

## **COMPANY LAW SUMMARY:**

### **MEETINGS**

#### **Notice of meetings: S62:**

1. Must be in writing.
2. Include the date, time and place of the meeting.
3. Where the company set a record date for a meeting
4. The notice should explain the general purpose of the meeting
5. In a public company and a non-profit company that has voting members, notice of a shareholder meeting should be given 15 business days before the date of the meeting. In any other company the notice, convening the meeting must be sent ten business days before the date of the meeting. The provisions of the memorandum of Incorporation may prescribe longer minimum notice.
6. A copy of any proposed resolution received by the company, which is to be considered at the meeting, must accompany the notice convening the meeting.
7. The notice must indicate the percentage of voting rights required for the resolution to be adopted.
8. A notice convening the AGM of a company must contain a summary of the financial statements that will be tabled at the meeting.
9. A notice convening a meeting must contain a statement that a shareholder is entitled to appoint a proxy
10. The notice should indicate that meeting participants will be required to provide satisfactory proof of identity at the meeting. Where the company has failed to give proper notice of the meeting or there has been a defect in the giving of the notice, the meeting may proceed if the persons who are entitled to vote in respect of each item on the agenda are present at the meeting and acknowledge actual receipt of the notice and agree to waive notice of the meeting or in the case of a material defect, ratify the defective notice.

The term shareholder is used in respect of profit companies. The term member is used in respect of non profit companies.

### **PROXY:**

A proxy is a person appointed to represent a shareholder at a meeting.

- ❑ At common law: there was no right to appoint a person, speak and vote on behalf of another.
- ❑ The companies Act allow a shareholder to appoint two or more proxies.

Once appointed, a proxy will be allowed to attend, participate in, speak and vote at the shareholders' meeting.

Ingre v Maxwell the court held that there must be at least two persons present to constitute a valid meeting where one person is in attendance and holds the proxies of all other persons who were entitled to attend the meeting.

- The appointment of a proxy must be in writing and signed by the shareholder appointing the proxy.
- The appointment remains valid for one year after it was signed.
- A proxy may delegate authority to act on behalf of the shareholder to another person.

- A copy of the proxy appointment form must be delivered to the company prior to the proxy exercising any rights of the shareholder at the shareholders meeting.
- The shareholder who appoints the proxy has the right to revoke the proxies' appointment at any time by cancelling it in writing, or making a later inconsistent appointment of a proxy and delivering a copy of the revocation instrument to the proxy and the company.

### **Demand to convene a shareholders' meeting**

The board or any other person specified in the company's Memorandum, may call a shareholders' meeting at any time

A meeting of shareholders must be convened if one or more written and signed demands for such a meeting are delivered to the company:

1. A demand must specify the purpose of the meeting.
2. Must be signed by the holders of at least 10% of the voting rights
3. The memorandum of Incorporation of a company may specify a lower percentage than 10%.
4. A company, or any shareholder of the company, may apply to a court for an order setting aside a demand for a meeting on the grounds that the demand is frivolous, or because it calls for a meeting for not other purpose than to re-consider a matter that has already been decided by the shareholders, or is vexatious.
5. A shareholder who submitted a demand for a meeting may withdraw the demand before the start of the meeting.

### **Shareholders acting other than at a meeting**

Act without holding a meeting

B4: don't need to hold an AGM if all the members entitled to attend consent in writing

Common law: unanimous assent:

Some decisions are valid without having a meeting if all the members know of the facts and have assented to it

Gohlke: shareholders appointed a director without a formal meeting if they have unanimous assent

In re Deuomatic: approval of directors salary by the 2 directors who had majority of the voting rights in the co could be done by unanimous assent

1973 Act: all members entitled to attend the meeting must consent in writing for a resolution to be passed without a formal meeting. Such decision is made as if a formal meeting was held

2008 Act: resolutions can be adopted in writing without a formal meeting – if its done by the required majority – it will be as if the meeting was held.

BUT AGM cant be conducted in this way

The rights must be exercised within 20 days of getting notice and members must return a written vote. Within 10 days of the adoption of the resolution = the company must deliver the results.

**RECORD DATE**

The term "record date" is defined in section 1 of the 2008 Act as the "date established under section 59 on which a company determines the identity of its shareholders and their shareholdings for the purposes of this Act".

The 2008 Act introduces new provisions enabling the board to set one or more appropriate record dates for determining which shareholders should:

- receive notice of a shareholders meeting,
- participate in and vote at a shareholders meeting,
- decide a matter by written consent
- exercise pre-emptive rights,
- receive a distribution, or
- be allotted or exercise other rights.

The record date may not be earlier than the date on which the board sets the record date, nor more than 10 business days before the date on which the event or action for which the record date is being set, is planned. The method for calculating the number of business days is set out in section 5(3) of the 2008 Act.

Where the board has set a record date, shareholders must be notified of the record date as prescribed in the 2008 Act

If the board does not determine a record date, then the record date for convening a meeting, is:

- the latest date by which the company is required to give shareholders notice of that meeting
- or in the case of another event or action, the date of the event or action, unless the company's Memorandum of Incorporation ("**MOI**") or Rules provide otherwise.

**Annual General Meetings (AGM)**

The first AGM of a public company must occur no more than 18 months after the date of incorporation of the company.

The subsequent AGM must occur within 15 months of the previous AGM.

The following matters must be discussed at every AGM:

- Director's report, financial statements
- The audit committee report.
- Election of directors.
- Appointment of the Auditor and the audit committee.
- Any matters raised by the shareholders

**Convening a meeting in special circumstances**

- Where the company cannot convene a meeting because it has no directors, or because all of its directors are incapacitated, any other person authorised by the company's Memorandum of Incorporation may convene the meeting.
- If no other person is authorised = any shareholder may request the Companies Tribunal to issue an administrative order for a shareholders meeting to be convened.
- a shareholder may apply to a court for an order requiring the meeting

**Quorum**

S64: A shareholders meeting may not begin until sufficient people are present, in aggregate, exercise at least 25% of the voting rights that are entitled to be exercised in respect of at least one matter to be decided. A company's Memorandum of incorporation may specify a lower or higher percentage than the 25%.

If a company has more than two shareholders and only two are present, a meeting may not begin until at least three shareholders are present.

**Conduct of meetings**

**Show of hands:** any person present and entitled to exercise voting rights must have only one vote, irrespective of the number of shares held by that person.

**Poll:** any member including his or her proxy must be entitled to exercise all their voting rights attached to the shares held by him.

A company may provide for a shareholders' meeting to be conducted entirely by electronic communication or allow one or more shareholders or proxies, to participate by electronic communication in all or part of a shareholders' meeting that is being held by that person.

**Resolutions**

**Ordinary resolution:** decision with the support of more than 50% of the vote. The Memo may require a higher percentage on certain decisions. The act provides there must be at least a margin, at all times, of at least 10% between the requirements for adoption of an ordinary or special resolution.

**Special resolution:**

- ❑ Requires 75% of the voting rights exercised
- ❑ Memo can provide for a lower %
- ❑ There must be a margin of at least 10 percentage points between the requirements for a special resolution and an ordinary resolution

**Decisions that require a special resolution**

A special resolution is required when taking the following decisions:

- Amendment of the company's Memorandum of Incorporation
- Approving a voluntary winding up of the company; and
- Approval of a sale of assets, a merger, an amalgamation or a scheme of arrangement.

**Postponement and adjourning of meetings**

A meeting may be postponed or adjourned for a week under the following conditions:

- Within one hour after the appointed time for a meeting to begin, a quorum is not present;
- When a quorum is not present at an adjourned or postponed meeting, the members of the company present in person or by proxy will all be deemed to constitute a quorum; and
- If there is other business on the agenda of the meeting, consideration of that matter may be postponed to a later time in the meeting without motion or vote.

**CORPORATE FINANCE**

A co get money to do business in 2 ways (HYBRID SYSTEM)

<b>EQUITY FINANCE:</b>  Issue shares = co share capital, shareholder gets a return on their investment through dividends	<b>DEBT FINANCE:</b>  Loans – debt security in terms of the debt – the creditor gets an amount and interest within a specific time
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**SHARE CAPITAL:**

- **Nominal share capital:** authorized share capital
- **Issued share capital:** shares sold

**Company shares**

Every company having share capital must have two types of share capital: the nominal share capital (authorized share capital) and issued share capital.

Company's act: requires the class and the number of shares of each class to be stated in the Memorandum of each company.

There is no minimum share capital prescribed

**Under the 1973 Act** = the share capital of a company may be divided into shares having par value or non par value

**Share**

Is incorporeal movable property transferable in the manner provided for in the Act (or any other legislation) and in terms of a Company's memorandum. A share is merely a measure of a shareholders' interest in a company. This interest consists of certain personal rights, which may be disposed of or transferred to some other person.

A share is defined in the Act as, one of the units into which the proprietary interest in a profit company is divided.

**Borland's trustee:** a share is merely the interest of a person in the company that interest being composed of both financial and non-financial rights and duties.

In **Standard Bank of SA Ltd v Ocean Commodities Inc:** a shareholder has a right to share in profits that have been declared by the company as a dividend and he or she has a share in the net assets of the company on a winding-up.

**Classes of shares**

Rights of shareholders:

1. The right to vote
2. The right to information
3. The right to share in the profits of a company that have been declared as dividend; and

4. The right to share in the net surplus capital of a company on its winding-up.

Classes of shares:

1. Ordinary Shares
2. Preference shares (convertible/redeemable or irredeemable preference shares)
3. Deferred shares (founders' shares)

**Preference shares**

Rights:

- Preferential payment
- Fixed percentage of the nominal value of the share
- Preference shares are paid before ordinary shareholders are paid their dividend.

S90 Companies Amendment 1999, a dividend may, if the articles permit and the company comply with the solvency and liquidity test, be paid out of capital.

Right to vote:

In return for the shares the memo usually limits the right to vote – BUT in terms of S37 (5)(a): provides that they have an irrevocable right to vote on any proposal to amend the preferences, rights and other terms associated with their shares.

Under the OLD ACT: S197: said they had a right to vote when

- ☐ The dividend remained in arrears or unpaid (not repeated in the new Act)
- ☐ Resolutions which affected their rights were proposed
- ☐ Or the winding up of the company (not mentioned in the new Act)

Utopia vakansie oorde v du Plessis

Held: in the context of voting rights, in arrears or unpaid mean either:

1. The dividend hasn't been declared
2. It remains unpaid even though, it may have been declared

A resolution can only affect the rights attaching to shares if it caused a variation of those rights by changing, prejudicing or affecting their extent or content.

With regard to a preference shareholders right to participate in distribution of surplus assets on liquidation, if the preference shareholders enjoy a prior right to return of capital on liquidation, they don't usually have the right to participate in such distribution

**S37 New Act:** there must be at least one class of shareholders of the company that may vote = the company can't be allowed to only issue preference shares which don't have the right to vote  
MOI can limit the right to vote BUT S37 gives the right to vote for the amendment of the share preference, rights or any limitation associated with the shares

**Cumulative Preference shares**

Non cumulative preference shares: receipt of a preferential dividend is dependent on whether a company has made a profit and whether it has declared a dividend, it may happen that a company resolves not to declare a dividend on its preference shares in a particular financial year.

Cumulative preference shares: should a dividend not be declared in any one year, that arrear dividend would then have to be paid before any dividend is paid to ordinary shareholders. The preferent shareholders continue to enjoy their right of preference in respect of any dividends declared in future.

**Participating preference shares**

Preference shares are presumed to be non-participating, that is, preference shareholders are entitled only to their fixed preferential dividend but are not entitled to share in any surplus profits after the payment of their dividends, no matter how profitable the company may be.

**Convertible preference shares**

Preference shareholders the right to convert usually after a given date = change their preference shares into shares of another class

**Ordinary shares**

If the company has issued preference shares, the ordinary shareholders receive their share of dividends that have been declared after the preferential dividend has been paid to pref shareholders.

The amount of the dividend paid to ordinary shareholders is not fixed as it is in the case of the preferential shares = the dividend paid to ordinary shareholders, fluctuates in accordance with the profits of the company  
It is usually the ordinary shareholders who enjoy a right to vote at general meetings of shareholders.

Under the companies act, 2008 **non-voting shares** are permitted = they are useful for those who wish to raise more share capital without wanting to lose control of the company.

The disadvantage of non-voting shares is that they are enable shareholders holding only a small proportion of the shares of the company to exercise effective control over the company.

**Deferred shares** - “founders shares”

Qualify for a dividend after a prescribed minimum dividend has been paid to ordinary shareholders.

**Capitalisation shares**

The company has converted its distributable profits into share capital instead of declaring dividends out of its distributable profits.

Divisible profits of the company may be paid out in the form of fully paid capitalisation shares and in this way, its profits are capitalised.

The number of capitalisation shares to be received by each shareholder depends on the proportion of his or her shareholding in the company  
S47 2008 Act: Capitalisation shares are permitted unless prohibited by the company’s memorandum.

Board may permit a shareholder to elect to receive a cash payment instead of capitalisation shares if the company's Memorandum so permits and the board is satisfied, on the assumption that even if every shareholder elects to receive cash that the **solvency and liquidity** test of the company would be complied with immediately upon the completion of the distribution.

### **Issue of shares**

The 2008, Act: circumstances where an issue of shares are to be approved by special resolution of the company's shareholders:

- Where the shares are issued to directors, future directors, or officers of the company
- Where the shares are issued to a person related to the company or a director or prescribed officer of the company.
- Where the shares are issued to a nominee of a director or prescribed officer of the company.

No special resolution is required where the shares or securities are:

- Issued under an underwriting agreement;
- In the exercise of pre-emptive rights;
- In proportion to existing shareholdings
- On the same terms and conditions as have been offered to all shareholders of the company
- In pursuance of an employee share scheme
- Or an offer of shares to the public.

If the voting power of the shares to be issued would exceed 30% of the voting power of all the shares held by the shareholders prior to issue, a special resolution of the members is required.

**Pre-emptive rights:** Shareholders in private companies will enjoy pre-emptive rights to new shares to be issued by the company except for shares issued to satisfy the exercise of share options, shares not issued for a cash consideration or capitalisation shares.

Pre-emption: right given to shareholders to subscribe for new shares to be issued by the company for cash *pro rata* to their existing shareholders.

Disadvantage of pre-emptive rights: restrict the flexibility, which many large companies require in raising new share capital and in structuring their share capital.

### **Debentures**

The financing of public companies differs from private companies, as the latter are not permitted to invite members of the public to subscribe for their shares or securities

Ways a company may finance its activities:

- ❑ A loan from a bank
- ❑ Issue notes, bonds and debentures

Advantage: is the flexibility given to it in the range of debt and equity securities that it may issue as well as hybrids consisting partly of debt and partly of equity.



**A debenture:** is a document issued by a company acknowledging that it is indebted to the debenture holder in the stated amount. This document is *prima facie* evidence of title, in the same way that a share certificate is. The debenture may be secured or unsecured.

- ❑ A debenture holder is a creditor of the company
- ❑ A debenture holder is not a member or shareholder of the company.
- ❑ Debenture holders are entitled to a copy of the company's annual financial statements.

### **Companies act:**

A debenture: a debt instrument including any security other than the shares of a company whether issued in terms of security document or not, but excluding promissory notes and loans.

The board of directors will have the power to issue secured or unsecured debentures unless the memorandum provides otherwise.

The board must designate whether the debenture or debt instrument is secured or unsecured. Such debt instruments may carry with them the right to attend and vote at general meetings and to appoint directors unless the company's memorandum provides otherwise.

### **Certified and uncertified shares:**

Certified shares: are evidenced by a certificate, which serves as *prima facie* proof of ownership (but isn't a negotiable instrument). Delivery of the certificate isn't required for a transfer of ownership.

A new certificate with the details of the new owner will be issued and authorised by the board (signed by 2 people authorised). It will contain:

- Name of the issuing company
- Name of the person to whom the shares were transferred
- Class, number of shares

Uncertified shares: are held and transferred by electronic means. A central security depository is licensed to operate the electronic system for the holding and transfer of uncertified shares (Strate)

The company's register of issued shares must include the number of uncertified securities

Transfer of uncertified shares done by debiting and crediting the relevant account in the securities register

Ownership WILL transfer even if any fraud, illegality or insolvency affected the security/transfer unless the transferee was a party to or had knowledge of such fraud etc

Perpetrator of unlawful action re uncertified shares is liable to any person who suffers any direct loss/ damage

Nominee: person acting as the registered owner of the security – nominated by the owner to be the registered holder and holds the security in name only – the real owner is called the beneficial owner of the security. Nominee is an agent with limited authority and must act on instruction

### **PUBLIC OFFERS OF SECURITIES:**

When a company sells shares to the public – the offer must be accompanied by a prospectus: enough information to enable the prospective investor to make an informed decision

Primary offer: offer to the public by the company

Secondary offer: offer for sale to public of securities of a co by a person other than the company

If an offer is made to the PUBLIC, accompanied by a prospectus: document which must accompany all initial public offers and all primary offer for unlisted securities

Prospectus must 1<sup>st</sup> be registered with the commission before it can be issued.

It must contain:

- Assets and liabilities
- Financial position
- Securities being offered

### **The following are NOT offers to the public:**

- Offer to specified share dealers (stock brokers, financial institutions)
- Total cost is not less than R100 000
- Offer is made to existing holders
- Listed securities
- Offer to directors
- Offer which is part of an employee incentive scheme
- Small issue: accepted by maximum 50 people

### **LIABILITY FOR AN UNTRUE PROSPECTUS:**

Common law: buyer could claim damages for fraud or negligent misrepresentation, based on the prospectus, which caused damage = prove all the elements of delict (esp fault)

S104: person who acquires securities based on prospectus can recover the loss/damage as a result of any untrue statement without proving fault

S102 personal liability due to untrue prospectus:

- Person who becomes a director between issuing of the prospectus
- Persons who consent to be named as director in prospectus
- Promoter of company
- Person authorized to issue the prospectus

SECONDARY OFFERS:

Must be accompanied by registered prospectus (if done with a primary offer) or by a written statement, which is signed and dated and includes:

- AFS
- Information about the seller
- Information about the company

Person who is party to the preparation, approval or publication of a written statement, which contains an untrue statement, commits an OFFENCE

**DIRECTORS:****Directors and board committees****DIRECTORS: S66:**

- Appointed (50% public elected by SH)
- Authorised in the Act/ MOI
- Deliver written consent accepting appointment

**EXECUTIVE DIRECTOR:** is an employee, is involved in the day to day management, separate service contract

**NON EXECUTIVE DIRECTOR:** Not an employee, no separate contract, isn't there on a day to day basis but can attend and vote at meetings

Howard: both executive and non executive directors owe fiduciary duties to the company

**EX OFFICIO:** Holds office as a director of a company solely as a result of that person holding another office or title of status. Not appointed by shareholders.

**DE FACTO DIRECTORS:** Act as director without being appointed in terms of the MOI or qualified or appointment doesn't comply with the Act. They aren't legally directors but their actions are valid until the irregularity was discovered

**DIRECTORS:** don't have to be employees

1. Protects the co assets and represents the co
2. Owes a Duty of care and skill and fiduciary duties to the co
3. Are accountable and can be removed by the shareholders
4. Looks at the ethical position of the co
5. Responsible for the co administration (day to day management)
6. Can be disqualified by the Act/ MOI

**MANAGERS:** Must be an employee of the company

1. Implement decisions and policies made by the board
2. Can't act against the interests of the employer
3. Appointed and dismissed by directors
4. Board tells them what to do
5. Directors can delegate the company's admin to the managers – but directors are still liable
6. Employment contract

Private and personal liability company must have at least one director.

A public and non-profit company must have at least three.

**Ineligible and disqualified persons: S69****INELIGIBLE:** prohibited from being a director NO EXCEPTIONS

- ❑ A juristic person.
- ❑ An unemancipated minor or person under a similar legal disability.
- ❑ Any person who does not satisfy any requirement in a company's Memorandum.

**DISQUALIFIED:** Can be a director if fall into the exceptions:

1. Prohibited by a court of law from becoming a director.
2. Declared a delinquent by the court.
3. Unrehabilitated insolvent
4. Prohibited in terms of any public regulation to be a director
5. Removed from an office of trust because of dishonesty
6. Convicted and imprisoned of a crime without the option of a fine (for theft, forgery, perjury and fraud)
7. Disqualified in terms of a company's Memorandum

**EXEMPTIONS****Exemptions by a court**

In terms of S69 (11) a court may exempt certain disqualified persons from the disqualifications. The following persons may apply to court for such an order:

- An unrehabilitated insolvent;
- A person who was removed from an office of trust for dishonest misconduct; or
- A person who was convicted of a crime with an element of dishonesty.

S69 (11) implies that the relevant person will have to make an *ex parte* application to court for permission to act as a director despite the disqualification.

In an application for permission to accept the position of director despite the disqualification, the applicant will have to prove to the court that he or she has been rehabilitated from his or her wrongful ways and can be trusted with the responsibilities of a director.

In *Ex Parte Tayob*: the applicants were convicted of bribery, a year after the conviction they brought an application for permission to be allowed to act as directors despite their disqualification. The court held that bribery and corruption imposes a serious threat, the court concluded that too little time had lapsed between the date of the conviction and the application to prove that they had been rehabilitated.

For private companies: S69(12): such person can be a director of a private company, if:

- All the shares are held by the disqualified person
- SH have given consent that such person act as director in writing

*Ex Parte Barron: court looks at:*

- The offence
- Was it 1<sup>st</sup> conviction
- Punishment imposed
- Public or private company
- SH attitude

Courts are more lenient with private companies

**S162: DELINQUENCY/ PROBATION:**

The following persons can apply to court for such an order: company, shareholder, director, A company secretary or prescribed officer of a company, A registered trade union that represents employees of the company, Any other representative of the employees of company, The commission AND The takeover regulation panel.

DELINQUENCY	PROBATION
<ul style="list-style-type: none"> <li>▪ Consents to be a director while ineligible (FOR LIFE)</li> <li>▪ Acted as director while under probation (FOR LIFE)</li> <li>▪ Abused his position as director</li> <li>▪ Used information for personal capacity</li> <li>▪ Gross negligence</li> <li>▪ Breach of trust</li> <li>▪ Failed to vote against a resolution which had to do with liquidity and solvency</li> </ul> <p>REST 7 YEARS</p>	<ul style="list-style-type: none"> <li>▪ Acted against his duties as director</li> <li>▪ Acted oppressively or in an unfairly prejudicial manner</li> </ul> <p>FOR 5 YEARS</p>

Orders can include:

- Remedial education
- Community service
- Payment of compensation to an affected person

**Application to the court**

A person, who has been declared delinquent, other than where the declaration is unconditional and subsists for the lifetime of the person declared delinquent, may apply to a court:

- To suspend the order of delinquency and substitute an order of probation, with or without conditions at any time more than 3 years after the order of delinquency was made;
- To set aside an order of delinquency at any time more than 2 years after it was suspended as contemplated in above paragraph.

The applicant must show he is rehabilitated and has fulfilled any conditions

**First directors of a company**

Every incorporator of the company is deemed a director until sufficient directors have been appointed to meet the required minimum number of directors.

the board must call a shareholders' meeting within 40 business days after the date of incorporation for the purpose of electing sufficient directors to fill all vacancies on the board at the time of the election.

**Vacancies on the board**

A person ceases to be a director and a vacancy arises on the board of a company in any of the following circumstances:

- When the period of the fixed term contract expires as provided by the Memorandum.
- Person resigns
- Person dies
- Position of an *ex officio* director becomes vacant if the person ceases to hold the office or title that entitled the person to be such a director
- Ceases to reside in South Africa, when no other directors are resident in South Africa
- Person becomes incapacitated to the extent that the person is unable to perform the functions of a director and is likely to regain that capacity within a reasonable time
- Declared delinquent
- Placed on probation under conditions that are inconsistent with continuing to be a director
- Becomes ineligible or disqualified from being a director
- Removed from office by resolution of the shareholders or by the board, or by order of the court.

**S71: REMOVAL OF DIRECTORS**

BEFORE Amdts: if there was an agreement between the directors and SH, such director could restrain SH from voting for his removal. The 2008 companies Act changes this, a director can be removed:

- Despite a memorandum or rules;
- Despite any agreement between the company and a director; and
- Despite any agreement between any shareholders and a director,

Removal by shareholders

A director may be removed by shareholders by an ordinary resolution adopted at a shareholders meeting = despite the contrary in:

- The MOI
- An agreement

**Notice of the meeting** period of notice that should be given is equivalent to that which a shareholder is entitled to receive when convening a meeting. The director must be allowed the reasonable opportunity to make a presentation, in person or through a representative, to the meeting, before the resolution is put to a vote.

Removal by the board of directors

The grounds upon which a director may be removed by a resolution of the board are as follows:

1. a director of the company has become ineligible or disqualified
2. Where a director has become incapacitated
3. The director has neglected the functions of the director or the board.

The director can take the boards decision on review within 20 days from which the decision was made

If the company has less than 3 directors, any director or shareholder can refer to the companies tribunal re removal

Removal and breach of contract

Removal as a director in terms of the 2008 act could constitute breach of contract. The particular director will retain the right to institute any claim that he or she has in terms of the common law for damages or other compensation for loss of office as a director or loss of any other office as a consequence of being removed as a director.

**De Villiers:** the articles and directors appointment isnt a contract – a person who wants to claim damages for breach must prove the existence of a valid contract



**COMPANY SECRETARY:****S88: DUTIES:**

- Give directors guidance re their duties
- Make directors aware of any law that affects the co
- Report on the failure to comply with the Act
- Ensure that the minutes of the meeting are taken
- Ensure that AFS are in order
- Give a copy of the AFS to anyone who requires it

Public and state owned enterprises must have a co secretary

**Disqualifications:**

- Prohibited from being a director
- Delinquency order
- Unrehabilitated insolvent
- Removed from an office of trust because of misconduct
- Convicted and imprisoned without the option of a fine of fraud, forgery etc

**Panorama Developments:**

The company secretary has APPARENT AUTHORITY with regard to the day to day running of the co – co may be bound by a contract concluded by the secretary

**DUTIES OF DIRECTORS**

**The 1973 Companies act** there were NO codified rules for directors

**Common law:** looked at a director's duty of care and skill and his fiduciary duties

**2008 Companies Act:** partially codified the common law rules – requires a standard of conduct, common law still applies

**COMMON LAW**

A director has a mandate to act on behalf of the co in good faith and in the company's best interests

**1. PREVENT A CONFLICT OF INTEREST:**

- Don't benefit from your position other than from remuneration – don't make secret profits = even if its done openly, in good faith and at no expense to the company (Robinson, Regal)
- Don't use information you got in your capacity as director for own benefit
- Don't compete with the company (Atlas, Cooley)
- This applies even if the director has resigned but he got the information in his capacity as director

**2. DON'T EXCEED THE LIMITATIONS OF YOUR POWERS:**

- Look at the co capacity and the duties

**3. MAINTAIN AN UNFETTERED DISCRETION**

- There can be no voting agreements between directors as they must act in the co best interests

**4. EXERCISE POWERS FOR THE REASON THEY ARE GIVEN**

- Don't act unfairly prejudicial/ oppressive

**2008 COMPANIES ACT:****S76 (2):**

- Don't abuse your position or use information for your own benefit
- Disclose material facts which are beneficial to the co

**S76 (3):**

- Act in good faith
- Acts in the companies best interests

**S75:** director must disclose any material interest in the company's matters

If not a shareholder:

- Disclose the interest to the shareholders
- Get approval by ordinary resolution
- Written notice

Others:

- Disclose the interest to the board
- Board considers it without the director being present
- Written notice

### **CARE AND SKILL:**

#### **COMMON LAW:**

Fisheries Development: to assess the duty of care and skill look at:

- The nature of the co business
- Don't require any special expertise
- Can delegate their powers
- Don't need to give continuous attention to the companies affairs
- If in breach of this duty = liable for damages

In re Equitable Fire Insurance Co Ltd (1925) 1 Ch 407,428, 429). A director is not liable for a mere error in judgment, directors don't need to perform their duties with a greater degree of care and skill than reasonably expected from someone with his knowledge and experience

In respect of all duties that can be delegated to another official, a director is entitled in good faith to trust that they will perform their duties honestly and a director can accept and rely on the judgment, information or advice of management unless there is a reason to question it.

#### **2008 COMPANIES ACT:**

##### **S76 (3):**

Objective test: would the reasonable person have done the same thing in the same situation

Subjective: look at that director:

Look at his:

- Knowledge
- Skill
- Experience

Did he take all reasonable steps to become informed?

The director will be excused from liability if the director had a rational basis for believing and did believe that the decision was in the best interests of the company

S76 (4): Business judgment rule:

A director wont be liable of he took all reasonable steps to be informed:

- No one had an interest that he knew of
- He disclosed any personal interest
- He believed that the decision was in the best interests of the co

A director wont be liable for a decision which leads to undesirable results if the decision was made in good faith, with care and on an informed basis  
This encourages qualified people to take up positions without fear of liability

**LIABILITY OF DIRECTORS**

The company may recover loss, damage or costs sustained by the company from the director under the following circumstances:

1. Delictal liability for breach of fiduciary duties
2. Where a director acted in the name of the company or signed anything on behalf of the company while the director knew that he lacked the necessary authority
3. Didn't comply with the requirements for a pre incorporation contract
4. The director is 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
5. The director signed, consented to or authorized the publication of a prospectus or a written statement that contained an 'untrue statement'
6. Where the director was present at a meeting or participated in the making of a decision where there was non-compliance with the formalities prescribed in the act
7. Where a director failed to vote against the issuing of any unauthorized shares, despite knowing they were unauthorized
8. Allowed the holding co to buy shares without maintaining liquidity and solvency

The director will be jointly and severally liable with any other person who is or may be held liable for the same act.

Proceedings to recover any loss, damages or costs may not be commenced more than 3 years after the act or omission that gives rise to that liability occurred.

**INDEMNIFICATION AND DIRECTORS INSURANCE**

The company cannot undertake not to hold a director liable for breach of duties and any provision in an agreement, the memorandum or rules of the company, a resolution adopted by a company, whether express or implied, is void to the extent that it directly or indirectly purports to relieve a director of a duty.

The company is entitled to take out indemnity insurance to protect a director against any liability or expenses for which the company is permitted to indemnify a director.

**S78:** A company may not indemnify a director in respect of any liability arising in the following circumstances:

- Where a director acted in the name of the company or signed anything on behalf of the company or purported to bind the company or authorize the taking of any action on behalf of the company while knowing that he or she lacked authority to do so.
- Where the director acquiesced in the carrying on of the company's business in insolvent circumstances while knowing that it was being so conducted.

- Where the director was 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.
- Where the company's loss or liability arose from willful misconduct or willful breach of trust on the part of the director.
- Where the director is liable to a fine for an offence in contravention of any national legislation.

## **Remedies against directors who have abused their position**

Two remedies are found. The first one is to declare the director delinquent or under probation in terms of s162. The second is the derivative action in terms of s165 which replaces the statutory derivative action found in s266 of the old act.

S165 abolishes the common law derivative action. All derivative actions on behalf of the co will have to be brought under the new statutory provisions.

It differs from s266. Firstly a wider category of persons may bring an action. S165 gives a general power to institute action on behalf of a co to the following:

Shareholders

Directors or prescribed officers

Registered trade union

Unlike s266 the new provision does not prescribe the type of conduct that should have infringed the rights of the co. The only requirement is that the company's legal interest should be in need of protection. A demand must be served on the co to institute legal proceedings.

Remedies available to shareholders to protect their own rights

Three remedies can be classified under this category namely 1. Relief from oppressive or prejudicial conduct in terms of s163 2. dissenting shareholders appraisal rights in terms of s164 and 3. an application in terms of s161 to protect the rights of the holders of securities.

### 1. Relief from oppressive or prejudicial conduct s163 1-3

S252 of the old act provided a statutory remedy to minority shareholders who were the victims of oppressive conduct by the majority. This remedy was in addition to the personal action which minority shareholders could bring against the co under the common law. S163 retains the remedy provided for in s252 except that directors are given the right to apply for relief on the basis of oppression or unfairly prejudicial conduct.

The court may make a range of orders, including an order

-restraining the conduct complained of

-appointing a liquidator if the co is insolvent

-appointing directors in place of or in addition to all or any of the directors then in office or declaring any person delinquent

-directing the co to restore to a shareholder any part of the

consideration that the shareholder paid for shares  
-varying or setting aside a transaction or an agreement to which the co is a party and compensating the co or any party to the agreement  
-to pay compensation to an aggrieved person

## 2. Appraisal rights s164

Although s163 of the 2008 Act retains the remedy provided for in s252 of the old act and although relief under s252 could include the purchase by the co of a dissenting shareholders shares, s164 of the 2008 act provides for an independent remedy for dissenting shareholders called dissenting shareholders appraisal rights.

An appraisal right is the right of a shareholder to require his co to buy his shares at their fair value if his co takes any of the listed triggering actions. The fair value of the shares must be determined as it was just before the co adopted the triggering resolution.

The shareholder must follow the prescribed procedures which includes giving the co notice of his objection before the triggering resolution is voted on .The shareholder must demand the repurchase of his shares by the co within 20 days after receiving notice.

## 3. Application to protect rights of securities holders

The holder of issued shares may apply to court for a declaratory order regarding rights. The holder of the shares can apply for an appropriate order protecting his rights or to rectify any harm done to him by the co as a result of an omission in contravention of the act, the memo of incorporation, rules, harm done by the directors of the co but only to the extent that they may be held liable under s77.

**REPRESENTATION**

If the co gives an agent authority = actual authority

Authority can be given:

- Expressly (oral or written)
- By necessary implication

**DOCTRINE OF CONSTRUCTIVE NOTICE**

The doctrine of constructive notice partially abolished by the 2008 act.

S19 (4): Third parties contracting or dealing with a company will no longer be deemed to have had notice of the contents of public documents of a company merely because they have been filed with the commission or are accessible for inspection at the company office.

Exception applies to special conditions stated in the company's Memorandum and also to the effect of personal liability of directors and former directors of a personal liability company. The company must draw attention to the fact that special conditions apply. S11: company add RF (ring fenced) after its name to show that special conditions attach to the company

**ULTRA VIRES****COMMON LAW: ULTRA VIRES DOCTRINE**

A co capacity is determined by their main object, a co exists for this purpose and if it acts outside the main purpose (UV) the action is NULL and VOID

Ashbury: its as if the company didn't exist

**1973 COMPANIES ACT:**

S36: co would be liable in terms of any ultra vires contract if the director had the required authority and the only problem was that he exceeded the co authority.

Good faith was NOT required and a company would be bound by such a contract

**2008 COMPANIES ACT:**

It's no longer mandatory for the companies MOI to have a main objects clause

S19 (1): A co has legal capacity and the powers of a natural person, to the extent that a co can possess such powers

The companies MOI can impose restrictions on the capacity of a co – BUT the contract will still be valid and bind the company

S20: SH, directors or officers can institute proceedings to stop the company or directors from acting inconsistently with a limitation in the MOI



A director would then be liable for breach of fiduciary duties

S20 (6): shareholders can claim damages from any person who fraudulently, or with gross negligence causes a co to do something which is inconsistent with the Act or any restrictions in the MOI, unless they have been ratified by SPECIAL RESOLUTION. They CANT ratify conduct, which contravenes the Act

### **INTRA VIRES**

Royal British Bank v Turquand: The rule entitled *bona fide* third parties to assume that the company has complied with its internal formalities and procedures as specified in its constitution unless

- The 3<sup>rd</sup> party was mala fide
- The circumstances were suspicious

Before:

Wolpert: the articles stated that the board can authorise a person to sign promissory notes on the companies behalf – an ordinary director signed without the boards authority, but based on *turquand* an outsider can assume that such a person had authority

Tuckers Land: a 3<sup>rd</sup> party cant automatically assume that a branch manager has authority and the company could escape liability based on the lack of authority of such person

### **2008 COMPANIES ACT:**

S20 (7): a person dealing with a company in good faith, other than a director, officer or shareholder, is entitled to presume the company, in making any decision in the exercise of power, complied with all the formal and procedural requirements = codifies the *Turquand Rule* BUT it excludes the third party from invoking the rule where he 'ought reasonably' to have known of non-compliance by the company. In contrast, the common law *Turquand Rule* requires that the third party must not have had any 'suspicion' of non-compliance by the company, as explained above.

The rule protects outsiders only. Although the doctrine of constructive notice is to be abolished, the *Turquand Rule* will still continue to apply to protect *bona fide* third parties who are aware of the failure by the company to fulfil its internal requirements.

### **Doctrine of estoppel:**

Freeman & Lockyer:

Estoppel applies when the agent DOESN'T have actual authority to bind the company, but where the company has misrepresented that such person did have the necessary authority.

Based on a misrepresentation, the company will be estopped from denying liability if the 3<sup>rd</sup> party can prove that:

1. The company misrepresented, intentionally or negligently, that the agent had the authority to represent the co
2. The misrepresentation was made by the co
3. The 3<sup>rd</sup> party was induced to deal with the agent because of the misrep

**CAPITAL MAINTENANCE:**

Companies were required to maintain their share capital = they were not allowed to return to shareholders funds given in return for their shares, nor could they issue shares at a discount.

This rule was gradually relaxed through the Companies Act

In *Ooregum Gold Mining Company of India Ltd v Roper* it was said: 'the capital is fixed and certain and every creditor is entitled to look to that capital as his security'.

**COMMON LAW**

1. Par value shares may not be issued at discount except in accordance
2. Dividends may not be paid out of share capital.
3. interest may not paid on shares out of share capital
4. A subsidiary could hold a maximum of 10% of the shares of its holding company.
5. A company could not redeem its redeemable preference shares except in accordance with s98 of the Companies act
6. A company could not purchase its own shares.
7. The prohibition against a company giving financial assistance - S38

A number of reasons were given for the decision of the court, some of the more important of which were as follows:

- A company cannot be a member of itself
- The purchase by a company of its own shares is an unauthorised reduction of capital
- It would enable a company to manipulate the price of its shares on the market
- It enables directors to maintain themselves in control and to buy-off bona fide opponents of the management.

**COMPANY BUYING ITS OWN SHARES**

**S48 of the new act:** companies will be allowed to repurchase their shares provided that it reasonably appears that the company will satisfy the solvency and liquidity test immediately after completing the share repurchase

**Liquidity and solvency test:** a company satisfies the solvency and liquidity test if, the company's assets fairly valued equal or exceed its total liabilities fairly valued and it appears that the company will be able to pay its debts as they become due in the ordinary course of business for a period of 12 months after the date on which the test is considered or within 12 months of the date of the distribution.

But for a director to incur personal liability to the company for failure to comply with the solvency and liquidity test, the director must have been present at the meeting and must either have participated in the decision or failed to have voted against the share repurchase despite knowing that the solvency and liquidity test had not been complied with.

If the company acquired shares without meeting the liquidity and solvency test or any other requirement of S48 – the agreement between the shareholder and the company remains enforceable BUT in terms of S48 (6) the company may within 2 years of the acquisition apply to the court for an order to have the repurchase reversed – the court may order:

- ❑ The person from who the shares were bought repay the consideration and
- ❑ The company to issue to that person shares of the same class as those acquired

### **DISTRIBUTIONS:**

#### 1973 COMPANIES ACT:

S90: if authorised by their articles, company may make payments including dividends to their shareholders. The payments must be made to shareholders in their capacity as shareholders.

The company must comply with the solvency and liquidity test in order to make a 'payment' to shareholders.

REDEEMABLE PREFERENCE SHARES: S98 allows for the purchase of these shares, from 2 possible sources:

- ❑ Fresh issue of shares
- ❑ Profit

#### 2008 COMPANIES ACT:

distribution: a direct or indirect transfer of money or other property of the company (except its own shares) whether out of capital or profits to shareholders in their capacity as shareholders.

### **S46: the following are distributions:**

1. A direct or indirect transfer of money or other property of the company (except its own shares) whether out of capital or profits to shareholders in their capacity as shareholders.
2. Dividend
3. Payment in stead of a capitalisation share
4. Consideration for the acquisition of its own shares or those of another company in the group
5. Transfer of money or property in respect of shares
6. Incurring a debt for the benefit of a shareholder/another company within the same group

## 7. Waiver of a debt to a shareholder or company within the group

Payments for share repurchases and even redemption of redeemable preference shares would be subject to the same test of solvency and liquidity that applies to all other distributions.

**FINANCIAL ASSISTANCE for acquisition of securities****1973 COMPANIES ACT:**

S38: it is unlawful for a company to finance the purchase of its own shares. = A statutory extension of the capital maintenance rule and originally may have been perceived as offending the rule in *Trevor v Whitworth* that a company may not purchase its own shares.

S38 (2) which provides that s38 (1) does not prohibit a company from giving financial assistance for the purchase of or subscription for the shares of that company or its holding company if:

- The board is satisfied that after the transaction, the assets will be more than its liabilities and the company will be able to pay its debts as they become due in the ordinary course of business
- The terms upon which the financial assistance is to be given have been approved by a special resolution of the members of the company.

**2008 COMPANIES ACT**

S44: the board of directors of a company may authorise a company to give financial assistance if the following conditions are fulfilled:

1. Restrictions in the company's memorandum have been complied with.
2. The financial assistance is given in pursuance of an employee share-scheme
3. Done in terms of a special resolution passed within the previous two years which approved such assistance
4. The board is satisfied that immediately after providing the financial assistance the company would comply with the solvency and liquidity test
5. The board is satisfied that the terms under which the financial assistance is to be given are fair and reasonable to the company.

There is no need for authorisation in the company's memorandum. Failure to comply with the provision of this section would result in the transaction being **null and void** and the responsible directors would incur personal liability for the loss suffered by the company.

The requirement that the financial assistance given by the company must be fair and reasonable to the company is commendable, provided that the courts in applying this provision have proper regard for the interests of minority shareholders.

**Lipshitz** – look at the transaction in 2 phases

- Look if there was financial assistance – Gradwell: the impoverishment test was created = look if the transaction will have the effect of leaving the company poorer = if so there was financial assistance. Jacobson. Consider if the company needs an asset in the normal course of business and paid a fair price or co stands surety for a loan
- Look at whether the assistance was for the purposes of acquiring shares in the company. Fidelity Bank v Three Woman (Pty) Ltd: the fact that the transaction which facilitated the transfer of shares didn't serve a commercial interest, amounts to financial assistance

## **COMPANY GROUPINGS**

Company group: several companies that are associated as a result of common shareholdings. It consists of a holding company and all of its subsidiaries.

## **2008 COMPANIES ACT:**

1. An individual is related to a juristic person if that individual is directly or indirectly in control of a juristic person.
2. A juristic person is deemed to be related to another juristic person if either of them, directly or **indirectly**, 'controls' the other entity or the business of the other in terms of the definition of control.

## **CONTROL:**

- Direct or indirect control through the majority of the voting rights regarding the securities of a co
- Right to appoint/ elect/ control the appointment of a director: who holds majority of voting rights at board

## **Legal consequences of a group of companies**

The main consequences are:

SHARES: S48: A subsidiary may only hold 10% of the shares in the holding co

DIRECTORS: S76 director must use his position as a director, or any information he got in his capacity as director for his own advantage and must act for the benefit of the co group

FINANCIAL ASSISTANCE: S44: board can provide Financial assistance

GROUP AFS: 2008 Act doesn't require group AFS, but the International Fiscal Reporting Standards that apply to certain companies implies that such reports must be made

EMPLOYEE SCHEMES: in which employees are offered shares, implies an employee of both the holding and subsidiary companies

DISPOSAL OF ASSETS: regulations re the disposal of majority of assets doesn't apply between holding companies and subsidiaries

LOANS TO DIRECTORS: restrictions on companies providing loans or financial assistance apply within the company group

## **TAKE OVERS AND FUNDAMENTAL TRANSACTIONS:**

**Fundamental transaction applies to both regulated and unregulated companies and include:**

- **Disposal of majority of assets**
- **Merger/amalgamation**
- **Schemes of arrangement**

### **S117: Affected transaction:**

1. the disposal of all or the greater part of the assets or undertaking of a regulated company
2. Merger or amalgamation if it involves at least one regulated company
3. A scheme of arrangement between a regulated company and its shareholders
4. A mandatory offer
5. A compulsory acquisition

### **S118: The company is a regulated company if it is:**

- A public company
- A state-owned enterprise, except to the extent that such company has been exempted to in terms of s9
- A private company, but only if:
  - i. The percentage of the issued securities of that company that have been transferred within a period of 24 months immediately before the date of a particular affected transaction or offer exceeds the prescribed percentage, being not less than 10%
  - ii. The memorandum of that company expressly provides that the company and its securities are subject to Parts B and C of chapter 5 of the new act and the Takeover Regulations, irrespective of whether the company falls within the criteria set out above.

**Such transactions fall under the jurisdiction of the take over regulation panel, which can:**

- Require filing or approval of an affected transaction
- Issue clearance notices
- Require compliance with orders



**DISPOSAL OF ALL OR A GREATER PART OF THE CO ASSETS:****S112:**

Where a company decides to sell more than 50%, company can do so if:

- ❑ Notice and summary of the transaction in writing is given to the creditors
- ❑ Approval bmo SR of the GM, after having a written summary of the agreement
- ❑ Assets are disposed of at a fair market value

**S112 does not apply to:**

1. Where the transaction is as a result of a business rescue plan
2. Between a wholly-owned subsidiary and its holding company and
3. Where a transaction is between or among:
  - i. Two or more wholly-owned subsidiaries of the same holding company
  - 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.

**MERGERS AND AMALGAMATIONS:****S113:**

Amalgamations or mergers occur when:

1. 2 or more co combine their assets and liabilities
2. These assets and liabilities are then held by the newly formed co or the surviving co
3. All the other amalgamated co cease to exist after the transaction

S113: consideration by the board of each amalgamating or merging company as to the satisfaction of the **solvency and liquidity tests** and the delivery of the notice which contains certain particulars to the shareholders do not apply to a company engaged in business rescue proceedings, in respect of any transaction that is as a result of or contemplated in the company's business rescue plan that has been adopted.

Shareholders meeting: pass a special resolution, APPRAISAL RIGHTS APPLY

Merging or amalgamating companies must enter into a **written agreement** setting out the terms and means of effecting the amalgamation or merger.

- The Memorandum of any new company;
- The name and identity number of each proposed
- Way the securities are to be converted/ exchanged

- payment of any consideration instead of the issue of securities
- Details of the proposed allocation of the assets and liabilities of the merging or amalgamating companies among the companies that will be formed or continue to exist when the agreement has been implemented;
- Details of any arrangement necessary to complete the amalgamation or merger
- The estimated cost of the proposed amalgamation or merger.

**SCHEME OF ARRANGEMENT****S114**

**Exemptions** A company may not propose a scheme of arrangement if it is in liquidation or in the course of business rescue proceedings

**Business rescue** means proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for:

- The temporary supervision of the company and of the management of its affairs, business and property
- A temporary moratorium on the rights of claimants against the company or in respect of property
- The development and implementation, if approved, of a plan to rescue the company by re-structuring its affairs, business, property, debts and other liabilities

**Can be used to make a company a wholly owned subsidiary****Legal requirements and process to be followed**

- A consolidation of securities of different classes
- A division of securities into different classes
- An expropriation of securities from the holders
- Exchanging any of its securities for other securities
- A reacquisition by the company of its securities
- A combination of the methods contemplated above.

The Act requires that the company must retain an independent **expert** to compile a report as required by the act.

The expert must not.

- Have any other relationship with the company
- Have had any relationship contemplated in the first point within the immediately preceding two years
- Be related to a person who has or has had a relationship contemplated in the first and second points above.

He must prepare a report to the board and cause it to be distributed to all holders of the company's securities, concerning the proposed arrangement, which must at a minimum:

1. State all the prescribed information relevant to the value of the securities
2. Identify every type and class of holders
3. Describe the material effects that the proposed arrangement will have on the rights and interests of the persons mentioned in the second point above
4. Evaluate any material adverse effects of the proposed arrangement against:
  - i. The compensation that any of those persons will receive in terms of the arrangement

- ii. Effect of the arrangement on the business and prospects of the company
- 5. State any material interest of any director of the company, or trustee for security holders and state the effect of the arrangement on those interests and persons

**COURT APPROVAL OF THE TRANSACTION****S115**

A company may not proceed to implement any fundamental transaction without the approval of a court if:

- The special resolution was opposed by at least 15% of the voting rights that were exercised on that resolution and any person who voted against the resolution requires the company to seek court approval
- The court, on an application by any person who voted against the resolution, grants that person leave to apply to a court for a review of the transaction only if
  - The resolution is unfair to any class of holders of the company's securities
  - The vote was tainted by conflict of interest, inadequate disclosure, failure to comply with the act, the memorandum or any applicable rules of the company, or other significant and material procedural irregularity.

The holder of any voting rights in a company is entitled to seek an appraisal remedy if that person:

- Notified the company in advance of the intention to oppose a special resolution contemplated in this section
- Was present at the meeting and voted against that special resolution.

**AFFECTED TRANSACTIONS:****TAKEOVER REGULATION PANEL:****S119: Takeover Regulation Panel**

Takeover regulations are rules which regulate affected transactions

**The purposes of the Panel's regulation**

1. To ensure the integrity of the marketplace and fairness to the holders of the securities of regulated companies
2. To ensure the provision of the necessary information to holders of securities of regulated companies
3. To ensure the provision of adequate time for regulated companies and holders of their securities to obtain and provide advice with respect to offers
4. To prevent actions by a regulated company designed to impede, frustrate, or defeat an offer, or the making of fair and informed decisions by the holders of that company's securities.

**MANDATORY OFFER S123:**

A mandatory offer: a transaction where one or more persons who are related or interrelated or are acting in concert attain a prescribed percentage of all voting securities in the company (currently being not less than 35%) = will be required by law to make an offer to acquire

any remaining securities on terms determined in accordance with the Bill and the Takeover Regulations.

A mandatory offer is triggered if either:

- A regulated company re-acquires any of its voting securities (i.e. buy back of securities by the company)
- A person acting alone has, or two or more related or interrelated persons, or 2 or more persons acting in concert, have, acquired a beneficial interest in any voting securities which enables them to exercise at least the prescribed percentage of all the voting rights attached to securities of that company.

After the date of a completed mandatory offer the person with the required % must give notice that:

- Acquired the %
- Offer to buy securities in terms of the Act/ take over regulation

Within one month after giving notice, the person or persons must deliver a written offer, in compliance with the Takeover Regulations, to the holders of the remaining securities of that company, to acquire those securities.

#### Sefalana Employee Benefits Organisation v Haslam:

This case involved the mandatory offer rule under the previous Act. Facts: the defendant agreed to buy the controlling shareholding of more than 30% of the shares of the offeree company = affected transaction (only required 30%). The buyer then repudiated the agreement and the seller accepted the repudiation and cancelled the contract before any offers were made to the minority shareholders.

The court: concluded that the agreement resulted in the buyer acquiring an interest with regard to enough securities and even though the agreement was cancelled the buyer had an obligation to make mandatory offers to the minority shareholders.

The decision of the court was reversed on appeal. It was held that the buyer hadn't incurred an obligation to make an offer to minority shareholders, as there was no change in the control of the company. They were not in danger of having to remain in a co in which control has changed without their approval.

#### **COMPULSORY ACQUISITION AND SQUEEZE OUT:**

This is a transaction where a person or offeror attains 90% of any class of securities in a company. If, within four months after the date of an offer for the acquisition of any class of securities of a regulated company, that offer has been accepted by the holders of the remaining securities of the class:

- That the offer has been accepted to that extent

- That the offeror desires to acquire all remaining securities of that class.

After giving notice, the offeror is entitled and bound, to acquire the securities concerned on the same terms that applied to securities whose holders accepted the original offer.

**BUSINESS RESCUE S128**

Business rescue:

- i) The temporary supervision of the company and of the management of its affairs, business and property
- ii) A temporary moratorium on the rights of claimants against the company or in respect of property in its possession
- iii) The development and implementation of a plan to rescue the company or a plan that would achieve a better return for the company's creditors than the payment they would have received if the company had simply been liquidated immediately.

Financially distressed

- If the company is reasonably unlikely to be able to pay all its debts as they become payable within the next six months; and
- If the company is reasonably likely to become insolvent (its debts are likely to be more than its assets) within the next six months.

**S129: BY THE BOARD:**

The directors of a company may pass a resolution to begin business rescue proceedings only if the board has reasonable grounds to believe that the company is financially distressed and that there appears to be a reasonable prospect of rescuing the company.

Can't be adopted if steps to liquidate the company have already been initiated.

The business rescue resolution will become effective only when it is filled. Within 5 business days after filing the resolution, the company must notify, every **affected person** regarding the resolution, the date on which it became effective and the grounds on which it was taken.

The company must also, within five business days, appoint a business rescue practitioner to oversee the company and its rescue proceedings.

**S130: Setting aside****Application to court**

Any affected person may apply to court to set aside this resolution on the grounds that:

- ❑ There is no reasonable prospect that the company will be rescued
- ❑ The company has failed to comply with the procedures OR
- ❑ Apply to court for the appointment of the business rescue practitioner to be set aside because the practitioner does not meet requirements set for a practitioner or is independent of the company or its management, or lacks the skills necessary to supervise the rescue of the particular company



- Application may also be made for the business rescue practitioner to provide security to protect the interests of the company and any affected persons.

Orders of the court:

- ❖ An order that the company be placed under liquidation or
- ❖ If the court finds that there were no reasonable grounds for believing that the company would be unable to pay all its debts as they become due and payable, order any director who voted in favour of the business rescue resolution to pay the costs of the application.

**S131: COURT ORDER:**

An affected person may apply to court for an order to commence business rescue proceedings and place the company under supervision.

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

The application for business rescue may even be made after proceedings for the liquidation of the company have commenced and this will have the effect of suspending the liquidation proceedings until the court has refused the application for business rescue or if the application is granted, until the proceedings have ended.

The court may make an order placing a company under supervision and commencing business rescue proceedings if it is satisfied that:

- The company is financially distressed
- The company has failed to pay over any amount due to a government authority in terms of a statutory obligation in respect of its employees
- Just and equitable to do so for financial reasons and there is a reasonable prospect of rescuing the company

The company may not place itself under liquidation until the business rescue has ended and must notify each affected person within 5 business days after the date of the order.

**LEGAL CONSEQUENCES:**

- A general moratorium: Enforcement of claims against the company or its property may be started or continued only with the written consent of the business rescue practitioner or if the court gives its permission.
- Protection of property interests: The power of the company to deal with its property is restricted during business rescue as it may only dispose of property if it takes place:
  - In the ordinary course of its business
  - In a transaction of good faith to which the business rescue practitioner has given his or her written consent
  - As part of the approved rescue plan of the company.

**OTHER CONTRACTS AND AGREEMENTS:**

S136: The practitioner could partially/ conditionally cancel or suspend an agreement

AMENDED:

Now the practitioner can suspend such contracts for the duration of the BR BUT to cancel, must make a court application to show that it is just and reasonable in the circumstances.

The other party to the contract can still claim damages from the company but not specific performance

**PEOPLE INVOLVED**

**EMPLOYEES:** Business rescue proceedings have no effect on the company's contracts with its employees: they continue to be employed by the company on the same terms and conditions as before.

**SHAREHOLDERS:** No change in rights

No alteration in the classification of any issued shares of the company is allowed during business rescue proceedings.

Shareholders of the company are also 'affected persons' and therefore have the right to be notified of important events and to participate in court proceedings and business rescue proceedings to the extent allowed in the new act.

**DIRECTORS:** Directors must continue to perform their duties during the business rescue proceedings, but under the authority of the business rescue practitioner.

Unless a director acts on behalf of the company knowing that he has no authority to do so, or takes part in reckless trading or fraudulent conduct by the company, he cannot be held liable for a breach of his statutory duties if following the instructions of the practitioner.

**CREDITORS:**

Must be notified, call a meeting within 10 days in which:

- Inform them of the co future
- Make them prove their claims

Can be represented by a creditors committee

Can vote according to the value of their claims

**THE BUSINESS RESCUE PRACTITIONER**

The qualifications for appointment as a business rescue practitioner are that the person must:

- Be a member in good standing of the professional organization chosen by the minister to regulate the practice.
- Not be subject to a probation order.
- Not be disqualified from acting as a director of the company
- Not have any relationship with the company that could interfere with the proper performance of his duties, or be related to a person who has such a relationship.

**Removal and replacement**

A business rescue practitioner may only be removed by an order of court. The order may be made on application by an affected person or by the courts own initiative.

These grounds involve:

- Incompetence
- Negligence
- Unethical or illegal conduct
- Inability to perform the functions of business practitioner

A new business practitioner must be appointed by the company (or if applicable the creditors who nominated the previous one) if:

The business practitioner:

- Dies
- Removed from office
- Resigns

**Powers and duties**

- **Management:** takes over full management of the company from the board, but he may delegate any of his powers to a director or manager.
- Must investigate the affairs of the company and decide whether the company has a reasonable chance of being rescued.
- If he decides at any time that it may not, he must inform the court, the company and all affected persons and apply to court for the business rescue proceedings to end and place the company in liquidation.
- Develop a rescue plan and to see its implementation.

- Not otherwise be held liable for anything done or omitted in good faith in his capacity, unless grossly negligent.
- The business rescue practitioner will be entitled to payment

### **THE BUSINESS RESCUE PLAN:**

<u>Background</u>	<u>Proposal:</u>	<u>Conditions:</u>
<ul style="list-style-type: none"> <li>❖ Lists of the assets and liabilities</li> <li>❖ The dividend that creditors will probably receive should the company be liquidated is stipulated.</li> <li>❖ List of holders securities</li> <li>❖ Copy of the agreement re practitioners fees</li> </ul>	<ul style="list-style-type: none"> <li>▪ Moratorium</li> <li>▪ Plan re debts</li> <li>▪ Which assets are going to be used to pay creditors</li> </ul>	<ul style="list-style-type: none"> <li>▪ Effects on employees</li> <li>▪ When it comes to an end</li> </ul>

### **Meeting to consider the business rescue plan**

#### **Effect of approval**

Approval of the rescue plan makes the plan binding on the company and all its creditors and holders of its securities, irrespective of whether such a person voted for or against the plan or even attended the meeting where the plan was considered.

#### **Effect of rejection**

If the plan is rejected by the creditors or the shareholders, the business rescue practitioner may either seek approval from the relevant meeting to prepare a revised plan, or inform them that the company will apply to court to have the result of their votes set aside on the grounds that the majority decision was irrational or inappropriate.

### **Termination of proceedings**

- Order of the court
- Setting aside the resolution or order that commenced the proceedings or converting the rescue into a liquidation proceeding
- Notice of termination
- Business rescue plan that has either been adopted and substantially implemented
- Or rejected without any further steps taken.



**COMPROMISES**

1974 COMPANIES ACT:

S311: this was used to get business rescue of a company.

S311: was used to transfer control of an insolvent company

Scheme of compromise: creditors write off a portion of their claim and you can force dissenting shareholders/ creditors to agree = show they would get more than they would have had the co gone into liquidation

S311:

- Apply to the court for an order for the meeting of share holders (arrangement) or creditors (compromise) to consider the proposal
- If there is a 75% majority in favor of the scheme, the court must then sanction the agreement – the court determines if it was:
  - Unequal
  - Oppressive

Can be if the company is in liquidation

Creditors will agree to:

- ❖ Write off a portion of their claim
- ❖ Waive their interest
- ❖ Postpone the claim

**2008 COMPANIES ACT****S155**

compromise apply to a company, irrespective of whether the company is financially distressed or not, but do not apply to a company that is 'engaged in business rescue proceedings'

**Who may propose a compromise?**

- The board of a company
- The liquidator of the company if the company is being wound up

May propose an arrangement or a compromise of its financial obligations to:

- All of its creditors
- To all of the members of any class of its creditors

By delivering a copy of the proposal and notice of a meeting to consider the proposal to: Every creditor of the company

- A proposal for compromise must contain all information reasonably required to assist creditors in deciding whether or not to accept or reject the proposal.

the proposal must contain the following information:

- A list of all the material assets of the company
- A list of creditors of the company as on the date of the proposal, including an indication as to which creditors qualify as secured, statutory preferent and concurrent creditors
- The probable dividend that would be paid to creditors if the company was placed in liquidation
- A list of the holders of the securities issued by the company and the effect the proposal will have on them
- Whether the proposal includes a proposal made informally by a creditor of the company.

### **Proposals**

Must include at the following:

- The nature and duration of any proposed debt moratorium
- The extent to which the company will be released from the payment of its debts and the extent to which any debt is proposed to be converted to equity in the company
- The treatment of contracts
- The property of the company that will be made available for the payment of creditors' claims
- The order of preference in terms of which the proceeds of property will be applied to pay creditors once the proposal is adopted
- The benefits of adopting the proposal as opposed to the benefits that would be received by creditors if the company was placed in liquidation.

or class, as the case may be, present and voting in person or by proxy, at the meeting called for that purpose.

This can be proposed to be meeting WITHOUT the consent of the court, it must be passed with a 75% majority

It MAY be sanctioned with the court to be binding = the court has no discretion to check the fairness of the proposal

<b><u>S311 1973 CO ACT</u></b>	<b><u>S155 2008 CO ACT</u></b>
Used to get the rescue of the co Apply to the court for an order for meeting the SH/ creditors to consider the proposal If 75% majority = the court must then sanction the agreement for it to be binding Can be done even if the co is in liquidation	Scheme: between co and cred/class of cred Don't need court order to propose it at a meeting Proposal must contain: <ul style="list-style-type: none"> <li>❖ Assets</li> <li>❖ Creditors</li> <li>❖ Moratorium</li> <li>❖ Preference of creditors</li> </ul>



	<p>❖ Conditions</p> <p>75% majority is required for it to be passed</p> <p>not if the co is in liquidation</p> <p>co MAY apply for the sanction of the agreement with the court =</p> <p>court has no discretion to determine the fairness of the agreement</p>
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**INSIDER TRADING NOTE THE SSA HAS BEEN REPLACED WITH FMA (FINANCIAL MARKETS ACT)****Inside information:**

1. The info must be precise
2. The info mustn't have been made to the public
3. The info must be such that if it were made public it would have a material effect on the price/value of securities listed on the regulated market

**INSIDER:** employee, director = person who has that information because of his profession (accountant, banker etc) = includes natural and juristic person

**Regulated market:** is a market which is regulated in terms of the law of the country in which that market conducts business for dealing in securities listed on that market.

**SECURITY SERVICES ACT**

Insider trading was governed by the Insider Trading Act, but in 2004 was changed by the Securities Services Act.

Security Services Act:

- Increase confidence in SA markets
- Reduce the danger of a disruption of the financial system in SA

The Act deals with 3 types of conduct, which is prohibited:

**Dealing:****S73 (1) (a): dealing for your own account:**

It's an offence for someone who knows that they have insider information to deal in the securities to which the information relates = to escape liability he will have to prove that he was acting in the completion of an affected transaction.

**S73 (2) (a): dealing for another person:**

It's an offence for someone who knows that they have inside information to deal for another in securities to which the information relates = can escape liability if he can prove:

- ❑ He was an authorized user and was acting on instructions of his client
- ❑ He was acting in terms of an affected transaction.

**Disclosure:**

**S73 (3) (a):** it's an offence for an insider who knows that he has inside

information to disclose that information to another = it could be a defence if he can prove:

- The information was disclosed in the proper performance of his duties.

### **Discourage/ encourage:**

**S73 (4):** it's an offence for an insider who knows that he has inside information to encourage or cause another to deal, or discourage or stop another from dealing – in securities listed on the regulated market to which the inside information relates.

### **CIVIL LIABILITY: S77**

Instituted by the FSB against the insider = it relieves the person who has suffered damage due to the insider trading from having to pay for the civil costs = the FSB must investigate, bring the civil action and distribute the award among the claimants.

### **DEALING:**

S77 (1): FBS can sue an insider who knew that he had inside information, who deals directly, or indirectly for his own account – in securities to which the information relates and who has made a profit or avoided a loss.

*Can sue for the equivalent of the loss or profit, interest and costs.*

*The court has discretion in determining the penalty but it can't exceed 3 times the profit or loss.*

S77 (2): FSB can sue an insider who deals for another and who makes them a profit or avoids a loss *can sue for the equivalent of the loss or profit, interest and costs.*

*The court has discretion in determining the penalty but it can't exceed 3 times the profit or loss.*

### **DISCLOSURE:**

S77 (3): FSB can sue an insider who knows he has inside information and who discloses it to another.

An insider will be liable to pay the FSB if the person to whom the information was disclosed dealt in the securities listed on the regulated market to which the information relates = equivalent of the profit made or the profit which would have been made if the securities had been sold at any stage or the loss avoided as a result of the dealing = penalty, interest, costs and the commission received can be claimed.

- The fact that the insider disclosed the information isn't enough
  - the 3<sup>rd</sup> party must have dealt in the securities and have made

a profit or be able to make a profit if they are sold at any stage or avoided a loss.

- Penalty of no more than 3 times the amount
- If the 3<sup>rd</sup> party didn't deal – no penalty
- BUT – the amount received for making the disclosure may be claimed
- If both the insider and 3<sup>rd</sup> party are liable = jointly & severally liable.

### **ENCOURAGE/ DISCOURAGE**

S77 (4): FSB can sue an insider who knew he had inside information and who encouraged or discouraged another to deal in the securities listed to which the info relates.

- An insider who encourages another to deal = liable if the 3<sup>rd</sup> party dealt = equivalent of the profit of loss avoided, costs, interest and commission
- If the 3<sup>rd</sup> party is liable = joint and several liability between the 3<sup>rd</sup> party and the insider

It's also an offence to discourage a person from dealing = no civil liability is imposed.

### **INSIDER TRADING OFFENCES: FMA**

Regulated person means:

#### **-a licensed central securities depository:**

Our licensed securities depository is a company called Strate. A CSD (central securities depository) is responsible for keeping all the records of ownership for financial instruments (shares, bonds, warrants and money market investments). These records are safely kept in electronic form by the CSD (these are the uncertificated shares as explained by the Companies Act) and allows for the daily transfer of ownership from seller to buyer to take place easily and efficiently. Every time someone buys or sells a share on the stock exchange (JSE), the transaction goes through the CSD (Strate) so that the transfer of ownership of the shares can be done efficiently and the transfer of ownership rights from seller to buyer can be correctly captured and recorded.

The CSD also act as a kind of “policeman” when transactions take place to make sure that the seller of the shares actually has the shares, and the buyer of the shares has the funds available to buy them. Strate ensures that settlement of the transaction takes place on

the due date by actually transferring the financial instrument/ shares from the sellers account to that of the buyer.

**-a licensed clearing house:**

**EXAMPLE:**

You are a farmer. You farm mielies and have to harvest 100 tons in 3 months' time.

You have one problem. How much do you think you are going to get for your mielies once you have harvested and need to sell them in 3 months' time?

If you sold them today, you will get R10.00 per ton in the market place, however, the price in 3 months' time (when your mielies are ready) might be R8.00 per ton in the market place and you would have lost out on R2.00 per ton because you did not have the mielies to sell today.

<b>Product</b>	<b>Quantity</b>	<b>Turnover if sold today (R10.00)</b>	<b>Turnover if sold in 3 months (R8.00)</b>
Mielies	100	R1000.00	R800.00

How do you lock in today's price?

You as a farmer will enter into a contract based on today's market price of R10.00 per ton, to sell your mielies in three months' time.

A counterparty is the person that wants to buy your mielies in 3 months' time and will agree to pay you a price of R10.00 per ton (because that is the price today).

Let's say the counterparty is a chicken farmer.

The chicken farmer does not have to pay you until 3 months' time when you deliver the mielies. He has agreed to buy 100 tons at R10.00 per ton.

But what if the market price in 3 months' time is R8.00 per ton? The chicken farmer can simply not honor the contract and go into the market and buy the mielies for R8.00 instead of R10.00 from you.

This will put you in a very difficult situation as you have already accounted for receiving R10.00 per ton and will now have to go sell your mielies in the market place for R8.00 making a loss of R2.00 per ton on your contract.

**This is why a clearing house was established. The clearing house is a third party to your contract with the chicken farmer. In order to have a valid contract, the clearing house will ask the chicken farmer to make a deposit into an account. This deposit is YOUR security against the chicken farmer not honoring his contract in three months' time. This deposit is referred to as a margin.**

The clearing house will ask the chicken farmer to deposit R200.00 margin into the account. This deposit will be kept in the account for 3 months until you deliver your mielies to him. If you do not deliver the mielies because of let's say a fire on your farm, the deposit is returned to the chicken farmer.

If the chicken farmer does not pay you for the mielies, the deposit is given to you as he did [not honor the contract](#).

If the chicken farmer does not honor the contract, you now have to go and sell your mielies in the market place for R8.00 per ton which will mean you get R800.00 in total for your 100 tons. However, the clearing house has R200.00 he deposited in the account, which is given to you. In total you get R800.00 from the market place, and the R200.00 deposit from the clearing house. Total amount received is R1000.00. In effect, you are now in the same position as you would have been if the chicken farmer honored the contract. You got  $R1000.00 / 100 \text{ tons of mielies} = R10.00 \text{ per ton}$ , your original agreed price in the contract.

**The clearing house acts as the “policeman” in the futures and options markets where contracts like these are bought and sold (specifically, the above example is for what’s called grain futures).**

**The clearing house makes sure, that if one party fails to honor the contract, the counterparty is not negatively affected. Almost like insurance.**

In South Africa, we use clearing houses such as Safcom or Bankserv.

**The clearing house is responsible for settling trades, collecting and maintaining the deposits/margins, regulating the delivering of funds for these contracts when they are settled, and finally for reporting the trade data to the exchange.**

**- a licensed exchange:**

A licensed exchange can be thought of as a market place of buyers and sellers. Our best example is the JSE (Johannesburg Stock Exchange). The JSE is where buyers and sellers of company shares can come together in a regulated (and safe) trading environment ensuring full disclosure on transactions.

**-an authorized user:**

An authorized user is someone who is employed by or has been given permission by the JSE (or the exchange) to deal securities or perform functions of the exchange.

An authorized user is someone who has permission to use the systems of the exchange to conclude transactions or access specific information on the exchange relating to any transactions, or submit information to the exchange relating to transactions that have been completed

**-a participant**

A clearing house as explained in the example with the mielies would be an example of a participant. They will report all transaction details to the exchange and are given permission by the exchange to handle the types of transactions and contracts. “Participant” literally means a company/entity performing the role of a clearing house and reporting information to the exchange.

**- a nominee:**

Say you want to buy shares in a company. However, you do not have time to attend shareholder meetings or AGM's of the company. You additionally don't have time to attend meetings where special resolutions may need to be voted on etc. In this instance, you will be able to appoint someone as a proxy/nominee. The nominee merely represents your interest on your behalf.

### **Securities services means:**

- the buying or selling of securities for own account or on behalf of another person as a business, a part of a business or incidental to conducting a business
- the use of the trading system or infrastructure of an exchange to buy or sell listed securities:

What is being spoken about here is the following:

Example:

Jono needs to buy 1000 shares of a company. He obviously cannot conclude the transaction himself as he is not authorized to do so by the JSE. He needs to approach a broker (which can be a bank, securities trader or company dealing with the buying and selling of shares) to conclude the transaction for him. Jono approaches me to buy the shares for him. I will access a trading platform (literally a computer program) which lists all the shares for sale on the JSE. I go onto my platform and purchase 1000 shares for Jono.

I have now provided securities services using the trading system and infrastructure of the JSE.

- the furnishing of advice to any person
- the custody and administration of securities by a participant or nominee (**The nominee is providing securities services by representing your interest in the shares you have bought in a company.**)



- the management of securities and funds by an authorized user
- clearing services(**The clearing services of a clearing house (ensuring the performance of contracts as explained in the clearing house example is providing securities service. )**
- settlement services (**The settlement of any trades (like the clearing house example when the contract is honoured by both parties) is providing a securities service)**

Publication means:

Information is regarded as having been made public when the info published in accordance with the rules of the relevant regulated market for the purpose of informing clients and their professional advisers.

### **INSIDER TRADING OFFENCES: FMA**

The FMA has introduced an additional offence, therefore there are 5 offences related to insider trading:

1. Dealing for yourself while in possession of inside information  
**Person can raise the following defences:**
  - **Person only becomes an insider after he gave the instruction to deal**
  - **Person was acting in terms of a transaction in respect of which:**
    - **All the parties had the same inside information**
    - **Trading wasn't limited to such parties**
    - **The transaction wasn't aimed at securing a benefit from exposure to the movement in the price of the securities resulting from inside information**
2. Dealing in securities on behalf of another while in possession of inside information  
**Defences:**

- **The person is an authorized user and was acting on the specific instructions from his client and he didn't know that the client was an insider**
- **Person only becomes an insider after he gave the instruction to deal**
- **Person was acting in terms of a transaction in respect of which:**
  - **All the parties had the same inside information**
  - **Trading wasn't limited to such parties**
  - **The transaction wasn't aimed at securing a benefit from exposure to the movement in the price of the securities resulting from inside information**

### 3. Dealing in securities for an insider

#### **Defences**

- **Person only becomes an insider after he gave the instruction to deal**
- **Person was acting in terms of a transaction in respect of which:**
  - **All the parties had the same inside information**
  - **Trading wasn't limited to such parties**
  - **The transaction wasn't aimed at securing a benefit from exposure to the movement in the price of the securities resulting from inside information**

### 4. Disclosing inside information to another

**Defence: the person disclosed the information because it was necessary to do so for the purpose of proper performance of the functions of his employment in circumstances unrelated to the dealing in any securities listed on the regulated market and he at the same time disclosed information, which was inside information**

### 5. Encourage/ discourage another person to deal

#### **No defences**

**Directors have a fiduciary duty not to use confidential information for personal purposes and such use would amount in a breach of fiduciary duties.**

Section 109 of the FMA Act provides that any person who contravenes the insider trading provisions in section 78 is liable on conviction to a fine not exceeding R50 million or to imprisonment for a period not exceeding 10 years or to both such fine and imprisonment.

Duties of the FSB(Financial Services Board):

- check on market abuse
- investigate matters relating to insider trading
- summon people to provide info or documents or appear for interrogation
- enter and search premises and seize documents
- delegate the investigation to a person they deem fit
- FSB may by notice on the official website or by means of any other appropriate public media, make known the status and outcome of its investigations and the details of an investigation if disclosure is in the public interest.

### **COMPANY SECRETARIES S 88-89**

-The company secretary is the chief administrative officer of his co. A public co or state owned enterprise is obliged to appoint a co secretary who is knowledgeable or experienced in the relevant laws , while other cobs are not obliged to have a co secretary but may appoint one,

-The first co secretary of a public co or state owned enterprise may be appointed by:

- .the incorporators of the co
- .within 40 business days after the incorporation of the co, by either the directors of the co or an ordinary resolution of the company's shareholders

-Within 60 business days after a vacancy arises in the office of a co secretary, the board must fill the vacancy by appointing a person whom the directors consider having the knowledge and experience and who is a permanent resident of South Africa.

-a co secretary stands in the position of an employee of the co and is accountable to the company's board. The exact nature of his duties depends on the terms of his employment contract but must include the duties stated in section 88 of the Companies act. The last item in the list of the co secretaries duties stated in this section is a reference to the duty on every co to file an annual return containing certain info.

-the board of directors can take a resolution to remove a co secretary. A co secretary may insist that a statement setting out the co secretary's contention to the circumstances be included in the annual

financial statements relating to that financial year. A co secretary may resign from office by giving one month's notice or less than one month's notice with the approval of the board.

-section 85 of the Companies act requires every co that appoints a co secretary or auditor to file a notice of the appointment or the termination of service of such an appointment with the Registrar within ten business days after the appointment or termination.

#### Duties of the company secretary s88:

- providing the directors of the co with guidance as to their duties, responsibilities and powers
- making the directors aware of any law relevant to or affecting the co
- reporting to the co board any failure on the part of the co or a director to comply with the act
- ensuring the minutes of all shareholders meetings, board meetings and the meetings of any committees of the directors or of the companies audit committee are properly recorded in accordance with the act
- certifying in the company's annual financial statements whether the co has filed required returns and notices in terms of the act
- ensuring that a copy of the company's financial statements are sent to every person who is entitled to it

### **AUDITORS AND AUDIT COMMITTEES**

#### Audit Committees

-section 94(2) of the Companies Act requires that at each annual general meeting a public co, a state owned enterprise or any other co which has voluntarily decided to have an audit committee, must appoint an audit committee for every financial year. The audit committee must have at least three members and consist only of non-executive directors of the company who have not been involved in the day to day management of the company in the preceding three financial years.

-the duties of the audit committee include nominating an auditor for appointment by the co, taking particular care that the auditor is independent, determining his fees and determining the extent of any non-audit services that the auditor may provide to the co.

Each member of an audit committee must be a director of the co, must not be involved in the day to day management of the company's business or been involved at any time during the previous financial year, be a full time employee of the co or been an employee at any time during the previous three financial years, be a material supplier

or customer of the co such that the reasonable and informed third party would conclude in the circumstances that the integrity, impartiality of that director is compromised by that relationship.

### Duties of audit committee

- to nominate an independent auditor
- to determine the auditors fees and terms of the engagement
- to ensure the appointment of the auditor complies with the provisions of the Act
- to pre approve any proposed agreement with the auditor for the provision of the non-audit services to the co
- to prepare a report to be included in the financial statements for that financial year describing how the audit committee carried out its functions, stating whether the audit committee is satisfied that the auditor was independent of the co
- to receive and deal with any concerns or complaints relating to accounting practices and the content or auditing of the company's financial statements
- to make submission to the board on any matter concerning the company's accounting policies, records and reporting
- to perform other functions determined by the board, including the development and implementation of a policy and plan to evaluate and improve the effectiveness of risk management.

### Auditor's ss92, 93, 30

-Companies have to appoint an auditor who must be independent. Precautions that apply in this regard include auditor rotation s92 so that an individual may not act as auditor for more than 5 years and a restriction on non-audit functions. The rotation requirement applies to individual auditors.

-in terms of section 30 every co must prepare annual financial statements within six months after the end of its financial year. Public companies and other companies as determined by the relevant regulations must have their financial statements audited,

### Appointment of auditors -s90

Every year at its general meeting a public co or state owned co must appoint an auditor.

To be appointed as an auditor of a co a person or firm:

- must be a registered auditor
- must not be prohibited from being a director of a co
- must not be:

A director of the co

An employee or consultant of the company who was or has been

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

A director, officer or employee of a person appointed as a co secretary  
A person who alone or with a partner or employees, regularly performs the duties of accountant or bookkeeper or performs secretarial work for the co.

### Rights and functions of auditor's s93

#### The auditor of a co:

-has the right to access at all times to the accounting records and all books and documents of the co and is entitled to require from the directors of the co any info necessary for the performance of the auditors duties

-in the case of the auditor of a holding co, has the right of access to all current and former financial statements of any subsidiary co of that holding co and is entitled to require from the directors of the holding co or subsidiary any info in connection with any such statements and in connection with the accounting records, books and documents of the subsidiary as necessary for the performance of the auditors duties

#### Auditors are entitled to -

Attend any general shareholders meeting

Receive all notices of and other communications relating to any general shareholders meeting