AUE1601 Summary

SEMESTER 2 – 2015

Topic 2: Interpretation, purpose, application and formation of a company

Study unit 2.1

Related and interrelated persons, and control (Sec 2) and Subsidiary relationships (Sec 3)

- Consanguinity: blood relationship
  - First degree: children (incl. adopted) and parents
  - Second degree: brother, sister, grandparents, grandchildren – there is at least one generation between you and a person related to you in the second degree
- Affinity: due to valid marriage
  - First degree: husband and wife or living together similar to marriage
  - Second degree: same as the underlying degree of relationship by blood

- An individual related to juristic person:
  - Individual directly/indirectly controls juristic person
- A juristic person related to another juristic person:
  - Either of them directly or indirectly controls the other or the business or the other, or
  - Either is a subsidiary of the other, or
  - A person directly or indirectly controls each of them or the business of each of them

From revision slides:
Relationship between individual and juristic person (company)
• Individual holds majority of shares in company (51% or more)
• Individual together with related/inter related person holds majority of shares (e.g. John, his wife, and his brother together holds 51% or more)
• Individual's wife or brother or child or parents holds 51% or more (even though the individual may hold nothing)
• Individual, although holding 0% or less than 50% of the shares, has the right to appoint or choose directors who controls the board.

From revision slides:
Relationship between juristic person and juristic person (company and company)
• Company A holds 51% or more of the shares in Company B
• Company A is able to appoint or choose the directors that controls the board of Company B
• John and/or his wife together holds 51% or more of the shares in both Company A and Company B
• Company A holds 51% in Company B and Company B holds 100% in Company C (all three are related and part of the same group).

- A person controls a juristic person or its business if:
  - If the juristic person is a company:
    - The juristic person is a subsidiary of the first person (refer to first section under subsidiary relationships), or
    - The first person together with a related or interrelated person is

        - Able to directly or indirectly exercise or control the majority of voting rights of securities of the company, whether pursuant to a shareholder agreement or otherwise, or
        - Has the right to (or control of right) appoint or elect directors of the company who control the majority of the votes at a board meeting
    - If the juristic person is a close corporation:
        - The first person owns the majority of the members interest, or controls directly or has the right to control the majority of the members votes
    - If the juristic person is a trust:
        - The first person is able to control the majority of the votes of the trustees or to appoint the majority of the trustees, or to appoint the majority of the beneficiaries of the trust
    - If the first person has the ability to materially influence the policy of the juristic person in a way similar to a person, in ordinary practice, would be able to exercise control referred to in the above 3 bullet points
- A court, Companies Tribunal or the Panel may exempt a person from application of a provision of the Act that would apply to someone because of a relationship (as stated in previous page), if the person can show that there is sufficient evidence proving that they acted independently of the related or inter-related person

Subsidiary relationships:
- A company is a subsidiary of another juristic person if one or more subsidiaries of the juristic person, or one or more nominees of the juristic person or any of its subsidiaries, alone or in any combination:
    - Is able to directly or indirectly exercise or control the majority of the general voting rights of issued securities of the company, whether pursuant to a shareholder agreement or otherwise, or
    - Has the right to appoint or elect (or control appointment or election) of directors of that company who control a majority of the votes at a board meeting, or
- A wholly-owned subsidiary of another juristic person if all of the general voting rights of the issued securities of the company are held by or controlled, alone or in any combination, by persons stated in the above section.

- To determine whether a person controls all or a majority of the general voting rights of issued securities of a company:
    - Voting rights that are exercisable only in certain circumstances are taken into account only
        - When those circumstances occur and for as long as the occur or
        - When those circumstances are under control of the person holding the voting rights
    - Voting rights that are exercisable only on the instructions of another person are to be considered as held by a nominee of the other person,
    - Voting rights held by
        - A person as a nominee for another person are treated as held by the other person,
        - A person in a fiduciary capacity are to be treated as held by the beneficiary of those voting rights

Solvency and Liquidity Test (Sec 4)
- Solvency test:
    - Assets fair valued are equal to or exceed liabilities fair valued of the company or group of companies
- Liquidity test:
    - The company will be able to pay its debts as they become due in the ordinary course of business for a period of twelve months after the date of the test
- The tests are used for:
    - Share capital reduction (share buyback)
    - Share capitalisation
    - 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 tests

Categories of companies (Sec 8)
- Non-profit companies
- Profit companies

- Non-profit companies
  - Purpose of public benefit
  - Reasonable compensation for services rendered, income and property not distributable
  - Assets and income used to advance objectives
  - Min of three incorporators
  - Min of three directors
  - Eg SPCA
- Profit companies
  - State-owned companies
  - Public companies
  - Private companies
  - Personal liability companies
- State-owned companies
  - Owned by municipality
- Public companies
  - Unrestricted transferability of shares
  - Offers to public permissible
  - Min of one incorporator
  - Min of three directors
- Private companies
  - Less disclosure and transparency requirements
  - Transferability of securities restricted
  - Min of one incorporator
  - Min of one director
- Personal liability companies
  - Meets criteria of private company
  - MOI states that it is a personal liability company

General interpretation of the Act *

- A court may consider foreign company law
- To calculate number of business days
  - Exclude day on which first event occurs
  - Include day on which second event occurs
  - Exclude public holiday, Saturdays and Sundays
- If this act is inconsistent with other legislation, both should be applied concurrently. If it is impossible to apply both concurrently then unless stated otherwise the Companies Act will prevail

Anti-avoidance *

- A court, on application by the Commission, Panel or an exchange in respect of a company listed on that exchange, may declare any agreement, transaction, arrangement, resolution or provision of a company's MOI or rules
  - To be primarily or substantially intended to defeat or reduce the effect of a prohibition or requirement established by or in terms of an unalterable provision of this Act and
  - Void to the extent that it defeats or reduces the effect of a prohibition or requirement established by or in terms of an unalterable provision of this Act

The following sections do not apply to non-profit companies *

- Capitalisation of profit companies
- Securities registration and transfer
- Remunerations 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

Criteria for names of companies *

- One or more words in any language
- Any letters, numbers or punctuation marks

- May include + & # @ % = ( )
- May be the registration number with other expression and include (South Africa) (applicable to profit company)
- May not be the same of another company
- May not
    - 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, or incitement to cause harm
- If the MOI restricts or prohibits amendment of any particular provision of the Memorandum, the name must be followed by RF
- Personal liability company – Inc. or Incorporated
- Private company – (Pty) Ltd or Proprietary Limited
- Public company – Ltd. Or Limited
- State-owned company – SOC Ltd.
- Non-profit company – NPC

Study unit 2.2

Incorporation and Legal Status of Companies

Right to incorporate company or transfer registration of foreign company (Sec 13) *

- One or more persons, or an organ of state may incorporate a profit company, and an organ of state, a 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 MOI in the prescribed form or in a form unique to the company and filing a Notice of Incorporation
- The Notice of Incorporation must be filed in the prescribed manner and form together with the prescribed fee and accompanied by a copy of the MOI, subject to any declaration prescribed
- 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 has been originally so incorporated and registered. A foreign company may transfer its registration if the law of the jurisdiction in which the company is registered permits such a transfer, the transfer has been approved by the shareholders, the whole or greater part of its assets are within the Republic, the majority of its shareholders are residents, the majority of its directors are or will be citizens and immediately after the transfer the company will satisfy the solvency and liquidity test.

Memorandum of Incorporation (MOI), shareholder agreements and rules of company (Sec 15)

- A founding document of company
- Must be consistent with Act and is void if it contravenes the Act
- May include aspects not dealt with in the Act and may alter the effect of any alterable provision of the Act. An alterable provision is a provision in which it is expressly contemplated that its effect on a particular company may be negated, restricted, limited, qualified, extended or otherwise altered in substance or effect by that company's MOI
- MOI may impose on company a higher standard, greater restriction, longer period of time or other requirement relating to an unalterable provision of the Act
- May contain restrictive conditions to the company
- May prohibit an amendment of any particular provision of MOI
- Except to the extent that the MOI provides otherwise, the board of the company may make, amend or repeal rules relating to the governance of the company for matters that are not addressed in the Act or the MOI by publishing a copy of the rules and filing a copy of those rules.
    - The rule needs to be consistent with the Act and the MOI or be declared void.
    - The rule takes effect on the later of either 10 business days after it was filed or the date specified in the rule.
    - The rule is binding on the interim basis from the time that it takes effect until it is put to a vote at the next general shareholders meeting and on a permanent basis only if it has been ratified by an ordinary resolution at the general shareholders meeting
    - If the rule is ratified the company must file a notice of ratification within five business days
    - If the rule was not ratified when put to a vote the company must file a notice of non-ratification within five business days after the vote and the company's board may not make a similar rule within the next twelve months unless it has been approved in advance by and ordinary resolution of the shareholders
- A company's MOI and any rules of the company are binding
    - Between the company and each shareholder
    - Between or among the shareholders of the company
    - Between the company and each director or prescribed officer or the company or any person serving the company as a member of a committee of the board
- The shareholders may enter into any agreement with one another as long as it is not inconsistent with the Act or the MOI or will be declared void due to inconsistency

Amending the Memorandum of Incorporation (Sec 16) *

- A MOI may be amended
    - In compliance with a court order or
    - By filing a Notice of Amendment of its MOI setting out changes (shares sec 36) or
    - At any time if a special resolution to amend it is proposed by the board of the company or the shareholders exercise at least 10% of the voting rights that may be exercised on such a resolution and

  - Is adopted at a shareholders meeting
- A company's MOI may provide other requirements than those above
- If a non-profit company has no voting members they can use a special resolution as proposed by the board of the company
- An amendment required by court order must be effected by a resolution of the company's board and doesn't require a special resolution
- An amendment by special resolution may take the form of a new MOI or an alteration to the existing MOI
- If the alteration places the company into a new category of profit company, the company needs to amend its name to match the new category
- The company needs to file the Notice of Amendment together with the prescribed fee within the prescribed timeframe. The commission may require the company to file a full copy of its MOI.
- If a company amends its name it will be issued with an amended registration certificate and updated in the companies register
- If a person is entitled to receive a notice of amendment, they may apply to a court for protection of their interests

Pre-incorporation contracts (Sec 21) and Regulation 35

- This refers to a written agreement in the name of an entity that is contemplated to be incorporated but does not exist as yet
- A person who enters into this contract is jointly and severally liable if the entity is not incorporated or if after incorporation the entity rejects any part of the agreement
- If the entity after incorporation enters into a contract on the same terms or in substitution of the first contract the original person will be discharged of liability
- Within three months after the date on which a company was incorporated the board of that company may completely, partially or conditionally ratify or reject any pre-incorporation contract or other action purported to have been mode or done in its name or on its behalf
- If after three months the company has not ratified or rejected the contract the company will be regarded as ratifying the contract and the original person is discharged of liability
- If the company rejects the contract the person who bears liability for the agreement may claim against the company for any benefit it has received or is entitled to receive in terms of the agreement
- Regulation 35:
  - A person may give notice to a company of a pre-incorporation contract by filing and delivering to the company form Notice of Pre-Incorporation Contract
  - If the company rejects or ratifies the contract it must file a notice of its decision with form Notice of Action Concerning Pre-Incorporation Contract within five business days and deliver a copy of that notice to each person who is party to or affected by the contract

Reckless Trading (Sec 22)

- A company must not carry on its business recklessly, with gross negligence, with intent to defraud any person or for any fraudulent purpose
- If the Commission has reasonable grounds to believe that a company is engaging in prohibited conduct or is unable to pay its debts as they become due in the normal course of business (must satisfy the solvency and liquidity tests), the Commission may issue a notice on the company to show cause why the company should be permitted to continue carrying on its business
  - Solvency: assets fair valued > liabilities fair valued
  - Liquidity: current assets > current liabilities
- If after 20 business days after a notice has been issued the business is unable to satisfy the Commission that it is not engaging in prohibited conduct or that it can pay its debt as it becomes due, the Commission may issue a compliance notice to the company requiring it to cease carrying on business and trading
- 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 dealings with the company and have suffered a loss. The question is whether a reasonable person would have acted in the same manner in a situation of factual insolvency

Topic 3: Company Records

Form and Standards for Company Records (Sec 24) and Accounting Records (Sec 28)

- Company records refer to any documentation, books, accounting records or other written documents that a company should keep
- Must be kept in written form for a min period of 7yr or shorter depending on how long company in existence
- The company needs to keep or maintain
    - Accurate and complete accounting records in one of the official languages
    - A copy of the MOI and any amendments thereto
    - A record of its directors details
    - Copies of
        - All reports presented at an annual general meeting (7yr)
        - All annual financial statements (7yr)
        - All accounting records (for current year and prior 7yr)
        - All notices and minutes of all shareholders meetings (7yr)
        - All copies of communication to shareholders (7yr)
        - All minutes of meetings and resolutions of directors meetings (7yr)
    - A register of shareholders (security register) of the company
- Accounting records must be kept 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 and complete accounting records or to keep record other than in the prescribed manner and form or to falsify any of its accounting records to permit any person to do so. The Commission may issue a compliance notice for failure to comply irrespective if the failure constitutes an offence.

Record keeping and Financial Statements (Sec 29-30) and Regulation 26-27

- Each year a company must prepare annual financial statements within six months after their year end
- Financial statement provided to any person must
    - Satisfy financial reporting standards
    - Represent the state of business and affairs of the company fairly
    - Explain the transactions and financial position of the company
    - Indicate whether the statements have been audited or independently reviewed or neither
    - State the name and designation of the preparer of the statements and
    - Not be incomplete, false or misleading
- The annual financial statements must
    - Be audited in the case of a public company and state owned companies
    - All companies who holds assets in a fiduciary capacity (i.e. assets that are held for other persons such as consignment stock, deposits, trust monies etc.) that exceed R5 million must be audited
    - For other profit or non profit company
        - Be audited if required by the regulation or public interest score, taking into account annual turnover, size of its workforce or the nature of its activities
        - Be audited voluntarily as per MOI or shareholders resolution or if the company's board has determined it to be so or
        - Be independently reviewed
- The annual financial statements must
    - Include an auditor's report if audited
    - Include a report by the directors regarding state of affairs
    - Be approved by the board and signed by an authorised director
    - Be presented to the first shareholders meeting after approval by the board
- 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

Public Interest Score (regulations)

- A public interest score is the sum of the points allocated to certain attributes applicable to all companies. The score is used to gauge the interest the public at large has in the company. The score determines various conditions the company needs to satisfy eg auditing.
- Must be calculated by private and public companies
- A company is awarded one point for every
  - R1 million of turnover or part thereof
  - Employee (based on the average number of employees employed during the financial year)
  - R1 million or part thereof owed to a third party at the financial year end (not all liabilities, only third party liabilities eg. Bank)
  - Individual who at the end of the financial year in the case of a profit company has a beneficial interest in the issued securities of the company, and in the case of a non-profit company to be a member of the company or a member of an association that is a member of the company
- Categories for public interest scores
  - Below 100 points
  - Equal to 100 but less than 350
  - Equal to and above 350

Category of company	***Audit/Review***
1. Public and state owned company	Audit by registered auditor
2. Non-profit company	Audit by registered auditor
3. Profit companies, non-profit companies and CC that hold assets in a fiduciary capacity which exceed R5mil at any time in financial year	Audit by registered auditor
4. Other companies or CC with public interest scores of • 350 or higher or • 100-350 and with financial statements that are internally compiled	Audit by registered auditor
5. Other companies with a public interest score of 100-350 and with financial statements not internally compiled (independently)	Reviewed by a registered auditor or CA(SA)
6. Other companies with a public interest score of less than 100	Reviewed by a registered auditor or CA(SA) or accounting officer
7. Other companies where the directors of the company hold or have all of the beneficial interests in the securities issued by the company and CC, if not subject to a public interest score audit as per nr 3 and 4	No audit or review
8. Other companies that fall into categories 5 - 7 above can elect to have a voluntary audit as per • MOI requirement • Shareholders resolution • Board resolution	Audit by a registered auditor

From revision slides:

Public interest score of 350 or more

• Must be audited

Public interest score of 100 or more, but less than 350

• Is the financial statements compiled by a person that works for the company?
• If yes then must be audited
• If no then:
• Is all the shareholders also directors?
• If no then must be independently reviewed
• If yes then there is no audit/review requirement

Public interest score of less than 100

• Is all the shareholders also directors?

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

Topic 4: Shareholders and Shares

Study Unit 4.1

Capitalisation of profit companies

Legal Nature of Company Shares and Requirement to have Shareholders (Sec 35)

- A security is a share, debenture or other instrument issued by a profit company
- A share issued by a company is movable property, transferrable in any manner provided by this act or other legislation
- A share no longer has nominal or par value
  Regulation 31:
  - If immediately before the effective date (1 May 2011), a pre-existing company has any authorised class of par value or nominal shares from which it has not issued any shares before the effective date, or from which it has issued shares, all of which have been acquired by the company before the effective date
    - The company must not issue any shares of that class on or after the effective date, until it has converted that class of shares
    - The board of the company may convert that class(es) of authorised shares to shares having no nominal or par value, by adopting a board resolution to do so, and filing a notice of that resolution in form Notice of Board Resolution to Covert Par Value Shares, at no charge at any time after the effective date
  - If immediately before the effective date, a pre-existing company has any outstanding issued shares of one or more classes of par value or nominal value shares, the company
    - May not increase the number of those authorised shares
    - May issue further authorised shares of that class at any time on or after the effective date, until it has published a proposal to convert the class of shares
    - May file without charge an amendment to its MOI to effect a conversion of those shares after adopting the amendment
- A company may not issue shares to itself
- An authorised share has no rights until it has been issued

Authorisation for shares (Sec 36)

- In MOI – different classes and number of shares a company authorised to issue – referred to authorised shares of company.
  - MOI also states name of each class of share, preferences, rights and limitations
  - MOI can also authorise a stated number of unclassified shares to be classified by the board and cannot be issued until classified by board in terms of the above point
- Authorised share has no rights until it is issued
- Person to whom the share is issued is the holder and called shareholder
- Amendments to shares done by
  (eg convert ordinary shares to preference shares)
  - Amendment to MOI by special resolution of the shareholders or
  - A decision by the company's board unless prohibited by MOI
    - Increase or decrease number of authorised shares of any class
    - Reclassify any classified shares that have been authorised but not issued
    - Classify any unclassified shares that have been authorised but not issued
    - Determine the preferences, rights, limitations or other terms of unclassified shares
    - The company would need to file a Notice of Amendment of MOI

Preferences, Rights, Limitations and Other Share Terms (Sec 37)

- All shares of any class authorised by a company have preferences, rights, limitations and other terms identical to other shares of the same class associated with it
- Each share, regardless of class, has one general voting right except to the extent provided by the Act or the company's MOI
- The voting right of shares can be limited but not excluded
- Provisions of the act:
    - Despite anything to the contrary in the MOI each issued share has a right of the shareholder to vote on matters to amend that share.
    - Despite anything to the contrary in the MOI, if the company has one class of shares those shares have a right to vote on every matter that may be decided by the shareholders of the company and the shareholders are entitled to receive the net assets of the company upon liquidation.
    - If there is more than one 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. Further, a class of share (not necessarily the voting class) must be entitled to the surplus at liquidation.
    - All shares of a particular class must have the same preferences, rights, limitations and other terms
- A company's MOI may establish for any particular class of share, preferences, rights, limitations and other terms that (below is subject to further requirements in Act – Sec 46-48)
    - Confer special, conditional or limited voting rights
    - Provide for shares to be redeemable or convertible
        - At option of the company, shareholder, or another person at any time, or upon the occurrence of any specified contingency
        - For cash, indebtedness, securities or other property
        - At prices and amounts specified or determined by a formula
        - Subject to any other terms in MOI
    - Entitle shareholders to distributions calculated in a manner, including dividends
    - Provide for shares to have preference over other shares for distributions or rights upon liquidation
- If the MOI has been amended to materially alter the share, any holder of those shares is entitled to seek relief if the shareholder notified the company in advance of the intention to oppose the resolution to amend the MOI and was present at the meeting and voted against the resolution
- A person acquires rights associated with a share when their name is entered into the company's certificated securities register and in accordance with rules of the Central Securities Depository in the case of uncertificated securities
- A person ceases to have rights when the share is transferred to another person or surrendered to the company
- Rights:
    - Control rights – voting rights at meeting
    - Financial rights – right to receive dividends and right to excess upon liquidation

Issuing shares (Sec 38)

- The board of directors may issue shares at any time, but only within the classes and to the extent as authorised by the MOI and in accordance with Sec 36. This decision is exercised by a board resolution.
    - Notice and quorum requirements must be adhered to regarding the board meeting and resolution
    - However, such a share issue must be approved by a special resolution if the issue is to a director or prescribed officer, or related or interrelated party of either, or to a future director or prescribed officer.
    - Section 38 and 40 do not apply in a business rescue scheme and practitioner can issue shares and determine the consideration
- If the company issues shares that have not been authorised or in excess of the authorised number of shares, the issuance of those shares may be retroactively authorised in accordance with Sec 36 within 60 business days after the date on which it was issued (by special resolution)
- If the resolution to retroactively authorise an issue of shares is not adopted when it is put to a vote
    - Contract will be null and void
    - Subscribers must be repaid, including interest
    - Share certificates will be nullified
    - Entries in the share register will be nullified
    - A director may be held liable if he was present at the meeting when the board approved the issue of any unauthorised shares, or participated in making the decision, or failed to vote against the issuing of shares despite knowing it had not been authorised shares

Subscription of shares (Sec 39)

- This section does not apply to a public or state owned company, unless provided for in MOI
- This section does not apply to private or personal liability companies in the following cases
    - Shares issued in terms of options or conversion rights
    - Capitalisation shares
    - In terms of future services/benefits and trust agreements – refer to sec 40 (5-7)
- Except to the extent that the MOI of a private or personal liability company provides otherwise
    - A shareholder may, in exercising their pre-emptive right, subscribe for fewer shares than he would be entitled to subscribe for
    - Shares not subscribed for by a shareholder within a reasonable time may be offered to other persons to the extent permitted by the MOI
- Example: Private company or public liability company proposes to issue shares –
    - Existing shareholders have a pre-emptive right before others to subscribe for a percentage of the shares offered equal to the voting power immediately before the offer and within a reasonable time, subject to any limitations, negations, restrictions or other conditions as provided for in the MOI
    - Macbeth has general voting rights relating to 35% shares of the company. They plan to issue 1000 shares. Thus Macbeth has a pre-emptive right to 35% of those shares, totalling 350 shares.

Distributions must be authorised by board (Sec 46)

- Distribution is defined as a direct or indirect
    - Transfer by a company of money or other property of the company, other than its own shares, to or for the benefit of one or more holders of any of its shares, or to the holder of a beneficial interest in any such shares, of that company or of another company within the same group of companies, whether
        - In the form of a dividend
        - As a payment in lieu of a capitalisation share
        - As consideration for the acquisition
            - By the company of any of its shares
            - By any company within the same group of companies, of any shares of a company within that group of companies or
        - Otherwise in respect of any of the shares of that company or of another company within the same group of companies
    - Incurrence of a debt or other obligation by a company for the benefit of one or more holders of any of the shares of the company or of another company within the same group of companies or
    - Forgiveness or waiver by a company of a debt or other obligation owed to the company by one or more holders of any of the shares of that company or of another company within the same group of companies
- Distributions include share buybacks and distribution of dividends
- A company must not make a distribution unless
    - It is pursuant to an existing legal obligation or court order or
    - The board has authorised the distribution by resolution. Shareholder approval is not required unless it is required by the MOI
    - The company satisfies the solvency and liquidity tests immediately after completing the distribution
    - The board acknowledges, by resolution, that they have applied the test and that the company satisfies the solvency and liquidity tests
- If the distribution has not been completed within 120 business days after board acknowledgment, the board must reconsider the solvency and liquidity test with respect to the remaining distribution to be made in terms of the original resolution/order/obligation. The company must not continue with any distribution without a further resolution by the board.
- If the requirements of Sec 46 are not adhered to directors can be held liable for losses incurred to the company and the transaction will be void. A director will be held liable if he was present at the meeting when the board approved the distribution and failed to vote against the distribution knowing that it was contrary to this section. The director would be liable to the company for the distribution amount, less what was recovered by the company. The director is liable to the company and not to the creditors. The creditors do not have the right to institute legal action against the director for unlawful distribution.

(Refer to activity 4 on page 44 of study guide for distribution question)

Company or subsidiary acquiring company shares (Sec 48)

- This is not the same as a company issuing shares to itself – which is prohibited. This is a company reacquiring its shares back.
- The company needs to meet the requirements of section 46 and 48
- The board of a company may determine that the company will acquire a number of its own shares and the board of a subsidiary company may determine that it will acquire shares of its holding company, but no more than 10% in aggregate of the number of issued shares of any class of a company may be held by all of the subsidiaries of the company in taken together. No voting rights will be attached to shares held by the subsidiary and it remains a subsidiary of the company whose shares it holds.
    - A decision by the board must be approved by a special resolution by the shareholders of the company if shares to are to be acquired from a director from a director or prescribed officer of the company, or related person; and is subject to sections 114 and 115 (refer to physical act) if the acquisition involves more than 5% of the issued shares of any particular class.
- The company may not acquire its own shares and a subsidiary may not acquire shares of that company, if as a result, there would no longer be any shares of the company in issue other than the shares held by subsidiaries or convertible or redeemable shares
- If a company acquires any shares against section 46 (distributions) or against this section, the company must not more than two years after the acquisition apply to a court for an order reversing the acquisition
- A director of a company is liable to the extent of acting against section 46 and/or 48, if the director was present at the meeting when the board approved the acquisition and failed to vote against the acquisition

Study Unit 4.2

Securities Registration and Transfer

Securities to be evidenced by certificates or uncertified (Sec 49)
(certified – evidenced by certificate)

- Any securities issued by a company must either be evidenced by a certificate or uncertificated
- The rights and obligations and provision of the Act are not different between certificated and uncertificated
- Section 52-55 apply only to uncertificated securities and prevail over any other provision, law, common law, MOI or other agreement
- Securities can be changed between certificated and uncertificated and once changed the sections governing that security will match certificated or uncertificated section (if security changed from certificated to uncertificated, the section governing uncertificated will then apply to the security)
- Any uncertificated securities may be withdrawn from the uncertificated securities register and certificates issued evidencing those securities, and transfer of ownership in those securities cannot be effected by a participant or central securities depository while they remain in certificated form, unless they are held in certificated form in collective custody by the participant or central securities depository
- Minister may make further regulations regarding provisions of this section

Securities register and numbering (Sec 50)

- Every company must establish and maintain a securities register in the prescribed form and to the prescribed standards
- In securities register – need to ender amount of securities held in uncertificated form, and details of the certificated securities such as name and address
- For uncertificated securities – a record needs to be administered and maintained by a participant or central securities depository in prescribed form, as the company's uncertificated securities register, which forms part of the company's securities register
- Unless all shares rank equally, each class of shares and other securities must be distinguished by an appropriate numbering system

Registration and transfer of certificated securities (Sec 51)

- A certificate evidencing any certificated securities of a company must state on its face the name of the issuing company, the name of the person to whom it was issued, the number and class of shares and the designation of the series (if any), and any restriction of transfer of the securities. The certificate must be signed by two persons authorised by the company's board and is proof that the named security holder owns the securities
- If the shares are ranked equally and are thus not distinguished by a numbering system, those shares need to be distinguished by a numbering system and if the share has been transferred the certificate must be endorsed with a reference number
- A company must enter into its securities register every transfer of any certificated securities including in the entry
    - Name and address of the transferee
    - Description of the securities
    - Value of any consideration still to be received by the company on each share

Registration of uncertificated securities (Sec 52)

- Within five business days after the date of a request for inspection, a company must produce a record of the uncertificated securities register
- A participant or central securities depository, determined in accordance with the rules of the central securities depository

- Must provide a regular statement at prescribed intervals to each person for whom any uncertificated securities are held in an uncertificated securities register, setting out the number and identity of the uncertificated securities held on that person's behalf
- Must not impose a charge for a statement on the person entitled to the statement and
- May impose a charge for the statement on the company

Transfer of uncertificated securities (Sec 53)

- Can be effected only by a participant or central securities deposit on receipt of an instruction to transfer sent and properly authenticated or by an order of the court. It needs to be done in accordance with this section and the rules of the central securities depository
- A company must enter into its securities register every transfer of any uncertificated securities including in the entry
  - Name and address of the transferee
  - Description of the securities
  - Value of any consideration still to be received by the company on each share
- A court may not order the name of a transferee to be removed from an uncertificated securities register, unless that person was a party to or had knowledge of a fraud or illegality

Substitution of certificated or uncertificated securities (Sec 54)

- A person who wishes to withdraw all or part of the uncertificated securities held by that person in an uncertificated securities register, and obtain a certificate in respect of those withdrawn securities, may so notify the relevant participant or central securities depository, which must within five 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 receiving a notice from the participant or central securities depository, a company must
  - Enter the person's name and details of that person's 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 and
  - Within ten business days, or twenty in the case of a holder of securities who is not a resident within the republic
    - Prepare and deliver to the relevant person a certificate in respect of the securities and
    - 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 fee to cover the actual costs of issuing a certificate

Liability relating to uncertificated securities (Sec 55)

- A person who takes any unlawful action in consequence of which any of the following events occur in a securities register or uncertificated securities register, namely
  - The name of a person remains in, is entered in, or is removed or omitted
  - The number of uncertificated securities is increased, reduced or remains unaltered or
  - The description of any uncertificated securities is changed
    - Is liable to any person who has suffered any direct loss or damage arising out of that action
- A person who gives an instruction to transfer uncertificated securities must warrant the legality and correctness of the instruction and indemnify the company and the participant or central securities deposit request to effect the transfer against a claim or loss or damage suffered
- A participant or central securities depository who may effect the transfer of uncertificated securities must indemnify a company against any claim upon it and against any direct loss or damage arising out of a transfer of uncertificated securities and any other person against any direct loss or damage arising out of the transfer, if the transfer was effected without instruction or the instruction was not authenticated or in a manner inconsistent with an instruction that was sent

Beneficial interest in securities (Sec 56)

- Except to the extent that MOI states 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

- A person is regarded to have a beneficial interest in a security of a public company if the security is held nomine officii by another person on that first person's behalf, or if that first person
    - Is married in community of property to a person who has a beneficial interest in that security
    - Is the parent of a minor child who has a beneficial interest in that security
    - Acts in terms of an agreement with another person who has a beneficial interest in that security, and the agreement is in respect of the co-operation between them for the acquisition, disposal or any other matter relating to a beneficial interest in that security
    - Is the holding company of a company that has a beneficial interest in that security
    - Is entitled to exercise or control the exercise of the majority of the voting rights at general meetings of a juristic person that has a beneficial interest in that security or
    - Gives directions or instructions to a juristic person that has a beneficial interest in that security, and its directors or the trustees are accustomed to act in accordance with that person's 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
    - 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 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

Study Unit 4.3

Governance of Companies

Shareholders and voting rights (Sec 57)

- 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 no 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
- 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

Shareholder right to be represented by proxy (Sec 58)

- 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

Notice of Meetings (Sec 62)

- 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 annul 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

Conduct of Meetings (Sec 63)

- 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

Shareholders resolutions (Sec 65)

- 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
- 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)
  - MOI can stipulate a different percentage as long as the difference between ordinary and special resolution is no less than 10%
- 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 or rights
    - Authorise the board to grant financial assistance
    - Reacquisition of shares
    - Compensation to directors
    - Winding up of the company
    - Transfer to foreign jurisdiction
- 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

Study Unit 4.4

Offers that are not offers to public (Sec 96)

- 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

Standards for qualifying employee share schemes (Sec 97)

- 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 compiled with the obligations during the past financial year

General restrictions on offers to public (Sec 99)

- 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 prospectors 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

Requirements concerning prospectus (Sec 100)

- 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

Topic 5

Directors

Study Unit 5.1

The board, directors and prescribed officers, election, ineligibility, disqualification and vacancies

(Most of Topic 5 is directly from the Companies Act) – http://www.justice.gov.za/legislation/acts/2008-071amended.pdf

Boards, directors and prescribed officers (Sec 66)

- The business and affairs of a company must be managed by or under the direction of its board, which has the authority to exercise all of the powers and perform any of the functions of the company, except to the extent that this Act or the MOI states otherwise
- The MOI can state a higher number of minimum directors

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

- (4) A company's Memorandum of Incorporation-
  - (a) may provide for-
    - (i) the direct appointment and removal of one or more directors by any person who is named in, or determined in terms of, the Memorandum of Incorporation;
    - (ii) a person to be an ex officio director of the company as a consequence of that person holding some other office, title, designation or similar status, subject to subsection (5)(a);or
    - (iii) the appointment or election of one or more persons as alternate directors of the company; and
  - (b) In the case of a profit company other than a state-owned company, must provide for the election by shareholders of at least 50 percent of the directors, and 50 percent of any alternate directors.
- (5) A person contemplated in subsection (4)(a)(ii)-
  - (a) may not serve or continue to serve as an ex officio director of a company, despite holding the relevant office, title, designation or similar status, if that person is or becomes ineligible or disqualified in terms of section 69; and
  - (b) who holds office or acts in the capacity of an ex officio director of a company has all the-
    - (i) powers and functions of any other director of the company, except to the extent that the company's Memorandum of Incorporation restricts the powers, functions or duties of an ex officio director; and
    - (ii) duties, and is subject to all of the liabilities, of any other director of the company.
- (6) The election or appointment of a person as a director is a nullity if, at the time of the election or appointment, that person is ineligible or disqualified in terms of section 69.
- (7) A person becomes entitled to serve as a director of a company when that person –
  - (a) has been appointed or elected in accordance with this Part, or holds an office, title, designation or similar status entitling that person to be an ex officio director of the company, subject to subsection (5)(a); and
  - (b) has delivered to the company a written consent to serve as its director.
- (8) Except to the extent that the Memorandum of Incorporation of a company provides otherwise, the company may pay remuneration to its directors for their service as directors, subject to subsection (9).
- (9) Remuneration contemplated in subsection (8) may be paid only in accordance with a special resolution approved by the shareholders within the previous two years.
- (10) The Minister may make regulations designating any specific function or functions within a company to constitute a prescribed office for the purposes of this Act.
- (11) Any failure by a company at any time to have the minimum number of directors required by this Act or the company's Memorandum of Incorporation, does not limit or negate the authority of the board, or invalidate anything done by the board or the company.
- (12) Save as otherwise provided elsewhere in this Act or in the company's Memorandum of Incorporation, any particular director may be appointed to more than one committee of the company, and when calculating the minimum number of directors required for a company in terms of subsections (2) and (3), any such director who has been appointed to more than one committee must be counted only once.

First director or directors (Sec 67)

- Each incorporator of a company is a first director of the company, and serves until sufficient other directors to satisfy the minimum requirements of this Act, or the company's MOI, have been
    - first appointed, as contemplated in section 66(4)(a)(i) or
    - first elected in accordance with section 68 or the MOI
- If the number of incorporators of a company, together with any ex officio directors, or directors to be appointed as contemplated in section 66(4)(a)(i), is fewer than the minimum number of directors required for that company in terms of this Act or the company's MOI, the board must call a shareholders' meeting within 40 business days after incorporation of the company for the purpose of electing sufficient directors to fill all vacancies on the board at the time of the election.

Election of directors of profit companies (Sec 68)

- (1) Subject to subsection (3), each director of a profit company, other than the first director or a director contemplated in section 66(4)(a)(i) or (ii), must be elected by the persons entitled to exercise voting rights in such an election, to serve for an indefinite term, or for a term as set out in the MOI
- (2) Unless a profit company's MOI provides otherwise, in any election of directors
    - the election is to be conducted as a series of votes, each of which is on the candidacy of a single individual to fill a single vacancy, with the series of votes continuing until all vacancies on the board at that time have been filled and
    - in each vote to fill a vacancy
        - each voting right entitled to be exercised may be exercised once
        - the vacancy is filled only if a majority of the voting rights exercised support the candidate
- (3) Unless the MOI of a profit company provides otherwise, the board may appoint a person who satisfies the requirements for election as a director to fill any vacancy and serve as a director of the company on a temporary basis until the vacancy has been filled by election in terms of subsection (2), and during that period any person so appointed has all of the powers, functions and duties, and is subject to all of the liabilities, of any other director of the company.

Ineligibility and disqualification of persons to be director or prescribed officer (Sec 69)

- (1) In this section, "director" includes an alternate director, and
    - a prescribed officer or
    - a person who is a member of a committee of a board of a company, or of the audit committee of a company,
    - irrespective of whether or not the person is also a member of the company's board.
- (2) A person who is ineligible or disqualified, as set out in this section, must not
    - (a) be appointed or elected as a director of a company, or consent to being appointed or elected as a director or
    - (b) act as a director of a company.
- (3) A company must not knowingly permit an ineligible or disqualified person to serve or act as a director.
- (4) A person who becomes ineligible or disqualified while serving as a director of a company ceases to o be entitled to continue to act as a director immediately, subject to section 70(2).
- (5) A person who has been placed under probation by a court in terms of section 162, or in terms of section 47 of the Close Corporations Act, 1984 (Act No. 69 of 1984), must not serve as a director except to the extent permitted by the order of probation.
- (6) In addition to the provisions of this section, the MOI of a company may impose
    - (a) additional grounds of ineligibility or disqualification of directors or
    - (b) minimum qualifications to be met by directors of that company.
- (7) A person is ineligible to be a director of a company if the person
    - (a) is a juristic person
    - (b) is an unemancipated minor, or is under a similar legal disability or
    - (c) does not satisfy any qualification set out in the company's MOI.
- (8) A person is disqualified to be a director of a company if
    - (a) a court has prohibited that person to be a director, or declared the person to be delinquent in terms of section 162, or in terms of section 47 of the Close Corporations Act, 1984 (Act No. 69 of 1984) or
    - (b) subject to subsections (9) to (12), the person
        - (i) is an unrehabilitated insolvent
        - (ii) is prohibited in terms of any public regulation to be a director of the company
        - (iii) has been removed from an office of trust, on the grounds of misconduct involving dishonesty or

        - (iv) has been convicted, in the Republic or elsewhere, and imprisoned without the option of a fine, or fined more than the prescribed amount, for theft, fraud, forgery, perjury or an offence
            - (aa) involving fraud, misrepresentation or dishonesty
            - (bb) in connection with the promotion, formation or management of a company, or in connection with any act contemplated in subsection (2) or (5) or
            - (cc) under this Act, the Insolvency Act, 1936 (Act No. 24 of 1936), the Close Corporations Act, 1984, the Competition Act, the Financial Intelligence Centre Act, 2001 (Act No. 38 of 2001), the Securities Services Act, 2004 (Act No. 36 of 2004), or Chapter 2 of the Prevention and Combating of Corruption Activities Act, 2004 (Act No. 12 of 2004).
- (9) A disqualification in terms of subsection (8)(b)(iii) or (iv) ends at the later of
    - (a) five years after the date of removal from office, or the completion of the sentence imposed for the relevant offence, as the case may be or
    - (b) at the end of one or more extensions, as determined by a court from time to time, on application by the Commission in terms of subsection (10).
- (10) At any time before the expiry of a person's disqualification in terms of subsection (8)(b)(iii) or (iv)
    - (a) the Commission may apply to a court for an extension contemplated in subsection (9)(b) and
    - (b) the court may extend the disqualification for no more than five 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 the application.
- (11) A court may exempt a person from the application of any provision of subsection (8)(b).
- (11A) The Registrar of the Court must, upon
    - (a) the issue of a sequestration order
    - (b) the issue of an order for the removal of a person from any office of trust on the grounds of misconduct involving dishonesty or
    - (c) a conviction for an offence referred in subsection (8)(b)(iv),
    - send a copy of the relevant order or particulars of the conviction, as the case may be, to the Commission
- (12) ……..Removed 2011
- (13) The Commission must establish and maintain in the prescribed manner a public register of persons who are disqualified from serving as a director, or who are subject to an order of probation as a director, in terms of an order of a court pursuant to this Act or any other law.

Vacancies on board (Sec 70)

- (1) Subject to subsection (2), a person ceases to be a director, and a vacancy arises on the board of a company
    - (a) when the person's term of office as director expires, in the case of a company whose MOI provides for fixed terms, as contemplated in section 68(1) or
    - (b) in any case, if the person
        - (i) resigns or dies
        - (ii) in the case of an ex officio director, ceases to hold the office, title, designation or similar status that entitled the person to be an ex officio director
        - (iii) 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, subject to section 71(3)
        - (iv) is declared delinquent by a court, or placed on probation under conditions that are inconsistent with continuing to be a director of the company, in terms of section 162
        - (v) becomes ineligible or disqualified in terms of section 69, subject to section 71(3) or
        - (vi) is removed
            - (aa) by resolution of the shareholders in terms of section 71(1)
            - (bb) by resolution of the board in terms of section 71(3) or
            - (cc) by order of the court in terms of section 71(5) or (6).
- (2) If, in terms of section 71(3), the board of a company has removed a director, a vacancy on the board does not arise until the later of
    - (a) the expiry of the time for filing an application for review in terms of section 71(5) or
    - (b) the granting of an order by the court on such an application, but the director is suspended from office during that time.
- (3) If a vacancy arises on the board, other than as a result of an ex officio director ceasing to hold that office, it must be filled by
    - (a) a new appointment, if the director was appointed as contemplated in section 66(4)(a)(i) or
    - (b) subject to subsection (4), by a new election conducted

        - (i) at the next annual general meeting of the company, if the company is required to hold such a meeting or
        - (ii) in any other case, within six months after the vacancy arose
            - (aa) at a shareholders meeting called for the purpose of electing the director or
            - (bb) by a poll of the persons entitled to exercise voting rights in an election of the director, as contemplated in section 60(3).
- (4) If, as a result of a vacancy arising on the board of a company there are no remaining directors of a company, any holder of voting rights entitled to be exercised in the election of a director may convene a meeting for the purpose of such an election.
- (5) A person contemplated in subsection (4) may apply to a court for relief, and the court may grant a supervisory order relating to a meeting convened in terms of that paragraph if the court is satisfied that such an order is required to prevent the oppression, or preserve the rights, of any shareholder.
- (6) Every company must file a notice within 10 business days after a person becomes or ceases to be a director of the company.

Removal of Directors (Sec 71)

- Despite anything to the contrary in a company's MOI or rules, or any agreement between a company and a director, or between any shareholders and a director, a director may be removed by an ordinary resolution adopted at a shareholders meeting by the persons entitled to exercise voting rights in an election of that director, subject to subsection (2).
- (2) Before the shareholders of a company may consider a resolution contemplated in subsection (1)
    - (a) the director concerned must be given notice of the meeting and the resolution, at least equivalent to that which a shareholder is entitled to receive, irrespective of whether or not the director is a shareholder of the company and
    - (b) the director must be afforded a reasonable opportunity to make a presentation, in person or through a representative, to the meeting, before the resolution is put to a vote.
- (3) If a company has more than two directors, and a shareholder or director has alleged that a director of the company
    - (a) has become
        - (i) ineligible or disqualified in terms of section 69, other than on the grounds contemplated in section 69(8)(a) or
        - (ii) incapacitated to the extent that the director is unable to perform the functions of a director, and is unlikely to regain that capacity within a reasonable time or
    - (b) has neglected, or been derelict in the performance of, the functions of director, the board, other than the director concerned, must determine the matter by resolution, and may remove a director whom it has determined to be ineligible or disqualified, incapacitated, or negligent or derelict, as the case may be.
- (4) Before the board of a company may consider a resolution contemplated in subsection (3), the director concerned must be given
    - (a) notice of the meeting, including a copy of the proposed resolution and a statement setting out reasons for the resolution, with sufficient specificity to reasonably permit the director to prepare and present a response and
    - (b) a reasonable opportunity to make a presentation, in person or through a representative, to the meeting before the resolution is put to a vote.
- (5) If, in terms of subsection (3), the board of a company has determined that a director is ineligible or disqualified, incapacitated, or has been negligent or derelict, as the case may be, the director concerned, or a person who appointed that director as contemplated in section 66(4)(a)(i), if applicable, may apply within 20 business days to a court to review the determination of the board.
- (6) If, in terms of subsection (3), the board of a company has determined that a director is not ineligible or disqualified, incapacitated, or has not been negligent or derelict, as the case may be-
    - (a) any director who voted otherwise on the resolution, or any holder of voting rights entitled to be exercised in the election of that director, may apply to a court to review the determination of the board and
    - (b) the court, on application in terms of paragraph (a), may
        - (i) confirm the determination of the board or
        - (ii) remove the director from office, if the court is satisfied that the director is ineligible or disqualified, incapacitated, or has been negligent or derelict.
- (7) An applicant in terms of subsection (6) must compensate the company, and any other party, for costs incurred in relation to the application, unless the court reverses the decision of the board.
- (8) If a company has fewer than three directors
    - (a) subsection (3) does not apply to the company

    - (b) in any circumstances contemplated in subsection (3), any director or shareholder of the company may apply to the Companies Tribunal, to make a determination contemplated in that subsection and
    - (c) subsections (4), (5) and (6), each read with the changes required by the context, apply to the determination of the matter by the Companies Tribunal.
- (9) Nothing in this section deprives a person removed from office as a director in terms of this section of any right that person may have at common law or otherwise to apply to a court for damages or other compensation for
    - (a) loss of office as a director or
    - (b) loss of any other office as a consequence of being removed as a director.
- (10) This section is in addition to the right of a person, in terms of section 162, to apply to a court for an order declaring a director delinquent, or placing a director on probation.

Refer to summary on page 60 of study guide

Study Unit 5.2

Board Committees, Meetings and Directors Acting Other Than at Meeting

Board Committees (Sec 72)

- Except to the extent that the MOI of a company provides otherwise, the board of a company may
  - Appoint any number of committees of directors and
  - Delegate to any committee any of the authority of the board
- Except to the extent that the MOI of a company, or a resolution establishing a committee, provides otherwise, the committee
  - may include persons who are not directors of the company, but
    - any such person must not be ineligible or disqualified to be a director in terms of section 69 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
- The board 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 audit committee is a possible committee that can be formed
- As per sec 94 a public company and state owned company are required to have an audit committee
- The King lll Report recommends that all companies appoint an audit committee and define its composition, purpose and duties in the MOI

Board meetings/ directors meetings (Sec 73)

- A director authorised by the board may
  - Call a meeting at any time and
  - Must call such a meeting if required to do so by at least
    - 25% of the directors if the board has at least 12 members or
    - Two directors in other cases
    - MOI may specify higher or lower amounts
- Unless the MOI states otherwise
  - A meeting may be conducted by electronic communication
  - One or more directors may participate via electronic communication
    - As long as it is done effectively and concurrently with no intermediary
- The board of a company may determine the form and time for giving notice of its meetings, but
  - Such a determination must comply with any requirements set out in the MOI, or rules, of the company and
  - No meeting of a board may be convened without notice to all of the directors, subject to below bullet point
- Except to the extent that the company's MOI provides otherwise
  - If all of 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 and
  - In the case of a tied vote
    - the chair may cast a deciding vote, if the chair did not initially have or cast a vote; or
    - the matter being voted on fails, in any other case
- A company must keep minutes of the meetings of the board, and any of its committees, and include in the minutes
  - any declaration given by notice or made by a director as required by section 75; and
  - every resolution adopted by the board
- Resolutions adopted by the board
  - must be dated and sequentially numbered and
  - are effective as of the date of the resolution, unless the resolution states otherwise.

- Any minutes of a meeting, or a resolution, signed by the chair of the meeting, or by the chair of the next meeting of the board, is evidence of the proceedings of that meeting, or adoption of that resolution, as the case may be.

Directors acting other than at meeting (Sec 74)

- Except to the extent that the MOI of a company provides otherwise, a decision that could be voted on at a meeting of the board of that company may instead be adopted by written consent of a majority of the directors, given in person, or by electronic communication, provided that each director has received notice of the matter to be decided.
- A decision made in the manner contemplated in this section is of the same effect as if it had been approved by voting at a meeting.

Study Unit 5.3

Directors' Personal Financial Interests

Directors' Personal Financial Interests (Sec 75)

- In this section "director" includes an alternate director, a prescribed officer and a person who is a member of a committee of the board of a company, irrespective of whether the person is also a member of the company's board. "Related person", when used in reference to a director, has the meaning set out in section 1, but also includes a second company of which the director or a related person is also a director, or a CC of which the director or a related person is a member.
- This section does not apply to a director of a company in respect of a decision that may generally affect all of the directors of the company in their capacity as directors or a class of persons, despite the fact that the director is one member of that class of persons, unless the only members of the class are the director or persons related or inter-related to the director, or in respect of a proposal to remove that director from office as contemplated in section 71, or to a company or its director, if one person holds all of the beneficial interests of all of the issued securities of the company and is the only director of that company
- If a person is the only director of a company, but does not hold all of the beneficial interests of all of 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 or as a director, determine any other matter in which the person or a related person has a personal financial interest, unless the agreement or determination is approved by an ordinary resolution of the shareholders after the director has disclosed the nature and extent of that interest to the shareholders.
- At any time, a director may disclose any personal financial interest in advance, by delivering to the board (or shareholders in the case of a company as stated in above bullet point), a notice in writing setting out the nature and extent of that interest, to be used generally for the purposes of this section until changed or withdrawn by further written notice from that director
- If a director of a company, other than a company contemplated in above two point, has a personal financial interest in respect of a matter to be considered at a meeting of the board, or knows that a related person has a personal financial interest in the matter, the director
    - must 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 known to the director
    - may disclose any observations or pertinent insights relating to the matter if requested to do so by the other directors
    - if present at the meeting, must leave the meeting immediately after making any disclosure
    - must not take part in the consideration of the matter, except for disclosure
    - while absent from the meeting in terms of this subsection
        - is to be regarded as being present at the meeting 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 and
        - must not execute any document on behalf of the company in relation to the matter unless specifically requested or directed to do so by the board.
- If a director of a company acquires a personal financial interest in an agreement or other matter in which the company has a material interest, or knows that a related person has acquired a personal financial interest in the matter, after the agreement or other matter has been approved by the company, the director must promptly disclose to the board, or to the shareholders in the case of a company contemplated in subsection (3), the nature and extent of that interest, and the material circumstances relating to the director or related person's acquisition of that interest.

- A decision by the board, or a transaction or agreement approved by the board, or by a company as contemplated in subsection (3), 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 in this section or
    - 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 in terms of below bullet point
- A court, on application by any interested person, may declare valid a transaction or agreement that had been approved by the board, or shareholders, as the case may be, despite the failure of the director to satisfy the disclosure requirements of this section.

Study Unit 5.4

Standards of Directors' Conduct, Liability of Directors and Prescribed Officers, Indemnification and Directors' Insurance

Standards of directors conduct (Sec 76)

- In this section, "director" includes an alternate director, a prescribed officer or a person who is a member of a committee of a board of a company, or of the audit committee of a company, irrespective of whether or not the person is also a member of the company's board.
- A director of a company must
    - not use the position of director, or any information obtained while acting in the capacity of a director
        - to gain an advantage for the director, or for another person other than the company or a wholly-owned subsidiary of the company or
        - to knowingly cause harm to the company or a subsidiary of the company and
    - communicate to the board at the earliest practicable opportunity any information that comes to the director's attention, unless the director
        - reasonably believes that the information is
            - immaterial to the company or
            - generally available to the public, or known to the other directors or
        - is bound not to disclose that information by a legal or ethical obligation of confidentiality.
- Subject to subsections (4) and (5), a director of a company, when acting in that capacity, must exercise the powers and perform the functions of director
    - in good faith and for a proper purpose
    - in the best interests of the company and
    - with the degree of care, skill and diligence that may reasonably be expected of a person
        - carrying out the same functions in relation to the company as those carried out by that director and
        - having the general knowledge, skill and experience of that director.
- In respect of any particular matter arising in the exercise of the powers or the performance of the functions of director, a particular director of a company
    - will have satisfied the obligations of subsection stated in above bullet point if
        - the director has taken reasonably diligent steps to become informed about the matter
        - either
            - the director had no material personal financial interest in the subject matter of the decision, and had no reasonable basis to know that any related person had a personal financial interest in the matter or
            - the director complied with the requirements of section 75 with respect to any interest contemplated in subparagraph immediately stated above and
        - the director made a decision, or supported the decision of a committee or the board, with regard to that matter, and the director had a rational basis for believing, and did believe, that the decision was in the best interests of the company; and
    - 4b-is entitled to rely on
        - the performance by any of the persons-
            - referred to in subsection (5) or
            - to whom the board may reasonably have delegated, formally or informally by course of conduct, the authority or duty to perform one or more of the board's functions that are delegable under applicable law; and
        - any information, opinions, recommendations, reports or statements, including financial statements and other financial data, prepared or presented by any of the persons specified in subsection (5) (below bullet point).

- To the extent contemplated in subsection (4)(b), a director is entitled to rely on
    - one or more employees of the company whom the director reasonably believes to be reliable and competent in the functions performed or the information, opinions, reports or statements provided
    - legal counsel, accountants, or other professional persons retained by the company, the board or a committee as to matters involving skills or expertise that the director reasonably believes are matters
        - within the particular person's professional or expert competence or
        - as to which the particular person merits confidence or
    - a committee of the board of which the director is not a member, unless the director has reason to believe that the actions of the committee do not merit confidence.

Review activity 4 in study guide page 70

Liability of directors and prescribed officers (Sec 77)

- (1) In this section, "director" includes an alternate director, and-
    - (a) a prescribed officer; or
    - (b) a person who is a member of a committee of a board of a company, or of the audit committee of a company, irrespective of whether or not the person is also a member of the company's board.
- (2) A director of a company may be held liable
    - (a) in accordance with the principles of the 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 contemplated in section 75, 76(2) or 76(3)(a) or (b);or
    - (b) in accordance with the principles of the common law relating to delict for any loss, damages or costs sustained by the company as a consequence of any breach by the director of
        - (i) a duty contemplated in section 76(3)(c);
        - (ii) any provision of this Act not otherwise mentioned in this section; or
        - (iii) any provision of the company's MOI.
- (3) A director of a company is liable for any loss, damages or costs sustained by the company as a direct or indirect consequence of the director having-
    - (a) acted in the name of the company, signed anything on behalf of the company, or purported to bind the company or authorise the taking of any action by or on behalf of the company, despite knowing that the director lacked the authority to do so;
    - (b) acquiesced in the carrying on of the company's business despite knowing that it was being conducted in a manner prohibited by section 22(1);
    - (c) been a party to an act or omission by the company despite knowing that the act or omission was calculated to defraud a creditor, employee or shareholder of the company, or had another fraudulent purpose;
    - (d) signed, consented to, or authorised, the publication of-
        - (i) any financial statements that were false or misleading in a material respect; or
        - (ii) a prospectus, or a written statement contemplated in section 101, that contained-
            - (aa) an "untrue statement" as defined and described in section 95; or
            - (bb) a statement to the effect that a person had consented to be a director of the company, when no such consent had been given,
            - despite knowing that the statement was false, misleading or untrue, as the case may be, but the provisions of section 104(3), read with the changes required by the context, apply to limit the liability of a director in terms of this paragraph; or
    - (e) been present at a meeting, or participated in the making of a decision in terms of section 74, and failed to vote against-
        - (i) the issuing of any unauthorised shares, despite knowing that those shares had not been authorised in accordance with section 36;
        - (ii) the issuing of any authorised securities, despite knowing that the issue of those securities was inconsistent with section 41;
        - (iii) the granting of options to any person contemplated in section 42(4), despite knowing that any shares-
            - (aa) for which the options could be exercised; or
            - (bb) into which any securities could be converted, had not been authorised in terms of section 36;
        - (iv) the provision of financial assistance to any person contemplated in section 44 for the acquisition of securities of the company, despite knowing that the provision of financial assistance was inconsistent with section 44 or the company's MOI;
        - (v) the provision of financial assistance to a director for a purpose contemplated in section 45, despite knowing that the provision of financial assistance was inconsistent with that section or the company's MOI;

        - (vi) a resolution approving a distribution, despite knowing that the distribution was contrary to section 46, subject to subsection (4);
        - (vii) the acquisition by the company of any of its shares, or the shares of its holding company, despite knowing that the acquisition was contrary to section 46 or 48; or
        - (viii) an allotment by the company, despite knowing that the allotment was contrary to any provision of Chapter 4.
- (4) The liability of a director in terms of subsection (3)(e)(vi) as a consequence of the director having failed to vote against a distribution in contravention of section 46-
    - (a) arises only if-
        - (i) immediately after making all of the distribution contemplated in a resolution in terms of section 46, the company does not satisfy the solvency and liquidity test; and
        - (ii) 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; and
    - (b) does not exceed, in aggregate, the difference between
        - (i) 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; and
        - (ii) the amount, if any, recovered by the company from persons to whom the distribution was made.
- (5) If the board of a company has made a decision in a manner that contravened this Act, as contemplated in subsection (3)(e)-
    - (a) the company, or any director who has been or may be held liable in terms of subsection (3)(e), may apply to a court for an order setting aside the decision of the board; and
    - (b) the court may make-
        - (i) an order setting aside the decision in whole or in part, absolutely or conditionally; and
        - (ii) any further order that is just and equitable in the circumstances, including an order-
            - (aa) to rectify the decision, reverse any transaction, or restore any consideration paid or benefit received by any person in terms of the decision of the board; and
            - (bb) requiring the company to indemnify any director who has been or may be held liable in terms of this section, including indemnification for the costs of the proceedings under this subsection.
- (6) The liability of a person in terms of this section is joint and several with any other person who is or may be held liable for the same act.
- (7) Proceedings to recover any loss, damages or costs for which a person is or may be held liable in terms of this section may not be commenced more than three years after the act or omission that gave rise to that liability.
- (8) In addition to the liability set out elsewhere in this section, any person who would be so liable is jointly and severally liable with all other such persons-
    - (a) to pay the costs of all parties in the court in a proceeding contemplated in this section unless the proceedings are abandoned, or exculpate that person; and
    - (b) to restore to the company any amount improperly paid by the company as a consequence of the impugned act, and not recoverable in terms of this Act.
- (9) In any proceedings against a director, other than for wilful misconduct or wilful breach of trust, the court may relieve the director, either wholly or partly, from any liability set out in this section, on any terms the court considers just if it appears to the court that-
    - (a) the director is or may be liable, but has acted honestly and reasonably; or
    - (b) having regard to all the circumstances of the case, including those connected with the appointment of the director, it would be fair to excuse the director.
- (10) A director who has reason to apprehend that a claim may be made alleging that the director is liable, other than for wilful misconduct or wilful breach of trust, may apply to a court for relief, and the court may grant relief to the director on the same grounds as if the matter had come before the court in terms of subsection (9).

Indemnification and Directors' Insurance (Sec 78)

- In this section, director includes a former director and an alternate director, and- (a) a prescribed officer; or (b) a person who is a member of a committee of a board of a company, or of the audit committee of a company, irrespective of whether or not the person is also a member of the company's board.
- (2) Subject to subsections (4) to (6), any provision of an agreement, the MOI or rules of a company, or a resolution adopted by a company, whether express or implied, is void to the extent that it directly or indirectly purports to
    - (a) relieve a director of-
        - (i) a duty contemplated in section 75 or 76; or

        - (ii) liability contemplated in section 77; or
    - (b) negate, limit or restrict any legal consequences arising from an act or omission that constitutes wilful misconduct or wilful breach of trust on the part of the director.
- (3) Subject to subsection (3A), 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.
- (3A) Subsection (3) does not apply to a private or personal liability company if –
    - (a) a single individual is the sole shareholder and sole director of that company; or
    - (b) two or more related individuals are the only shareholders of that company, and there are no directors of the company other than one or more of those individuals.
- (4) Except to the extent that a company's MOI provides otherwise, the company-
    - (a) may advance expenses to a director to defend litigation in any proceedings arising out of the director's service to the company; and
    - (b) may directly or indirectly indemnify a director for expenses contemplated in paragraph (a), irrespective of whether it has advanced those expenses, if the proceedings-
        - (i) are abandoned or exculpate the director; or
        - (ii) arise in respect of any liability for which the company may indemnify the director, in terms of subsections (5) and (6).
- (5) Except to the extent that the MOI of a company provides otherwise, a company may indemnify a director in respect of any liability arising other than as contemplated in subsection (6).
- (6) A company may not indemnify a director in respect of-
    - (a) any liability arising-
        - (i) in terms of section 77(3)(a), (b) or (c);or
        - (ii) from wilful misconduct or wilful breach of trust on the part of the director; or
    - (b) any fine contemplated in subsection (3).
- (7) Except to the extent that the MOI of a company provides otherwise, a company may purchase insurance to protect-
    - (a) a director against any liability or expenses for which the company is permitted to indemnify a director in accordance with subsection (5); or
    - (b) the company against any contingency including, but not limited to –
        - (i) any expenses-
            - (aa) that the company is permitted to advance in accordance with subsection (4)(a);or
            - (bb) for which the company is permitted to indemnify a director in accordance with subsection (4)(b);or
        - (ii) any liability for which the company is permitted to indemnify a director in accordance with subsection (5).
- (8) A company is entitled to claim restitution from a director of the company or of a related company for any money paid directly or indirectly by the company to or on behalf of that director in any manner inconsistent with this section.

Topic 6

Enhanced Accountability and Transparency

Study Unit 6.1

Application of and General Requirements Regarding Enhanced Accountability and Transparency

Application of Chapter (Sec 84)

- Applies to
  - public company
  - state owned company, unless exempt
  - private company, personal liability company or non-profit company if required by this Act, or by the regulations to have its annual financial statements audited
    - or unless required to by the company MOI
    - a private company may also require an audit depending on its public interest score
- Public company and state owned company need to
  - Appoint a person to serve as company secretary
  - Appoint a person to serve as auditor
  - Appoint an audit committee
- A person who has been disqualified to serve as a director may not be appointed to or continue to serve in the above bullet point mentioned capacities
- If the auditor general has elected to conduct an audit, the company may not appoint an external auditor for that year
- If the board of the company fails to make an appointment, the Commission may issue a notice to the company to show cause why the Commission should not proceed to convene a shareholders' meeting for the purpose of making the appointment

Registration of company secretary and auditor (Sec 85)

- Company must maintain a record of its company secretaries and auditors
  - Name
  - Date of appointment
  - If a firm or juristic person is appointed
    - Name, reg nr, reg office address
    - Name of individual performing the functions
  - Any changes to be noted with details of that change
- Within 10 business days after making an appointment, or after a termination of appointment, a company must file a notice of appointment or termination
- The incorporators of a company may file a notice of appointment of the company's first company secretary, auditor or audit committee as part of the company's Notice of Incorporation

Regulation 28 Categories of Companies required to be audited
(Refer back to topic 3 table)

- This regulation applies to a company, unless it is exempt from having its annual financial statements either audited or independently reviewed
  - If, with respect to a particular company, every person who is a holder of, or has a beneficial interest in, any securities issued by that company is also a director of that company, that company is exempt from the requirements to have its annual financial statements audited or independently reviewed, unless required by the Minister in the form of regulations, or by another law or agreement to which the company is a party
- In addition to public companies and state owned companies, any company that falls within any of the following categories in any particular financial year must have its annual financial statement for that year audited
  - Any profit or non profit company, if in the ordinary course of its primary activities, it holds assets in a fiduciary capacity for person who are not related to the company, and the aggregate value of such assets held at any time during the financial year exceed R5mil
  - Any non profit company if it was incorporated
    - Directly or indirectly by the state, an organ of state, a state owned company, an international entity, a foreign state entity or a foreign company or
    - Primarily to perform a statutory or regulatory function in terms of any legislation, or to carry out a public function at the direct or indirect initiation or direction of an organ of the state, a

state owned company, an international entity, or a foreign state entity, or for a purpose ancillary to any such function or
    - Any other company whose public interest score in that financial year as calculated in accordance with regulation 26,
        - Is 350 or more or
        - Is at least 100 if its annual financial statements for that year were internally compiled

(Activity on page 81 of study guide indicates application of public interest score in terms of auditing requirements)

Study Unit 6.2

The company secretary, including the mandatory appointment of the company secretary, juristic person or partnership as company secretary, and the duties, resignation or removal of a company secretary

Mandatory Appointment of company secretary (Sec 86)

- Mandatory for public or state owned company or in terms of company MOI
- Company secretary must have knowledge of or experience in relevant laws and be permanent resident of republic and remain so while in this capacity
- The first company secretary of a public or state owned company may be appointed by the incorporators of the company or within 40 business days after incorporation by either the directors of the company or by an ordinary resolution of the holders of company securities
- The above bullet point also applicable to companies required by their MOI to make appointment
- Within 60 days after a vacancy arises the board must fill the vacancy by a person whom the directors consider has the adequate knowledge and experience

Juristic person or partnership may be appointed company secretary (Sec 87)

- A juristic person or partnership may be appointed to hold the office of company secretary provided that
    - Every employee of that juristic person who provides company secretary services, or partner and employee of that partnership, satisfies the requirement of 84(5) – not disqualified from acting as a director
    - And at least one employee of that juristic person, or one partner or employee of that partnership, satisfies the requirements of sec 86 - Company secretary must have knowledge of or experience in relevant laws and be permanent resident of republic and remain so while in this capacity
- A change in the membership of a juristic person or partnership that holds office as a company secretary does not constitute a casual vacancy in the office of company secretary, if the juristic person or partnership continues to satisfy the requirements as stated in first bullet point section 87 (including sec 86)
- If at any time a juristic person or partnership holds office as a company secretary of a particular company
    - Must immediately notify the directors of the company if they no longer satisfy the requirements of first bullet point of this section, and are considered as resigned upon giving notice to that company
    - The company is entitled to assume that the respective juristic person or partnership meet the requirements of the first bullet point until they receive notice stating otherwise and
    - Any action taken by the juristic person or partnership in performance of its functions as company secretary is not invalidated merely because the juristic person or partnership has ceased to satisfy requirements of first bullet point at the time of the action

Duties of company secretary (Sec 88)

- The company secretary is accountable to the company's board
- A company secretary's duties include, but are not restricted to
    - Providing the directors with guidance as to their duties, responsibilities and powers
    - Make the directors aware of any law relevant to 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
    - Ensure that minutes of all shareholders meetings, board meetings and meetings of any committees of the directors or 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 such returns and notices appear to be true, correct and up to date
    - Ensuring that a copy of the company's annual financial statement is sent to every person who is entitled to it and
    - Carrying out the functions of a person designated in terms of section 33(3) which states that

- Each year, in its annual return filed in terms of subsection 1 (file annual return in prescribed form with prescribed fee within prescribed period), every company must designate a director, employee or other person who is responsible for the company's compliance with requirements, if it applies to the company

Resignation or removal of company secretary (Sec 89)

- A company secretary may resign from office by giving the company one month written notice, or less than one month written notice with the approval of the board
- If the company secretary is removed from office by the board, the company secretary may require the company to include a statement in its annual financial statements relating to that financial year, not exceeding a reasonable length, setting out the company secretary's opinion as to the circumstances that resulted in the removal. If the company secretary wishes to do this, they must give written notice to the company by no later than the end of the financial year in which the removal took place, and that notice must include the statement.
- This statement must be included in the directors' report in the company's annual financial statements

Study Unit 6.3

Auditors, including the appointment, resignation, rotation and rights and restricted functions of auditors

Appointment of auditor (Sec 90)

- Upon its incorporation and each year at its annual general meeting, a public or state owned company must appoint an auditor
- Any other company (contemplated in 84-1-c-i and 34-2) required by the act (public interest score) or their MOI must appoint an auditor if the requirement to have its annual financial statements audited applies to that company when it is incorporated or at the annual general meeting at which the requirement first applies to the company and each annual general meeting thereafter
- To be appointed as an auditor of a company a person or firm
    - Must be a registered auditor
    - Must not be disqualified to serve as a director of any particular company – if you are disqualified to serve as a director you are thus disqualified to serve as the auditor
    - Must not be a director or prescribed officer of the company
    - Must not be an employee or consultant of the company who was engaged for more than one year in the maintenance of any of the company's financial records or the preparation of any of its financial statements
    - Must not be a director, officer or employee of a person appointed as company secretary
    - Must not be a person who, alone or with a partner or employees, regularly performs the duties of accountant or bookkeeper, or performs related secretarial work for the company
    - Must not be a person who at any time during the five financial years immediately preceding the date of appointment, was a person as contemplated in above bullet points of this subsection, excluding the first one
    - Must be acceptable to the company's audit committee as being independent of the company in matters of section 94, in the case of a company that has appointed an audit committee
    - Must not be related to anyone described above
- If a company appoints a firm as an auditor, the individual responsible for performing the functions of auditor must satisfy the abovementioned requirements (bullet point 3)
- If a company that is required to appoint an auditor does not do so when it registers the incorporation, the directors must appoint the first auditor of the company within 40 business days after the date of incorporation of the company
- The first auditor holds office until the conclusion of the first annual general meeting of the company
- A retiring auditor may be automatically reappointed at an annual general meeting without any resolution being passed unless
    - The retiring auditor is
        - No longer qualified for appointment
        - No longer willing to accept the appointment and has notified the company
        - Required to cease serving as auditor in terms of sec 92 – rotation
    - An audit committee appointed by the company objects to the reappointment or
    - The company has notice of an intended resolution to appoint some other person or persons in place of the retiring auditor
- If an annual general meeting of a company does not appoint or reappoint an auditor the directors must fill the vacancy within 40 business days after the date of the meeting, procedure in sec 91

Resignation of auditors and vacancies (Sec 91)

- The resignation of an auditor is effective when the notice is filed
- If a vacancy arises in the office of auditor of a company, the board of that company
    - Must appoint a new auditor within 40 business days, if there was only one incumbent auditor
    - May appoint a new auditor at any time, if there was more than one incumbent, but while any such vacancy continues, the continuing auditor may act as auditor of the company
- Before making an appointment
    - The board must propose to the company's audit committee, within 15 business days after the vacancy occurs, the name of at least one registered auditor to be considered for appointment as the new auditor and
    - May proceed to make an appointment of this person if, within 5 business days after delivering the proposal, the audit committee does not give written notice to the board rejecting the proposed auditor
- 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 below bullet point
- If, by comparison with the membership of a firm at the time of its latest appointment, less than one half of the members remain after the change stated above, that change constitutes the resignation of the firm as auditor of the company, giving rise to a vacancy
- Resignation of auditor the same as for company secretary

Rotation of auditors (Sec 92)

- The same individual may not serve as the auditor or designated auditor of a company for more than five consecutive financial years
- If an individual has served as the auditor or designated auditor for a company for two or more consecutive financial years and then ceased to be the auditor or designated auditor, the individual may not be appointed again as the auditor or designated auditor of that company until after the expiry of at least two further financial years
- If a company has appointed two or more persons as joint auditors, the company must manage the rotation required by this section in such a manner that all of the joint auditors do not relinquish office at the same time
- Study guide pg 86 – When it comes to rotation requirements, bear in mind that counting the five years should only start from the effective date of the Act, namely 1 May 2011. In effect, an individual who had served as an auditor for longer than five years on 1 May 2011 may still serve another five years from that date before the rotation requirement becomes effective. An audit firm may thereafter appoint another designated auditor in the firm. Would need to resign after 5 years. (Schedule 5)

Rights and restricted functions of auditors (Sec 93)

- The duties of an auditor are fulfilled in terms of the Auditing Profession Act
- The auditor has right of access at all times to accounting records, all books and documents
- The auditor can require info from directors or prescribed officers any info or explanations necessary for performing his duties
- Entitled to
    - Attend any general shareholders meeting
    - Receive all notices of and other communications relating to any general shareholders meetings and
    - Be heard at any general shareholders meeting on any part of the business of the meeting that concerns the auditor's duties or functions
- An auditor may not perform any services for the company that would place the auditor in a conflict of interest or as stated in section 94 by audit committee
- An auditor may apply to the court for an order if company, directors or prescribed officers preventing performance of auditor's duties

Activity 2 of study guide pages 88-89

- The Act has introduced auditor rotation for public and certain other companies.
  The following applies to public companies:
    - The same individual (not firm) may not serve as a designated auditor for more than five consecutive years
    - If an individual has served for two consecutive years and then ceases to fill the role, he may not be reappointed until two financial years have elapsed
- The designated auditor

- The designated auditor is the individual partner responsible for the audit. The latter audit firm is appointed as the former company's auditors in terms of the companies act, and the designated auditor will be the individual auditor (usually a partner) who takes charge of the audit

Refer to activity 3 of study guide page 89 for meeting requirements

Study Unit 6.4

Audit Committees

Audit Committees (Sec 94)

- At each general meeting, a public company, state owned company or other company required by its MOI to have an audit committee (voluntarily), must elect an audit committee comprising 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 other company will perform the functions required under this section of behalf of that subsidiary company
- The first members of the audit committee may be appointed by
  - The incorporators of the company or
  - By the board within 40 business days after the incorporation of the company
- Each member of an audit committee of a company must
  - Be a director of the company who satisfies applicable requirements set by the Minister relating to adequate financial knowledge and experience to perform the functions
  - Must not be
    - Involved in the day to day management of the company's business or have been so involved at any time during the previous financial year
    - A prescribed officer, or full-time employee, of the company or another related or inter related company, or have been such an officer or employee during the previous three financial years
    - A material supplier or customer of the company
    - A person related to any of the above-mentioned persons
- The board of a company must appoint a person to fill any vacancy on the audit committee within 40 business days after the vacancy arises
- An audit committee of a company has the following duties
  - Nominate an independent registered auditor for appointment
  - Determine 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 the internal audit
    - The content or auditing of the financial statements
    - Internal financial controls
    - Other related matter
  - Make 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
- The audit committee must determine that a registered auditor is independent of a company. They must ascertain that the auditor does not receive any direct or indirect remuneration or other benefits from the company, except as an auditor or for rendering permitted services.
- Neither the appointment nor the duties of an audit committee reduce the functions and duties of the board or the directors of the company, except with respect to the appointment, fees and terms of engagement of the auditor

Topic 7

Transactions

Financial assistance for subscription of securities (Sec 44)

- 2- Except to the extent that the MOI states otherwise, the board may authorise (directors resolution) a company to provide financial assistance (loan, guarantee, provision of security) to purchase or subscribe to their shares for issue, by their company or a related/inter-related company. Subject to subsection 3 and 4
- 3- Despite any provision in the MOI to the contrary, the board may not authorise any financial assistance unless
    - The particular provision of financial assistance is
        - Pursuant to an employee share scheme that satisfies requirements of sec 97 or
        - Pursuant to a special resolution of the shareholders adopted within the previous two years, which approved assistance for the specific person, or generally for a category of potential recipients and this person falls within that category and
    - The board is satisfied that
        - Immediately after providing assistance the company satisfies the liquidity and solvency test and
        - Terms of assistance are fair and reasonable for the company
- 4- The board must ensure that any conditions or restrictions regarding granting financial assistance, as stated in MOI, have been satisfied
- 5- A decision by the board to grant financial assistance would be void if it was inconsistent with
    - This section or
    - A prohibition, condition or requirement contemplated in subsection 4
- 6- If the resolution or agreement is void, a director of the company is liable if the director
    - Was present at the meeting when the board approved the resolution or agreement, or participated in the making of such a decision and
    - Failed to vote against the resolution or agreement, despite knowing it was inconsistent with act, etc
- Does not include lending in the ordinary course of business – eg – if you lent money from a bank and thereafter used it to purchase shares it would not be considered financial assistance, but if a company gives up a building for you to enable you to buy shares then this would be considered financial assistance
- Securities refer to bonds, debentures and any other form of security
- Review activity one in study guide page 99

Study Unit 7.2

Loans and other financial assistance to directors

Loans or other financial assistance to directors (Sec 45)

- This includes lending money, guaranteeing a loan or other obligation, and securing any debt or obligation
- Exclusions
    - Primary business of the company is lending money and the loan in question is in the ordinary course of business
    - Loan for meeting legal expenses relating to a matter concerning the company
    - Assistance for paying for expenses to be incurred by the person on behalf of the company
    - Assistance is an amount to defray the person's expenses for removal at the company's request
- Granting assistance to director of the company or a related person
    - Except to the extent that the MOI provides otherwise, the board may authorise the company to provide direct or indirect financial assistance to a director or prescribed officer of the company or of a related or inter-related company, or to a related or inter-related company or corporation, or to a member of a related or inter-related corporation, director, prescribed officer or member, subject to subsection 3 and 4
- 3- Despite any provision of MOI, the board may not authorise financial assistance unless
    - The particular provision of financial assistance is
        - Pursuant to an employee share scheme that satisfies the requirements of sec 97 or
        - Pursuant to a special resolution of the shareholders, adopted within the previous two years, which approved such assistance either for the specific recipient, or generally for a category of potential recipients, and the specific recipient falls within that category and
    - The board is satisfied that
        - Immediately after providing the financial assistance, the company would satisfy the solvency and liquidity test and
        - The terms are fair and reasonable to the company
- 4- The board must ensure that any conditions or restrictions set out in the MOI have been satisfied
- If the board of a company adopts a resolution, the company must provide written notice of that resolution to all shareholders, unless every shareholder is also a director of the company, and to any trade union representing its employees
    - Within 10 business days after the board adopts the resolution, if the total value of all loans, debts, obligations or assistance contemplated in resolution, together with any previous such resolution during the financial year, exceeds $1/10^{th}$ of 1% of the company's net worth at the time of the resolution or
    - Within 30 days after the end of the financial year in other cases
- A resolution or agreement is void if that provision is inconsistent with
    - This section
    - A prohibition, condition or requirement of subsection 4
- The director of the company is liable if the director
    - Was present at the meeting when the board approved the resolution or agreement, or participated in the making of such a decision and
    - Failed to vote against the resolution or agreements, despite knowing that the provision was inconsistent with this section or MOI
- Refer to activity 2 & 3 in study guide page 103

Study Unit 7.3

Proposals to dispose of all or the greater part of assets or undertaking

Fundamental transactions
This is a transaction that significantly affects ownership of a company's assets or that signal a notable change in shareholding of a company. This includes disposal of all or the greater part of the company's assets or undertaking, amalgamations or mergers and schemes of management.

Proposals to dispose of all or greater part of assets or undertaking (Sec 112)

- (1) This section and section 115 do not apply to a proposal to dispose of all or the greater part of the assets or undertaking of a company, if that disposal would constitute a transaction
  - (a) that is pursuant to or contemplated in a business rescue plan adopted in accordance with Chapter 6;
  - (b) between a wholly-owned subsidiary and its holding company; or
  - (c) between or among
    - (i) two or more wholly-owned subsidiaries of the same holding company; or
    - (ii) 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.
- (2) A company may not dispose of all or the greater part of its assets or undertaking unless
  - (a) the disposal has been approved by a special resolution of the shareholders, in accordance with section 115; and
  - (b) the company has satisfied all other requirements set out in section 115, to the extent those requirements are applicable to such a disposal by that company.
- (3) A notice of a shareholders meeting to consider a resolution to approve a disposal contemplated in subsection (2)(a) must
  - (a) be delivered within the prescribed time, and in the prescribed manner, to each shareholder of the company, subject to section 62 read with any changes required by the context
  - (b) include or be accompanied by a written summary of
    - (i) the precise terms of the transaction or series of transactions, to be considered at the meeting; and
    - (ii) the provisions of sections 115 and 164,
    - in a manner that satisfies the prescribed standards
- Any part of the undertaking or assets of a company to be disposed of, as contemplated in this section, must be fairly valued, as calculated in the prescribed manner, as at the date of the proposal, which date must be determined in the prescribed manner
- A resolution contemplated in subsection (2)(a) is effective only to the extent that it authorises a specific transaction

Required approval for transactions contemplated in part (Sec 115)

- (1) Despite section 65, and any provision of a company's MOI, or any resolution adopted by its board or holders of its securities, to the contrary, a company may not dispose of, or give effect to an agreement or series of agreements to dispose of, all or the greater part of its assets or undertaking, implement an amalgamation or a merger, or implement a scheme of arrangement, unless
  - (a) the disposal, amalgamation or merger, or scheme of arrangement
    - (i) has been approved in terms of this section; or
    - (ii) is pursuant to or contemplated in an approved business rescue plan for that company, in terms of Chapter 6; and
  - (b) to the extent that Parts B and C of this Chapter, and the Takeover Regulations, apply to a company that proposes to
    - (i) dispose of all or the greater part of its assets or undertaking;
    - (ii) amalgamate or merge with another company; or
    - (iii) implement a scheme of arrangement, the Panel has issued a compliance certificate in respect of the transaction, in terms of section 119(4)(b), or exempted the transaction in terms of section 119(6)
- (2) A proposed transaction contemplated in subsection (1) must be approved
  - (a) by a special 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 of the voting rights that arc entitled to be exercised on that matter, or any higher percentage as may be required by the company's MOI, as contemplated in section 64(2); and

    - (b) by a special resolution, also adopted in the manner required by paragraph (a), by the shareholders of the company's holding company if any, if
        - (i) the holding company is a company or an external company;
        - (ii) the proposed transaction concerns a disposal of all or the greater part of the assets or undertaking of the subsidiary; and
        - (iii) having regard to the consolidated financial statements of the holding company, the disposal by the subsidiary constitutes a disposal of all or the greater part of the assets or undertaking of the holding company; and
    - (c) by the court, to the extent required in the circumstances and manner contemplated in subsections (3) to (6).
- (3) Despite a resolution having been adopted as contemplated in subsections (2)(a) and (b), a company may not proceed to implement that resolution without the approval of a court if
    - (a) the resolution was opposed by at least 15% of the voting rights that were exercised on that resolution and, within five business days after the vote, any person who voted against the resolution requires the company to seek court approval; or
    - (b) the court, on an application within 10 business days after the vote by any person who voted against the resolution, grants that person leave, in terms of subsection (6), to apply to a court for a review of the transaction in accordance with subsection (7)
- (4) For the purposes of subsections (2) and (3), any voting rights controlled by an acquiring party, a person related to an acquiring party, or a person acting in concert with either of them, must not be included in calculating the percentage of voting rights
    - (a) required to be present, or actually present, in determining whether the applicable quorum requirements are satisfied; or
    - (b) required to be voted in support of a resolution, or actually voted in support of the resolution
- (5) If a resolution requires approval by a court as contemplated in terms of subsection (3)(a), the company must either
    - (a) within 10 business days after the vote, apply to the court for approval, and bear the costs of that application; or
    - (b) treat the resolution as a nullity.
- (6) On an application contemplated in subsection (3)(b), the court may grant leave only if it is satisfied that the applicant
    - (a) is acting in good faith
    - (b) appears prepared and able to sustain the proceedings; and
    - (c) has alleged facts which, if proved, would support an order in terms of subsection (7).
- (7) On reviewing a resolution that is the subject of an application in terms of subsection (5)(a), or after granting leave in terms of subsection (6), the court may set aside the resolution only if
    - (a) the resolution is manifestly unfair to any class of holders of the company's securities; or
    - (b) the vote was materially tainted by conflict of interest, inadequate disclosure, failure to comply with the Act, the MOI or any applicable rules of the company, or other significant and material procedural irregularity.
- (8) The holder of any voting rights in a company is entitled to seek relief in terms of sec 164 if that person
    - (a) notified the company in advance of the intention to oppose a special resolution contemplated in this section; and
    - (b) was present at the meeting and voted against that special resolution.
- (9) If a transaction contemplated in this Part has been approved, any person to whom assets are, or an undertaking is, to be transferred, may apply to a court for an order to effect
    - (a) the transfer of the whole or any part of the undertaking, assets and liabilities of a company contemplated in that transaction;
    - (b) the allotment and appropriation of any shares or similar interests to be allotted or appropriated as a consequence of the transaction;
    - (c) the transfer of shares from one person to another;
    - (d) the dissolution, without winding-up, of a company, as contemplated in the transaction;
    - (e) incidental, consequential and supplemental matters that are necessary for the effectiveness and completion of the transaction; or
    - (f) any other relief that may be necessary or appropriate to give effect to, and properly implement, the amalgamation or merger.

From Revision Slides

- Use the information in a given scenario to determine whether it is in fact the sale of the greater part of assets
- Special resolution of shareholders must be obtained

- Shareholders must receive notice of the plan to sell the assets which should include, in additional to the information that must always be on the notice
- Written summary of the transaction
- Sale value must be fair towards company