



## This issue

The New Companies Act

Who will be affected?

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### SHORT NOTES ON THE NEW COMPANIES ACT, NO. 71 OF 2008

#### 1. THE ACT

The Companies Act No. 71 of 2008 (“the Act”) has been signed by the President on 8 April 2009. The commencement date still has to be promulgated, but it will not be before April 2010.

#### 2. REGULATORY AGENCIES

The Regulatory Agencies created by the Act are:

The Companies and Intellectual Property Commission (“the Commission”) headed by the Commissioner – will mainly be responsible for the registration of companies, to maintain information in connection therewith and enforcement of the Act;

The Companies Tribunal – will mainly be responsible for adjudication and provision of dispute and resolution;

The Takeover Regulation Panel – will mainly be responsible for the provision of the regulations of transactions and offers; and

The Financial Reporting Standards Council - responsible for receiving and considering information regarding the



#### 3. TYPES OF COMPANIES

The Act provides for two types of Companies, namely:

**Non-Profit Companies:** companies incorporated for a public benefit or an object relating to one or more cultural or social activities, communal or group interests where the income and property are not distributable to its incorporators or members, except as permitted by the Act. Non-Profit Companies will have the words “NPC” at the end of their names; and

**Profit Companies:** companies incorporated for the purpose of financial gain for its shareholders and will either be:

- State Owned Companies – “SOC Limited”;
- Private Companies – “Proprietary Limited” – (Pty) Ltd;
- Personal Liability Companies – “Incorporated” or “Inc”; or
- Public Companies – “Limited” or “Ltd”.

#### 4. FORMATION: MEMORANDUM OF INCORPORATION AND RULES

A Company will have a Memorandum of Incorporation which will set out the rights, duties and responsibilities of the Shareholders, Directors and others.

A Company may also make rules relating to the governance of the Company which rules must be filed with the Commissioner. The Rules may not be inconsistent with the Act or the Memorandum of Incorporation.

Shareholders may enter into a Shareholders Agreement but if such Agreement is inconsistent with the Act or the Memorandum of Incorporation, such inconsistency will be void.



## 5. AUDITED FINANCIAL STATEMENTS

Only Public Companies need audited financial statements, but regulations promulgated in terms of the Act may require other types of Companies to be audited as well.

## 6. SHARES

The Act acknowledges that shares are considered as movable property. Shares will no longer have a nominal or par value.

A Company may provide financial assistance with the subscription of shares, provided that:



- such assistance is pursuant to:
  - an Employee Share Scheme; or
  - Special Resolution adopted within the previous two years; and
- the Board is satisfied:
  - that the Company would satisfy the solvency and liquidity tests; and
  - the terms are fair and reasonable to the Company.

A Company may, under certain circumstances and subject to certain conditions, acquire its own shares and any subsidiary of the Company may acquire shares of that Company.

## 7. FINANCIAL ASSISTANCE TO DIRECTORS AND PRESCRIBED OFFICERS

A Company may give financial assistance to Directors or Prescribed Officers or related Companies or Corporations or Members of such related Companies, provided that:

- such assistance is pursuant to:
  - an Employee Share Scheme; or
  - Special Resolution adopted within the previous two years; and
- the Board is satisfied that:
  - the Company would satisfy the solvency and liquidity tests; and
  - the terms are fair and reasonable to the Company.

## 8. GOVERNANCE AND MEETINGS

Certain governance requirements are not applicable to Companies with only one Shareholder or where every Shareholder is also a Director of the Company. Only Public Companies must convene an annual general meeting of Shareholders.

The Act now provides for meetings to be held entirely by electronic communication or one or more Shareholder may participate in meetings by electronic communication. Decisions by Shareholders may be submitted for consideration to the Shareholders entitled to exercise voting rights instead of a formal voting at Shareholders Meetings.

A Company is allowed to require a higher percentage of the voting rights in respect of ordinary resolutions and may also provide for a lower percentage in respect of Special Resolutions, provided there is always a margin of at least 10% between the requirements for an Ordinary Resolution and a Special Resolution.



## 9. DIRECTORS, COMPANY SECRETARY AND AUDITORS

Board Meetings of Directors may be conducted by electronic communication and, except where the Memorandum of Incorporation provides otherwise, a Meeting of the Board may be adopted by written consent of the majority of Directors given in person or by electronic communication. The Act contains certain standards of Director's conduct and how duties are to be performed. These standards also apply to Prescribed Officers or committee members of the Company.

Public Companies and State Owned Companies are obliged to appoint a Company Secretary and an Auditor and there are certain extended accountability requirements for Company Secretaries, Auditors and Audit Committees. The Act also requires that a Company Secretary must be knowledgeable and experienced in the relevant Law. Auditors must be appointed upon incorporation and each year thereafter at the Company's annual general meeting. The same individual may not serve as the auditor or designated Auditor of a Company for more than five consecutive financial years.



## 10. TAKEOVERS AND OFFERS

The Act provides for the procedure to be followed for amalgamation or mergers as well as schemes of arrangement. The Takeover Regulation Panel is responsible for co-ordinating and regulating such transactions.

## 11. BUSINESS RESCUE AND COMPROMISE

The rehabilitation of Companies in financial distress is completely different from the requirements for judicial management under the present Companies Act. The Act provides for procedures for the business rescue of a Company in terms whereof a Business Rescue Practitioner is appointed to oversee the business rescue process.

The effect of a business rescue procedure is that:

- No legal proceedings may commence or proceed unless:
  - with the consent from the Business Rescue Practitioner;
  - with leave of a Court;
  - for set-off against a claim made by the Company in legal proceedings; or
  - in criminal proceedings;
- No guarantee or surety by a Company may be enforced (except with leave of the Court); and
- Any time limit as to the right to commence proceedings or to otherwise assert a claim against the Company, is suspended during the rescue proceedings.

The Board of Directors may resolve that the Company begin rescue proceedings or a Shareholder, Creditor or Trade Union may apply to the Court to place the Company under supervision and commence rescue proceedings.

## 12. ENFORCEMENT AND COMPLIANCE NOTICES

The Act has various procedures for the enforcement of any provision or right in terms thereof or of a Company's Memorandum of Incorporation or Rules, namely:

Alternative dispute resolution;

Adjudication by the Companies Tribunal;

Application to the High Court;

Filing a complaint to the Commission or the Takeover Regulation Panel.

The Commission or the Takeover Regulation Panel may issue Compliance Notices to a person whom they may on reasonable grounds believe to have contravened the Act or assented to, was implicated in or directly or indirectly benefited from a contravention of the Act.

Failure to comply with a Compliance Notice as aforesaid may result in an application to a Court for the imposition of an administrative fine or the matter may be referred to the National Prosecuting Authority. Administrative fines which may be imposed will be an amount not exceeding the greater of 10% of the Company's turnover for the period during which the Company failed to comply with such Compliance Notice or the maximum amount prescribed in terms of the Act, [presently R1,000,000.00 (One Million Rand)].





### 13. TRANSITIONAL ARRANGEMENTS

All pre-existing Companies continue to exist as a Company as if registered and incorporated in terms of the Act.

Pre-existing Companies may, within 2 (two) years immediately following the general effective date of the Act, file (without charge) an amendment to its Memorandum of Incorporation to bring it in accordance with the new Act.

Close Corporations may still be registered up to the date that the Act becomes operative. The Act makes provision for a Notice of Conversion to be filed by a Close Corporation in order to convert the Close Corporation to a Company. No Close Corporation will be registered after the effective date of the Act. Existing Close Corporations will be allowed to continue trading as a Close Corporation, but it is possible that close corporations may in future be incentivized to convert to a Company.

### 14. CONCLUSION

The Act will definitely impact on the business of companies and there are some interesting changes and new challenges to the governance of companies. The above mentioned are only some of the important aspects and you are welcome to contact us for further information.

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