

COMPANY LAW NOTES:

SHAREHOLDERS AND COMPANY MEETINGS:

A company acts through its members in the general meeting, its directors and its employee's.

S66 (1): The day-to-day running of the company is the responsibility of the directors, (executive directors'), which has the authority to exercise all of the powers and functions of the company, except to the extent that the Act or memo of incorporation provide otherwise. Many NB decisions of the directors may have to be approved by the shareholders

A shareholder: is the holder of the shares issued by the company = they get the right to vote in general meetings of members of the company.

Shareholders do not have any duties towards the company, but they may have duties or obligations towards each other in terms of a shareholders' agreement.

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

MEETINGS

Notice convening a meeting must be given to all persons who are entitled to receive notice of the meeting.

- A meeting must be convened at a time, date and place, which is accessible to the members of the company.
- Quorum must be present = A quorum is the minimum number of members who have to be present at the meeting before the meeting can commence.

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, the notice of the meeting must include the record date.
4. The notice should explain the general purpose of the meeting and any other specific purposes.
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.

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.

At the meeting the proxy is entitled to vote as he or she thinks fit unless the shareholder has indicated otherwise on the proxy form.

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.

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

1973 Companies Act: don't need to hold an AGM if all the members entitled to attend consent in writing. Such a resolution will be passed as if the meeting was held.

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

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

A resolution that can be voted on at a shareholders' meeting may instead be submitted for consideration to the shareholders and voted on in writing by shareholders entitled to voting rights in relation to the resolution.

E.g. An election of a director

Within ten business days after adopting a resolution the company must deliver a statement describing the results of the vote, consent process, or election to every shareholder who was entitled to vote on the resolution.

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 company's tribunal may grant an extension if good cause is shown.

The following matters must be discussed at every AGM:

- Director's report, financial statements and 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.

If a company fails to convene a meeting for any reason, a shareholder may apply to a court for an order requiring the meeting

The company must compensate the shareholder who applies to the Companies Tribunal or to a court for the costs of those proceedings. Failure to hold a required meeting does not affect the existence of a company or the validity of any action by the company.

Quorum

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

Voting: either by a **show of hands** or through a **poll** amongst those persons who are present at the meeting and entitled to exercise voting rights on that matter.

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. The electronic communication used must enable all persons participating in that meeting to communicate concurrently with each other without an intermediary and to participate reasonably effectively in the meeting.

Where participation in a meeting by electronic communication is allowed the notice convening the meeting should inform shareholders of the availability to participate electronically and provide necessary information to enable shareholders or their proxies to access the available medium or means of electronic communication.

Exercise of voting rights

Profit company (other than a state-owned enterprise) with only one shareholder:

- ❑ The shareholder may exercise all of the voting rights

Profit company (other than a state-owned enterprise) has only one director:

- ❑ Director may exercise any power or function of the board at any time, except when the Memorandum of Incorporation provides otherwise.

Company (other than a state-owned enterprise) where every shareholder is also a director of that company:

- ❑ Shareholders may decide on any matter to be referred by the board at any time without notice or compliance with any internal formalities except where the memo provides otherwise

Pender: the shareholders unlike the directors don't exercise their voting rights for the benefit of the company and can act in their own interests.

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.

The chairperson of the meeting where the quorum is not present within one hour of the scheduled starting time may extend the one-hour limit for a reasonable length of time, on the grounds that exceptional circumstances affecting whether, transportation or electronic communication have generally impeded the ability of the shareholders' to be present at the meeting or that one or more shareholders, having been delayed, have communicated an intention to attend the meeting, and those shareholders, together with others in attendance, would constitute a quorum.

Unless the company's memo or rules provide otherwise, after a quorum has been established for a meeting, or for a matter to be considered, so long as

at least shareholder with voting rights entitled to be exercised at the meeting, or on that matter, is present at the meeting.
A meeting may not be adjourned beyond the earlier of the date that is 120 business days after the record date or the date that is 60 business days after the date on which the adjournment occurred. The latter is an alterable provision that can be altered by the provisions of the memorandum of Incorporation.

CORPORATE FINANCE

Companies can get money to do business in 2 ways (hybrid system):

- ❖ Equity finance: company can issue shares: get share capital and the shareholder gets a return on their investment through dividends
- ❖ Debt finance: Loans: debt security in terms of a debt, in which the creditor gets an amount and interest within a specific time

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 = statement is required from the directors' of a public or private company that the company had acquired adequate capital to commence business. The share capital of a company may be divided into shares having par value or non par value

Par value of a share seldom bore any realistic relationship with the market value of the share as a result of which it was increasingly acknowledged that not only is par value artificial, it is also insignificant so they introduced no par value shares on an optional basis.

The result is that South Africa uniquely and unnecessarily had both par value and no par value shares

The Companies Act, 2008, par value shares can no longer be issued.

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.

However, although a shareholder also owes certain duties to it, the most important of which is to comply with the Memorandum. Apart from legal aspects of a share, it is trite that shares and especially listed shares are a form of personal property, which can be actively traded on the securities exchange.

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.

The constitution of the company or the resolution creating the shares may, however, confer different rights on the shareholders particularly in regard to payment of dividends and the return of capital on a winding-up. Based on these rights, a company may divide its shares into different classes of shares.

Classes of shares:

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

Preference shares

Described as a class of shares whose holders enjoy preference over any other class of shares with respect to the payment of dividends and sometimes the return of capital on a winding-up.

The rights conferred on preference shares are determined by the memorandum or article

Rights:

- Preferential payment
- Fixed percentage of the nominal value of the share

- Preference shares are paid before ordinary shareholders are paid their dividend.

A company cannot have preference shares unless it also has ordinary shares or some other class of shares.

Since the preference shares remain part of the share capital of the company, preferential shareholders become entitled to payment of their preferential share dividend only when a company has made a profit and has declared a dividend. It must follow that unless the company's constitution or terms of issue provide otherwise, arrear but undeclared dividends cannot be claimed by the preference shareholders.

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

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. If the

preference shares are non-cumulative, the preferential dividend is lost forever.

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 pref shareholders continue to enjoy their right of preference in respect of any dividends declared in future.

In the absence of express provision in the Co. Constitution or terms of issue, dividends must be declared before they can be claimed. Even the holders of cumulative preference shares enjoy no preference on the winding-up of the company to arrear dividends that have not been declared.

Preference shares are presumed to be cumulative unless this presumption is displaced by express provision.

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.

Preference shareholders may:

- ❑ In the constitution,
- ❑ Terms of issue,
- ❑ Explicitly

Be given the right to share on a *pro rata* basis together with ordinary shareholders in distributions of surplus profits after the payment of their preferential dividend.

Preferential rights to refund of capital on winding-up

General rule: don't enjoy a right to repayment of their capital in priority to ordinary shareholders.

In the absence of express provision preference shares would on a *pro rata* basis share with ordinary shares both in repayment of their capital as well as in surplus assets on a winding-up.

Where preference shares are given priority to return of capital on a winding-up, they would share in surplus assets on a winding-up only if this right is expressly given to them by the company's constitution or terms of issue.

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 prefferent 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 enable shareholders holding only a small proportion of the shares of the company to exercise effective control over the company.

The 2008, Act: if a company has only one class of shares, all shares shall have a right to vote; if there is more than one class of share, at least one of those classes of shares must have voting rights.

Every share must at the minimum have a right to vote on any resolution to amend the preferences, rights, limitations and other terms associated with that share. In this event, even non-voting shares acquire automatically by operation of law a statutory right to vote.

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

Old Act: the directors of a company do not have the power to allot or issue shares without the prior approval of the members in general meeting (s221).

New act: power to issue shares and increase authorised share capital is exercisable by the board instead of the members.

The decision to increase share capital or a decision to finance the company through debt, is essentially a management decision for the directors to

make, rather than the shareholders and it is the directors who have the responsibility to manage the affairs of the company

The board may at any time resolve to issue new shares and should it exceed the authorised share capital of the company or the authority conferred on the board by the company's Memorandum, the issuance of the shares may be retrospectively authorised by amendment to the Memorandum by special resolution or in, appropriate cases, by the board itself.

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. The Memorandum of the private company may limit, restrict such pre-emptive rights with respect to any or all classes of shares of the company.

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.

Pre-emptive rights protect the existing shareholders they enable existing shareholders to protect their voting power by preventing any dilution of their voting rights.

Shareholders should be given the opportunity to preserve their proportionate share in the company's capital and in their voting rights. These rights should not be diluted without their consent.

Pre-emptive rights cannot apply to an allotment or issue of shares for the purposes of an employee share scheme or to the issue of capitalisation or bonus shares.

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.

Securities registration and transfer:

Both Acts: look at certified and uncertified shares.

Holders can choose whether to hold shares in certified or uncertified form, only uncertified shares may be transferred on the JSE.

The bona fide transferee of uncertified shares is protected in the case of fraud, illegality or insolvency of which he had no knowledge

Every company must keep a register of its issued shares including:

- ❑ Total no of uncertified securities
- ❑ The name and addresses of the holders to whom the certified shares were issued
- ❑ The no of shares held in trust

The securities register is sufficient proof of the facts recorded in it, in the absence of evidence to the contrary.

The records of the CSD with regard to uncertified shares form part of the companies security register.

S51: certificate must be signed by 2 people authorised by the board = prima facie proof that the person named securities holder owns the securities.

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 depositary 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 1st 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

A director is a member of the board and includes director or alternate director.

A person becomes a director only when that person has:

- ❑ Given his or her written consent to serve as a director,
- ❑ After having been appointed or elected or holding office in accordance with the provisions of s66.

S66: the business and affairs of a company must be managed by or under the direction of its board, which has the authority to exercise all of the powers and perform any of the functions of the company, except to the extent that the Act or the memorandum provides otherwise.

Kings' code identifies three types of directors:

EXECUTIVE DIRECTOR:

- Day to day management
- Employee of company
- Employee of company's subsidiaries

NON EXECUTIVE DIRECTORS:

- Not involved with day to day management
- Not a salaried employee of company or subsidiaries.

INDEPENDENT DIRECTORS:

- Non-executive director
- Not a representative of a controlling shareholder
- Not employed by the company in an executive capacity
- Has no contractual or business or business interest in the company or group

'Shadow directors': people who are not officially appointed as directors; they do not complete the consent to act form, they do not comply with other formalities on appointment and their particulars do not give instructions to the board and the board does not indeed act on their instructions.

EX OFFICIO DIRECTORS:

- 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.
- Has all the powers and functions of any other director, except to the extent that the company's Memorandum restricts such powers and functions.
- Has all the duties and is subject to the same liabilities as other directors.

Memorandum appointed director:

- Does not have to be appointed by the shareholders.
- Memorandum can specify how and/or by whom such a director is appointed.

Alternate director:

- May be appointed or elected depending on the memorandum.
- Person elected or appointed to serve as a member of the board of a company in substitution for a particular elected or appointed director of that company.
- Can have more than one person as alternate.
- In the case of a profit company, at least 50% of alternate directors must be elected by shareholders.

Elected director:

In the case of a profit company, at least 50% of directors must be elected by shareholders.

Temporary director:

- The memorandum can provide for the appointment of a temporary director.
- Unless the memorandum provides otherwise, the directors may appoint a temporary director.

DIRECTORS AND MANAGERS

Manager: is an employee of a company

Director: does not have to be an employee = code requires a majority of non-executive directors, to ensure objective decision making

<u>Directors</u>	<u>Managers</u>
Protect assets and reputation.	Implement decisions and policies made by the board.
Apply skill and care in exercising their duty to the company and are subject to fiduciary duties. If they are in breach of their duties or have acted improperly, directors may be made personally liable in both civil and criminal law.	Cannot act contrary to interests of the employer
Directors are accountable to the shareholders for the company's performance and can be removed from office by them.	Usually appointed and dismissed by directors or management and do not interact with shareholders.
Determination of the values and ethical position of the company.	Take their direction from the board.
Directors are responsible for the company's admin.	Company admin can be delegated to managers, BUT the ultimate responsibility for them resides with the directors.
Directors can be disqualified as directors under the Act or in terms of the Memorandum.	The control over the employment of a manager rests with board and control is exercised in accordance with a manager's employment contract.

King Code: the key functions of the board of directors are the following:

- To give strategic direction to the company;
- To ensure that management implements board plans and strategies;
- To be responsible for the performance and affairs of the company and to retain full effective control over the company.

Number of directors and consent

A person becomes a director of a company when that person has been appointed or elected in terms of the provisions of the memorandum or acts or holds office, title, designation or similar status entitling that person to be an *ex officio* director of the company.

A person will only become a director if he or she delivered a written consent accepting the position of director to the company.

REMOVAL OF DIRECTOR:

1973 Act:

S220: director ceases to hold office if he doesn't get his qualification shares in time, he becomes disqualified or there is a compulsory winding up of the company.

Unless the articles provide otherwise a director can resign at any time. An agreement with the shareholders could prevent them from voting for the director's removal.

A director can be removed by ordinary resolution, despite:

- ❖ Anything in the memo or articles
- ❖ Agreement between the company and director

BEFORE Amols: 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 board's 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 isn't a contract – a person who wants to claim damages for breach must prove the existence of a valid contract

Remuneration:

- A director does not have an automatic right to remuneration in terms of the act of 2008.
- S66 (9) provides that a company may pay remuneration to a director, unless prohibited in a Memorandum.

Remuneration payable, otherwise than in terms of a Memorandum, must be approved by a special resolution within the previous two years

INELIGIBLE AND DISQUALIFIED

S69 provisions apply to those wishing to be a

- Director
- An alternate director;
- A prescribed officer; and
- Any person who is a member of a committee of a board of a company or of the audit committee of a company, irrespective of whether such person is also a member of the company's board.

If a person is ineligible from being appointed as a director, this means that such person is absolutely prohibited from becoming a director of a company and there are no exceptions to this prohibition.

The following persons are **ineligible** to be appointed as a director:

- ❑ 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.

The following persons are **disqualified** from being appointed as a director:

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 = A disqualification in terms of this section ends at the latest of five years after the date of removal from office or at the completion of the sentence imposed for the relevant offence or as determined by a court from time to time on application by the commission.

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
8. Prohibited by a court of law from becoming a director.

Director disqualification: Exemptions

Section 69(11) gives a court discretion and s69 (12) gives shareholders of certain private companies an opportunity to avoid this disqualification.

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 1st 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">▪ Consents to be a director while ineligible (FOR LIFE)▪ Acted as director while under probation (FOR LIFE)▪ Abused his position as director▪ Used information for personal capacity▪ Gross negligence▪ Breach of trust▪ Failed to vote against a resolution which had to do with liquidity and solvency REST 7 YEARS	<ul style="list-style-type: none">▪ Acted against his duties as director▪ Acted oppressively or in an unfairly prejudicial manner FOR 5 YEARS

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.

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. If the number of incorporators of a company, together with any *ex officio* directors and appointed directors is fewer than the minimum number of directors required for that company, 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.

Filling of vacancies

If a vacancy arises in the board other than as a result of an *ex officio* director ceasing to hold that office, it must be filled by a new appointment or by a new election conducted at the next annual general meeting of the company if the company is required to do so.

Where as a result of a vacancy, there are no remaining directors or no remaining director's resident within the republic. Any shareholder with voting rights may convene a meeting to elect directors.

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

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.

Board Committees

S72 of the companies act provides that except to the extent that a memorandum provides otherwise, the board of directors may appoint any number of committees and it may delegate any of the authority of the board to a committee.

The King Code, however, makes clear that the board is the focal point of the corporate governance system and whilst the board may delegate authority, there is an important distinction to be made between a 'delegation' and an 'abdication' of powers. In other words, the board is responsible for carrying out its duties properly and a director cannot avoid responsibility, for example, by shielding behind a committee.

S72 (3) thus provides that the board of directors or the particular director will remain liable for the proper performance of a director's duty despite the delegation of a duty to a committee.

A committee may include persons who are not directors of the company, but s 72(2) (a) provides that such a person cannot be a person who is not ineligible or disqualified to be a director.

Committees and the King Code

The king code proposed that the board committees should be established to assist the directors by giving detailed attention to important areas. In terms of the King Code, a public listed company should, at the least, have both an audit and a remuneration committee.

Remuneration committee:

- Make recommendations to the board on specific remuneration packages for each of the executive directors.
- Make recommendations as to the fees to be paid to each non-executive director.

Audit Committee:

- Recommend to the board, for acceptance by shareowners, the appointment of external auditors.
- Set principles for recommending using the accounting firm of the external auditors for non-audit services.
- Consider whether or not an interim report should be reviewed by an external auditor.
- Internal audit should report at all audit committee meetings.
- The appointment or dismissal of the head of the internal audit should be with the concurrence of the audit committee.
- If the external and internal audit functions are carried out by the same firm, the committee has a duty to ensure that there is adequate segregation between the two functions to ensure that independence is not impaired.
- The internal audit plan should be based on a number of matters including issues highlighted by the audit committee.

Nomination committee:

- Assist the board in the formal and transparent procedures leading to board appointments
- Assist the board in the formal and transparent procedures leading to the appointment of the company secretary
- Review and evaluate other qualities of the board such as its demographics and diversity
- Review and evaluate the boards mix of skills and experience
- Review and evaluate all committees and the contribution of each director.

Board Meetings

A director authorised by the board of a company may call a meeting of the board at any time. A directors' meeting must be called in certain circumstances:

- If required to do so by the number or percentage of directors specified in a company's memorandum.
- If required to do so by at least 25% of the directors, where the board that has at least 12 members.
- If required to do so where the board has less than twelve members and the meeting is requested by at least two directors.

DIRECTORS DUTIES

The 1973 Companies Act: did not contain clear rules regarding corporate governance and the duties and liabilities of directors.

Common law: contained the fiduciary duties of directors to act in good faith and with the required degree of care and skill

2008 Act: has partially codified the director's duties and in S76 set a standard of conduct = codifies the duties of directors, which includes fiduciary duties and care and skill. Directors are required to know what is expected of them. Common law still applies

FIDUCIARY DUTIES:

At common law a director was subject to the fiduciary duties to act in good faith to the benefit of the company as a whole and to avoid the situation where the director's personal interest conflicts with that of the company.

These fiduciary duties include:

- ❖ Director should prevent a conflict between his interests and the interests of the company
- ❖ Directors may not exceed the limits of their powers
- ❖ Directors should maintain an unfettered discretion
- ❖ Directors should exercise their powers for the purpose for which they are conferred

Conflict of interest: a person in a fiduciary position has a legal duty to prevent a conflict between his own interests and those of the person he serves – a director can't get a benefit other than that which has been entitled to him through his directors remuneration.

This is known as secret profits, this rule applies even if the advantage was obtained:

- ❖ Openly
- ❖ In good faith
- ❖ At no expense to the company

The question is whether the advantage arose from the director's position. A director can't make personal gain from the use of information he got in his capacity as director (this applies even if such director resigns)

Robinson v Randfontein estate Gold Mining co:

Facts: the co wanted to buy a farm, but couldn't come to an agreement with its owner. Robinson, the chairman of the board bought the farm in his own name for R120 000 and sold it to the co for a profit of R550 000

AD held: Robinson wasn't justified in making a profit from his office or placing himself in a position where his personal interests conflicted with his

duties. He was ordered to repay the co the profit of R430 000 which he had made.

Regal (Hastings) ltd v Gulliver:

Facts: regal was unable to buy all the shares in another co X, so the directors and their friends took up the balance of the shares in X – 3000 of the 5000 shares

Thereafter all the shares in Regal and in X were sold to a 3rd party. The shares in X, which had been taken by the directors, were sold at a profit.

Regal instituted action against its former directors for the improper profits they had made out of their directorship. Their action succeeded.

Atlas Organic Fertilizers (pty) ltd:

MD had breached his fiduciary duties where he sabotaged his co chances to get a contract, he later left the co, and took over the contract for his new co.

General rule: director isn't prohibited from serving as director of other company's, even if that co is a competitor, but he can't use confidential information of the 2 co for the benefit of the other.

Cooley case:

Facts: the MD Cooley tried to get a building contract for his co, but the other party didn't want to do business with the co but indicated they would do business with Cooley himself. Cooley resigned as MD and accepted work from the other party.

Held: even though the other party wasn't prepared to contract with the co, Cooley was held liable to pay the co, all the profit he made in terms of the contract, because they were made as a result of information Cooley got in his capacity as MD

An MD can't be an MD or even an ordinary director of a competing co

Exceeding the limitation of his powers: director has a fiduciary duty to observe the limitations of the companies powers, as well as his own limitations on his authority to act on the companies behalf – the director will incur liability if the company suffers damage

Failure to maintain an unfettered discretion: director must consider the affairs of the company in an objective manner and therefore must not contract as a director to act in a certain way

Failure to exercise the powers for the purpose they were conferred: board of directors must use their powers for their true purpose and not for frustrating the wishes of the majority.

The codification of the directors duties in the 2008 Companies Act, doesn't replace common law – it's a partial codification in which common law and the codified rules are both recognized.

When interpreting the Act, the court will look at common law

2008 Act: director's duties

- 1. S76 (2)(a): don't use the position or information he gets in his capacity as director for the advantage of himself or another**
- 2. S76 (2)(b): disclose to the directors any material information that comes to his attention:** unless its:
 - ❖ Immaterial
 - ❖ Generally available to the public
 - ❖ Known to the other directors
- 3. S76 (3)(a): act in good faith and for a proper purpose**
- 4. S76 (3)(b): act in the best interests of the company**
- 5. S75: disclose to the board any financial interest in the matters of the company**

MMA Architects: the court referred to Ultraframe case: said directors rules include:

1. No conflict rule: director can't enter into a transaction where the director has an interest that conflicts with that of the company
2. No profit rule: director must account for any profits he makes from his position unless there has been informed consent

Contract between the director and the company

S75 deals specifically with a directors' personal financial interests and provides that if a director's personal interests conflict with those of the company, the director should disclose the conflict of interest to the shareholders or the board of directors' of the company.

The director may disclose any personal financial in advance by delivering a notice in writing to the board of directors or shareholders.

The written notice should set out the nature and extent of the personal interest and will be valid until changed or withdrawn by further written notice from that director.

If a director of a company has a personal financial interest in respect of a matter to be considered at a meeting of the board or knows that a related person has a personal financial interest in the matter, the director must disclose the interest and its general nature before the matter is considered at the meeting.

The director is compelled to disclose to the meeting any material information relating to the matter that is known to the director. The director may disclose any observations or pertinent insights relating to the matter if requested to do so by the other directors if present at the meeting but must leave the meeting immediately after making any disclosure. The director is not allowed to take part in consideration of the matter.

During a director's absence he or she will still be considered present for purposes of determination of the quorum. However, the director is not regarded as being present at the meeting for the purposes of determining whether a resolution has sufficient support to be adopted. The relevant director may not execute any document on behalf of the company in relation to the matter unless specifically requested or directed to do so by the board. A decision by the board or an agreement approved by the board is valid despite any personal financial interest of the director or related person, if it was approved and ratified by an ordinary resolution of the shareholders.

A director must communicate to the board any information that comes to his attention, unless the director reasonably believes the information is:

- Immaterial
- Generally available to the public
- Known to the other directors

A director is not compelled to disclose information where a legal or ethical obligation of confidentiality prevents him from disclosing the information.

DUTY OF CARE AND SKILL

COMMON LAW: Fisheries Development Corp v Jorgenson: the court summarized the director's duty of care and skill:

1. The extent of a directors duty of care and skill depends on the nature of the company's business
2. A director isn't required to have special business expertise or even experience in the business of the co – he's expected to exercise the care which can reasonably be expected from a person with his knowledge and experience)
3. In respect of all duties that may be properly left to some other official, a director is justified in trusting that official to perform such duties honestly
4. A director isn't bound to give continuous attention to the affairs of the co
5. A director, who doesn't observe his duties of care and skill towards the co, is liable to it for damages.

Shareholders should be responsible for the competency of people appointed by them as managers

Re Elgindata Ltd: the court held that members of the company have no right to expect a reasonable standard of general management of the companies

managing director – it was seen as one of the risks of investing in a company that its management may turn out not to be of the highest quality

Common law requires gross negligence before a director will be held liable for breach of his duties.

Brazilian Rubber Plantations and Estates: where the director contracted on behalf of the company to buy a plantation on the basis of a fraudulent report.

Despite the facts the director was aware of the discrepancies in the report, their failure to make a proper inquiry and to correct the discrepancy didn't amount to gross negligence

SA Company law recognizes that a director must exercise his power and carry out his office bona fide and for the benefit of the company

In Re City Equitable Fire Insurance Co: the basis of the duty of care and skill is delictual in nature – it may also be contractual, if the director has concluded a contract with the company in which he has undertaken any further obligations

The Company's Act 2008 has partially codified the duty of care and skill and provides that the director must exercise that degree of care and skill with diligence that may reasonably be expected of a person carrying out the same functions in relation to the company as those carried by that director.

An objective test is applied to determine what the reasonable director would have done in the same situation. The objective test applied contains subjective elements in that the

- ❖ General knowledge,
- ❖ Skill and
- ❖ Experience of the particular director in question are taken into account.

A director satisfies his or her obligations if he or she has taken reasonably diligent steps to become informed about a particular matter.

The company's act 2008 introduces the **business judgment rule** into our company law.

S76 (4): Business judgment rule:

A director won't be liable if 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 won't 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

A director will not be held liable for breach of the fiduciary duties and will have satisfied his or her obligations as director if he or she can prove that they have taken reasonably diligent steps to become informed about the matter and either the director had no reasonable basis to know that any related person had a personal financial interest in the matter. The particular director will also not incur liability if he or she disclosed the conflict of interest required by the act.

Business judgment rule: was developed in the US to protect honest director from the risk of an unsuccessful business decision: the advantages of this is that judges don't like to interfere with the decision of directors, which means that courts will now only look at the procedure rather than the merits of the decision.

It encourages directors to take business risks without fear of liability and shareholders benefit from such risk taking.

The disadvantages: are that it creates a presumption in favor of the director that if he follows the procedure he isn't liable.

2008 Act: S76 (3) partially codifies care and skill:

Directors must exercise care and skill with the diligence that can reasonably be expected of a person carrying out the same functions (objective test), the court also looks at subjective factors:

- ❖ General knowledge
- ❖ Skill
- ❖ Expertise of the director himself

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. A director is entitled to rely on:

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

Liability of directors and prescribed officers

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

1. In terms of the principles of common law or the provisions of the law of delict relating to 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 or she lacked the necessary authority
3. The director conducted the company's business in contravention of the provisions in the 2008 Act relating to pre-incorporation contracts
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' or a statement to the effect that a person had consented to be a director of the company when no such consent had been given despite knowing that the statement was false, misleading or untrue
6. Where the director was present at a meeting or participated in the making of a decision other than at a meeting or participated in the making of a decision other than at a meeting 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. Where the director participated in the granting of options to any person despite knowing that any shares for which the options could be exercised or into which any securities could be converted had not been authorized
9. The acquisition by the company of any of its shares or the shares of its holding company, despite knowing that the acquisition was contrary to S46 or S48. A company may acquire its own shares provided the company passes the solvency and liquidity test. Any subsidiary of a company may acquire shares of that company. Subsidiaries may not acquire more than 10%, in aggregate, of the number of shares issued by the holding company. No voting rights attached to shares are acquired by subsidiaries;

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.

In any proceedings against a director other than for willful misconduct or breach of trust, the court may relieve the director either wholly or partly from any liability or on any terms the court considers just. The court may

relieve a director from liability if it appears to the court that the director has acted honestly and reasonably. A director may apply to a court for relief.

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.

Except to the extent that a company's memorandum provides otherwise, the company may advance expenses to a director to defend litigation in any proceedings arising out of the director's service to the company.

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 dealing with indemnification and directors' insurance applies also to former directors of the company. A company may not directly or indirectly pay any fine that may be imposed on the director of the company or of a related company, who has been convicted of an offence in terms of any national legislation.

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.

Finally, s78 (8) entitles the company to claim restitution from a director of the company or of a related company for any money paid directly or indirectly by the company to or on behalf of that director in any manner inconsistent with the above restrictions.

S218 (2): any person who contravenes the provisions of this Act are liable to any person for any loss/ damage suffered regarding the contravention

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.

CAPACITY OF A COMPANY: REPRESENTATION

A company has a separate legal personality and therefore give an agent the authority to act on its behalf = actual authority and will bind the company in acts which fall within the mandate given to him

Authority can be given:

- ❖ Expressly: oral or written
- ❖ By implication: Paddon: can be inferred when the official purports to exercise authority which that type of official usually has even though he has exceeded his actual authority.

Panorama Developments: the secretary of the company fraudulently ordered self drive cars from the plaintiff stating that they were for business purposes. The company was found liable based on apparent authority – *today the secretary regally makes representations on the companies behalf and concludes contracts for the day to day running of the company = he is held out to have authority to act.*

APPARENT AUTHORITY: A legal relationship between the company and the agent is created by a representation that the agent has such authority = the 3rd party could rely on ESTOPPEL

Freeman & Lockyer: estoppel applies when an agent doesn't have actual authority, a misrepresentation, the company will be estopped from denying liability if the 3rd 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 3rd party was induced to deal with the agent because of the misrep
4. The 3rd party was prejudiced

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: The legal capacity of a company was determined by the objects clause, which the memorandum of every company had to contain. The company existed in law only for the purpose of the objects for which it was incorporated and it had legal capacity to perform only such acts as are indicated by its objects = any contract that fell outside the scope of the company's objects clause was null and void.

In *Ashbury Railway Carriage and Iron Co v Richie* it was laid down that if a company would not exist as a legal person for the purposes of that contract. The contract was therefore absolutely null and void and as such, could not be ratified even by the unanimous assent of all members.

Ultra vires doctrine protects both shareholders and creditors so that they may know the objects or business activities for which their money was to be employed by the company.

The legal consequences of an *ultra vires* contract were that as between the company and the other party to the contract, the contract was null and void

1973 COMPANIES ACT:

S36:

No act shall be void only for the reason that the company lacked capacity. Between the company and a 3rd party a contract, which is ultra vires, is now valid and binding. Members of the company can apply to the court for an interdict to stop the director. Good faith isn't required

2008 COMPANIES ACT:

S19 (1)(b) states that a company has the legal capacity and powers of an individual except to the extent that a juristic person is incapable of exercising any such power, such as, for instance, the capacity to enter into a contract of marriage.

The company's memorandum may, however, impose restrictions on the legal capacity of the company. The Act: any such restrictions would not render invalid any contract that conflicts with such restrictions, i.e. the contract remains valid and binding on the company and the other party to the contract.

- ❑ The restrictions on the company's capacity may only be raised internally in legal proceedings between the company, its shareholders and directors.
- ❑ The directors would thus incur liability for breach of fiduciary duty or face an action by the members to restrain them from entering into the contract will not affect the other party to the contract, provided that such party has acted in good faith and without knowledge of the restriction imposed by the company's constitution.

S20 (6) that each shareholder of a company has a claim for damages against any person who fraudulently or due to gross negligence causes the company

to do anything inconsistent with the act, or limitation, restriction or qualification on the powers of the company as stated in its Memorandum, unless this has been ratified by special resolution. Ratification is not permissible if the act in question 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 3rd party was mala fide
- The circumstances were suspicious

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.

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'.

A number of rules flowed from the capital maintenance concept, some of which are as follows:

1. Par value shares may not be issued at discount except in accordance with S81 of the Previous Act or S82 in the case of no par shares.
2. Dividends may not be paid out of share capital.
3. At common law, interest may not be 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

One of the foundations of South African company law until recently was the rule that a company not purchase its own shares. The basis of this rule was the capital maintenance concept that required the issued share capital of a company to be maintained.

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.

Trevor v Whitworth = Companies amendment act finally repealed the common law prohibition against a company purchasing its own shares. The amendment act substitutes for the capital maintenance concept the tests of 'solvency' and 'liquidity' as a safeguard for creditors.

COMPANY BUY OWN SHARES

S48 2008 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 and
- ❖ the board of directors acknowledges that it has applied the tests and has reasonably concluded that the company will satisfy the solvency and liquidity requirements at this point. The repurchased shares must be cancelled on their acquisition by the company and cannot be held as treasury shares.

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.

- ❑ A subsidiary would still be entitled to acquire a maximum of ten percent of the shares of its holding company but it may not vote these shares (once again, there is no mention of dividend rights).
- ❑ An agreement for the acquisition of shares is enforceable if it meets the liquidity and solvency test, BUT if a company can't fulfil its obligations under a repurchase agreement:
 - Company must apply for a court order – to suspend the repurchase
 - The court can make an order that's just and equitable in the circumstances

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 (S46):

1973 COMPANIES ACT:

Distribution: payments made to shareholders in their capacity as shareholders but excludes repurchase of shares by a company and redemption of shares

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.

S90 enables it to pay dividends out of capital, thereby casting aside the capital maintenance rule that dividends may only be paid out of divisible profits. Payment need not be approved by a special resolution of the members of the company. This doesn't apply to the purchase of redeemable preference shares in which S98 allows for the purchase of these shares, from 2 possible sources:

- ❑ Fresh issue of shares
- ❑ Profit

2008 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.

It will be for the board of directors and not for the members in general meeting to authorise a 'distribution'. No special or ordinary resolution of the members is required. The distribution must, however, comply with the solvency and liquidity test.

The distribution must be effected or completed within 120 days, failing which it is subjected afresh to the solvency and liquidity test.

Only the directors who voted for or who had assented to the authorisation of a distribution exceeded the amount that could have been validly distributed without contravening the solvency and liquidity test or the recovered by the company from persons to whom the distribution was made. The directors' liability is thus limited to the extent of the unauthorised amount.

OPTIONS

An option contract gives the option holder a right to buy or sell a specified quantity of a particular share or debenture within a stated period of time at a stated price, called the 'strike price'. A company may grant an option in return for a payment made to it or an option may be granted as remuneration for services rendered or to be rendered or it may be given gratuitously.

An option holder is not as such a member of the company but is a contingent creditor.

1973 ACT: share option plans that directly or indirectly give directors or future directors the right to subscribe to any shares of the company or to take up debentures convertible into the shares of the company shall not be valid unless authorised by a special resolution of the members of the company or the shares or debentures are allotted or issued in proportion to existing shareholdings on the same terms and conditions as have been offered to all the shareholders or debentures holders of the company. This restriction does not, however, apply where the option is given to a director (or future director) who is a salaried employee of the company and the option is given to him in his capacity as an employee.

2008 ACT: a company may issue options for the allotment or subscription of authorised (but unissued) shares or other securities of the company. It is for the board of directors to determine the consideration or other benefit and the terms upon which the options are issued. If the board issues any unauthorised shares contrary to the memorandum or the board grants any unauthorised options, the directors who were aware of this fact and who voted in favour of granting the options or who had failed to vote against it become personally liable for any loss, damages or costs sustained by the company in consequence of the unauthorised issue or option.

FINANCIAL ASSISTANCE (S44) for Acquisition of Securities

COMMON LAW: the rule that a company can't buy its own shares is extended by S38 to financial assistance

1973 ACT:

S38: it is unlawful for a company to finance the purchase of its own shares.
Contravention of S38 included:

- ❖ Bonding the company's property to pay for shares
- ❖ Fake debt to the share seller
- ❖ Taking over debts
- ❖ Bogus contracts of employment

If there was a contravention of S38 the transaction was void and the director participating could be liable for breach of his fiduciary duties

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.

The corporate laws amendment act 2006, amended S38 to align the section with the tests of solvency and liquidity.

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 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

1. 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
2. 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

When a transaction passes these 2 phases it will have to comply with S44 to be valid.

COMPANY GROUPINGS

Definitions

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

The essential idea of a group is the existence of control through one company of one or more subsidiary companies.

Holding and subsidiary companies under the 1973 act

Previous Act:

S1 (4): a company shall be deemed to be a holding company of another if the other company is a subsidiary.

S (1) (b) of the Companies amendment act:

- Control over the majority of voting rights in the company for a majority equity ownership
- Control over the right to appoint or remove directors, having a majority of voting rights at board meetings, for control over the composition of the board.

Group of companies

New 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.

The 2008 act defines a 'group of companies' as two or more companies that are related or inter-related.

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 not 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

AFFECTED AND FUNDAMENTAL TRANSACTIONS

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. The announced intention to acquire a beneficial interest in the remaining voting securities of a regulated company not already held by a person or persons acting in concert
5. A mandatory offer
6. A compulsory acquisition

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.

Fundamental Transactions

Chapter 5 of the 2008, Act, is divided into 3 parts
Namely:

1. The approval for Fundamental Transactions.
2. The authority of the takeover regulation panel and with the Takeover Regulations
3. The Regulation of affected transactions and offers.

DISPOSAL OF ALL/ GREATER PART OF THE ASSETS OR UNDERTAKING

The disposal or sale of all or the greater part of the assets or undertaking of a company is regulated by s112 of the Act.

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

- ❑ Approved by special resolution
- ❑ Notice and summary of the transaction in writing is given to the creditors
- ❑ Assets are disposed of at a fair market value

Exemptions

S112 does not apply to sales or disposals of all or the greater of part of the assets of the company or undertaking in 3 situations:

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.

Legal requirements and process to be followed.

A notice of a shareholders' meeting to consider the resolution must include or be accompanied by a written summary of the terms of the transaction to be considered at the meeting.

A resolution approving the sale or disposal of all or the greater part of the assets or undertaking is effective only to the extent that it authorizes or ratifies a specific transaction.

MERGER AND AMALGAMATIONS

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

Exemptions

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.

Legal requirements and process to be followed.

S113: two or more profit companies, including holding and subsidiary companies, may amalgamate or merge if, upon implementation of the amalgamation or merger, each amalgamated or merged company will satisfy the solvency and liquidity test.

For profit companies are recognized as being of one of the following types:

- A private company, which in terms of its memorandum, restricts the transferability of its securities and prohibits the offering of its securities to the public
- A personal liability company, which in terms of its memorandum, provides for joint and several liability of its directors or former directors for debts incurred by the company during the director's term in office. This type of company is comparable to a s53 (B) company.

- A public company, which does not restrict transferability of its securities and allows its securities to be offered to the public
- A state-owned enterprise, which is an enterprise that is registered in terms of the Companies Act, 2008 as a company

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

- The proposed Memorandum of any new company must be formed by the amalgamation or merger
- The name and identity number of each proposed director of any proposed amalgamated or merged company
- The way in which the securities of each amalgamated or merging company are to be converted into securities of any proposed amalgamated or merged company, or exchanged for other property
- If any securities of any of the amalgamating or merging companies are not to be converted into securities of any proposed amalgamated or merged company, the consideration that the holders of those securities are to be receive in addition to or instead of securities of any proposed amalgamated or merged company
- The manner of payment of any consideration instead of the issue of fractional securities of an amalgamated or merged company or of any other juristic person, the securities of which are to be received in the amalgamation or merger
- 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 or strategy necessary to complete the amalgamation or merger and to provide for the subsequent management and operation of the proposed amalgamated or merged company or companies and
- The estimated cost of the proposed amalgamation or merger.

These particulars reflect the involved nature of such agreements and as a result, companies will almost invariably enlist the services of an expert to unravel some of the issues concerned.

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

Legal requirements and process to be followed

On the initiative of the board, a company may implement any arrangement between the company and holders of any class of its securities, including a reorganisation of the company's share capital. The act further provides that the arrangement may be by way of, among other things:

- 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 affected by the proposed arrangement
2. Identify every type and class of holders of the company's securities affected by the proposed arrangement
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 A FUNDAMENTAL TRANSACTION: S115

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

- a. 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
- b. 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
 - ii. The resolution is unfair to any class of holders of the company's securities
 - iii. 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.

APPRAISAL RIGHTS:

Is the rights of a dissenting shareholder to force the company to buy their shares at a mutual price or a judicially determined price

Procedure:

- ❖ Notice of the meeting to consider the transaction must be given to each shareholder
- ❖ If the resolution would trigger an appraisal remedy – the dissenting shareholder must give notice objecting to the resolution before it is voted on
- ❖ Shareholder must have voted against the resolution
- ❖ The action is only allowed if the resolution is adopted
- ❖ Once the resolution is adopted the company must send notice to the shareholder within 10 working days
- ❖ Shareholder can then demand fair value by giving written notice to the company within 20 days after getting notice that the resolution has been passed

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 shareholder's 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.

The takeover regulation panel and regulation of affected transactions

‘Affected transaction’:

1. Transaction or series of transactions amounting to 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. The announced intention to acquire a beneficial interest in the remaining voting securities of a regulated company not already held by a person or persons acting in concert
5. A mandatory offer
6. A compulsory acquisition

Takeover Regulation Panel

Takeover regulations are rules which regulate affected transactions and which are issued by the minister of trade and industry after consultation with the Takeover Regulation Panel.

The Takeover Regulation Panel must regulate any affected transaction or offer without regard to the commercial advantages or disadvantages of any transaction or proposed transaction.

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.

The Takeover Regulation panel may:

- Require the filing of any document with respect to an affected transaction or offer
- Issue clearance notices
- Initiate or receive complaints, conduct investigations and issue compliance notices with respect to any affected transaction or offer

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%). Upon attaining such a prescribed percentage, such person or persons 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.

Within one day after the date of a completed mandatory offer, the person or persons in whom the prescribed percentage, or more, of the voting securities beneficially vests must give notice in the prescribed manner to the holders of the remaining securities, including in that notice:

- A statement that they are in a position to exercise at least the prescribed percentage of all the voting rights attached to securities of that regulated company
- Offering to acquire any remaining such securities on terms determined in accordance with the Act and the takeover regulations.

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/ SQUEEZE OUT: S124

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.

COMPROMISE

1973 ACT: S311

The company might need to come to an arrangement or compromise that binds all members or creditors – its difficult to negotiate and get consent from each of them individually, so the Act enables the company to negotiate with all members in a group and bind them all (even those that voted against it)

- ❖ Proposal of the scheme between the company and members/ creditors
- ❖ Application to the court for permission to call a meeting to consider the scheme
- ❖ Send relevant information to the people involved
- ❖ Hold the meeting
- ❖ Resolution must be passed by a special resolution
- ❖ The court must sanction the scheme
- ❖ File it with the registrar

This was a court driven procedure from the time the procedure commenced, right up to the time the court sanctioned the compromise and arrangement. NOW: The new procedure basically does away with court involvement in commencing the procedure and in reaching a compromise.

2008 ACT: S155

According to the new act, the provisions relating to a 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' or is a company contemplated in the act.

Who may propose a compromise?

In terms of s155 (2):

- 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
- Every member of the relevant class of creditors whose name and address is known to or can reasonably be obtained by the company
- The commission

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.

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.

Certificate by authorised director or prescribed officer of company

A proposal for a compromise must conclude with a certificate by an authorised director or prescribed officer of that company, stating that:

- Any factual information provided in the proposal appears to be accurate, complete and up to date
- Any projections provided are estimates made in good faith on the basis of factual information and assumptions as detailed in the statement.

Majority required for adoption of proposal

In terms of s155 (6), a proposal for a compromise will be regarded as adopted by the creditors of the company if it is supported by a majority in number, representing at least 75% in value of the creditors or class, as the case may be, present and voting in person or by proxy, at the meeting called for that purpose.

Adopted proposal to be sanctioned by the court

In terms of s155 (7) (a), the company may apply to the high court for an order approving (sanctioning) the proposal if it has been adopted by the creditors in accordance with s155 (6). Although the 2008 act, uses the word 'may', it is clear that the proposal will not be enforceable until such time as the court has sanctioned it.

In terms of s155 (7) (b) the court may sanction the compromise as embodied in the adopted proposal if it considers it just and equitable to do so. In determining whether it would in fact be just and equitable to sanction the proposal for a compromise, the court must have regard to:

- The number of creditors of any affected class of creditors who were present or represented at the meeting and who voted in favour of the proposal
- In the case of a compromise in respect of a company that is in liquidation, a report by the master.

Filing requirements and effect of sanctioned compromise

In terms of s155(8) a copy of the court order sanctioning a compromise must be filed by the company within 5 days and must be attached to each copy of the company's memorandum.

Once a compromise has been sanctioned by the court, it is final and binding on all the company's creditors or all members of the relevant class of creditors, as the case may be, as from the date on which the copy of the order is filed.

However, a compromise sanctioned in terms of s155 does not affect the liability of any person who is surety of the company.

BUSINESS RESCUE PROCEEDINGS

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.

A company will (128(1) (f)) be financially distressed in the following circumstances:

- 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.

BOARD RESOLUTION: S129

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.

The business rescue resolution

The board of directors of a company may take formal decision (by majority vote) to begin business rescue proceedings but 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 filed with (delivered) the Companies and Intellectual Property Commission. The rescue proceedings officially commence on the date of filing.

Notification

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 Act allows notification to be given by way of electronic communication if the company does not notify the affected persons as prescribed, the business rescue resolution will become null and void and the company will not be allowed, except with the consent of the court, to file another business rescue resolution within three months after the date of adopting the one that has lapsed.

Appointment of a business rescue practitioner

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

person (or persons) must meet the requirements of s138 and provide his or her written consent to be appointed.

The company must file a notice of his or her appointment with the Commission and, within five business days after filing this notice, the company must make a copy of the notice of appointment available to every affected person

S130: Setting aside the business rescue resolution or appointment of the business rescue practitioner

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.

A director of the company who voted in favour of the resolution to start business rescue proceedings may not bring an application for either the resolution or the appointment of the business rescue practitioner to be set aside, unless he or she can satisfy the court that he or she supported the resolution in good faith based on information that he or she later found to be misleading or false.

Setting aside the rescue resolution

The court may set aside the business rescue resolution on any grounds on which such an application may be based or because the court regards it as just and equitable to do so.

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.

Appointing another business rescue practitioner

If the courts sets aside the appointment of the business rescue practitioner, it must appoint another business rescue practitioner who meets the requirements of s138 and is recommended by or acceptable to the majority in value of recognized independent creditors of the company who were represented in court.

S131: COURT ORDER FOR BUSINESS RESCUE

Procedure

If no resolution has been adopted by directors = 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. Each affected person has the right to take part in the hearing of this 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.

What the court may do

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.

Court: appoint an interim business rescue practitioner nominated by the applicant, if the business rescue practitioner meets the requirements of S138. The appointment will be subject to approval by the majority in value of the independent creditors at the first meeting of creditors.

LEGAL CONSEQUENCES OF BUSINESS RESCUE

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.

Section 133: General moratorium on legal proceedings against company as amended by section 84 of the Companies Amendment Act No. 3 of 2011

During **business rescue proceedings**, no legal proceeding, including enforcement action, against the company, or in relation to any property belonging to the company, or lawfully in its possession, may be commenced or proceeded with in any forum, except—

- (a) with the written consent of the **practitioner**;
- (b) with the leave of the court and in accordance with any terms the court considers suitable;
- (c) as a set-off against any claim made by the company in any legal proceedings, irrespective of whether those proceedings commenced before or after the business rescue proceedings began;
- (d) criminal proceedings against the company or any of its directors or officers;
- (e) proceedings concerning any property or right over which the company exercises the powers of a trustee; or
- (f) proceedings by a regulatory authority in the execution of its duties after written notification to the business rescue practitioner.

(2) During **business rescue proceedings**, a guarantee or surety by a company in favour of any other person may not be enforced by any person against the company except with leave of the court and in accordance with any terms the court considers just and equitable in the circumstances.

(3) If any right to commence proceedings or otherwise assert a claim against a company is subject to a time limit, the measurement of that time must be suspended during the company's **business rescue proceedings**.

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.
- No person may deal with any property that is in the lawful possession of the company, even if the company is not the owner, unless the business rescue practitioner has given his or her written consent.

Employment contracts and employees

Employment contracts

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.

Unpaid remuneration before business rescue proceedings

Any unpaid salary payments already due to an employee when business rescue proceedings commenced, the employee becomes a preferred unsecured creditor of the company.

Employee's committee

The rescue practitioner must convene a meeting of the employees or their representatives within ten business days after his or her appointment to inform them about the company's future. They will decide whether or not to appoint an employee's committee. This committee may consult with the business rescue practitioner and must ensure that the employee's interests are properly represented but its members may not give instructions to the business rescue practitioner.

Shareholders

No change in rights

No alteration in the classification of any issued shares of the company is allowed during business rescue proceedings. The other party to such a contract may claim only damages from the company and not, for example, specific performance of the contract.

Participation

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.

Shareholders do not have the right to vote on the business rescue plan, except for any shareholder whose rights will be affected by the plan.

Directors

Duties and liabilities

Directors must continue to perform their duties during the business rescue proceedings, but must do so under the authority and according to all reasonable instructions of the business rescue practitioner.

Directors must co-operate with the business rescue practitioner, deliver books and records of the company to him, and within 5 business days, after the beginning of the proceedings, provide him with a statement of the company's affairs containing the prescribed information.

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.

Removal

The business rescue practitioner may apply to court for the removal of a director if the director fails to comply with any provisions of the Act, regulating a directors conduct during business rescue or hinders the business rescue practitioner in the performance of her duties or carrying out a business rescue plan.

The rights of creditors during business rescue proceedings

Right to participate

As affected persons, the creditors (including unpaid employees) have the right to be notified of and formally and informally participate in all stages of the proceedings.

Creditors' committee

The practitioner must convene a meeting of creditors within ten days after his appointment to inform them of the company's future and to allow them to prove their claims against the company.

The creditors have the right to form a creditors' committee to represent their interests and which the business rescue practitioner is obliged to consult during the development of the plan, although this committee may not direct or instruct the practitioner in any way.

Voting rights

Whenever creditors have to vote on any decision regarding business rescue proceedings, each creditor has a voting interest equal to the value of his claim against the company, irrespective of whether the claim is secured or unsecured.

A concurrent creditor whose claim would be subordinated in liquidation will, however, have a vote based only on the amount, if any, that he or she could reasonably expect to receive in the case of liquidation.

Apart from the special provisions regarding the approval of a business rescue plan; a decision needs only the support of the holders of a majority of the voting interests of the independent creditors to be a valid and binding decision by the creditors.

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

The business rescue practitioner takes over full management of the company from the board, but he may delegate any of his powers to a director or manager.

He or she must also have possible criminal acts investigated, if he finds evidence of such matters in the dealings of the company or acts of the directors before business rescue proceedings began.

Investigation

The practitioner must investigate the affairs of the company as soon as possible after his appointment 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.

BUT as soon as the business rescue practitioner discovers the company is no longer financially distressed, he must inform the court and take further steps to terminate the proceedings.

Rescue plan

Probably the most important duty of the practitioner is to develop a rescue plan and to see its implementation.

Liability

Although the practitioner has all the duties of a director, and is liable for breach of these duties, he may not otherwise be held liable for anything done or omitted in good faith in his capacity, unless grossly negligent.

Remuneration

The business rescue practitioner will be entitled to payment by the company in accordance with a tariff that will be prescribed by the minister but may also enter into an agreement with the company that he will be paid an additional fee if the rescue plan is adopted or a special result is achieved. Such an agreement will be binding on the company only if approved by the majority in value of creditors who attend the relevant meeting and the majority of shareholders who are entitled to a portion of the residual value of the company on liquidation.

BUSINESS RESCUE PLAN

Preparation

It is the duty of the business rescue practitioner to prepare a business rescue plan for the company, but he must consult the creditors, other affected persons and the management of the company when doing so.

Three parts:

Background

- ❖ Lists of the assets and liabilities of the company, indicating which assets are held for security by creditors and specifying whether a creditor is a secured, preferent or concurrent creditor.
- ❖ The dividend that creditors will probably receive should the company be liquidated is stipulated.
- ❖ List of holders of issued securities of the company
- ❖ A copy of the agreement stipulating the business rescue practitioner's fees

- ❖ A statement as to whether the plan includes any proposal made informally by a creditor.

Proposals

It contains:

- Details of any moratorium
- Release from payment of debts, or conversion of debts into equity that are planned
- Which assets of the company will be used to pay creditors and in what order they will be paid.

Assumptions and conditions

The plan has to state any conditions that must be fulfilled before the plan can come into operation, or before it can be fully implemented.

It must also explain what the effect of the plan will be on the number of employees and their conditions of employment, under which circumstances the rescue plan will come to an end

Certificate

The business rescue plan must conclude with a certificate by the business rescue practitioner in which he or she states the information provided in the plan appears to be correct and the projections, based on this information, have been made in good faith.

Publication of the plan

The plan must be published within 25 business days after the appointment of the business rescue practitioner

Meeting to consider the business rescue plan

The business rescue practitioner must first convene a meeting of the company's creditors to consider the rescue plan. This meeting must take place within ten business days after the publication of the plan. Affected persons must be notified of the meeting at least 5 business days before it is due to take place.

The business rescue practitioner must explain the plan to the meeting and inform the meeting as to whether he or she still believes that there is a reasonable prospect of the company being rescued. The new act specifically provides that the representatives of the employee's must be given an opportunity to address the meeting.

The meeting may discuss and propose amendments to the plan before voting on its approval. If the plan is supported by more than 75% in value of all the creditors and at least 50% of independent creditors who voted and no rights of shareholders of any class are altered, the plan is regarded as finally approved.

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

The Act stipulates it should take no longer than three months. If they cannot be completed in three months after being commenced, the business rescue practitioner may apply to the court for more time.

Business rescue proceedings are terminated in the following ways:

- 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.

INSIDER TRADING

NOTE THE SSA-SECURITIES SERVICES ACT 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
4. The information must have been obtained by an insider = employee, director = person who has that information because of his profession (accountant, banker etc) = includes natural and juristic person.

Securities: shares, stock, debentures, bonds etc.

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.

Regulated person means:

- a licensed central securities depository
- a licensed clearing house
- a licensed exchange
- an authorized user
- a participant
- a nominee

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
- the furnishing of advice to any person
- the custody and administration of securities by a participant or nominee
- the management of securities and funds by an authorized user
- clearing services
- settlement services

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.

PREVIOUS POSITION:

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.

S77 SSA: CIVIL LIABILITY FOR INSIDER TRADING = Civil liability =

derivative civil liability: 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.

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.

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 3rd 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 3rd party didn't deal – no penalty
- BUT – the amount received for making the disclosure may be claimed
- If both the insider and 3rd party are liable = jointly & severally liable.

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 3rd party dealt = equivalent of the profit or loss avoided, costs, interest and commission
- If the 3rd party is liable = joint and several liability between the 3rd party and the insider

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

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

