

## ***Chapter 6***

### **COMPANIES ACT**

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## 1 Introduction and institutional bodies

- 1 The new Companies Act 71 of 2008 (the new Act), which replaced the Companies Act 61 of 1973 (the old Act), gives rise to significant changes to company law in South Africa.
- 2 The English text of the new Companies Act was signed off by the President on 8 April 2009. The new Act has also been translated into Afrikaans as the other official language. This Act has been changed by the Companies Amendment Act 3 of 2011, which was assented to by the President on 19 April 2011. The new Companies Act, as well as the amendment thereto, together with the regulations published thereunder has come into operation on 1 May 2011, as published in Proclamation R32 of Government Gazette 34239 dated 26 April 2011. As already mentioned, the new Act repealed and replaced the old Act (Companies Act 61 of 1973) except for Chapter XIV of the old Act, which will continue to regulate the winding up and liquidation of insolvent companies (Schedule 5, item 9 of the new Act).
- 3 A new institution has been established in terms of the new Act, namely the Companies and Intellectual Property Commission. Three existing company law entities were furthermore transformed, namely the Take-over Regulation Panel, the Financial Reporting Standards Council and the Companies Tribunal. ***These four institutions will together be responsible for the regulation and enforcement of company law.***

## 2 External companies

- 1 A distinction must be made between a “**foreign company**” and an “**external company**”.
  - A **foreign company** is an entity incorporated in another country outside South Africa. This is irrespective of whether it is a profit or non-profit company or whether it carries on its business or non-profit activities within South Africa.<sup>1</sup>
  - But where a foreign company carries on business or non-profit activities within South Africa, it qualifies as an **external company**<sup>2</sup> that must be registered as such in terms of the new Act.

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<sup>1</sup> Section 1.

<sup>2</sup> Section 1.

- 2 The question therefore arises: ***When is a foreign company carrying on business or non-profit activities in South Africa*** and therefore has to be registered in terms of the Act and must comply with the provisions of the Act, to the extent that it applies to external companies?
- 3 According to section 23(2) of the new Act, a foreign company must be regarded as conducting business, or non-profit activities within the Republic if that foreign company –
  - a) is a party to one or more employment contracts within the Republic; or
  - b) subject to subsection (2A),<sup>3</sup> is engaging in a course of conduct, or has engaged in a course or pattern of activities within the Republic over a period of at least six months, such as would lead a person to reasonably conclude that the company intended to continually engage in business or non-profit activities within the Republic.
- 4 The Commission must -
  - a) ***assign a unique registration number*** to each external company that has been registered in accordance with subsection (1);
  - b) maintain a register of external companies;
  - c) enter the prescribed information concerning each external company in the register; and
  - d) in the case of an external company whose name is a foreign registration number but does not indicate the name of the foreign jurisdiction in which it was incorporated, append to its name on the registry the name of that jurisdiction.
- 5 Apart from this one instance (see paragraph 4(d) above), the new Act does not contain a provision similar to that of section 49(2) of the old Act that the name of an external company must always be followed by a statement indicating the country in which it was incorporated.

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<sup>3</sup> According to subsection(2A), a foreign company must not be regarded as “conducting business activities or non-profit activities in the Republic, solely on the ground that it has engaged in one or more of the following –

- a) holding a meeting or meetings within the Republic of the shareholders or board of the foreign company or otherwise conducting any of the company’s internal affairs in the Republic;
- b) establishing or maintaining any bank or other financial accounts within the Republic;
- c) establishing or maintaining offices or agencies within the Republic for the transfer, exchange, or registration of the foreign company’s own securities;
- d) creating or acquiring any debts within the Republic, or any mortgages or security interests in any property within the Republic;
- e) securing or collecting any debt, or enforcing any mortgage or security interest in the Republic;
- f) acquiring any interest in any property within the Republic.

- 6 Once a foreign company registers as an “external company” it has to –
- a) “continuously maintain” at least one office in the Republic; and
  - b) register the address of its office, or its principal office if it has more than one office.
- 7 According to Chief Registrar’s Circular 3/2012, it is uncertain, in terms of section 23(2) read with section 23(2A), whether a foreign company can acquire immovable property or be a mortgagee without being registered as an external company. Registrar’s Conference Resolution 47 of 2011 therefore provides that a foreign company can acquire property or act as mortgagee, provided that the conveyancer provides the registrar of deeds with documentary evidence (for example an auditors’ certificate or affidavit from a director of such foreign company) to the effect that the company need not register as an external company in terms of section 23(2) of the Act.
- 8 The following description can be used for an external company, namely –<sup>4</sup>

*(in the case of a private company)*

Blue Mountain Proprietary Limited  
Registration number 2011/000678/10  
(incorporated in Australia)

or

Blue Mountain (Pty) Ltd  
Registration number 2011/000678/10  
(incorporated in Australia)

*(in the case of a public company)*

Blue Mountain Limited  
Registration number 2011/000789/10  
(incorporated in Australia)

or

Blue Mountain Ltd.  
Registration number 2011/789/10

*(where the name of the external company is a foreign registration number)*

15789456 (Canada)  
Registration number 2011/000753/10

<sup>4</sup> Chief Registrar’s Circular 3 /2012.

- 9 A company that does not need to register as an external company in South Africa, must be described by referring to its name and registration number as reflected on its registration certificate or similar document.<sup>5</sup>

### 3 Close corporations

- 1 The new Act contemplates the phasing out of close corporations. In terms of the new Act no new close corporations can be registered after the commencement of the New Act, that is after 1 May 2011.<sup>6</sup> Existing close corporations may continue to exist indefinitely. The rationale is that as the New Act now offers flexibility with regard to accounting, audit and other legal requirements, it can accommodate the particular needs of smaller companies similar to close corporations.
- 2 As close corporations are allowed to co-exist with companies, the new Act makes provision for the co-existence of the Close Corporations Act alongside the new Companies Act. Schedule 3 amends the Close Corporations Act to make this co-existence possible.

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<sup>5</sup> Chief Registrar's Circular 3/2012.

<sup>6</sup> Schedule 3 item 2(1).

#### 4 “Holding” and “subsidiary” company and “related” and “inter-related” persons

- 1 The definitions of “holding” and “subsidiary” companies have been revised and widened in the New Act.
- 2 The **definition of “subsidiary” in the new Act**, refers to section 3 of the New Act to determine its meaning. According to section 3, a company is –
  - a) a subsidiary of another “**juristic person**” if that juristic person (or one or more other subsidiaries of that juristic person, or one or more nominees of that juristic person or any of its subsidiaries, alone or in any combination) -
    - i) is or are directly or indirectly able to exercise, or control the exercise of, a majority of the general voting rights associated with issued securities of that company, whether pursuant to a shareholder agreement or otherwise; or
    - ii) has or have the right to appoint or elect, or control the appointment or election of, directors of that company who control a majority of the votes at a meeting of the board; or
  - b) a wholly-owned subsidiary of another juristic person if all of the general voting rights associated with issued securities of the company are held or controlled, alone or in any combination, by persons contemplated on paragraph (a)
- 3 This definition in the new Act differs from the definition in the old Act in that the holding entity need not be **another company**, but may be **any juristic person**, which is defined in the new Act as to include a foreign company as well as a *trust*, irrespective of whether or not it was established within or outside the Republic.
- 4 An entirely new concept that is introduced by the new Act, is that of “**related**” and “**inter-related**” persons. Section 1 of the new Act defines “**inter-related**” as when used in respect of three or more persons, means persons who are related to one another in a linked series of relationships, such that two of the persons are related in a manner contemplated in section 2(1), and one of them is related to the third in any such manner and so forth. Section 2 of the new Act deals with the concept “**related**” persons as follows:
  - 4.1 An **individual** is related to **another individual** if they –
    - are married, or live together in a relationship similar to a marriage;
    - or

- are separated by no more than two degrees of natural or adopted consanguinity or affinity;
- 4.2 An **individual** is related to a **juristic person** if –
- the individual directly or indirectly controls the juristic person, as determined in accordance with subsection (2);
- 4.3 A **juristic person** is related to another **juristic person** if –
- either of them directly or indirectly controls the other, or the business of the other, as determined in accordance with subsection (2);
  - either is a subsidiary of the other; or
  - a person directly or indirectly controls each of them, or the business of each of them, as determined in accordance with subsection (2).

## 5 Names and registration of companies

### 1 Names of companies – (sections 11-12 & 14; regulations 8-13)

- 1 Item 2(1) of Schedule 5 provides for the **continuance of every pre-existing company**,<sup>7</sup> as if it had been incorporated and registered in terms of the new Act, **with the same name and registration number previously assigned to it**, subject to item 4. Pre-existing companies will therefore continue to be legally recognised under the new Act and **will also retain their old names and registration numbers that were allocated to them under the old Act, subject to the new suffixes that must be added to their names**.
- 2 Despite section 11 of the Act, a pre-existing company –
- a) whose name, immediately before the coming into operation of the Act, satisfied with requirements of section 49 of the previous Act, is not required to change its name to comply with section 11(3)(c) solely on the ground that any part of its name was in an official language other than English; and
  - b) may continue to use a translated name that, immediately before the effective date, was registered and otherwise met the requirements of section 50(2) of the previous Act – (item 2(2) of Schedule 5).
- 3 The effect of the abovementioned is that –
- a) a pre-existing company need not amend its name in instances where such company's name has complied with the criteria as referred in in items 2(1) and 2(2) of Schedule 5 of the Act; and

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<sup>7</sup> that, immediately before the effective date (in other words the coming into operation of the New Act) –

- i) was incorporated or registered in terms of the Companies Act 61 of 1973; or
- ii) was recognized as an “**existing company**” in terms of the Companies Act 61 of 1973; or
- iii) was deregistered in terms of the old Act and subsequently re-registered in terms of the new Act.

- b) a pre-existing company may continue to use a translated name if such name was registered before 1 May 2011 and has met the requirements of section 50(2) of the previous Act.<sup>8</sup>
- 4 According to section 11(1), a company name -
- a) may comprise one or more words in any language, together with –
- i) any letters, numbers or punctuation marks;
  - ii) any of the following symbols: +, &, #, @, %, =;
  - iii) any other symbol permitted by the regulations, made in terms of subsection (4);<sup>9</sup> or
  - iv) round brackets used in pairs to isolate any other part of the name, alone or in any combination; or
- b) in the case of a profit company, may be the registration number of the company together with the relevant expressions required by subsection (3).
- 5 Subsection 2 places certain limitations and restrictions on the selection of a company name.
- 6 Section 11(3) sets out additional requirements regarding a company's name. It stipulates that in addition to complying with the requirements of s 11(1) & (2) –
- a) If the name of a profit company is the company's registration number, that number must be immediately followed by the expression "**(South Africa)**". If the name of a profit company is the company's registration number, that number must be immediately followed by the expression "**(Suid-Afrika)**" when the deed/document is drafted in Afrikaans";<sup>10</sup>

### Examples <sup>11</sup>

*(in the case of a private company)*

2011/000123/07 (South Africa) Proprietary Limited

Registration number 2011/000123/07

or

2011/000123/07 (South Africa) (Pty) Ltd

Registration number 2011/000123/07

<sup>8</sup> Chief Registrar's Circular 3/2012.

<sup>9</sup> The symbol "-" is authorised in terms of regulation 8(7).

<sup>10</sup> Chief Registrar's Circular 3/2012, ad paragraph 4.2.1.4.6.

<sup>11</sup> Chief Registrar's Circular 3/2012.

*(in the case of a public company)*

2011/000456/06 (South Africa) Limited

Registration number 2011/000456/06

or

2011/000456/06 (South Africa) Ltd

Registration number 2011/000456/06

- b) If the company's memorandum of incorporation includes any provision contemplated in section 15(2)(b) or (c), the name must be immediately followed by the expression "**(RF)**"; and

### Examples <sup>12</sup>

*(in the case of a private company)*

Blue Mountain Proprietary Limited (RF)

Registration number 2011/000678/07

Blue Mountain (Pty) Ltd (RF)

Registration number 2011/000678/07

*(in the case of a public company)*

Black Water Limited (RF)

Registration number 2011/000789/06

Black Water Ltd (RF)

Registration number 2011/000789/06

*(where the name of the RF-company is also its registration number)*

2011/000891/07 (South Africa) Proprietary Limited (RF)

Registration number 2011/000891/07

- c) A company name, must end with one of the following expressions –
- i) the word "**Incorporated**" or its abbreviation "**Inc.**", in the case of a personal liability company;
  - ii) the expression "**Proprietary Limited**" or its abbreviation "**(Pty) Ltd.**", in the case of a private company;

<sup>12</sup> Chief Registrar's Circular 3/2012.

- iii) the word “**Limited**” or its abbreviation, “**Ltd.**”, in the case of a public company;
  - iv) the expression “**SOC Ltd.**” In the case of a state-owned company – (this also applies to companies registered before 1 May 2011);
  - v) the expression “**NPC**”, in the case of a non-profit company – (this also applies to companies registered before 1 May 2011).
- 4 These suffixes are automatically applicable to all pre-existing companies (incorporated before 1 May 2011) as well as to all new companies (incorporated after 1 May 2011).
- 5 Therefore, when dealing with a property registered in the name of a pre-existing company, or when a property is to be registered into the name of a pre-existing company, the relevant suffix must be added to the name of that company in the relevant deed of transfer or mortgage bond. No application for a name change (addition of the suffix) must be lodged in this regard.
- 6 Both Afrikaans and English suffixes are catered for in the Act, as they are set out in the English and Afrikaans text of the Act. Therefore, as was the case under the old Companies Act 61 of 1973, either English or Afrikaans suffixes may be used, irrespective of the language in which the name of the company appears. The relevant expressions in Afrikaans are as follows, namely:
- i) the word “**Geïnkorporeer**” or its abbreviation “**Geïnk.**”, in the case of a personal liability company;
  - ii) the expression “**Eiendoms Beperk**” or its abbreviation “**(Edms) Bpk.**”, in the case of a private company;
  - iii) the word “**Beperk**” or its abbreviation, “**Bpk.**”, in the case of a public company;
  - iv) the expression “**MSB Bpk.**” In the case of a state-owned company;
  - v) the expression “**MSW**”, in the case of a non-profit company.

## 2 Registration of companies – (sections 13,14 & 19, regulation 14-19)

- 1 The incorporation of a company involves the filing of a notice of incorporation.<sup>13</sup>

<sup>13</sup> The prescribed form for the notice of incorporation can be found in the regulations, namely – Form CoR 14.1, and Forms CoR 14.1 - Annexures A-D. The Act itself requires certain information to be stated in the notice of incorporation, such as the name of the company, its initial directors, its registered office and the

- 2 After accepting the filed notice of incorporation from the incorporators, the Commission must register the company and issue and deliver a **registration certificate** to the company.
- 3 The registration certificate is issued by the Commission as **evidence of the incorporation and registration** of the company. The registration certificate serves as conclusive proof that all the requirements for incorporation have been complied with.<sup>14</sup>
- 4 The new Act does not require a *certificate to commence business* to be issued, as under the old Act.<sup>15</sup> A company may now generally commence business once it is registered.

## 6 Change of name and effect thereof - Section 16(1) and (8)-(9) of the new Act

- 6.1 A change of name by a company is treated as merely one of the possible amendments to a company's Memorandum of Incorporation which all require -
  - a) a **special resolution** by the shareholders
  - b) **proposed by** the board of the company or shareholders who hold at least 10% of the voting rights that may be exercised on the resolution.
- 6.2 The new name must comply with all the requirements of section 11 for company names, and the procedures set out in section 14(2) and (3) that must be followed in the case of an incorrect or unacceptable name, will also apply.
- 6.3 If the name is already reserved for the company, or is not the registered name of another company, registered external company, close corporation or co-operative (or reserved for another person), the Commission must

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date of its financial year end. A notice of the appointment of the first company secretary, auditor or audit committee (where appointed) may be filed as part of the notice of incorporation - (See Form CoR 14.1, annexure D).

<sup>14</sup> Section 14(4).

<sup>15</sup> The old Act provided that no company having a share capital was allowed to commence business or to exercise any borrowing powers until a certificate to commence business was received by it.

issue an **amended registration certificate** and alter the name on the companies register - (section 16(8)).

- 6.4 The amendment of the name takes effect on the date set out in the amended registration certificate, which could either be the date on which it is issued by the Commission or a later date stipulated in the resolution in terms of section 14(1)(b)(iii).
- 6.5 Neither the Act nor the draft regulations places a burden on the Registrar of Deeds to endorse deeds and documents regarding a change of name of a company.
- 6.6 The following documents must be lodged in the deeds office to note the change of name against relevant title deeds – (CRC 3/2012):

**Documents to be lodged at the deeds registry**

- 1 **Application** in terms of section 93 of the Deeds Registries Act;
- 2 Relevant **title deed** registered in that deeds registry;
- 3 Proof of name change – (certified copy of the **amended registration certificate**);
- 4 All the **mortgage bonds** (if any);

- 6.7 The provisions of section 93(1)(a) that provides for consent of any person that may be affected by a registration of a change of name, and section 93(1)(b) that provides for the lodgement of any operative deeds in which the applicant's old name appears as a party thereto other than as transferor or cedent, need not be complied with. In such instance, a caveat will be noted by the deeds registry to the effect that all the relevant title deeds must be endorsed to indicate the change of name.<sup>16</sup>
- 6.8 Where a company's name appears in the title conditions of a deed, such name need not be amended when bringing forward a condition containing such name of a company to the new deed. If a consent is required by a company in terms of a condition in a title deed, which company has amended its name, the consent must reflect the old as well as the new

<sup>16</sup> Chief Registrar's Circular 3/2012, ad paragraph 4.4.3.

name of the company.<sup>17</sup>

6.9 When a company who is a mortgagee in a mortgage bond that is about to be cancelled has changed its name (once or several times) it will not be necessary to endorse the bonds regarding the name changes. The consent to cancellation must however refer to all the changes of the name.<sup>18</sup>

6.10 The status quo remains regarding the endorsement of deeds and documents to reflect a change of name of a company, effected prior to 1 May in terms of the repealed Companies Act 61 of 1973 – (CRC 3/2012, paragraph 4.4.6). In this regard the following documents must be lodged at the deeds registry, namely –

#### Documents to be lodged at the deeds registry

- 1 Certified copy of the **amended certificate of incorporation or certificate of change of name**;
- 2 All the **title deeds** registered in that deeds registry;
- 3 All the **mortgage bonds** (if any);
- 4 **Affidavit** on behalf of the company that there are no further deeds registered in that particular deeds registry on which the change of name needs to be reflected

## 7 New concept

### Solvency & liquidity test

- 1 Section 4 of the new Act deals with the solvency and liquidity test. According to this section, a company satisfies this test at a particular time, if considering all reasonably foreseeable financial circumstances of the company at that time –
  - a) the assets of the company or, if the company is a member of a group of companies, the aggregate assets of the company, as fairly valued equal or exceed the liabilities of the company, or if the

<sup>17</sup> Chief Registrar's Circular 3/2012, ad paragraph 4.4.4.

<sup>18</sup> Chief Registrar's Circular 3/2012, ad paragraph 4.4.5.

company is a member of a group of companies, the aggregate liabilities of the company, as fairly valued; and

- b) 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 –
  - i) 12 months after the date on which the test is considered; or
  - 3 in the case of a *distribution* in section 1, 12 months following that distribution.

- 2 The new Act requires in respect of many transactions by the company that the directors declare that the company meets the solvency and liquidity test. It is therefore a very important concept, especially for the party declaring compliance therewith, being the directors of the company.

## 8 Conversion of close corporation into company- Item 1 of Schedule 2 to the new Act

- 8.1 A close corporation may file a notice of conversion in terms of Schedule 2, in Form CoR 18.1 in the prescribed manner and form, at any time.
- 8.2 A notice of conversion must be accompanied by -
  - a) a written statement of consent approving the conversion of the close corporation signed by members of the corporation holding in total at least **75% of the members' interest** in the corporation;
  - b) a memorandum of incorporation consistent with the requirements of the new Act; and
  - c) the prescribed filing fee.<sup>19</sup>
- 8.3 Section 14 applies to the filing of a notice of conversion as if it were a notice of incorporation, which means that the Commission must assign a unique registration number to the company, enter it into the companies register and issue a **registration certificate**.<sup>20</sup>
- 8.4 Upon conversion of a close corporation in terms of schedule 2 (item 1(4)),

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<sup>19</sup> Regulation 18 of the new Companies Regulations. In terms of Annexure 2, Table CR 2B of the Companies Regulations, no fee will be payable if conversion takes place within three years after the Act comes into operation and the name of the close corporation is retained or the same as filing a notice of incorporation, in any other case.

<sup>20</sup> In Form CoR 18.3.

the Commission must ***enable the Registrar of Deeds to effect the necessary changes resulting from conversions and name changes.***

- 8.5 Although the Act is silent on the lodgement of an application and the relevant title deed(s), the endorsement of a title deed to reflect a conversion into a company will only be given effect to when the following documents are lodged at the deeds registry:

**Documents to be lodged at the deeds registry**

- 1 **Application** for endorsement in terms of section 3(1)(v);<sup>21</sup>
- 2 **Proof of conversion** (registration certificate);
- 3 **All title deeds**, bonds and other documents registered in the relevant deeds registry.

- 8.6 The Act does not provide for the conversion of a company into a close corporation. However, any conversion of a company to a close corporation applied for in terms of section 27 of the Close Corporations Act 69 of 1984 and filed with the Commission before 1 May 2011 and not fully addressed at that time, must be concluded by the Commission in terms of Act 69 of 1984 – (item 3(2) of Schedule 5).

## 9 Pre-incorporation contracts -Section 21 of the new Act

- 9.1 Section 1 of the new Act defines a “***pre-incorporation***” contract as “a written agreement entered into before the incorporation of a company by a person who purports to act in the name of, or on behalf of, the proposed company, with the intention or understanding that the proposed company will be incorporated and will thereafter be bound by the agreement”.

- 9.2 In other words, a pre-incorporation contract –
- a) must be ***in writing***;
  - b) had to be entered into ***before*** the company comes into existence;
  - c) is entered into by and between a third party and a person, as agent,

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<sup>21</sup> Of the Deeds Registries Act 47 of 1937.

who purports<sup>22</sup> to act in the name of or on behalf of the company.

9.3 Compared to section 35 of the old Act, section 21 of the new Act provides for a much simpler procedure for pre-incorporation contracts, as section 21(1) merely requires that the agreement must be ***in writing*** and that the person enters into the agreement in the name of, or on behalf of the company, before the company comes into existence. The only formality that is required is that it should be in writing.

9.4 The board of directors<sup>23</sup> may –

- ***completely,***<sup>24</sup>
- ***partially; or***
- ***conditionally***

***ratify or reject*** the contract within three months after the company was incorporated.<sup>25</sup>

9.5 If the board fails to do either, the company will be regarded as having ratified the agreement.<sup>26</sup> In other words, there is a deemed ratification if the company fails to ratify or reject within the three month period. This deemed ratification is also a new idea in the new Act.

9.6 To the extent that the agreement is ratified or regarded as ratified, it will bind the company as if it had been a party to the agreement when it was made.<sup>27</sup>

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<sup>22</sup> This is very correctly worded, as the company at this stage does not exist and the agent can therefore not act by or on behalf of such company. Therefore the agent can only purport to act on behalf of the company.

<sup>23</sup> In other words, the power to ratify or reject pre-incorporation contracts, vests in the board of directors of the company.

<sup>24</sup> If the board of a company has completely or partially rejected, or completely or partially ratified, a pre-incorporation contract, the company must within five business days –

- file a notice of its decision with respect to that contract in Form CoR 35.2; and
- deliver a copy of that notice to each person who is a party to the contract or materially affected by the action.

<sup>25</sup> Section 21(4).

<sup>26</sup> Section 21(5).

<sup>27</sup> Section 26(1)(a). There is uncertainty as to whether this provision lends retrospective effect to the pre-incorporation contracts, in other words there is no certainty as to the point in time at which the company obtains rights and incurs liabilities in terms of the contract.

- 9.7 The personal liability of a person who enters into a pre-incorporation agreement is drastically altered by section 21. A person who enters into such contracts is held jointly and severally liable with any other such person(s)<sup>28</sup> for *liabilities* emanating from the pre-incorporation contract if -
- a) incorporation does not take place,<sup>29</sup> or
  - b) once the process of incorporation has been completed, the company rejects any part of the agreement.<sup>30</sup>
- 9.8 According to section 21(7), when a company rejects an agreement or any part of it, a person who bears liability for that rejected agreement (as referred to in paragraph 9.7 above), may assert a claim against the company for any benefit it has received, or is entitled to receive in terms of the agreement.
- 9.9 Similarly to section 35 of the old Act, section 21 of the new Act does not expressly exclude the common law, which means that a promoter may also use the common law alternatives such as the *stipulation alteri* where two parties contract for the benefit of a third party in their capacities as principals and not as agents. If applied to companies, the promoter (or stipulator or promisee) enters into a contract with another party (the promisor) for the benefit of the company to be formed. It is essential that the promotor acts as principal and not as agent in that it acts in his own name and not in the name of the company.

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<sup>28</sup> It is unclear who the “any other such person” might be. It might be that these words refer to co-agents or co-trustees where the agreement was entered into by not only one agent on behalf of the company to be formed, but by more than one agent or even by a group of agents.

<sup>29</sup> Section 21(2)(a).

<sup>30</sup> Section 21(2)(b).

## 10 Capacity of company to act- Sections 19 and 20 of the new Act

- 10.1 The capacity of a company is considerably widened under the new Act, as section 19(1)(b) of the new Act provides that a company has all the legal capacity and the powers of a natural person except -
- a) to the extent that a juristic person is incapable of exercising any such power;<sup>31</sup> or
  - b) the company's memorandum of incorporation provides otherwise.
- 10.2 The company's capacity is therefore not limited by its main or ancillary objects or business and these do not have to be stated in the memorandum of incorporation, unless the powers or purpose of the company is specifically restricted to these objects. It must however be noted that it is no longer mandatory for a company to have an objects clause in its memorandum of incorporation, in terms of the new Act.
- 10.3 Although the company's memorandum of incorporation may limit, restrict or qualify the purposes, powers or activities of the company,<sup>32</sup> any such restrictions would not render invalid any contracts that conflict with these restrictions.<sup>33</sup> Such contracts would therefore remain valid and binding on the company and the other party to the contract.<sup>34</sup>
- 10.4 The lack of authority by the directors to act, resulting from a lack of capacity of the company, also does not render a contract void. Section 20(1)(a)(ii) provides that if a company's memorandum of incorporation limits, restricts, or qualifies the purposes, powers or activities of that company (as contemplated in section 19(1)(b)(ii)), no action of the company is void by reason only that, as a consequence of that limitation, restriction or qualification, ***the directors had no authority to authorise***

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<sup>31</sup> For example the concluding of a marriage.

<sup>32</sup> In other words impose restrictions on the legal capacity of the company.

<sup>33</sup> Section 20(1)(a) of the new Act.

<sup>34</sup> Section 20(1)(a)(i) provides that if a company's memorandum of incorporation limits, restricts, or qualifies the purposes, powers or activities of that company (as contemplated in section 19(1)(b)(ii)), no action (which is wider as a transaction and would most probably include something like a donation or gratuitous disposition by the company) of the company is void by reason **only** that ***the action was prohibited by that limitation, restriction or qualification.***

**the action by the company.** The basis here is the same as under the old section 36, namely that the lack of authority by the directors must be due to a lack of capacity by the company.

10.5 Section 20(1)(b) provides that if a company's memorandum of incorporation limits, restricts or qualifies the purposes, powers or activities of that company (as contemplated in section 19(1)(b)(ii), in any legal proceedings, other than proceedings between –

- the company and its shareholders, directors or prescribed officers;  
or
- the shareholders and directors or prescribed officers of the company

no person may rely on such limitation, restriction or qualification to assert that an action was prohibited by that limitation, restriction or qualification or as a consequence of that limitation, restriction or qualification, the directors had no authority to authorise the action by the company.

10.6 In other words the lack of capacity may not be raised externally, by either the company or the third party, but it may be raised internally as between the company, directors, shareholders and prescribed officers. This does not differ from the provisions of section 36 of the old Act, which also provided for remedies internally when the directors breached their fiduciary duty not to exceed their authority to act.<sup>35</sup>

10.7 Section 20(2) provides that the **shareholders, by special resolution may ratify** any action of the company or the directors that is a contravention of any limitation, restriction or qualification in the company's memorandum of incorporation. Section 20(3) however states that ratification is not allowed if the action by the company is in contravention of the new Act. If the special resolution ratifies the act by the company as well as the act of the

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<sup>35</sup> Section 20(4) provides that one or more shareholders, directors or prescribed officers of a company, or a trade union representing employees of the company, may apply to the High Court for an appropriate order to restrain the company from doing anything inconsistent with the Act.

Section 20(5) further provides that one or more shareholders, directors, or prescribed officers of a company may apply to the High Court for an appropriate order to restrain the company or the directors from doing anything inconsistent with any limitation, restriction or qualification of the purposes, powers or activities of that company, but any such proceedings are without prejudice to any rights to damages of a third party who –

- obtained those rights in good faith; and
- did not have actual knowledge of the limit, restriction or qualification.

director(s), the directors will also be relieved from liability for breach of their fiduciary duty.

- 10.8 Section 20(6) provides that each shareholder of a company has a claim for damages against any person who intentionally, fraudulently or due to gross negligence causes the company to do anything inconsistent with –
- the Act; or
  - a limitation, restriction or qualification, unless that action has been ratified by the shareholders in terms of section 20(2), unless of course it has been ratified by virtue of a special resolution.

### Doctrine of constructive notice

- 10.9 The doctrine of constructive notice, according to common law entailed that persons dealing with a company were deemed to be aware of the contents of the constitution and other public documents of the company that were lodged with the Registrar of Companies and were open for public inspection, whether they had read those documents or not.
- 10.10 The doctrine of constructive knowledge is effectively abolished by section 19(4) of the new Act. (Also see in this regard Session 1 under paragraph E: Memorandum of incorporation, rules, shareholders' agreements and restrictive conditions).
- 10.11 According to section 19(4), a person must not be regarded as having received notice or knowledge of the contents of any document relating to a company merely because the document –
- has been filed; or
  - is accessible for inspection at an office of the company.
- 10.12 A third party will therefore not be deemed to know the contents of a company's memorandum of incorporation or governance rules made in terms of section 15(3). This is however subject to **two exceptions**. Section 19(5) provides that a person must be regarded as having notice and knowledge of -
- a) any provision of a company's memorandum of incorporation contemplated in section 15(2)(b) or (c) (which respectively refer to any restrictive condition applicable to the company and any requirement for the amendment thereof in addition to those

contained in section 16 of the Act, on the one hand and the prohibition of amending any particular provision of the memorandum of incorporation on the other hand), provided –

- the company's name includes the element "RF" as required by section 11(3)(b); and
  - the company's notice of incorporation or a subsequent notice of amendment has drawn attention to the relevant provision as contemplated in section 13(3); and
- b) the effect on a personal liability company of the joint and several liability of the directors and past directors of the company, together with the company, for debts and liabilities of the company that are or were contracted during their respective periods of office.

### The Turquand rule

10.13 The Turquand Rule was an exception to the doctrine of constructive notice. It was originally designed to mitigate the severe effects of the doctrine of constructive notice. In terms of this rule **bona fide** third parties contracting with the company are entitled to assume that all the company's internal formalities required for a valid contract have been complied with. Such party does not have a duty to enquire whether the company has complied with its internal formalities and procedural requirements.

10.14 Section 20(7) of the new Act provides that a person dealing with a company in **good faith** may presume that the company has complied with all formal and procedural requirements of –

- the Act;
- its memorandum of incorporation; and
- its rules

in making a decision in the exercise of its powers.

10.15 However, this arrangement does not apply when the person -

- knew or should reasonably have known of the company's failure to comply with the requirement. Directors, prescribed officers or shareholders of a company may not rely on this provision when dealing with the company.

10.16 As can be gathered from the above, section 20(7) resembles the common

law *Turquand rule*. Section 20(8) states that section 20(7) does not substitute any relevant common law principle relating to the presumed validity of the actions of the company, but applies concurrently.

## Representation and the authority of directors

10.17 Section 66(1) of the new Act provides that 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 company's memorandum of incorporation provides otherwise**.

10.18 Authority of a director to act on behalf of a company is a concept of agency law. According to agency law, if an agent contracts with a third party on behalf of the company, the contract will bind the third party and the principal (in other words the company) as if concluded personally between them. The agent does not acquire any rights nor incurs any liabilities in terms of the contract, unless the parties agreed to the contrary. The same applies where a director contracts on behalf of a company. In order for the director to act on behalf of the company he must have authority to do so.

## 11 Financial assistance to directors and to holding companies and other related companies – Section 45 (Section 45 has combined the provisions regarding section 37 and 226 of the old Companies Act, as well as section 55 of the Close Corporations Act)

11.1 Section 45(2) allows the board of a company to authorise direct or indirect financial assistance (including<sup>36</sup> lending money, guaranteeing a loan or other obligation and securing a debt or obligation)<sup>37</sup> to–

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<sup>36</sup> The use of the word “includes” in the definition of financial assistance indicates that the types of transactions referred to are not an exhaustive list, one would have expected the term “means” to have been used instead of “includes”. Transactions such as donations, sales at discounted prices and leases at favourable rentals would be covered by section 45 but not by section 226. It is therefore unclear as what precisely is meant by financial assistance.

<sup>37</sup> Section 45(1)(a) defines “financial assistance” as including these items.

- a) a director or prescribed officer<sup>38</sup> of the company; or
- b) a director or prescribed officer of a related or inter-related company;  
or
- c) a related or inter-related company or corporation (discussed in 6.2 above); or
- d) a member of a related or inter-related corporation; or
- e) a person related to any such company, corporation, director, prescribed officer or member - (section 45(2)),

except to the extent that the company's memorandum of incorporation provides otherwise.

11.2 In addition to complying with any requirements or conditions contained in the company's memorandum of incorporation<sup>39</sup> (but despite any provision of a company's memorandum of incorporation to the contrary), the board may only authorise financial assistance if -

- a) the particular<sup>40</sup> provision of financial assistance is in accordance with either -
  - i) an employee share scheme that complies with section 97; or
  - ii) a special resolution<sup>41</sup> of shareholders adopted within the previous two years<sup>42</sup> approving assistance for the specific recipient, or a category of potential recipients in which the

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<sup>38</sup> A prescribed officer is defined in regulation 38 as a person who is not a director but (a) exercises general executive control over and management of the whole, or a significant portion, of the business and activities of the company; or (b) regularly participates to a material degree in the exercise of general executive control over and management of the whole, or a significant portion, of the business and activities of the company, irrespective of the title given to his office or function.

<sup>39</sup> Section 45(4).

<sup>40</sup> It appears that the special resolution will have to specify **what type of financial assistance it relates to**, and this cannot therefore be left to the discretion of the board of directors, due to the words "particular provision of financial assistance."

<sup>41</sup> A special resolution is a resolution adopted with the support of at least 75% of the voting rights exercised on the resolution, or the different percentage required by the company's Memorandum of Incorporation as contemplated in section 65(10). This section allows a company to stipulate a different percentage for specific or all special resolutions, on condition that it is at least 10% more than the percentage required for ordinary resolutions. The Act does not contain any other requirements specifically for special resolutions.

A special resolution does not have to be passed at a formal meeting. It may be passed by way of a round robin resolution, if it has been supported by persons entitled to exercise sufficient voting rights for it to have been adopted as a special resolution, at a properly constituted shareholders' meeting - (section 60 of the new Act).

<sup>42</sup> In other words, **prior** to the financial assistance. Ratification is therefore not possible.

- specific recipient falls; and
- b) the board is satisfied that -
- i) immediately after providing the financial assistance, the company would satisfy the solvency and liquidity test ;<sup>43</sup>
  - ii) the terms under which the financial assistance is proposed to be given are fair and reasonable to the company.<sup>44</sup>

11.3 A resolution by the board in contravention of –

- a) section 45; or
  - b) any prohibition, condition or requirement contained in the memorandum of incorporation,
- is void.<sup>45</sup>

11.4 If the resolution is void as a result of this, any director who was present at the meeting when this resolution was taken or participated in the making of the resolution, and failed to vote against it despite knowing<sup>46</sup> that it was inconsistent with section 45 or a provision in the memorandum, is liable for any loss, damages or costs sustained by the company<sup>47</sup> as a direct or indirect consequence thereof.

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<sup>43</sup> If a comparison is drawn between the requirements for an exemption in terms of section 45 of the new Act with such requirements in terms of section 226 and 37 of the old Act, a new concept that was absent under the old Act, now features, namely the solvency and liquidity test.

The test is as follows: Considering all reasonably foreseeable financial circumstances, the company's fairly valued assets exceed its fairly valued liabilities (solvency test), 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 considering the test (liquidity test) (section 4(1)).

<sup>44</sup> This requirement was added by the Companies Amendment Act 3/2011. Although the amendment Act makes it applicable to financial assistance to all entities as set out in section 45, it has now been recommended that it should be excluded in the case of loans between companies in a group because of the fact that these loans are often made and are usually "softer" than loans to outsiders.

<sup>45</sup> Contravention of this section 45 of the new Act does not constitute a criminal offence. However contravention of both sections 37 and 226 of the old Act constituted a criminal offence.

<sup>46</sup> In terms of section 1, the words "knowing", "knowingly" or "knows" not only mean actual knowledge, but also where a person reasonably ought to have known, or should have investigated the matter or taken other measures that would have provided actual knowledge.

<sup>47</sup> This only refers to a remedy in favour of the company itself and not to third parties, as opposed to section 226 which also extended liability in favour of any other person who had no actual knowledge of the contravention. Section 20(6)(a) of the new Act however provides that a shareholder of a company has a claim for damages against any person who intentionally, fraudulently or due to gross negligence causes the company to do anything inconsistent with the Act (which includes section 45 thereof). Furthermore, section 218(2) of the new Act extends a claim for damages in favour of any person (not only a shareholder). It provides that any person who contravenes any provision of the Act is liable to any other person for any loss or damage suffered by that person as a result of that contravention.

- 11.5 The following are not regarded as financial assistance and are thus not subject to section 45, namely –
- a) loans made in the ordinary course of business by a company whose primary business is the lending of money;<sup>48</sup> or
  - b) accountable<sup>49</sup> advances made to meet legal expenses in a matter concerning the company, or for anticipated expenses to be incurred on behalf of the company; or
  - c) expenses for a person's removal at the company's request.<sup>50</sup>
- 11.6 The extent of the operation of section 45 is somewhat softened by section 2(3) of the new Act, which provides that with respect to any particular matter arising from the Act, a court, the Companies Tribunal or the Panel may exempt any person from the application of a provision of the Act (for example section 45) that would apply to that person because of a relationship, if such person can show that, in respect of that particular matter, there is sufficient evidence to conclude that the person acts independently of any related or inter-related person.

## 12 Financial assistance to purchase shares of a company or a related or inter-related company - Section 44 of the new Act

- 12.1 Section 44(2) provides that the board of a company may authorise the company to give financial assistance<sup>51</sup> to a person for the purpose of, or

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<sup>48</sup> Section 226 had a similar provision and can be compared to the provision under section 45 as follows:-

- a) In section 226, a transaction was exempted if done *bona fide* in the ordinary course of the business of a company actually and regularly carrying on the business of the making of loans or the provision of security. In section 45 the words "*bona fide*" is absent. Theoretically this means that even though financial assistance has been given in bad faith, but all the other requirements have been complied with, it will be excluded from the operation of section 45.
- b) The extent of the business was irrelevant in section 226. In section 45 the exclusion only operates if it is the "primary business", which presumably means the greater part of the business.

<sup>49</sup> The insertion of this word ("accountable") is important, because it effectively means that if a person does not have to account for how the advance was expended it will be financial assistance within the meaning of section 45.

<sup>50</sup> The meaning here is not clear. The question arises whether this will also apply to a forceful removal by the shareholders as contemplated in section 71 or not. Most probably not. Most probably it refers to the situation where a director has been removed in terms of an amicable settlement. It is also unclear what expenses are envisaged. "Removal" has been translated into Afrikaans with the word "verhuising" which gives this provision a whole different meaning again.

<sup>51</sup> **By way of a loan, guarantee, the provision of security or otherwise.**

in connection with, the subscription<sup>52</sup> of any option,<sup>53</sup> or any securities,<sup>54</sup> issued or to be issued by the company (or a related or inter-related company) or for the purchase of any securities of the company (or a related or inter-related company) provided that -

- a) such assistance is not prohibited by the memorandum of incorporation;<sup>55</sup> and
- b) the statutory requirements are met, despite any contrary provision of the company's memorandum.<sup>56</sup>

12.2 The board of directors has to decide whether to assist a person to acquire shares. However such decision must be in accordance with the conditions as stipulated in section 44 (3) & (4).<sup>57</sup> These conditions are -

- a)
  - i) that the particular provision of financial assistance must be in terms of an employee share scheme which meets the requirements of section 97; or
  - ii) that the particular provision of financial assistance must be pursuant to a special resolution adopted within the previous two years by the shareholders which authorised such assistance to the specific person or to persons that fall in a specific class or category. In the latter case the person to whom assistance will be given must obviously fall in that class – (section 44(3)(a)); **and**

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<sup>52</sup> The reference to “subscription” and “purchase” indicates that section 44 applies where a company –  
 a) Assists a person in purchasing a security in the company from the holder of the security; and  
 b) Assists a person in acquiring a security in the company from the company itself

Section 44 in other words only applies to a purchase or subscription and not to any other transaction.

<sup>53</sup> According to the wording, the option relates to a “subscription” and not to a “purchase”. Section 44 does not state what the options are in respect of.

<sup>54</sup> The ambit of section 44 of the new act is wider than section 38 of the old Act, which only regulated the purchase or subscription of “shares” and not “securities”. “Securities” is defined in the new Act as meaning any shares, debentures or other instruments, irrespective of their form or title, issued by a profit company.

<sup>55</sup> In other words, the memorandum of incorporation may remove or substitute the authority of the board, (for example requiring the authority of all the shareholders at a general meeting), or qualify or restrict it in some way.

<sup>56</sup> These requirements are set out in section 44(3) and (4).

<sup>57</sup> Two transactions that were specifically exempted from the provisions of section 38 under the old Act, namely –  
 Loans to *bona fide* employees and the provision of financial assistance for the acquisition of shares in a company by the company or its subsidiary, have not been repeated under the new Act, which makes compliance thereof more onerous.

- b) That the board must be satisfied that immediately after providing the financial assistance -
  - i) the company would satisfy the solvency and liquidity test; and
  - ii) that the assistance is given under terms that are fair and reasonable to the company – (section 44(3)(b)); **and**
- c) The board must also ensure that any conditions or restrictions respecting the granting of financial assistance set out in the memorandum of incorporation of the company have been complied with – (section 44(4)).

12.3 According to section 44(5), a decision by the board or the agreement to provide financial assistance is **void** to the extent that it is inconsistent with section 44 or any condition or restriction contained in the memorandum of incorporation.

12.4 Although section 38 of the old Act did not impose any civil liability on the directors of a company who was responsible for a contravention of section 38 of the old Act, section 44 (6) of the new Act provides that if the transaction is void, a director of the company who was present at the meeting where the decision was taken or participated in the making of the decision, and failed to vote against it although he knew that the requirements of the Act and memorandum of incorporation have not been met, is liable to the company for any loss, damages or costs suffered as a result.

12.5 For the purposes of this section, financial assistance does not include the lending of money in the ordinary course of business of a company which primary business is the lending of money – (section 44(1)).

## **13 Disposal of greater part of assets or undertaking of company - Sections 112 & 115 (of the new Act)**

13.1 The disposal<sup>58</sup> of all or the greater part of its assets or undertaking by a

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<sup>58</sup> As with section 228 of the old Act, the new Act does not define what “dispose” means. Due to the similarities in the wording of the old and the new Act, it is submitted that judicial decisions under the old Act might be helpful in determining the meaning thereof under the new Act.

company constitutes a **fundamental transaction** and if a regulated company<sup>59</sup> is the one disposing of the assets or undertaking, then it also constitutes an affected transaction and which requires involvement of the Take-over Regulation Panel.

- 13.2 In terms of section 112(2)& (3), a company may only dispose of all or the greater part of its assets or undertaking if the following requirements are met -
- a) the specific disposal must be approved by a **special resolution** of the shareholders of the disposing company.<sup>60</sup>
  - b) The **notice of the shareholders' meeting** to consider the resolution –<sup>61</sup>
    - i) must be delivered within the prescribed time and in the prescribed manner to each shareholder of the company, subject to section 62;<sup>62</sup>
    - ii) must include or be accompanied by a written summary of the precise terms of the transaction or series of transactions,<sup>63</sup> to be considered at the meeting, and the provisions of section 115<sup>64</sup> and 164.<sup>65</sup>

It has been laid down that the ordinary meaning of the word “dispose” is “to part with” or “to get rid of”. The intended meaning of the word “dispose” is a transaction that “would have the effect of permanently depriving the company of its right to ownership of the assets involved”. – *Alley v Courtesy Wholesalers (Pty) Ltd* 1996 (3) SA 134 (N); *Alexander V Standard Merchant Bank Ltd* [1978] 3 All SA 109 (W) 116.1

Therefore, the following do not constitute a disposal, namely –

- the grant of a right of first refusal;
- a pledge;
- a cession in *securitatem debiti*
- the passing of a mortgage bond over the assets of the company, because like a pledge, it is not an absolute disposal of ownership.  
(In *Standard Bank of South Africa Ltd v Hunkydory Investments 188 (Pty) Ltd (No. 2)* 2010 (1) SA 634 (WCC), the court held that dispose meant a disposal in the form of a transfer of ownership, rather than a transaction that exposes the company's assets to the risk of forced disposal because of borrowing).

<sup>59</sup> A “regulated company” is defined in s 118(1) as a public company, a state-owned company (unless exempted in terms of s 9) and, under certain restricted circumstances, a private company. The Takeover Regulation Panel must regulate any affected transaction and may issue a compliance certificate if satisfied that the applicable requirements of the Act have been satisfied.

<sup>60</sup> Section 115 prescribes the requirements to which this resolution must comply. A special resolution can either authorise or ratify a disposal as long as the resolution pertains to a specific transaction, thus outruling any blanket approvals. Despite sections 112(2), 115(1) and 115(2) referring only to the approval of the (proposed) transaction, ratification is apparently possible.

<sup>61</sup> Section 112(3).

<sup>62</sup> Section 62 deals with notices of meetings.

<sup>63</sup> According to section 112(5), a special resolution in terms of section 112 is effective only to the extent that it authorises a specific transaction.

<sup>64</sup> Relating the required approvals for the transaction.

- c) The company must have satisfied all the other requirements set out in section 115, to the extent that those requirements are applicable to such a disposal by that company.

13.3 According to section 115(2) -

- a) the special resolution must be adopted by persons entitled to exercise voting rights on such a matter, at a meeting called for that purpose and at which sufficient persons are **present** to exercise, in aggregate, at least 25% of all of the voting rights that are entitled to be exercised on that matter, or any higher percentage, as may be required by the company's memorandum of incorporation;<sup>66</sup>
- b) a special resolution is also required by the company's holding company, if any, if –<sup>67</sup>
  - i) the holding company is a company or an external company;
  - ii) the proposed transaction concerns a disposal of all or the greater part of the assets or undertaking of the subsidiary; and
  - iii) having regard to the consolidated financial statements of the holding company, the disposal by the subsidiary constitutes a disposal of all or the greater part of the assets or undertaking of the holding company.
- c) court approval is only necessary in the circumstances set out in section 115(3) to (6).<sup>68</sup>

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<sup>65</sup> Section 164 deals with the appraisal rights of dissenting shareholders.

<sup>66</sup> The special resolution must be adopted with the support of at least 75% of the voting rights that are exercised on the resolution – (section 65(10)).

<sup>67</sup> In other words, if the requirements in the subparagraphs are met, the holding company must also authorise the transaction by means of a special resolution. In this instance the disposing company (in other words the subsidiary) must also pass a special resolution, in other words two special resolutions by two different companies must authorise the disposal.

<sup>68</sup> Despite a duly passed special resolution, a company may not proceed with the implementation of the disposal without court approval if –

- a) the resolution was opposed by at least 15% of the voting rights; and within 5 business days after the vote, any person who voted against the resolution requires the company to seek court approval; or
- b) the court, on application within 10 business days after the vote by any person who voted against the resolution, grants that person leave to apply to court for a review of the transaction.

- 13.4 Section 115(8) deals with the appraisal rights of dissenting shareholders. It provides that the holder of any voting rights in a company is entitled to seek relief in terms of section 164<sup>69</sup> if that person -
- a) had notified the company in advance of his intention to oppose the special resolution; and
  - b) had been present at the meeting and voted against that special resolution.
- 13.5 This right effectively entitles shareholders, who do not approve of the fundamental transaction, to opt out of the company (but not to prevent the transaction) by withdrawing the fair value of their shares in cash.
- 13.6 The above requirements do not apply to the disposal of or sale of all or the greater part of the assets or undertaking of a company where the transaction is -<sup>70</sup>
- a) as a result of a business rescue plan;
  - b) between a holding company and its wholly-owned subsidiary;
  - c) between two or more wholly-owned subsidiaries of the same holding company; or
  - d) between a wholly-owned subsidiary on the one hand, and its holding company and one or more wholly-owned subsidiaries of that holding company, on the other hand.

## **14 Proposals for amalgamation or merger- Sections 113, 115 and 116 of the new Act**

- 14.1 In terms of section 1, an amalgamation or merger may either result in -
- a) the forming of one or more new companies which will hold all the assets and liabilities of the merging companies, and the dissolution of all the merging companies; or
  - b) the survival of at least one of the merging companies, with or without the formation of one or more new companies, and the vesting of all the assets and liabilities previously held by any of the

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<sup>69</sup> This section deals with the dissenting shareholders' appraisal rights.

<sup>70</sup> Section 112(1).

amalgamating or merging companies, in the surviving company or companies and, if applicable, the new company or companies.<sup>71</sup>

- 14.2 When a merger agreement has been implemented –
- a) the property of each amalgamating or merging company becomes the property of the newly amalgamated, or surviving merged, company or companies (s 116(7)(a));
  - b) each newly amalgamated, or surviving merged company is liable for all of the obligations of every amalgamating or merging company.
- 14.3 From this section it appears that the vesting of the assets and liabilities in the surviving company occurs automatically, by operation of law. There is consequently no need for compliance with any of the legal formalities associated with transfer, save in terms of section 116(8).
- 14.4 If any property **that is registered in terms of any public regulation**<sup>72</sup> has to be **transferred** from an amalgamating or merging company to an amalgamated or merged company (*for example immovable property*) –
- a) a copy of the relevant merger agreement, together with
  - b) a copy of the filed notice of amalgamation or merger
- constitute sufficient evidence for the keeper of the relevant property registry (**registrar of deeds**) to effect a transfer of that property – (s 116(8)).
- 14.5 Documents to be lodged at the deeds registry in accordance with Chief Registrar's Circular of 3/2012 are the following, namely –

**Documents to be lodged**

- 1 **Application** for an endorsement to section 3(1)(v) of the Deeds Registries Act;

<sup>71</sup> Although in America the situation in (a) is referred to as an amalgamation, and the one in (b) as a merger, this distinction is not clearly made in the new Act and the terms appear to be interchangeable.

<sup>72</sup> Public regulation means any national, provincial or local government legislation or subordinate legislation, or any licence, tariff, directive or similar authorisation issued by a regulatory authority or pursuant to any statutory authority – section 1.

- 2 Existing title deed(s);
- 3 Certified copy of amalgamation or **merger agreement**;
- 4 Certified copy of the filed **notice of amalgamation or merger**.

## 15 Practice regarding winding up and liquidation of companies <sup>73</sup>

- 15.1 Item 9 of Schedule 5 to the Act provides that the provisions of chapter 14 of the Companies Act 61 of 1973 (old Act) must be applied as if it had not been repealed, until a date to be determined by the Minister responsible for companies.
- 15.2 In terms of item 2(3) of Schedule 5 to the Act, section 49(5) to 49(7) of the old Act apply to the description of companies that were engaged in any winding-up or judicial management procedures **immediately before 1 May 2011**. Therefore, where deeds are lodged for registration in instances where a company is in liquidation, voluntary liquidation or under judicial management, the words “**in liquidation**” or “**in voluntary liquidation**” or “**under judicial management**” must still form part of the description of the name of such a company, if such proceedings were started before 1 May 2011.
- 15.3 If a company is liquidated **after 1 May 2011**, the words “**in liquidation**” or “**in voluntary liquidation**” must still appear as part of the description of such company in deeds and documents for lodgement at the deeds office.

### Examples

**(in the case where a company has been liquidated before or after 1 May 2011)**

ABC (Pty) Ltd (in liquidation)  
Registration number 2011/000123/07

or

ABC (Pty) Ltd (in voluntary liquidation)  
Registration number 2011/000123/07

**(in the case where a company has been placed under judicial management, only before 1 May 2011)**

ABC (Pty) Ltd (under judicial management)  
Registration number 2011/000123/07

<sup>73</sup> Chief Registrar's Circular 3 /2012.

## 16 Practice regarding business rescue proceedings<sup>74</sup>

- 16.1 Section 155 of the Companies Act deals with a compromise between a company and its creditors irrespective of whether or not it is financially distressed as defined in section 128(1)(f), unless it is engaged in business rescue proceedings in terms of Chapter 6 of the Act.
- 16.2 The **board of the company** itself, in terms of section 129 of the Companies Act may resolve to begin voluntary business rescue proceedings and place the company under supervision or **the court**, in terms of section 131 of the Companies Act may place the company under the supervision and order the commencement of business rescue proceedings. Either the company or the court is entitled to appoint a business rescue practitioner. After the appointment of a business rescue practitioner, the company must lodge a notice of appointment of a practitioner with the CIPC (Companies and Intellectual Property Commission). In terms of section 140 of the Companies Act, ***the practitioner has full management and control of the company in substitution for its board and pre-existing management***. The practitioner acts on behalf of the company.

### 16.3 Description of the transferor in the power of attorney to pass transfer

I the undersigned

Jan van der Merwe in my capacity as business rescue practitioner of  
ABC (Pty) Ltd

Registration number 2008/049786/07

duly appointed by \*the board of directors on ..... in terms  
of section 129(3)(b) of the Companies Act 71 of 2008 / a court order in  
terms of section 131(5) of the Companies Act 71 of 2008

as will appear from Notice of Appointment of business rescue practitioner  
filed with the CIPC on .....

*\* Delete whichever is not applicable*

- 16.4 The vesting clause of a deed must not make reference to the fact that the company is under business rescue proceedings.

<sup>74</sup> Chief Registrar's Circular 3 /2012

**If a company is the seller of a property or the mortgagor in respect of a property registered in the name of the said company, the following documents must be obtained by the conveyancer in order for him to comply with the requirements of regulation 44A issued under the Deeds Registries Act:**

*Certified copies of –*

- 1 **notice of incorporation (CoR 14.1);**<sup>75</sup>
- 2 **registration certificate(CoR 14.3);**<sup>76</sup>
- 3 **latest updated memorandum of incorporation;**<sup>77 , 78 , 79</sup>

<sup>75</sup>

In this form, the following information is reflected, namely –

- a) name, address, identity number or registration number of the incorporator;
- b) type of company;
- c) effective date of incorporation;
- d) first financial year;
- e) company's registered address;
- f) amount of initial directors;
- g) name of the company;
- h) reference to the type of memorandum of incorporation
- i) confirmation if there are restrictive conditions contained in the memorandum of incorporation.**

Form **CoR 14.1 Annexure A**, must be filed together the CoR 14.1. This form is also known as notice of incorporation: **initial directors of the company**.

If there are restrictive conditions contained in the memorandum of incorporation, Annexure C must also be filed, with the title: **notice of Incorporation: notice of "Ring-Fencing" conditions**

In Annexure D, namely notice of incorporation: notice of company appointments (which is optional) the initial company secretary, auditor, or members of the audit committee are set out.

<sup>76</sup>

In this certificate the name and registration number of the company are reflected. The date on which the registration becomes effective, is also set out herein. It also appears from this certificate whether the name of the company –

- a) is in accordance with the name option selected on the notice of incorporation; or
- b) has been altered by the Commission in terms of section 14(2)(a); or
- c) has been assigned by the Commission as an interim name in terms of section 14(2)(b). and wherein the company is invited to file an amended notice of incorporation to change the name.
- d) The certificate also indicates whether the Commission has issued a notice of potentially contested name or potentially offensive name.

<sup>77</sup>

There are standard forms provided for the different types of memoranda of incorporation in the regulations, but the company may also file a unique memorandum of incorporation. The forms in the regulations are as follows –

- a) CoR 15.1 A Shortened standard form for private company
- b) CoR 15.1 B Long standard form for profit companies
- c) CoR 15.1 C Shortened form for non-profit companies without members
- d) CoR 15.1 D Long standard form for companies non-profit companies without members
- e) CoR 15.1 E Long standard form for non-profit companies with members

As part of the memorandum of incorporation, the following information is included, namely –

- a) Name of the company;
- b) Type of company;
- c) Amount of directors of the company;
- d) Amount of alternate directors of the company;
- e) Amount of shares in a single class of shares which it is authorised to be issued;
- f) Particulars of the incorporators of the company, namely name, address, identity number or registration number and signature.

***It can inter alia consist out of –***

- 3.1 **memorandum of incorporation**
- 3.2 **notice of amendment of memorandum of incorporation (CoR 15.2)**
- 3.3 **notice of consolidation of memorandum of incorporation (if applicable) (CoR 15.5)**

- 4 all notices of **change of directors** (CoR 39)
- 5 latest **registered address** (CoR 21)
- 6 latest notice of change of **auditor** or secretary of member of audit committee<sup>80</sup> (CoR 44))

<sup>78</sup> The notice of amendment of the memorandum of incorporation must be filed by Form CoR 15.2. If the notice of amendment is in respect of restrictive conditions, form CoR 15.2, annexure A must be attached to the notice.

<sup>79</sup> According to section 17(5) of the new Act, a company may, after it has filed one or more amendments to its memorandum of incorporation, file a consolidated revision of its memorandum of incorporation as so altered or amended. The Commission may also require the company to file a consolidated revision of its memorandum of incorporation, as so altered or so amended. Such consolidated memorandum of incorporation must be accompanied by a sworn statement by a director of the company or a statement by an attorney or notary public, stating that the consolidated revision is a true accurate and complete representation of the company's memorandum of incorporation, as altered or amended up to the date of the statement.

<sup>80</sup> A company that is a –

- a) public company; or
- b) state-owned company; or
- c) any other company which is required to **audit its financial statements** according to its memorandum of incorporation or the new Act or regulations,

is compelled to appoint an auditor. In such an instance proof of the appointment of the auditor must be obtained through the acquisition of Form CoR 44 and the duly appointed auditor must sign the auditor's report (certificate).

If the company is not obliged to appoint an auditor, as required in the abovementioned paragraph, its financial statements are subject to **independent review**. According to regulation 29(4) an independent review of the financial statements of a company must be done –

- a) in the case of a company whose public interest score for the specific financial year was at least 100, by **an auditor**, or a member of a professional body which is accredited in terms of section 33 of the Auditing Professions Act; or
- b) in the case of a company with a public interest score for a specific year that is below 100, either by a person referred to in paragraph (a) above or a person who is qualified to be appointed as an **accounting officer** of a close corporation in terms of section 60(1), (2) and (4) of the Close Corporation Act.

According to section 30(2A), it is not a requirement for a company to have its annual financial statements audited or independently reviewed, if each person who is the holder of a beneficial interest in any securities issued by that company, is also a director of that company. This section is subject to any regulation issued by the Minister in terms of the new Companies Act which has to audit its financial statements – (in this regard, see regulations 28 and 29, which has already been discussed above).

- 7 certified copy of **resolution by the directors** of the company –
- a) authorising the sale and transfer of the property (or the entering into the loan and bond registration); as well as
  - b) appointing the representative to sign all documents that are necessary for the sale and subsequent transfer or loan and subsequent bond registration on behalf of the company
- 8 **certificate by the accounting officer or auditor** of the company wherein the following is confirmed:
- a) that the company is still registered in the register of companies;
  - b) that the memorandum of incorporation reflects all amendments up to date;
  - c) the names of the current directors;
  - d) that no part of the money provided by the transaction or to be provided by the transaction is contrary to the provisions of sections 44,<sup>81</sup> 45,<sup>82</sup> and 75;<sup>83</sup>
  - e) that the sale and transfer is not a disposal of the whole, or the greater part of the assets or undertaking of the company – (s 112)<sup>84</sup>
  - f) that the registration of the transaction is not contrary to the memorandum of incorporation;
  - g) that no resolution has been taken for the voluntary winding-up of the company; no application for the liquidation of the company has been submitted to a court and that company is not subject to any business rescue proceedings.
- 9 **identity document** of the representative who will sign the document on behalf of the company;
- 10 **solvency affidavit** by the company (including ‘an affidavit whether the company is subject to any business rescue proceedings)

<sup>81</sup> Section 38 under the old Act.

<sup>82</sup> Sections 37 and 226 under the old Act.

<sup>83</sup> This was the old section 236 under the old Act. If a director (or alternate director or prescribed officer or committee member) or related person has a personal financial interest in any agreement, such director may not enter into such agreement unless the agreement is approved by an ordinary resolution of the shareholders, after the director has disclosed the nature and extent of that interest to the shareholders. If such personal is not disclosed and approved as aforesaid, such agreement shall be void.

<sup>84</sup> Section 228 under the old Act.

**Additional documents to be obtained, depending on the type of transaction**

- 11 ***If the company gives financial assistance in respect of the subscription of any of its securities or for the purchase of any of its securities*** -<sup>85</sup>
- a) a **special resolution** adopted within the previous two years by the shareholders;
  - b) **resolution by the directors** authorising the financial assistance;
  - c) confirmation by the board that the **solvency and liquidity test** are satisfied;
  - d) confirmation by the board that the terms under which assistance is given are **fair and reasonable to the company**; and
  - e) confirmation that any conditions or restrictions in the **memorandum of incorporation** has been complied with.
- 12 ***If the company gives financial assistance to or in connection with*** -<sup>86</sup>
- i) a director or prescribed officer of the company;
  - ii) a director or prescribed officer of a related or inter-related company;
  - iii) a related or inter-related company or corporation;
  - iv) a member of a related or inter-related corporation; or
  - v) a person related to such company, corporation, director, prescribed officer or member –
    - a) a **special resolution** adopted within the previous two years by the shareholders;
    - b) a **resolution by the board** for such assistance;
    - c) confirmation by the board that the **solvency and liquidity tests** are satisfied;
    - d) confirmation by the board that the **terms** under which the assistance is given are **fair and reasonable** towards the company;
    - e) confirmation that all the conditions and restrictions in the **memorandum of incorporation** have been complied with;
- 13 ***If the whole or substantially the whole of the assets or undertaking of the company is alienated*** -<sup>87</sup>
- a) a **special resolution**<sup>88</sup> by the shareholders, except if one of the exceptions is applicable.
  - b) confirmation by the board that the **approval of the court** as set

<sup>85</sup> Section 44 of the new Act.

<sup>86</sup> Section 45 of the new Act.

<sup>87</sup> Section 112 & 115 of the new Act.

<sup>88</sup> This resolution must comply with the specific requirements as set out in section 115 of the new Act, as this constitutes a fundamental transaction.

out in section 115(3) – (6) **is not necessary**, in other words that there is no pending court proceedings as referred to in section 115(3) – (6).

- 14 ***If immovable property is transferred as a result of a amalgamation or merger -***
- a) confirmation by the boards of directors of the merging companies regarding the satisfaction of the **solvency and liquidity test** in respect of the merged companies, upon implementation of the merger
  - b) **special resolution** by the shareholders of the merging companies;
  - c) **notice of merger** (CoR 89);
  - d) **merger agreement**;
  - e) confirmation by the boards of directors that there is no pending court proceedings, either in terms of section 115(3) –(6) or section 116(1)(b).<sup>89</sup>

### SOURCES

- 1 Companies Act 71 of 2008, as amended
- 2 Regulations issued in terms of the Companies Act published in Government Gazette No.34239 dated 26 April 2011
- 3 Contemporary Company Law, Farouk HI Cassim, Maleka Femida Cassim, Rehana Cassim, Richard Jooste, Joanne Shev & Jacqueline Yeats, First published 2010, Juta
- 4 Maatskappye en ander Besigheidstrukture in Suid-Afrika, Dennis Davis, Farouk Cassim, Walter Geach, Tshepo Mongalo, David Butler, Anneli Loubser, Lindi Coetzee, David Burdette, First published 2009, Oxford University Press.
- 5 Michael Katz, “A practical guide to the implications of the new Companies Act: An introduction”, De Rebus, January/February 2010, p.50.
- 6 Vivian Chaplin, “A practical guide to the implications of the new Companies Act: Classification of Companies”, De Rebus, March 2010, p.39.
- 7 Paul Descroizilles, “A practical guide to the implications of the new Companies Act: the memorandum of incorporation, shareholders’ agreements and special resolutions”, De Rebus, March 2010, p.39.
- 8 Chief Registrar’s Circular 3/2012.

<sup>89</sup> In terms of section 116(1)(b), a creditor may seek relief to apply to court for a review of the merger on grounds that the creditor will be materially prejudiced by the merger.