appointment of auditor

A public and state-owned company (or a company required to in terms of its MOI or its public interest score) must appoint an individual or firm as an auditor at their annual general meeting

Note 1: The audit committee must accept an auditor as being independent. The audit committee must

- Ascertain that the auditor does not receive any direct/indirect remuneration or other benefit except
 - As an auditor
 - For rendering other non-audit services that the audit committee has determined
- Consider if the auditor's independence has been prejudiced
 - As a result of a previous appointment as an auditor or
 - With regard to the extent of consultancy, advisory or other work that the auditor has undertaken
- Consider whether the auditor complies with the rules and regulations of the IRBA for example the code of Professional Conduct in relation to independence and conflict of interest

Upon its incorporation and each year at its annual general meeting. If not the company has 40 business days after incorporation to do so

Must be

A registered auditor

Must be acceptable to the company's audit committee as being independent

Must not be

- A director or prescribed officer of the company
- An employee/consultant who has been engaged for more than one year in the maintenance of financial records or preparation of financial statement of the company
- A director, officer or employee of the company secretary
- A person involved in performing duties of an accountant/bookkeeper or secretarial work for the company
- A person who at any time during the five financial years preceding the date of appointed was any of the above
- A person related to any of the above

Note 2: if a person has been disqualified to serve as a director, he or she is also disqualified as an auditor

Note 3: A retiring auditor (coming to the end of his/her annual appointment) may be re-appointed automatically without a resolution being passed at the annual general meeting unless:

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

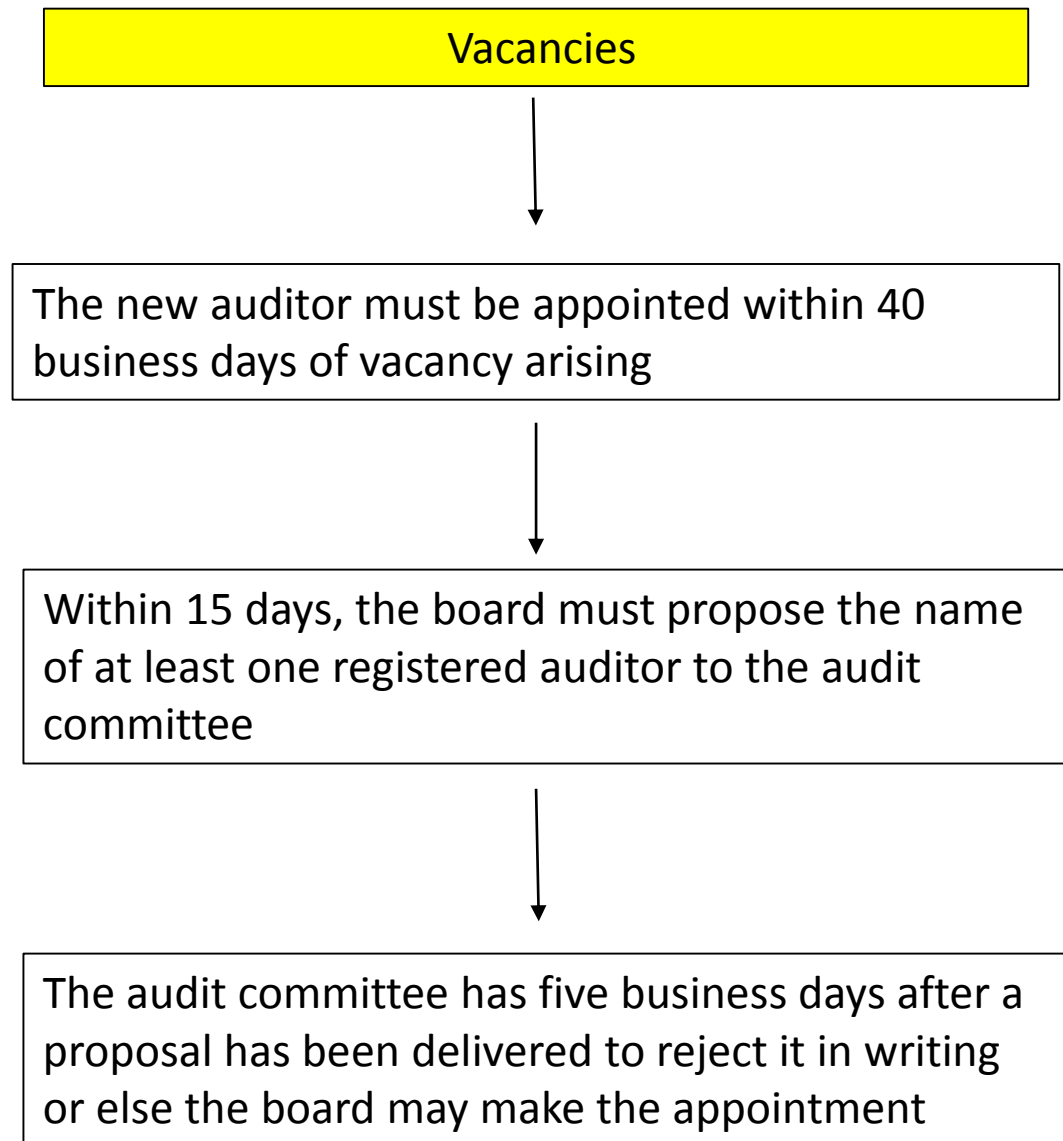
Note 4: If an annual general meeting of a company does not appoint or reappoint an auditor the directors must fill the vacancy in the office within 40 business days after the date of the meeting

Section 91: Resignation of auditors and vacancies

Resignation becomes effective when notice is filed

Note 1: If a company appoints a firm as its auditor, any change in the composition of the members of that firm does not by itself create a vacancy in the office of auditor for that year subject to:

If less than one half of the members remain after a change, that change constitutes the resignation of the firm as auditor of the company giving rise to a vacancy



Section 92: Rotation of auditors

The same individual may not serve as an auditor for more than five consecutive years

If an individual has served as an auditor for two/more consecutive financial years and then ceases to be the auditor the individual may not be appointed again as an auditor until the expiry of at least two further financial years

Example:

Mr X was the designated auditor of ABC Ltd for the financial years ended 31 March 2007 and 31 March 2008. In 2009, he left the firm but returned in February 2010. However he cannot be re-appointed as the auditor of ABC Ltd until after the 2010 financial year end. It seems that nothing is preventing him from becoming part of the audit team again.

Section 93: Rights and restricted functions of auditors

The auditor of the company:

- Has the right of access at all times to the accounting records and all books and documents of the company and is entitled to require from the directors or prescribed officers of the company any information and explanations necessary for the performance of the auditors duties
- In the case of the auditor of a holding company, has the right of access to all current and former financial statements of any subsidiary of that holding company and is entitled to require from the directors or officers of the holding company or subsidiary any information and ex-connection with the accounting records, books and documents of the subsidiary as necessary to the performance of the auditors duties
- Is entitled to
 - Attend any general shareholders meeting
 - Receive all notices of and other communications relating to any general shareholders meeting and
 - Be heard at any general shareholders meeting

An auditor may apply to a court for an appropriate order to enforce the rights above and the court may

- Make any order that is just and reasonable to prevent frustration of the auditors duties by the company or any of its directors, prescribed officers or employees and
- Make an order of costs personally against any director or prescribed officer whom the court has found to have wilfully and knowingly frustrated or attempted to frustrate the performance of the auditors functions

Section 94: Audit committees

First members of the audit committee may be appointed by the incorporators or by the board within 40 business days after the incorporation of the company

Composition of an audit committee

An audit committee must consist of at least three members unless the company is a subsidiary of another company that has an audit committee and the audit committee of that company will perform the functions required on behalf of the subsidiary company

A member must:

- Be a director of the company
- Satisfy minimum qualifications as prescribed by minister (adequate financial knowledge and experience)

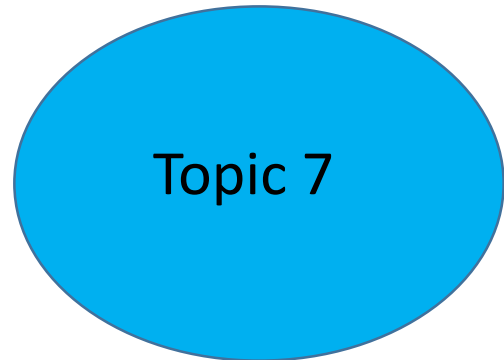
A member must not:

- Involved in day to day management (currently or at any time during the previous financial year)
- A prescribed officer, or full time executive employee of the company or a related/interrelated company, or have held such a post at any time during the previous three financial years
- A material supplier or customer of the company
- A person related to any of the above-mentioned persons

Duties of an audit committee

- Nominates an independent registered auditor for appointment
- Determines the auditor's fees and terms of engagement
- Ensures that the appointment of the auditor complies with provisions of the act and other legislation
- Determines the nature and extent of any non-audit services
- pre-approves any proposed agreement with the auditor for provision of non-audit services
- Prepares a report to be included in the annual financial statements for that financial year:
 - Describing how its functions were carried out
 - Stating whether it is satisfied that the auditors were independent
 - Commenting on the appropriateness of the financial statements, accounting practices and internal financial control
- Receives and deals appropriately with any concerns/complaints, relating to
 - Accounting practices and internal audit
 - The content or auditing of the financial statements
 - Internal financial controls
 - Other related matter
- Makes submissions to the board on any matter concerning accounting policies, financial control, records and reporting of the company
- Performs other functions determined by the board

Section 44: Financial assistance for subscription of securities



Financial assistance does not include lending money in the ordinary course of business by a company whose primary business is the lending of money.

Example:

A bank normally lends money in its ordinary course of business. If you were to lend money from the bank, at the same interest rate and repayment terms as would apply to any other person, and thereafter used this money to purchase share in the bank which lent you the money. This would not constitute financial assistance.

Financial assistance includes a loan, a guarantee or the provision of security or otherwise to any person for the purpose of or in connection with, the subscription of any option, or securities, issued or to be issued by the company or a related or interrelated company, or for the purpose of any securities of the company or a related or interrelated company – if a company would give up a building, which it owns as security in order for you to obtain a loan (to enable you to purchase shares in this company), it would constitute financial assistance

In order for financial assistance to be provided legally:

- 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, which approved such assistance either for a specific recipient or generally for a category of potential recipients
- The board should be satisfied that the solvency and liquidity tests have been satisfied immediately after providing financial assistance
- The board should be satisfied that the terms under which the financial assistance is to be given are fair and reasonable to the company

- The board must ensure that if the company's MOI includes any conditions or restrictions regarding the giving of financial assistance, they must have complied with (if no reference is made in the MOI to financial assistance, the transaction can still go ahead provided the company has complied with the other requirements)

The inclusion of the special resolution is an essential safeguard against potential abuse of power by the directors

If these requirements are not met:

- The transaction will be void
- The directors can be held liable for the losses of the company has incurred in this regard

Section 45: Loans or other financial assistance to directors

Remember: Financial assistance can take the form of a loan, a guarantee, a provision of security etc. Apart from loans, other forms of financial assistance are often hidden in the scenario

Exclusions:

- The primary business of the company is the lending of money
- The financial assistance is for meeting legal expenses (relating to a matter concerning the company)
- The financial assistance is for paying expenses to be incurred by the person on behalf of the company
- The financial assistance is an amount to defray the person's expense for removal at the company's request



Requirements:

- Any conditions set of in the MOI in this regard should be met
- The liquidity/solvency test should be satisfied immediately after the financial assistance is granted
- The terms should be fair and just
- A special resolution should be obtained (must have been passed within previous two years except if the financial assistance is pursuant to an employee share scheme)
- Written notice of the meeting and the intended assistance should be given to all shareholders (unless all shareholders are directors)
- Written notice of the meeting and the intended assistance should be given to any trade union that is representing the employees of the company

If not adhered to the transaction will be void and directors can be held liable for losses

Written notice:

- Within 10 business days after the board adopts the resolution if the total net value of all loans, debts, obligations or assistance contemplated in that resolution together with any previous such resolution during the financial year exceeds one-tenth of 1% of the company's net worth at the time of the resolution
- with 30 business days after the end of the financial year in any other case

Section 112: Proposals to dispose of all or greater part of assets or undertaking

Does not apply if that disposal would constitute a transaction:

- That is pursuant to or contemplated in a business rescue plan
- Between a wholly-owned subsidiary and its holding company
- Between or among two or more wholly-owned subsidiaries of the same holding company or a wholly-owned subsidiary of a holding company on the one hand and its holding company and one or more wholly-owned subsidiaries of that holding company on the other hand

May not dispose of all or the greater part of the assets or undertaking unless

- A special resolution of the shareholders, in accordance with section 115 (A special resolution is required in order to protect minority shareholders in particular by ensuring that a significant minority can block large disposals)
- The company has satisfied all other requirements set out in section 115

A notice of a shareholders meeting to consider a resolution to approve a disposal must

- Be delivered within the prescribed time and in the prescribed manner to each shareholder
- Include or be accompanied with a written summary of the precise terms of the transaction or series of transactions to be considered at the meeting and the provisions of sections 115 and 164

Where any party of the assets of the company of the undertaking is disposed, the company must be sold at its fair market value. The price should be that which an interested seller would pay to an interested buyer in an open market

Section 115: Required approval for transactions (refer to actual act)

Makes provision for approvals required for major disposals, mergers and amalgamations and scheme of arrangement. It provides inter alia that the proposed transaction must be approved:

- By a resolution adopted by persons entitled to exercise voting rights on such a matter, at a meeting called for that purpose and at which sufficient persons are present to exercise, in aggregate, at least 25% of all the voting rights that are entitled to be exercised on the matter or any higher percentage as may be required by the company's MOI
- By a special resolution also in the manner described in the above paragraph by the shareholders of the company's holding company if
 - The holding company is a company or an external company
 - The proposed transaction concerns a disposal of all or the greater part of the assets or undertaking of the subsidiary
 - Having regards for the consolidated financial statements of the holding company, the disposal by the subsidiary constitutes a disposal of all or greater part of the assets or undertaking of the holding company
- By the court to the extent required under the circumstances and in the manner contemplated in section 115

Section 79: Winding up of solvent companies

Solvent company may be dissolved by:

- Voluntary winding up initiated by the company and conducted either by the company as determined by a special resolution adopted by the company
- Winding up and liquidation by a court order

Where a company has adopted a resolution for the voluntary winding-up of a solvent company or after an application has been made to a court for winding up and subsequently it is determined that the company to be wound up is or may be insolvent, on application by any interested person, may order that the company be wound up as an insolvent company.

Winding up -

The process of selling all the assets of a business, paying off creditors, distributing any remaining assets to the principals or parent company, and then dissolving the business.

Section 80: Voluntary winding up of solvent company

A resolution providing for the voluntary winding up of a company must be filed, together with the prescribed notice and filing fee

If a resolution provides for winding-up by the company, before the resolution and notice are filed the company must:

- Arrange for security, satisfactory to the Master, for the payment of the company's debts within no more than 12 months after the start of the winding up of the company OR
- Obtain the consent of the master to dispense with security which the master may do only if the company has submitted to the master
 - A sworn statement by a director authorized by the board of the company stating that the company has no debts
 - A certificate by the company's auditor stating that to the best of the auditors knowledge and belief and according to the financial records of the company, the company appears to have no debts

A voluntary winding up begins when the resolution of the company has been filed

When a resolution has been filed the commission must promptly deliver a copy of it to the master

The company remains a juristic person and retains all of its powers while it is being wound up voluntarily BUT From the beginning of the company's winding up it must stop carrying on its business except to the extent required for the beneficial winding up of the company and all of the powers of the company's directors cease except when specifically authorized in the case of the winding up of the company by the liquidator or the shareholders at a general meeting or in the case of a winding up by creditors, the liquidator or the creditors

Section 81: Winding up solvent companies by court order

A court may order a solvent company to be wound up if:

- The company has passed a special resolution to the effect that it be wound up by the court; or applied to the court to have its voluntary winding up continued by the court
- One or more of the company's creditors have applied to the court for an order to wind up
- The practitioner of a company appointed during business rescue proceedings has applied for liquidation on the grounds that there is no reasonable prospect of the company being rescued
- One or more of the company's directors have applied to the court
- The company, one or more directors or one or more shareholders have applied to the court on the grounds that the directors are deadlocked in management and the shareholders are unable to break the deadlock, the shareholders are deadlocked in voting power and have failed for a period that includes at least two consecutive annual general meeting dates to elect successors to directors whose terms have expired, it is otherwise just and equitable for the company to be wound up
- A shareholder has applied, with leave from the court, for an order to wind up the company on the grounds that the directors, prescribed officers or other persons in control of the company are acting in a manner that is fraudulent or otherwise illegal or the company's assets are being misapplied or wasted
- The commission or panel has applied to the court for an order to wind up the company

A shareholder may not apply to a court unless the shareholder:

- Has been a shareholder continuously for at least 6 months immediately before the date of the application
- Became a shareholder as a result of acquiring another shareholder or the distribution of the estate of a former shareholder and the present shareholder and other shareholder in aggregate satisfied the above

A court may not make an order before the conclusion of the court proceedings –

- Any of the directors have resigned or have been removed and the court concludes that the remaining directors were not materially implicated in the conduct on which the application was based or
- One or more shareholders have applied to the court for a declaration to declare delinquent the directors in any responsible for the alleged misconduct, and the court is satisfied that the removal of those directors would bring the misconduct to an end

Section 82: Dissolution of companies and removal from register

The master must file a certificate of winding up of a company when the affairs of the company have been completely wound up

Upon receiving the certificate the commission must record the dissolution of the company and remove the company's name from the company's register

Other reasons to remove a company's name from the register:

- The company has transferred its registration to a foreign jurisdiction or has failed to file an annual return for two or more years in succession and has failed to give satisfactory reasons for the failure to file the required annual returns or show satisfactory cause for the company to remain registered
- The commission has determined that the company appears to have been inactive for at least 7 years and no person has demonstrated a reasonable interest in or reason for its continued existence or has received a request and determined that the company has ceased to carry on business and has no assets, or because of the inadequacy of its assets there is no reasonable probability of the company being liquidated

Section 83: Effect of removal of company from register

A company is dissolved as of the date its name is removed from the companies register unless the reason for the removal is that the company's registration has been transferred to a foreign jurisdiction

The removal of a company's name from the companies register does not affect the liability of any former director or shareholder of the company or any other person in respect of any act or omission that took place before the company was removed from the register

Any liability continues and may be enforced as if the company had not been removed from the register

At any time after a company has been dissolved:

- The liquidator of the company, or other person with an interest in the company may apply to a court for an order declaring the dissolution to have been void or any other order that is just and equitable in the circumstances and
- If the court declares the dissolution to have been void any proceedings may be taken against the company as might have been taken if the company had not been dissolved

Business Rescue:

Proceedings to facilitate the rehabilitation of a company that is financially distressed providing for:

- The temporary supervision of the company and of the management of its affairs, business and property
- A temporary moratorium on the rights of claimants against the company or in respect of property in its possession and
- The development and implementation if improved of a plan to rescue the company by restructuring its affairs, business, property, debts and other liabilities, and the equity in a manner that maximizes the likelihood of the company continuing in existence on a solvent basis. If it is not possible for the company to so continue in existence, results in a better return for the company's creditors or shareholders than would result from immediate liquidation of the company

Section 129: Company Resolution to begin business rescue proceedings

The board of a company may resolve that the company voluntarily begin business rescue proceedings and place the company under supervision if the board has reasonable grounds to believe that:

- The company is financially distressed
- There appears to be a reasonable prospect of rescuing the company

A resolution may not be adopted if liquidation proceedings have been initiated by or against the company and has no force or effect until it has been filed

Within 5 business day after a company has adopted and filed a resolution (or any longer period as given by commission) the company must

- Publish a notice of the resolution and its effective date to every effected person, including with the notice of a sworn statement of the facts relevant to the grounds on which the board resolution was founded
- Appoint a business rescue practitioner who satisfies the requirements and who has consented in writing to accept appointment

After appointing a practitioner a company must

- File a notice of the appointment within two business days after making the appointment

Publish a copy of the notice to each affected person within 5 business days after the notice was filed

If a company fails to comply with any provisions:

- Its resolution to begin business rescue lapses and is a nullity
- The company may not file a further resolution for a period of three months after the date on which the lapsed resolution was adopted unless a court approves the company filing a further resolution

If the board of a company has reasonable grounds to believe that the company is financially distressed but the board has not adopted a resolution the board must deliver a written notice to each affected person, setting out the criteria referred to in section 128 that are applicable to the company and its reasons for not adopting a resolution

Section 130: Objection to company resolution

At any time after the adoption of a resolution until the adoption of a business rescue plan an affected person may apply to a court for an order:

- Setting aside a resolution on the grounds that
 - There is no reasonable basis for believing that the company is financially distressed
 - There is no reasonable prospect for rescuing the company
 - The company has failed to satisfy the requirements
- Setting aside the appointment of the practitioner on the grounds that the practitioner:
 - Does not satisfy the requirement
 - Is not independent of the company or its management
 - Lacks the necessary skills, having regards to the company's circumstances
- Requiring the practitioner to provide security in an amount and on terms and conditions that the court considers necessary to secure the interest of the company and any affected person

An affected person who as director voted in favour of the resolution may not apply

An applicant must serve a copy of the application on the company and the commission and notify each affected person of the application

When considering the application to set aside the company's resolution the court may:

- Set aside the resolution
- Afford the practitioner sufficient time to form an opinion whether or not the company appears to be financially stressed or there is a reasonable prospect of rescuing the company and after receiving a report from the practitioner may set aside the company's resolution if the court finds that the company is not financially distressed
- May make any further necessary and appropriate order including
 - An order placing the company under liquidation or
 - Found that there were no reasonable grounds for believing that the company would be unlikely to pay all of its debts as they become due and payable and order of costs against any director who voted in favour of the resolution unless the court finds that the director acted in good faith

If the court makes an order setting aside the appointment of a practitioner

- The court must appoint an alternative practitioner who satisfies the requirements recommended by or acceptable to the holders of a majority of the independent creditors' voting interest who were represented in the hearing before the court

Section 131: Court order to begin business rescue proceedings

Unless a company has adopted a resolution an affected person may apply to a court at any time for an order placing the company under supervision and commencing business rescue proceedings

This applicant must

- Serve a copy of the application on the company and the commission
- Notify each affected person of the application

Each affected person has the right to participate in the hearing

After considering an application the court may:

- Make an order placing the company under supervision and commencing business rescue
- Dismissing the application together with any necessary and appropriate order including an order placing the company under liquidation

If liquidation proceedings have already been commenced by or against the company at the time an application is made the application will suspend those liquidation proceedings until

- The court has adjudicated upon the application or
- The business rescue proceedings end if the court makes the order applied for

A company that has been placed under supervision:

- May not adopt a resolution placing itself in liquidation until the business rescue proceedings have ended
- Must notify each affected person of the order within 5 business days after the date of order

Section 132: Duration of business rescue proceedings



Begin

When the company:

- Files a resolution to place itself under supervision
- Or applies to the court for consent to file a resolution

An affected person applies to the court for an order placing the company under supervision

A court makes an order placing a company under supervision during the course of liquidation proceeding or proceedings to enforce a security interest



End

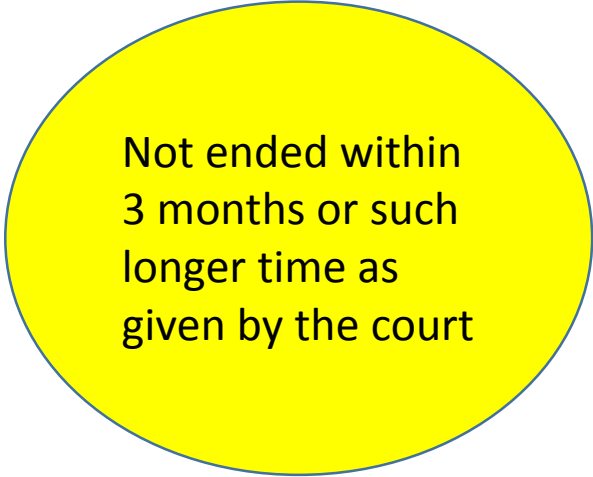
The court:

- Set aside the resolution or order that began those proceedings
- Has converted the proceedings to liquidation proceedings

The practitioner has filed with commission a notice of the termination of business rescue proceeding

A business rescue plan has been

- Proposed and rejected
- Adopted and the practitioner has filed a notice of substantial implementation of that plan



Not ended within
3 months or such
longer time as
given by the court

The practitioner must:

- Prepare a report on the progress of the business rescue proceedings and update it at the end of each subsequent month until the end of those proceedings and
- Deliver the report and each update to each affected person and to the court if the proceedings have been subject to a court order/ if not then also to the commission

Section 134: Protection of property interest

During a company's business rescue proceedings

- A company may dispose or agree to dispose of property only
 - In ordinary course of its business
 - In a bona fide transaction at arms length for fair value approved in advance and in writing by the practitioner
 - In a transaction contemplated within and undertaking as part of the implementation of a business rescue plan
- Any person who as a result of an agreement made in the ordinary course of the company's business before the business rescue proceedings began is in lawful possession of any property owned by the company may continue to exercise any right in respect of that property
- Despite any provision of an agreement to the contrary no person may exercise any right in respect of any property in the lawful possession of the company irrespective of whether the property is owned by the company

Section 135: Post-commencement finance

To the extent that any remuneration, reimbursement for expenses or other amount of money relating to employment becomes due and payable by a company to an employee during the company's business rescue but is not paid to the employee:

- The money is regarded to be post commencement financing
- Will be paid in the order of preference

During the business rescue proceedings the company may obtain financing other than the above and any such financing:

- May be secured to the lending by utilizing any asset of the company
- Will be paid in order of preference

Order of preference

- 1st – practitioners remuneration
- 2nd – expenses referred to in 143
- 3rd – other claims arising out of the costs of the business rescue
- 4th – the remuneration
- 5th – the expense of financing
- 6th – unsecured claims

If the company is to be liquidated the order of preference remains the same except for costs relating to the liquidation

Section 136: Effect of business rescue on employees and contracts

During a company's business rescue proceedings, employees immediately before the beginning of those proceedings continue to be employed on the same terms and conditions except that:

- Changes occur in the ordinary course of attrition
- The employees and the company in accordance with applicable labour laws, agree different terms and conditions

The practitioner may:

- Entirely and partially or conditionally suspend for the duration of the business rescue, any obligation of the company that:
 - Arises under an agreement to which the company was a party at the commencement of the business rescue
 - Would otherwise become due during those proceedings

The practitioner may not:

- Suspend any provision of an employment contract

Any party to an agreement that has been suspended or cancelled may assert a claim against the company only for damages

If liquidation proceedings have been converted into business rescue the liquidator is a creditor of the company to the extent of any outstanding claim by the liquidator for any remuneration due for work performed or compensation for expenses incurred before the business rescue began

Section 137: Effect on shareholders and directors

Alteration in the classification or status of any issued securities of a company, other than by way of a transfer of securities in the ordinary course of business is invalid except:

- If the court otherwise directs
- If approved by business rescue plan

During business rescue proceedings each director of a company:

- Must continue to exercise functions of director, subject to the authority of the practitioner
- Has a duty to the company to exercise any management function within the company in accordance with the express instructions or direction of the practitioner
- Remains bound by the requirements of section 75 concerning personal financial interests of the director or a related person

Each director must attend to the requests of the practitioner at all times and provide the practitioner with any information about the company's affairs as may reasonably be required

If a director takes any action that should have been approved by the practitioner that action is void until approved

A practitioner may apply to the court for an order removing a director from office on the grounds that the director has failed to comply with these requirements

Section 138: Qualification of practitioners

Practitioner may only be appointed if the person:

- Is a member in good standing of a legal, accounting or business management profession accredited by the commission
- Has been licensed as such by a commission
- Is not subject to an order of probation
- Would not be disqualified from acting as a director of the company
- Does not have any other relationship with the company such as would lead a reasonable and informed third party to conclude that the integrity, impartiality or objectivity of that person is compromised by that relationship
- Is not related to a person who has a relationship of being disqualified from acting as a director

The minister may make regulations prescribing:

- Standards and procedures to be following by the commission in carrying out its licensing functions and powers
- A minimum qualification for a person to practice as a business rescue practitioner including different minimum qualifications for different categories of companies

Section 139: Removal and replacement of practitioner

A practitioner may be removed

- By a court order



- Incompetence or failure to perform the duties of business rescue practitioner
- Failure to exercise the proper degree of care in the performance of the practitioner's functions
- Engaging in illegal acts or conduct
- If the practitioner no longer satisfies the requirements
- Conflict of interest or lack of independence
- The practitioner is incapacitated and unable to perform the functions of that office and is unlikely to regain that capacity within a reasonable time

The company or the creditor who nominated the practitioner must appoint a new practitioner if a practitioner dies, resigns or is removed from office

Section 140: General powers and duties of practitioners

During business rescue the practitioner has:

- Full management control of the company in substitution for its board a pre-existing management of the company
- May remove from office any person who forms part of the pre-existing management or appoint or person as part of the management whether to fill a vacancy or not. The person appointed may not have any other relationship with the company or is related to a person who has such a relationship.
- Is responsible to develop a business rescue plan to be considered by affected persons and implement any business rescue plan that has been adopted

The practitioner must as soon as practicable after appointment inform all relevant regulatory authorities having authority in respect of the activities of the company of the fact that the company has been placed under business rescue proceeding and of his or her appointment

During the business rescue proceedings the practitioner:

- Is an officer of the court and must report to the court in accordance with any applicable rules of or orders made by the court
- Has the responsibilities, duties and liabilities of a director of the company
- Is not liable for any act or omission in good faith in the course of the exercise of the powers and performance of the functions
- If the business rescue process concludes with an order of liquidation, the practitioner may not be appointed as liquidator of the company

Section 141: Investigation of affair of company

As soon as possible after being appointed a practitioner must investigate the company's affairs, business, property and financial situation and after having done so consider whether there is any reasonable prospect of the company being saved

- Not able to be rescued – so inform the court, the company and all affected persons and apply to the court for an order discontinuing the business rescue proceeding and placing the company into liquidation
- No grounds to believe the company is financially distressed – inform the court, the company and all affected persons (apply to a court for an order terminating the business rescue proceedings or file a notice of termination of the business rescue proceedings)
- Evidence in dealings of the company before the business rescue proceedings began of voidable transactions or the failure by the company or any director to perform any material obligation relating to the company – take any necessary steps to rectify the matter
- Evidence in dealings of reckless trading, fraud or other contravention of any law – forward the evidence to the appropriate authority for further investigation and possible prosecution and direct the management to take any necessary steps to rectify the matter

Section 142: Directors of a company to co-operate with and assist practitioner

Each director of a company must deliver to the practitioner all books and records that relate to the affairs of the company and are in the directors possession

Any director of a company who know where other books and records relating to the company are kept must inform the practitioner as to the whereabouts

Within 5 business days after business rescue proceeding begin or any time as given by the practitioner the directors must provide a statement with the minimum particulars:

- Any material transaction involving the company or the assets of the company and occurring within 12 months immediately before business rescue
- Any court, arbitration or administrative proceedings including pending enforcement proceedings involving the company
- Assets and liabilities of the company and its income and disbursements within the immediately preceding 12 months
- The number of employees and any collective agreements or other agreements relating to the rights of the employees
- Any debtors and their obligations to the company
- Any creditors and their rights or claims against the company

No person is entitled to retain possession of any books or records unless he or she has made copies available to the practitioner or has afforded the practitioner a reasonable opportunity to inspect the books or records

Section 143: Remuneration of practitioner

The practitioner is entitled to charge an amount to the company for the remuneration and expenses of the practitioner and if not fully paid the practitioners claim for those amounts will rank in priority before the claims of all other secured and unsecured creditors

The practitioner may also propose an agreement with the company providing for further remuneration to be calculated on the basis of a contingency related to:

- The adoption of a business rescue plan at all or within a particular time or the inclusion of any matter within such a plan
- The attainment of any particular result or combination of results relating the business rescue proceedings

This agreement will be final and binding if approved by the holders of a majority of creditors voting interest, present and voting at a meeting called for the purpose of considering the proposed agreement

A creditor or shareholder who voted against a proposal may apply to a court within 10 business days after the date of voting for an order setting aside the agreement on the grounds that the agreement is not just and equitable or the remuneration provided for in the agreements is unreasonable having regard to the financial circumstances

Section 144: Rights of employees

During a company's business rescue process, every registered trade union representing any employees of the company is entitled to:

- Notice which must be given to employees at their workplace and served at head office of the relevant trade union of each court proceeding, decision, meeting or other relevant event concerning the business
- Participate in any court proceedings arising during the business rescue process
- Form a committee of employees representatives
- Be consulted by the practitioner during the development of the business rescue plan and afforded sufficient opportunity to review any such plan
- Be present and make a submission to the meeting of the holders of voting interest before a vote is taken on any proposed business rescue plan
- Vote with creditors on a motion to approve the proposed business plan to the extent that the employee is a creditor

A medical scheme, or pension scheme including a provident scheme for the benefit of the past or present employees of a company is an unsecured creditor

Section 145: Participation by creditors

Each creditor is entitled to:

- Notice of each court proceeding, decision, meeting or other relevant event concerning the business rescue proceedings
- Participate in any court proceedings
- Formally participate in a company's business rescue proceedings
- Informally participate in a company's
- The right to vote to amend, approve or reject a proposed business rescue plan

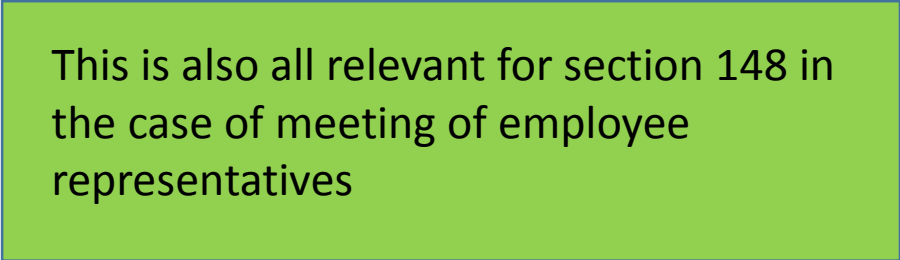
The creditors of the company are entitled to form a creditors committee and through that committee are entitled to be consulted by the practitioner during the development of the business rescue plan

A secured or unsecured creditor has a voting interest equal to the value of the amount owed to that creditor by the company

Section 146: Participation by holders of company's securities

Each holder of any issued securities are entitled to:

- Notice of each court proceeding, decision, meeting or other relevant event concerning the business rescue proceedings
- Participate in any court proceedings
- Formally participate in a company's business rescue proceedings
- Vote to approve or reject a proposed business rescue plan



This is also all relevant for section 148 in the case of meeting of employee representatives

Section 147: First meeting of creditors

Within 10 business days after being appointed, the practitioner must convene and preside over a first meeting of creditors at which

- The practitioner must inform the creditors whether the practitioner believes that there is a reasonable prospect of rescuing the company and may receive proof of claims by creditors
- The creditors may determine whether or not a committee of creditors should be appointed and if so may appoint the member of the committee

The practitioner must give notice of the first meeting to all creditors setting out the date, time and place of the meeting and the agenda for the meeting

Section 149: Functions, duties and membership of committees of affected persons

The committee as mentioned before:

- May consult with the practitioner about any matter relating to the business rescue proceedings but may not direct or instruct the practitioner
- May on behalf of the general body of creditors or employees receive and consider reports relating to the business rescue proceedings
- Must act independently of the practitioner to ensure fair and unbiased representation of creditors or employees interest

A person may be a member of a committee only if the person is:

- An independent creditor or an employee
- An agent, proxy or attorney of an independent creditor or employee
- Authorised in writing by an independent creditor or employee

Section 150: Proposal of business rescue plan

The business rescue plan must contain all the information reasonably required to facilitate affected persons in deciding whether or not to accept or reject the plan:

Background:

- A complete list of all the material assets of the company as well as an indication as to which assets were held as security by creditors when rescue began
- A complete list of creditors when rescue began and which creditors would qualify as secured statutory preferent and concurrent in terms of laws of insolvency
- Thee probably dividend that would be received by creditors in their specific classes if liquidation
- Complete list of the holders of company's issued securities
- A copy of the written agreement concerning the practitioners remuneration
- Statement whether the business rescue plan includes a proposal made informally by a creditor

Proposals:

- Nature and duration of any moratorium for which the business rescue plan makes provision
- Extent to which the company is to be released from the payment of its debts
- Ongoing role of the company and the treatment of existing agreements
- The property of the company that is to be available to pay creditors claims
- Order of preference in which the proceeds of property will be applied to pay creditors if the business rescue plan is adopted
- The benefits adopting the plan as opposed to the benefits that would be received by creditors if the company were to be placed in liquidation
- Effect that the plan will have on the holders of each class of issued securities

Assumptions and conditions:

- A statement of the conditions that must be satisfied for the plan to come into operation and be fully implemented
- Effect if any that the plan contemplates on the number of employees and their conditions of employment
- The circumstances in which the plan will end
- A projected balance sheet for the company and statement of income and expenses for the ensuing three years

Section 151: Meeting to determine future of company

Within 10 business days after publishing a business rescue plan the practitioner must convene and preside over a meeting of creditors and any other holder of a voting interest

At least 5 business days before the meeting the practitioner must deliver a notice of the meeting to all affected persons setting out

- The date, time and place
- The agenda
- A summary of the rights of affected persons to participate in and vote at the meeting

Study section 152 – 155 in prescribed book