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COMPANIES ACT, 71 OF 2008

A SUMMARY OF
KEY ASPECTS



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Introduction

The Companies Act, no 71 of 2008 replaces both the Companies Act of 1973 and Corporate Laws Amendment Act no 24 of 2006. The Close Corporations Act, 1984 will be amended as provided for in Schedule 5.

The Act was signed by the President on the 9th April 2009 and gazetted in Gazette No. 32121 (Notice No. 421). It will come into operation on a date still to be fixed by the President by proclamation in the Gazette, which may not be earlier than one year following the date on which the President assented to it.

In terms of sec 223 of this Act the Minister is required to publish certain regulations which may affect the implementation and interpretation of the Act. None of the regulations contemplated have yet been published by the Minister.

This summary is intended to be an easy guide to all our clients and stakeholders who have an interest in corporate law reform.

Due to the fundamental reforms brought about by the Act, we recommend that professional advice be sought before making any decisions based on this summary when dealing with any matters relating thereto.

Following is a summary of the Key Aspects of the Companies Act, and we trust that this guide will assist in enhancing your understanding of the new Companies Act no. 71 of 2008.

Sindi Zilwa
Chief Executive Officer
Nkonki Inc.



New Regulatory Bodies Introduced by The Act

1. COMPANIES AND INTELLECTUAL PROPERTY COMMISSION (CIPC)

Previously known as CIPRO (the Companies Intellectual Property & Registration Office) will, as from the general effective date of the new Act be known as the Companies and Intellectual Property Commission (CIPC). Main objectives to:-

- To efficiently and effectively register: Companies and External companies; Other juristic person; and Intellectual property rights; and
- To maintain up to date information concerning registered companies
- To promote education and awareness of Company and Intellectual property laws and related matters.
- To promote and enforce compliance with this Act through:-
 - Promoting voluntary resolution of disputes arising in term of the Act;
 - Monitoring proper compliance with the Act; and
 - Receive or initiate complaints concerning alleged contraventions of this Act.

2. COMPANIES TRIBUNAL (CT)

- To adjudicate in relation to any application that may be made to it in terms of this Act; and
- To assist in the resolution of disputes, and to perform any other function assigned to it by the Act.

3. TAKE-OVER REGULATION PANEL (TORP OR PANEL)

- To regulate affected transactions and offers to the extent provided for,
- To investigate complaints with the affected transactions and offers;
- To apply for court order to wind up a company as contemplated in s81(1)(f); and
- To consult with the minister in respect of addition, deletions and or amendments to the take over regulations.

The panel must not express any view or pinion on the commercial advantages or disadvantages or any transaction or proposed transaction.

4. FINANCIAL REPORTING STANDARDS COUNCIL (FRSC)

- Must receive and consider any relevant information relating to the reliability of and compliance with financial reporting standards and adapt international reporting standards for local circumstances; and
- Must advise the Minister on matters relating to financial reporting standards.



Categorisation of Companies

The Act provides for two categories of companies, namely Profit companies and Non-Profit companies.

PROFIT COMPANIES

- 1 or more persons (including juristic persons) may incorporate,
- 1 or more directors required,
- 3 or more directors for public (Ltd) companies,
- No limit on number of shareholders,
- A share issued by a pre-existing company (before repeal of Company's Act 1973) & held by a shareholder immediately before the effective date of the Act continues to have all rights associated with it immediately before the effective date.

STATE OWNED COMPANY (SOC LTD)

- If it falls within the meaning of the state owned enterprise in terms of PFMA, or is owned by the Municipality

PRIVATE COMPANY [PROPRIETARY LIMITED OR (PTY) LTD]

A company is categorised as a private company if :-

- It's not a state owned company; and
- Memorandum of Incorporation (MOI) prohibits it offering any of its securities to the public & restricts the transferability of its securities.

No limit on number of shareholders (previously was limit of 50) and a share no longer has a nominal or par value.



PERSONAL LIABILITY COMPANY (INCORPORATED OR INC)

A company is categorised as a personal liability company if:-

- It meets the criteria for a private company,
- Its MOI states that it is a personal liability company

PUBLIC COMPANY, [LIMITED OR LTD].

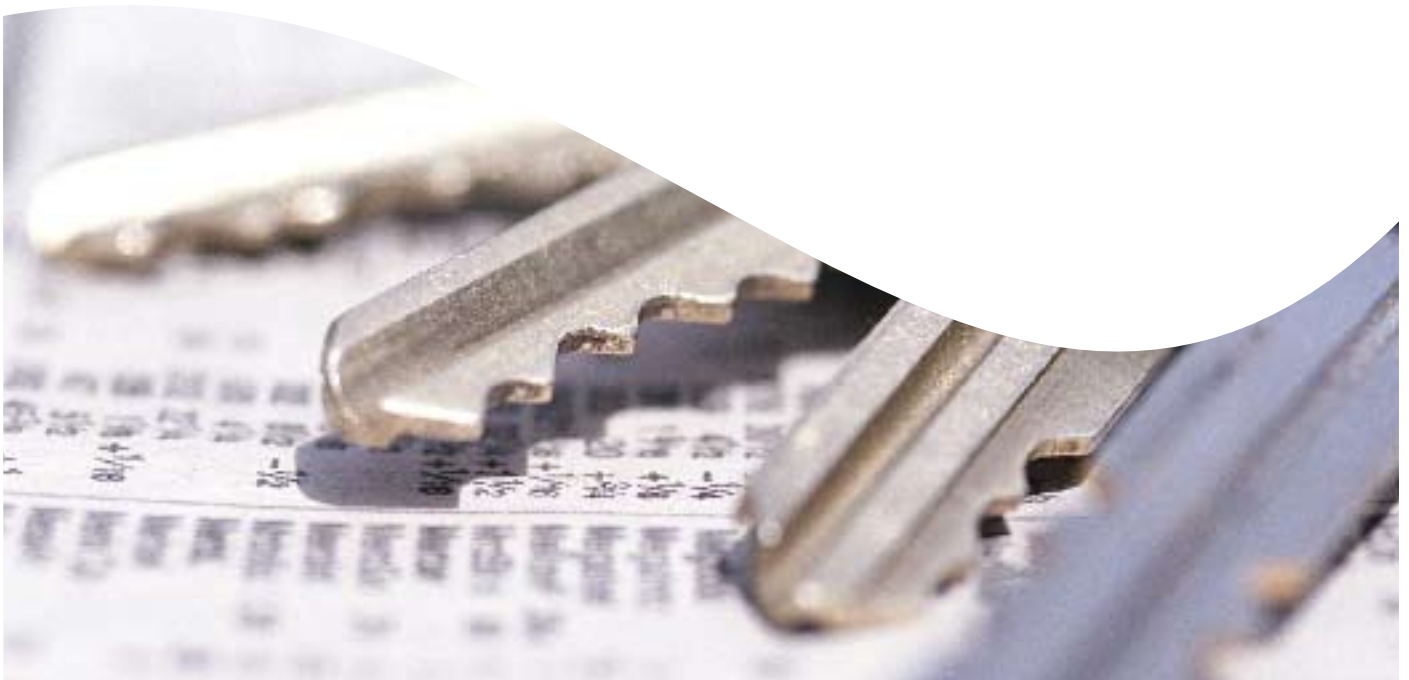
If not a private company or state owned company.

NON-PROFIT COMPANIES (NPC)

- Name to be followed by suffix "NPC", {previously Section 21 Companies}.
- 3 or more persons (including juristic persons) may incorporate;
- 3 or more directors required with/without members;
- A NPC without members can be incorporated;
- A NPC can have voting or non-voting members;
- NPC membership can be held by juristic persons, including profit companies; and
- Each voting member has at least one vote and the vote of each member is of equal value to the vote of each other voting member on any matter to be determined by vote of the members, except to the extent that the company's MOI provides otherwise.

EXTERNAL COMPANY

An external company is a foreign company (Profit or Non-Profit), that is carrying on business or non-profit activities within the RSA. Such a company must register with CIPC within 20 business days after it first begins to conduct business or non-profit activities within RSA.



The Memorandum of Incorporation

The Memorandum Of Incorporation (MOI) replaces a two part Memorandum & Articles of Association.

The MOI is the sole governing document of the company. It must be consistent with the Act, and is void to the extent that it contravenes or is inconsistent with the Act. The MOI is binding between Company and each shareholder, amongst shareholders, and between company and directors or offices.

Except to the extent that a company's MOI provides otherwise, the Board may make, amend or repeal any necessary or incidental rules relating to the governance of the company in respect of matters not addressed in the Act or the MOI - by publishing a copy of its rules to the shareholders and filing a copy thereof with the CIPC.

Shareholders can enter into any other agreement with one another but if the agreement is inconsistent with the act or the MOI, it will be void to the extent of the inconsistency.

AMENDMENT OF MOI

A company's MOI can be amended by resolution if the amendment is:

- In compliance with a court order;
- Proposed by the Board or by the holders of at least 10% of the voting shares;- and
- Approved by the shareholders by formal or informal special resolution (this second requirement is not applicable to NPC's-that have no voting members).



Shares

SECTION 36: AUTHORISATION FOR SHARES

A company's MOI must set out: the classes of shares and the number of shares that it is authorised to issue (authorised share capital). Shares do not have a nominal or par value.

SECTION 38: ISSUE OF SHARES

The board has the power to issue shares to the extent that they have been authorised in the MOI. If unauthorised shares been issued and a resolution to retroactively authorise them is not adopted when put to vote, such shares shall be nullity and subscribers shall be refunded with interest.

SECTION 40: CONSIDERATION FOR SHARES

The Board may issue authorised shares only for adequate consideration as determined by the Board, or other benefit to the company or as a capitalisation share without consideration.

SECTION 41: SHAREHOLDER APPROVAL REQUIRED FOR ISSUING SHARES IN CERTAIN CASES

An issue of shares must be approved by a special resolution of the shareholders of a company if they are issued to:

- a current or future director or prescribed officer of the company,
- person related or inter-related to the company or to a director or prescribed officer or
- a nominee of any of the above.

An issue of shares requires approval of the shareholders by special resolution if the voting power of the shares that are issued or issuable as a result of the transaction will be equal to or exceed 30% of the voting power of all the shares of that class held by the shareholders immediately before the transaction.

A Director who fails to vote against shares issued in contravention of this section will be held liable.



Financial Assistance

SECTION 44: FINANCIAL ASSISTANCE FOR THE SUBSCRIPTION OF SECURITIES

The board may authorise the company to provide financial assistance by way of

- a loan,
- a guarantee, and
- the provision of security or otherwise to any person

for the purpose of or in connection with the subscription of any option, or any securities 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 subject to the solvency and liquidity requirements relating to conditions and consequences of lending financial assistance; and the reasonableness and fairness of the terms to the company.

SECTION 45: LOANS OR OTHER FINANCIAL ASSISTANCE TO DIRECTORS

A company may not give direct or indirect financial assistance (i.e. provide a loan to or secure a debt or obligation)

- to a director or prescribed officer of a company or of a related or inter-related company or CC, or
- to a person related to any such company, CC or director.

The Board may not authorise it unless pursuant to a special resolution of shareholders and it meets the solvency and liquidity requirements relating to conditions and consequences of lending financial assistance.

CONDITIONS FOR LENDING FINANCIAL ASSISTANCE

Despite any provision in a Company's MOI to the contrary, the board may not authorise financial assistance unless:

- (a) the particular provision of financial assistance is –
 - (i) pursuant to an employee share scheme that satisfies the requirements of Section 97; or
 - (ii) pursuant to a special resolution of the shareholders adopted in the previous two years which approved such assistance for the specific recipient or generally for a category of potential recipients & the specific recipient falls within that category and;
- (b) the board is satisfied that –
 - (i) immediately after giving the financial assistance, the company would be in compliance with the solvency & liquidity test, and;
 - (ii) the terms under which the financial assistance is proposed to be given are fair and reasonable to the company (this applies to S44 only).

Any resolution by the Board to provide financial assistance that is inconsistent with Section 44 OR Section 45 or any prohibition, restriction or requirement in the company's MOI is VOID and any director who voted in favour of such a resolution or approved an agreement providing the assistance is liable to the extent set out in section 77(3)(e)(iv) and Section 77(3)(e)(v) read with Section 218 (All only effectively void once declared so by a court). A director will be liable if he:-

- (a) was present at the meeting when the board approved the resolution or agreement, or participated in the making of such a decision in terms of section 74; and
- (b) failed to vote against the resolution or agreement despite knowing that the provision of financial assistance was inconsistent with this section or a prohibition, condition or requirement contemplated in the MOI.

Distributions and Solvency Test

SECTION 46: DISTRIBUTIONS TO BE AUTHORISED BY THE BOARD

No distribution may be made by the company unless

- It is pursuant to an existing legal obligation of the company; or
- A court order; or
- Has been authorised by the board by resolution and immediately after giving effect to the authorization it reasonably appears that the company would satisfy the solvency and liquidity test, and
- The board resolution acknowledges that the board has applied the solvency and liquidity test by reference to the accounting records and financial statements and reasonably concluded that the company will satisfy that test immediately after completing the proposed distribution.

The Company may apply to court for an order varying the original order if it will fail the Solvency and Liquidity test after implementing the original court order.



Directors

NON-ELIGIBLE & DISQUALIFIED DIRECTORS: Section 69

A person is ineligible if the person is:

- A juristic person,
- An unemancipated minor or under similar legal disability or,
- Does not satisfy any qualification set out in the MOI,

A person is disqualified if the person:

- Has been declared a delinquent or a court has prohibited that person to be a director (or member of a CC),
- Is an unrehabilitated insolvent, and is prohibited in terms of any public regulation to be a director,
- Has been removed from an office of trust because of misconduct involving dishonesty,
- Has been convicted of offences involving theft, forgery, perjury or an offence involving fraud, misrepresentation or dishonesty or connection with the promotion, formation management of a company or under this the Insolvency Act, CC's Act, Competition FICA, Security Services Act, Prevention Combating of Corruption Activities Act.

DELINQUENT DIRECTORS & DIRECTORS ON PROBATION: Section 162

The Act introduces a remedy to shareholders and other stakeholders (namely the company, director, company secretary, prescribed officer, a registered trade union that represents employees of the company or other representative of the employees) to hold directors accountable by an application to Court, to :

- Declare a director delinquent (and thus prohibited from being a director) or
- Under probation (and restricted from serving as a director in terms of the conditions of the probation).

BOARD OF DIRECTORS: SECTION 66 & 70

A profit company {not a SOC Ltd} must allow for shareholders to elect a minimum of 50% of the directors, and 50% of the alternate directors.

[Note: as the majority of directors should be non-executive directors it would suffice for only non-executive directors to be elected].

Each director to be appointed by a separate resolution.

BOARD COMMITTEES: SECTION 72

Board Committees may appoint non-directors to a Committee (as long as they are not disqualified or ineligible), and Such persons shall not have a vote. If desirable in terms of turnover, workforce size and nature and extent of company activities, the Minister may prescribe a established Social and Ethics committee as a Board Committee of the company. The Board may delegate to the Committee any of the authority of the Board.

BOARD MEETINGS: SECTION 73

A director may call a meeting of the board at any time and a Board meeting is obligatory if called for by:

- At least 2 of the directors or
- In the case of a Board with 12 or more directors, 25% of the directors require it.

REMOVAL OF DIRECTORS: SECTION 71

Despite anything to the contrary in the MOI or rules or agreement between a company and director or between any shareholders and a director, a director may be removed by an ordinary resolution adopted at a shareholders meeting by the persons entitled to exercise voting rights in an election of that director provided that director has been given notice of the meeting and the resolution and has been afforded a reasonable opportunity to make a presentation in person or through a representative to the meeting before the resolution is put to vote.

PERSONAL FINANCIAL INTERESTS OF DIRECTOR: SECTION 75

A director (including one appointed as a member of a Board Committee), is required to disclose his personal financial interest in respect of a matter to be considered at a meeting of the board (this is also applicable to a related person to him), He must disclose his interest before it is considered by a meeting of the Board and recuse himself by leaving the meeting, without taking part in the discussion [Note: the Companies Act 1973 did not require the director to recuse himself]. If a director acquires a financial interest after the company has concluded a transaction with the company in which he has acquired an interest, he has an obligation to disclose the interest to the board.

CODIFIED REGIME OF DIRECTORS DUTIES: SECTION 76

A director must exercise the powers and perform the functions of director in good faith and for proper purpose, in the best interests of the company, and with a degree of care, skill and diligence that may reasonably be expected of such a person. (Section 76(3)(a)(b)(c))

S76(3)(a) a director is required to act in good faith & for a proper purpose &;

S76(3)(b) in the best interests of the company;

S76(3)(c) each director is subject to a duty to exercise a degree of care, skill & diligence that would reasonably be expected of a person with general knowledge skill & experience reasonably expected of that person when carrying out the functions of a director; -

A director will have exercised degree of care and skill and acted in the best interest of the company if it:-

- (i) has taken diligent steps to become informed about the subject matter of the decision and
- (ii) does not have a material personal financial interest in the subject matter of the decision (nor does a related person) (and it is a decision that a reasonable person in a similar position could hold in comparable circumstances) and the director has complied with Section 75 (disclosure of financial interests-see above) and
- (iii) the director made a decision or supported the decision of a committee and had a rational basis for believing that the decision was in the best interests of the company; -

In discharging any duty contemplated in this section, the director is entitled to rely on the performance by any of the persons to whom the board may have delegated formally or informally duties to perform one or more of the board's functions that are delegable under law or any financial reports or statements or one or more employees of the company whom the director reasonably believes to be:-

- Reliable & competent;
- Legal counsel, accountants or other professional persons;
- Any financial reports or statements, prepared by any professionals or persons with expert competence;
- A committee of the board of which the director is not a member.(Unless the director has reason to believe that the actions of the board do not merit confidence.)

GENERAL LIABILITY OF DIRECTORS & OFFICERS: SECTION 77

A director, is liable when in breach of a fiduciary duty, for losses, damages or cost resulting from breach of

- Sections 75, 76(2), 76(3)(a) or (b), or a duty in terms of MOI
- S77(3)(a) - for acting in the name of the company despite knowing he did not have the authority to do so;
- S77(3)(b) - acquiescing to carrying on of company's business despite knowing that it was being conducted contra to Section 22 (reckless trading),
- S77(3)(c) - party to an act or omission by the company despite knowing that it was calculated to defraud a creditor, employee or shareholder,
- S77(3)(d) - for signing or consenting to the publication of AFS or a prospectus which contains an untrue statement,
- For knowingly consenting to or not voting against the issue of shares, which had not been authorised,
- For granting unauthorised options,

- For agreeing to the granting of financial assistance to directors or other parties, when not in accordance with requirements (Section 45),
- For knowingly failing to vote against a share purchase which did not accord with legislative requirements,
- Section 46- a director will only be liable for failing to vote against a distribution if immediately after so voting, the company failed to satisfy the solvency and liquidity test and this was reasonably predictable.

Action to recover loss, damages or costs may not commence more than 3 years after the act or omission.

SECTION 78(2) and (3): DIRECTOR MAY NOT BE RELIEVED OF LIABILITY

Any agreement, provision in the MOI, resolution which directly or indirectly relieves a director of liability in regard to the duties contemplated in sections 75 and 76 and liability contemplated in section 77 is void.

A company may not directly or indirectly pay a fine imposed on a director.

SECTION 78(4): INDEMNITY OF DIRECTORS / COMPANY MAY ADVANCE LEGAL EXPENSES:

A company may, if authorised in its MOI: advance expenses to a director to defend litigation in any proceedings arising out of his/her service to the company and directly or indirectly indemnify the director for expenses.

SECTION 78(7): DIRECTORS' INSURANCE:

The company may purchase insurance to protect the company, or the director against liability and expenses.

SECTION 214: FALSE STATEMENTS RECKLESS CONDUCT AND NON-COMPLIANCE:

A person guilty of an offence if :-

- He is party to falsification of any accounting records of a company with a fraudulent purpose,
- Knowingly provided false or misleading information calculated to defraud a creditor employee or security holder of the company or
- Is party to the preparation, approval, dissemination or publication of financial statements or summaries or a prospectus or written statement that contained an untrue statement.

SECTION 218: CIVIL ACTIONS

A shareholder can also have a claim against the directors or any person who contravenes the Act for damages for any loss or damages suffered as a result of that contravention.



Ultra Vires

Where a director acts ultra vires, the shareholders may ratify the transaction retrospectively by special resolution or may elect to repudiate the action, whereupon the erring director may be held personally liable to the company for any loss suffered by the company as a result thereof.

Meetings and Resolutions

Except as otherwise provided for in the company's MOI, the company must ensure that notice of each meeting is delivered to each shareholder as follows:

- Public companies or NPC (that has members) 15 business days.
- All other categories of companies 10 business days.

Failure to give required notice or a defect in the notice may be condoned if:

- All the holders of the shares entitled to be voted in respect of each item on the agenda acknowledge actual receipt of the notice and are present at the meeting and,
- Waive notice of the meeting or
- In the case of a material defect in the manner and form of the notice, ratify the defective notice.

A public company must convene the first Annual General Meeting (AGM) of its shareholders no more than 18 months after the company's date of incorporation, and thereafter once in every calendar year but no more than 15 months from the date of the previous AGM.

The Board or any other person specified in the company's MOI or rules may call a meeting of shareholders at any time.

A company must hold a meeting when: -

- The board is required by the Act or the MOI to refer a matter to shareholders for decision (this relates to fundamental transactions),
- Whenever required in terms of Section 70(3) to fill a vacancy on the Board,
- When required by the MOI,
- When an AGM of a public company is required,
- When one or more written and signed demands for a meeting are delivered to the company which demand describes the purpose of the meeting and the aggregate of the demands for substantially the same purpose are made and signed by the holders of at least 10% of the shares entitled to be voted in respect of the matter that is proposed for consideration at the meeting.

Quorum

The quorum for all meetings is the presence at the meeting of the holders of at least 25% of all of the voting rights that are entitled to be exercised in respect of at least one matter to be decided on at the meeting and a matter to be decided on at the meeting may not begin to be considered unless sufficient persons are present at the meeting to exercise in aggregate at least 25% of all of the voting rights that are entitled to be exercised on that matter at the time when the matter is called on the agenda.

NOTE: the MOI may lower or higher the % required above. Irrespective of the votes quorum, if a company has more than 2 shareholders, a meeting may not begin or a matter may not be debated unless at least 3 shareholders are present and the requirements of the "votes" quorum above are also met.

Company Secretary

Appointment of a Company Secretary is mandatory.

Must be permanently resident in SA and have the requisite knowledge and experience to act as such, is accountable to the Board, duties are set out in Section 88 of the Act.

Vacancy to be filled in within 60 business days, and a juristic person or partnership may be appointed as Company Secretary if every employee qualifies in terms of the Act.



Resolutions

In terms of Section 65, every resolution adopted is either an Ordinary resolution or a Special resolution.

ORDINARY RESOLUTIONS

- An ordinary resolution – has to be supported by holders of at least a majority (more than 50%) of the voting rights exercised on that resolution, unless the company's MOI requires a higher percentage of voting rights to approve the ordinary resolution or one or more higher percentage of voting rights to approve ordinary resolutions concerning specific matters. There must at all times be a margin of at least 10 percentage points between the requirements for approval of an ordinary resolution and a special resolution on any matter.

SPECIAL RESOLUTIONS

- A special resolution adopted by holders of at least 75% of the voting rights exercised on the resolution – unless the company's MOI permits a lower percentage of voting rights to approve the special resolution or one or more lower percentage of voting rights to approve special resolutions concerning one or more particular matters provided there must at all times be a margin of at least 10 percentage points between the requirements for approval of an ordinary resolution and a special resolution on any matter. A special resolution is required to:-
 - Amend the Company's MOI;
 - Approve voluntary winding up;
 - Approve any proposed fundamental transaction; or
 - Approve any other matter requiring a special resolution in terms of the MOI.



Accounting Records and Financial Statements

SECTION 28 ACCOUNTING RECORDS

A company must keep accurate and complete accounting records in one of the official languages of RSA at its registered office

- As necessary to enable the company to satisfy its obligations in terms of the Act or any other law with respect to the preparation of financial statements and
- Including any prescribed accounting records to be kept in the prescribed manner and form.

SECTION 29 FINANCIAL STATEMENTS

If a company provides any financial statements (including annual financial statements) to any person for any reason, these must:

- Satisfy the financial reporting standards as to form and content, if any such standards are prescribed,
- Present fairly the state of affairs and business of the company, and explain the transactions and financial position of the company,
- Show the company's assets, liabilities and equity as well as its income and expenses and any other prescribed information,
- Set out the date on which the statements were produced and the accounting period to which they apply, and Bear on the first page a prominent note indicating,
 - (i) Whether the statements – (in compliance with any applicable requirements of this Act:
 - (aa) have been audited,
 - (bb) if not audited, have been independently reviewed, or
 - (cc) have not been audited or independently reviewed, and
 - (ii) The name, and professional designation (if any) of the individual who prepared or supervised the preparation of the statements.

Any such statements must not be false or misleading in any material respect or incomplete in any material particular.

A company may provide any person with a summary - however these must also comply with prescribed requirements – and non-compliance is an offence – (Sections 29 and 218.)

SECTION 30: ANNUAL FINANCIAL STATEMENTS (AFS)

A company is required to produce AFS each year within 6 months after the end of its financial year which:

- (a) are audited in the case of a public company or
- (b) in the case of any other company,
 - (i) be audited if so required by the regulations (whereby the Minister may make regulations and different requirements for different categories of companies), taking into account whether it is desirable in the public interest, having regard to the economic or social significance of the company as indicated by
 - (aa) its annual turnover,
 - (bb) the size of its workforce,

(cc) the nature and extent of its activities or,

(ii) be either audited voluntarily at the option of the company or independently reviewed unless it has been exempted.

The annual financial statements (AFS) must include :-

- An auditors report if the statements are audited, and
- A report by the directors with respect to the state of affairs, the business and profit or loss of the company or group of companies (if the company is part of a group) including any matter considered material in enabling the shareholders to appreciate the company's state of affairs.

AFS to be approved by the board and signed by an authorised director, and

AFS to be presented to the first shareholders meeting after approval by the board.

Trade Unions must, through the Commission, have access to the company's financial statements for the purpose of initiating a Business Rescue Process;

S30(4)-(6) If the AFS are required to be audited, they must contain extensive information about any remuneration received by a director or prescribed officer as set out in the Act.

Auditors

APPOINTMENT & ROTATION OF AUDITOR (S90) and (S92)

Upon its incorporation and each year at its annual meeting, relevant company must appoint an auditor, who must be a registered auditor and acceptable to its audit committee,

The auditor must not be a director, prescribed officer, or 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 or a director, officer or employee of a person performing the secretarial work for the company.

Neither must the auditor be a person who, alone or with a partner or employees, habitually or regularly performs the duties of secretary or bookkeeper of the company, or is related to any such person, or a person who at any time during the five financial years immediately preceding the date of appointment was a person contemplated above.

ROTATION

The same individual may not serve as the auditor or designated auditor for more than five consecutive financial years,

If an individual has served as auditor or designated auditor for two or more consecutive financial years and then ceases to be the auditor, that individual may not be appointed again until after the expiry of at least 2 further financial years.

For joint audits the company must manage the rotation in such a way that all joint auditors do not relinquish office in the same year.

Audit Committee

At each AGM, the relevant company (not the board of directors) must elect an audit committee for the following financial year (subject to certain exemptions) comprising at least three members who must be independent non-executive directors of the company.

The audit committee has the following duties with respect to the financial year for which it is appointed:

- Nominate for appointment by the Board and subsequent confirmation by the members, a registered auditor of the company, who is independent of the company;
- Determine fees to be paid to the auditor and the auditors' terms of engagement;
- Ensure the appointment of the auditor complies with the Act and any other legislation governing auditors;
- To determine the nature and extent of non-audit services the auditor may provide to the company;
- To pre-approve any proposed contract with the auditor for the provision of non-audit services to the company;
- To insert into the AFS to be issued, a report describing how the audit committee carried out its functions and stating whether or not the audit committee is satisfied that the auditor was independent, and commenting in any way the committee considers appropriate on the financial statements, the accounting practices and internal financial control of the company and;
- To receive and deal appropriately with any complaints from within or outside the company relating to the accounting practices or internal audit of the company or to the content or auditing of its financial statements or to internal financial controls of the company or to any related matter;
- Make submissions to the Board on any matter concerning the company's accounting policies, financial control, records and reporting, and
- To perform other functions determined by the board.

A company must pay all expenses reasonably incurred by its audit committee including the fees of any consultant or specialist engaged by the committee to assist it with its duties (if the audit committee considers it appropriate). Note: If a holding company has an audit committee, the subsidiary does not require one.



Solvency and Liquidity Test

Section 4(1): a company satisfies the solvency and liquidity test at a particular time if, considering all reasonably foreseeable financial circumstances of the company at that time -

- 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 company is a member of a group of companies, the aggregate liabilities of the company, as fairly valued, and;
- It appears that the company will be able to pay its debts as they become due in the course of business for a period of -
 - (i) 12 months after the date on which the test is considered; or
 - (ii) in the case of a distribution contemplated in para (a) of the definition of 'distribution' in section 1, 12 months following that distribution.

Section 4(2): for the purposes contemplated in (1) (a) any financial information to be considered concerning the company must be based on -

- Accounting records which satisfy requirements of S28;
- Financial statements which satisfy requirements of S29
- The board or any other person applying the solvency and liquidity test to a company must :-
- consider a fair valuation of the company's assets and liabilities including any reasonably foreseeable contingent assets & liabilities irrespective of whether or not arising as a result of the proposed distribution; and
- may consider any other valuation of the company's assets and liabilities that is reasonable in the circumstances.
- Unless the MOI provides otherwise, a person applying the test in respect of a distribution contemplated in para (a) of the definition of 'distribution' in S1 is not to be regarded as a liability any amount that would be required if the company were to be liquidated at the time of the distribution to satisfy the preferential rights upon liquidation of shareholders whose preferential rights on liquidation are superior to the preferential rights on liquidation of those receiving the distribution.



Business Rescue

APPLICABLE DEFINITIONS

“Financially distressed” means within the immediately ensuing six months;-

- It appears to be reasonably unlikely that the company will be able to pay all of its debts as they fall due and payable, or
- It appears to be reasonably likely that the company will become insolvent.

“Affected person” in this section means: in relation to a company;-

- A shareholder or creditor of the company;
- Any registered trade union representing employees of the company; and
- If any of the employees are not represented by a registered trade union each of those employees or their respective representatives.

“Independent Creditor” means a creditor not related to the company, director, or practitioner. An employee of the company in terms of S144 (2) is considered to be an independent creditor.

“Business Rescue” means proceedings to facilitate the rehabilitation of a company that is financially distressed by providing:-

- Temporary supervision and management of the company and its affairs;
- Temporary movement or the rights of claims against the company;
- The development and implementation of an approved plan to rescue the company.

COMPANY RESOLUTION TO BEGIN PROCEEDINGS (SECTION 129)

The Board may resolve that the company voluntarily begin business rescue proceedings and place the company under supervision if there are reasonable grounds to believe that:-

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

A resolution may not be adopted if liquidation proceedings have been initiated by or against the company.

Once the resolution is filed, the company must within five business days:-

- Publish a notice of the resolution and its effective date to every affected person including a sworn statement of the facts relevant to the grounds on which the board resolution was founded; and
- Appoint a business rescue practitioner who satisfies the requirements of S138 and who has consented to his/her appointment in writing, and file a notice of his/her appointment within two business days, and
- Publish a copy of the notice to each affected person within five business days.

OBJECTIONS TO COMPANY RESOLUTION (SECTION 130)

An affected person may apply to a court for an order:

- Setting aside the resolution (any time after the resolution has been filed but before the adoption of the business plan) on the grounds set out in the Act.
- For an order setting aside the appointment of the practitioner on the grounds set out in the Act.

COURT ORDER TO BEGIN BUSINESS RESCUE PROCEEDINGS (SECTION 131)

An affected person may apply to court for an order placing the company under supervision and commencing business rescue proceedings, in the event that the company has not taken a resolution as per S129.

EFFECT ON SHAREHOLDERS AND DIRECTORS (SECTION 137)

During proceedings any alteration in the classification or status of any issued securities of a company – other than by way of transfer of securities in the ordinary course of business, is invalid except if the court otherwise directs or such alteration is contemplated in and approved in the business rescue plan;

The Board and directors must continue to perform and exercise their functions and powers – subject to the authority of the practitioner, and have a duty to the company to exercise any management function within the company in accordance with the express instructions of the practitioner, to the extent that it is reasonable to do so, and remains bound by the requirements of S75 concerning personal financial interests .

Any action taken by the Board and/or directors that requires practitioner approval is void unless so approved.
A practitioner may apply for a court order to remove an unco-operative director or director that impedes his functioning.

SECTION 144-PART C - RIGHTS OF EMPLOYEES DURING BUSINESS RESCUE

The Act protects the interests of workers by recognising them as creditors of the company with a voting interest to the extent of any unpaid remuneration.

An employee is thus a preferred unsecured creditor in regard to any monies which became due and payable by the company at any time before the beginning of the company's business rescue proceedings and which have not been paid to that employee before the beginning of those proceedings.

During proceedings each employee may elect to exercise any rights as a creditor either directly or by proxy through their registered trade union, and are entitled to:

- Notice of each significant court proceeding, decision, meeting;
- To participate in court proceedings;
- To form a committee of employee's representatives;
- To be consulted by the practitioner during the development of the business rescue plan;
- To be present and make a submission to the meeting of holders of voting interests before a vote is taken on any proposed business plan;
- To vote with creditors on a motion to approve a proposed business rescue plan to the extent that the employee is a creditor; and
- If the plan is not adopted, to propose the development of an alternative plan or to present an offer to purchase the interests of one or more affected persons.

THE BUSINESS RESCUE PLAN

Section 152: At the meeting the proposed business rescue plan must be presented for consideration by creditors and shareholders if applicable, and will either be preliminarily adopted or rejected.

It will be preliminarily approved if it is supported by the holders of more than 75% of the creditors' voting interests that were voted and the votes in support of the plan included at least 50% of the independent creditors voting interests, if any, that were voted;

If adopted, the plan is binding on the company and on each of the creditors and every holder of the company's securities of the company whether or not they were present at the meeting, or voted in favour or not of the plan, or in the case of creditors, whether or not they proved their claims against the Company.

If a business rescue plan has been approved and implemented a creditor is not entitled to enforce any debt owed by the company immediately before the beginning of the business rescue process except to the extent provided for in the business rescue plan.

Alternative Dispute Resolutions

As an alternative to applying for relief to a court, or filing a complaint with the Commission,

- Any person,
- Or a person acting on behalf of another,
- Or as a member of a group or class of affected persons,
- Or a person acting in the public interest, (with leave of the court) or
- An association acting in the interest of its members,

May attempt to resolve any dispute with or within a company through alternative dispute resolution or -

- Apply to a Companies Tribunal, or an entity accredited by the Commission for Mediation, Conciliation and Arbitration.

If a Companies Tribunal or Accredited entity resolves or assist parties to resolve a dispute, the resolution must be recorded in the form of an order to be confirmed by the court as a Consent order.

Transitional Arrangements

An existing company may file within two years of the general effective date of the new Act, an amendment to its MOI to harmonise it with the Act and if necessary a notice of name change and copy of a special resolution under Section 16 to alter its name to meet the requirements of the Act.

A Section 21 and Section 53(b) company will be deemed to have amended its MOI from the general effective date of the new Act to expressly state that it is an NPC or personal liability company respectively.

CC's continue to exist for an indefinite period or until deregistered or dissolved in terms of the Close Corporations Act.

CC's can continue to be registered until Section 13 of the new Act comes into operation and thereafter no further registrations of CC's and no company can be converted to a CC.

The same requirements as per Section 28, 29, 30 (see pages 28-30) applies to CC's unless it has been dormant or on application to and exemption by CIPC, or if the CC has only one member.

Holder of Nominal Par value shares holds his rights until the Minister make regulations providing for the transactional status and conversion of such shares provided their rights are preserved, and provide for Compensation in cases where shareholders lose such rights.

Related Parties

RELATED AND INTER-RELATED PERSONS AND CONTROL

Section 2(1)(a):

An individual is related to another individual if

- They are married or live together in a relationship similar to marriage
- Are separated by no more than two degrees of natural or adopted consanguinity or affinity;

Section 2(1)(b):

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) - and

Section 2(1)(c): 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 –see below*
- Either is a subsidiary of the other or
- A person directly or indirectly controls each of them or the business of each of them - see below*

Section 2(1)(d): two or more persons are inter-related if the first and second such persons are related, the second and third such persons are related and so forth in an unbroken series.

CONTROL

A person controls a juristic person (JP) or its business if;

- In the case of a JP that is a company, (i) that JP is a subsidiary of that 1st person
- That 1st person together with any related or inter-related person is
 - (aa) directly or indirectly able to exercise control over the majority of voting rights associated with the securities of that company
 - (bb) has the right to appoint directors who control the majority of votes at a meeting of the Board;
- In the case of a JP that is a Close Corporation, the 1st person owns the majority of members interest or controls/has right to control majority of members votes;
- In the case of a JP that is a trust, the 1st person has the ability to control the majority of votes of trustees or appoint majority of trustees or appoint or change the majority of beneficiaries;
- That 1st person has the ability to materially influence the policy of the JP.

Exemptions

LENIENCY /EXEMPTIONS FOR CERTAIN COMPANIES - (S57) (other than SOC Ltd's).

Where only one person holds beneficial interest in all securities issued by the company (eg only one shareholder).

- Less onerous reporting requirements;
- No notice requirements (simplified decision making);
- S59-65 do not apply (re shareholders meetings-notice, conduct, quorum, resolutions) ie no need for compliance with internal formalities;
- Exempted from audit or independent review of FS or AFS (unless voluntarily done);

Where there is only one director who is also the sole shareholder, the disqualifications listed in S69(8)(b)(iii) & (iv) do not apply and a person may still act as a director if all the shares are held by him/her or by him/her together with persons related to him/her and they all consented in writing to his continued position as director;

- No notice requirements for board meetings;
- S75(2)(b): requirement for disclosure of directors personal financial interest does not apply;
- S57(3) no notice or other compliance with internal formalities required [S71(3)-(7), S73, S74 not applicable]
- May enter a contract in which (s)he or a related person has a personal financial interest after obtaining an ordinary resolution of shareholders.

Where every director is also a shareholder:-

- S30(2) – exempted from audit or independent review of FS or AFS (unless voluntarily decides to do so) unless the company has only one director and he/she continues to act as such despite being disqualified (as per S69(12)–then exemption falls away;
- Diminished need to seek shareholder approval for certain board actions;
- No notice or other internal formalities e.g referral by Board for shareholders decisions;
- Less onerous reporting requirements
- When acting in capacity as shareholders, no need to comply with S73-78 relating to meetings, duties, obligations, standards of conduct, liabilities & indemnification of directors.
- Can still be a director even if disqualified.



Application and Interpretation

Where there are conflicts with the Companies Act 2008 and a provision of any other national legislation,

- The provisions of both Acts will apply concurrently to the extent that it is possible to apply and comply with one of the inconsistent provisions without contravening the second, and
- If there is inconsistency between the Companies Act and any of the following legislation, the latter will prevail:
 - The Promotion of Access to Information Act 2 of 2000;
 - The Auditing Profession Act 26 of 2005; -
 - The Labour Relations Act 66 of 1995; -
 - The Public Finance Management Act 1 of 1999;
 - The Promotion of Administrative Justice Act 3 of 2000, -
 - The Banks Act
 - The Securities Services Act 36 of 2004
- If there is a conflict between a provision of chapter 8 and a provision of the Public Service Act, 1994, the provisions of that Act prevail.



Disclaimer

This summary is not intended to constitute legal or professional advice. The purpose of the document is to provide readers with a high level summary of the new key issues of the Companies Act no. 71 of 2008 (Companies Act). While every effort has been taken to summarise key aspects in Companies act, other aspects could have been omitted. We recommend referral to the actual Companies Act for all issues.



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