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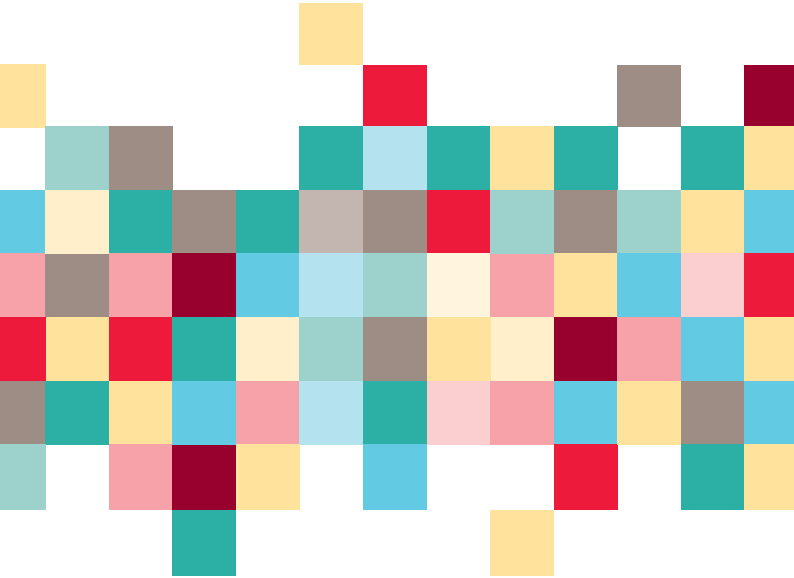
COMPLIANCE GOVERNANCE SECRETARIAL

DIRECTORS GUIDE



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INTRODUCTION

The information contained in this guide is a summary of some of the key issues affecting directors and officers of companies, and provides an overview of relevant legislation.

Due to limitations in length of the guide, many aspects affecting the director and officer have not been covered.

The role of a director is a challenging one, accompanied by onerous duties and responsibilities.

With improving standards of corporate governance, directors are required to be more and more accountable, transparent and responsive to stakeholders and to society.

Directors and officers are required to be cognisant of corporate legislation pertaining to their office.

Directors also have a duty to ensure that the company complies with all other applicable laws, industry or sector specific legislation which may be applicable to the company.

Directors are required to ensure that managers and employees are aware of the legislation, and that all within the company are committed to act honestly and with integrity, and a high level of competence and knowledge.

Adherence to non-binding rules, codes and standards of good corporate governance is considered to be key to the effective management and control of a company.

On 1 November 2016, the King Committee released the King IV Report on Corporate Governance for South Africa (King IV™).

King IV™ replaces King III™ in its entirety and is effective in respect of financial years commencing on or after 1 April 2017.

King IV™ is a guideline for best practice and provides the main standard for corporate governance in South Africa.

CATEGORIES OF COMPANIES

The Act provides for two categories of companies, namely profit companies and non-profit companies as follows:

PROFIT COMPANIES	■ State owned company (SOC Ltd)
	■ A private company (Pty) Ltd if: ◆ it is not a state owned company ◆ its Memorandum of Incorporation (MOI) prohibits it offering any of its securities to the public and restricts the transferability of its securities.
	■ A personal liability company (Incorporated or Inc.) if: ◆ it meets the criteria for a private company ◆ its MOI states that it is a personal liability company
	■ A public company, (Ltd) in any other case **The minimum number of incorporators is reduced from 7 to 1.**
One or more persons, or an organ of state, may incorporate a profit company.	
NON-PROFIT COMPANIES	Name to be followed by suffix "NPC" Incorporated for a public benefit or an object relating to one or more cultural or social activities, or communal or group interests. Can be incorporated with or without members.
An organ of state, a juristic person, or 3 or more persons acting in concert may incorporate a non-profit company.	

External Company means a foreign company (profit or non-profit) that is conducting business or non-profit activities within the RSA. The company does business in the RSA while remaining primarily regulated by its country of origin or registration.

Domesticated Company means a foreign company whose registration has been transferred to the RSA and is regulated as if it had been incorporated in the RSA.

CLOSE CORPORATIONS (CC'S)

A CC is subject to Close Corporations Act 69 of 1984 and the Companies Act 71 of 2008. Under the new Act, CC's are treated a lot more like companies.

As from 1 May 2011 (implementation date of the new Act), no new CC can be registered. The conversion from a company to a CC is no longer allowed.

A CC is similar to a private company, having its own legal personality and perpetual succession. A CC has no share capital and therefore no shareholders. The owners of a CC are the members, holding a membership interest in the CC.

Conversion of CC to Company

Existing CC's may convert to a company by filing a Notice of Conversion to the Commission, together with the prescribed fee, a MOI consistent with the requirements of the Act, and a written statement of consent approving the conversion of the CC (signed by members of the CC holding in aggregate at least 75% of the members' interest in the CC).

Every member of a converted CC is entitled to become a shareholder of the company, but the shares to be held in the company by the shareholders individually need not necessarily be in proportion to the members' interests as stated in the founding statement of the CC.

Financial Statements and Accounting Records of CC's

The same requirements of maintaining accurate and complete accounting records, satisfying the financial reporting standards and preparing annual financial statements applies to CC's.

The CC may also voluntarily apply the enhanced accountability and transparency provisions.

The financial statements of a CC must be prepared within six months of the financial year end. AFS may be required to be audited unless exempted by law or independently reviewed by the accounting officer (depending on its Public Interest Score at the end of the financial year).

RING-FENCED AND PERSONAL LIABILITY COMPANIES

Under the previous Act, the public was deemed to be fully acquainted with the Memorandum and Articles of the company.

A party contracting with a director who acted on behalf of the company, beyond the scope of his powers, could not therefore state that he did not have knowledge of the director's lack of authority to act.

The company would not be bound by the contract, unless it chose to ratify it (or unless the director fraudulently did not disclose his limitation).

The new Act provides that the public will not deemed to be acquainted with or having knowledge of any provision of a company's MOI merely because it is filed with the Commission or is available for inspection at the company's office, except for the following two specific scenarios:

Ring-fenced

A company's MOI may restrict the purpose, objectives or powers of the company; and may contain additional requirements or even prohibit the amendment of these restrictions or limitations.

In such a case, the company is required to have the word Ring-Fenced or RF subjoined to its name, and its Notice of Incorporation or subsequent Notice of Amendment is required to draw attention to the relevant provision and its location in the MOI.

All persons or the public are then regarded as having notice and knowledge of such a provision in the company's MOI.

Personal Liability Company

All persons are also regarded as having notice and knowledge of the fact that a personal liability company (Incorporated) means that the directors and past directors are jointly and severally liable, together with the company, for any debts and liabilities of the company as are or were contracted during their respective periods of office.

KING IV™

Since 1994, there have been several versions of the King Report. Each version has been built on the underlying principles of the previous report. The latest version, King IV™, was released on 1 November 2016 and completely replaces King III™.

King IV™ recognises that good corporate governance and ethical leadership are essential in society today, irrespective of the size or nature of the entity. King IV™ has been designed to encourage broader participation by all industry sectors, including municipalities and state-owned entities.

King IV™ has been simplified and made more user-friendly, and is an essential tool for successful, responsible and effective corporate governance. King IV™ takes the form of a report which includes the Code, and separate sector supplements for SME's, NPO's, State-Owned Entities, Municipalities and Retirement Funds. All organisations and governing bodies should follow the principles and practices laid down in this document.

King IV™ is voluntary (unless prescribed by law or by a Stock Exchange listings requirement). Some of the principles have been legislated. If a conflict occurs, the law prevails.

The King IV Code provides 17 principles, as well as a large number recommended practices, to help governing bodies and organisations achieve 'good corporate citizen' status and governance outcomes.

Unlike the previous reports which were rules-based and followed a 'tick-box' approach, King IV™ is principles-based and outcomes-based. King IV™ encourages organisations to have a more 'hands-on' approach to principles, so that practices can be clearly linked to outcomes in an "apply and explain" approach. This gives governing bodies more flexibility when implementing the recommended practices, but requires them to be transparent when disclosing how they achieved their goals.

King IV™ is effective in respect of financial years commencing on or after 1 April 2017.

Source:
The King IV Report on Corporate Governance for South Africa 2016, Institute of Directors S.A.
For more information, see http://www.iodsa.co.za/?page=AboutKingIV"

Key Concepts of King IV™

Organisations do not function in isolation, but operate within the wider context of the economy, society and the environment. As an integral part of society, organisations should not just be concerned with their economic bottom line, but they also need to be aware of the wider impact of their operations on the environment and on broader society.

Because of the interdependence of organisations and wider society, board decisions should not be made in isolation. Integrated thinking, where the board of directors considers all issues affecting the organisation when making decisions, is fundamental to the long-term sustainability of the organisation through the sustained creation of value for stakeholders. Integrated thinking reinforces the way the company operates as an integral part of society, and underpins sustainable development, integrated reporting and the stake-holder inclusive approach.

Sustainable Development – an approach to development which balances the different, and often competing needs of the company against an awareness of the environmental, social and economic limitations of society. It is regarded as the primary moral and economic imperative of the 21st century. The board should develop a strategy which includes accounting for sustainability issues and reporting these to stakeholders.

Corporate Citizenship – the company should be a responsible "citizen", involved with social, environmental and economic issues, respect for human rights, effective management of stakeholder relationships, resource management with an eye on future needs, and ensuring a positive impact on the community within which it operates.

Stakeholder-Inclusive Approach – the board should consider and balance the legitimate needs, interests and expectations of all stakeholders in making decisions in the best interests of the company. Active stakeholders play a crucial role in the governance process because they are entitled to hold the board and the company accountable for their actions and disclosures.

Source:
The King IV Report on Corporate Governance for South Africa 2016, Institute of Directors S.A.
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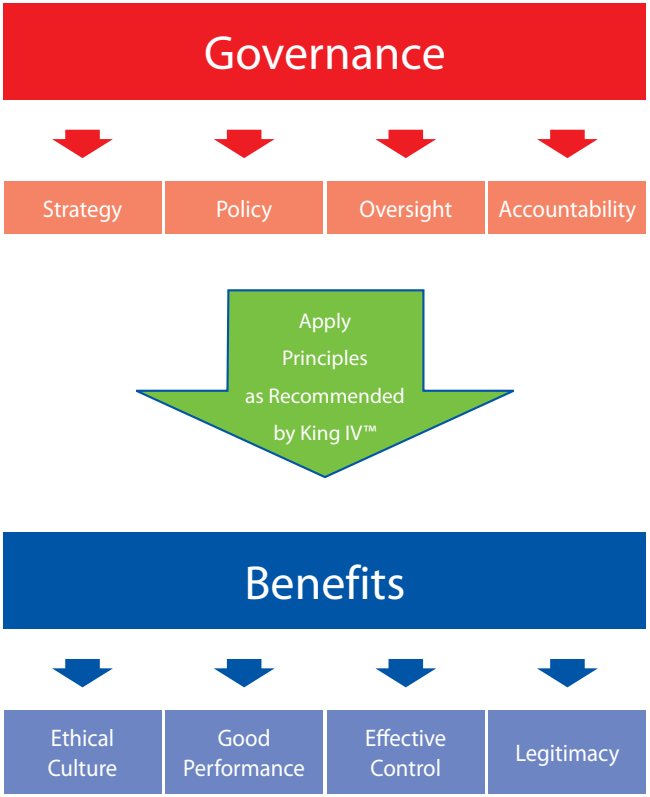
King IV™ in a Nutshell



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King IV™ Principles of Good Governance

The board of directors should:

- Lead ethically and effectively
- Govern ethics and establish an ethical culture
- Ensure responsible corporate citizenship
- Appreciate that the company's core purpose, its risks and opportunities, strategy, business model, performance and sustainable development are all inseparable components of the value creation process
- Ensure that reports allow stakeholders to make informed assessments about the organisation's performance and its short, medium and long-term prospects
- Serve as the focal point and custodian of corporate governance
- Have the appropriate balance of knowledge, skills, experience, diversity and independence
- Delegate within the board to promote independent judgement, and assist with the balance of power and effective discharge of duties
- Evaluate board's performance and support continued improvement and effectiveness
- Appoint and delegate to management in a way that contributes to role clarity and the effective exercise of authority and responsibilities
- Govern risk in line with strategic objectives
- Govern information and technology in line with strategic objectives
- Comply with applicable laws and adopted, non-binding rules, codes and standards
- Remunerate fairly, responsibly and transparently
- Use assurance services and functions to enable an effective control environment which supports the integrity of information
- Adopt a stakeholder-inclusive approach
- Practise responsible investment which promotes good governance and the creation of value (applies to institutional investor organisations)

Source:
The King IV Report on Corporate Governance for South Africa 2016, Institute of Directors S.A.
For more information, see http://www.iodsa.co.za/?page=AboutKingIV"

NATURE AND DEFINITION OF A DIRECTOR

Nature of a Director

The directors of a company are the key people entrusted by law with the function of administering the company and are central to ensuring good corporate governance in the company.

The director functions as both a trustee and a consultant:

- A director is required to have the experience, skill, time and ability necessary to carry out his functions effectively, and should place the interests of the company first, similar to that of a "consultant".
- At common law, directors owe fiduciary duties and obligations of care and skill to the company, which are similar to that of a "trustee".

Definition of a Director

The definition of "director" in the Act includes a member of a board of a company, or an alternate director of a company, and includes any person occupying the position of a director or alternate director, by whatever name designated.

The definition is extended to include a prescribed officer, a person who is a member of a committee of a board of a company, or the audit committee of a company (irrespective of whether or not the person is also a member of the company's board).

With reference to indemnification and directors' insurance, the definition also includes former director(s).

Prescribed officers are subject to the same standards of conduct, duties of care, skill and diligence and fiduciary duties as directors, and will be held jointly and severally liable with directors.

The MOI and any additional rules are also specifically binding between the company and such officers.

DEFINITION OF A PRESCRIBED OFFICER

A Prescribed Officer is a title created by the new Companies Act. Within the scope of the Act, a prescribed officer is anyone who fulfils the role of a director but who is operating (intentionally or otherwise) under a different designation.

Section 1 of the Act: A prescribed officer can be defined as a person who within a company, performs any function that has been designated by the Minister in terms of section 66(10).

Regulation 38 states that, despite not being a director of a particular company, a person is a "prescribed officer" of the company for all purposes of the Act, if that person:

- Exercises general executive control over the management of the whole, or a significant portion, of the business and activities of the company, or
- Regularly participates to a material degree in the exercise of general effective control over, and management of the whole, or a significant portion, of the business and activities of the company.

The Regulation applies to such a person irrespective of any particular title given by the company to:

- An office held by that person in the company, or
- A function performed by the person for the company.

Prescribed officers are bound by the same codified duties and liabilities of directors which are referred to in numerous sections of the Act.

Inability to identify the prescribed officers in the company puts both the board of directors and the prescribed officers at risk of non-compliance with the Act. This could lead to activities that may even result in personal liability.

It is very important that the board is able to identify who the prescribed officers are. Equally important is that the prescribed officers know who they are, and that they understand their responsibilities in terms of the Act.

APPOINTMENT AND ELECTION OF DIRECTORS

Section 66(2): The board must comprise:

- In the case of a private or personal liability company: at least one director, or
- In the case of a public company or a non-profit company: at least three directors,

In addition to the minimum number of directors that the company must have to satisfy any requirement, whether in terms of the Act or its MOI, to appoint an audit committee, or a social and ethics committee.

The MOI may provide for a higher number in substitution for the minimum number of directors than those required by the Act.

Section 66(4)(a) provides that the MOI may:

- Provide for the direct appointment and removal of one or more directors, by any person named who is named in, or determined in terms of, the MOI, and
- May also provide for a person to be an ex officio director as a consequence of that person holding some other office, title, designation or similar status (subject to him being eligible and qualified to do so in terms of section 69)
- The appointment or election of alternate director(s) to the company.

Section 66(4)(b): A profit company (other than a SOC Ltd) must provide for the election by shareholders of at least 50% of the directors, and 50% of any alternate directors.

Section 66(11): A failure by a company at any time to have the minimum number of directors does not limit or negate the authority of the board or invalidate anything done by the board or the company.

Section 66(12): Save as otherwise provided elsewhere in the Act, or in the company's MOI, any particular director may be appointed to more than one committee and when calculating the minimum number of directors required for a company, any such director who has been appointed to more than one committee must be counted only once.

Section 66(5)(b): A person who holds office or acts in the capacity of an ex officio director of a company has all the powers and functions of any other director of the company and is subject to all of the liabilities, of any other director of the company (unless otherwise stated in the company's MOI).

Election of Directors of Profit Companies

Section 68 (1): Each director of a profit company must be elected by the persons entitled to exercise voting rights in such an election, to serve for an indefinite term, or for a term as set out in the MOI.

Section 68(2): Unless a profit company's MOI provides otherwise, the election is to be conducted as a series of votes each of which is on the candidacy of a single individual to fill a single vacancy with the series of votes continuing until all vacancies on the board at that time have been filled.

Section 68(3): Unless the MOI of a profit company provides otherwise, the board may appoint a person who satisfies the requirements for election as a director to fill any vacancy and serve as a director of the company on a temporary basis.

It is recommended that the majority of directors be non-executive directors so as to ensure that the board operates independently and is not an extension of the day to day management of the company.

Prior to accepting an appointment, a director should carefully consider whether he has the necessary expertise to act as a director, given the size, nature and complexity of the company.

Section 66(7): A person becomes entitled to serve as a director when he has been appointed or elected in accordance with the provisions of the Act, or holds an office, title, designation or similar status as ex officio director in terms of these provisions, and is not ineligible or disqualified in terms of section 69, and has delivered to the company a written consent to serve as its director.

NON-ELIGIBLE AND DISQUALIFIED DIRECTORS

Section 69 of the Act sets out qualifications and disqualifications of directors.

A person who is ineligible or disqualified, must not be appointed or elected as a director of a company, or consent to being appointed or elected as a director, or act as a director of a company. The election or appointment is a nullity if, at the time of the election or appointment, that person is ineligible or disqualified.

A company may, in its MOI, impose additional grounds of ineligibility or disqualification on its directors, and set out minimum qualifications to be met by directors of the company.

A company must not knowingly permit an ineligible or disqualified person to serve or act as a director.

A person who becomes ineligible or disqualified while serving as a director of a company ceases to be entitled to continue to act as a director immediately, subject to section 70(2).

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.

The Act Sets Out Disqualifications as Follows

Section 69(8)(a): a court has prohibited that person to be a director, or declared the person to be delinquent in terms of section 162, or in terms of section 47 of the Close Corporations Act, or

Section 69(8)(b):

- An unrehabilitated insolvent
- Is prohibited in terms of any public regulation to be a director
- Any person removed from an office of trust because of dishonesty
- Any person convicted of offences in the Republic or elsewhere, and imprisoned without the option of a fine, or fined more than the prescribed amount, for fraud, theft, forgery, perjury or a specific offence involving fraud, misrepresentation or dishonesty.

PROBATION AND DELINQUENCY

Directors must understand the serious impact of Section 162 of the Act (declaration of delinquent directors) which states that a director may be declared delinquent, or placed on probation, if that person is, or was, a director within two years of the court application.

The Act introduces a remedy to shareholders and other stakeholders (namely the company, a shareholder, 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 person 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).

The director in question must be a current director or within the twenty-four months immediately preceding the application, have been a director of the company.

The Commission must keep a register of all those persons declared delinquent or on probation.

A director may also face civil claims and potential criminal liability.

Grounds for Probation

- Was present at a meeting and failed to vote against a resolution despite the inability of the company to satisfy the solvency and liquidity test.
- Acted in a manner materially inconsistent with the duties of a director.
- Acted in or supported a decision of the company to act in a manner that was oppressive or unfairly prejudicial
- Within ten years after the effective date (1 May 2011), was a director of more than one company or a managing member of more than one close corporation (concurrently, sequentially or at unrelated times), and during that time two or more of those companies or close corporations failed to fully pay all of their creditors or meet all their obligations (except under a business rescue plan resulting from a board resolution or a compromise with creditors).

Grounds for Delinquency

- Acted as a director or prescribed officer whilst ineligible or disqualified by the Act or by the Close Corporations Act.
- Acted as a director in a manner that contravened a probation order.
- Grossly abused the position of director.
- Took personal advantage of information or an opportunity, or intentionally or by gross negligence inflicted harm on the company or a subsidiary of the company.
- Acted in a manner which reflects "wilful misconduct" or a "breach of trust" – (unauthorised acts, reckless trading or fraud).
- Was repeatedly subject to a compliance notice or similar enforcement mechanism.
- Was personally convicted, at least twice, of an offence or subjected to an administrative fine or penalty in terms of any legislation.
- Within a period of five years, acted as a director of one or more companies or was a managing member of one or more Close Corporations (CC's), or controlled or participated in the control of a juristic person (irrespective of whether concurrently, sequentially or at unrelated times) that was convicted of an offence or subjected to an administrative fine or similar penalty in terms of any legislation.

All references to director apply equally to members of CC's who are participating in the management thereof in this section dealing with probation and delinquency, and all references to a company applies equally to CC's.

Not only do directors need to make sure that they are maintaining the highest standard in respect of their duties, but they must also ensure that they are complying with the administrative provisions of other legislation, such as the Income Tax Act.

Effect of Delinquency or a Probation Order

The effect of an order of delinquency is that a person is disqualified from being a director of a company. The order may be conditional and subsist for seven years or longer, as determined by the court. However, under certain circumstances the order be unconditional and subsist for the lifetime of the delinquent director.

A person who has been placed under probation may not serve as a director, except to the extent permitted by the order of probation. The probation order may be subject to any conditions the court considers appropriate and generally subsists for up to five years.

A court may order as a condition applicable to the declaration that the person undertake a designated program of remedial education relevant to the conduct of a director and/or do community service and/or pay compensation to any person adversely affected by his conduct as a director/member (to the extent that such a victim does not otherwise have a legal basis to claim compensation).

Application to Suspend or Set Aside a Delinquency or Probation Order

In cases where a director has been declared delinquent for consenting to serve as a director or for acting in the capacity of a director while ineligible or disqualified, or on account of contravening a probation order there is no relief, the declaration of delinquency subsists for the lifetime of the delinquent director and may not be suspended or set aside.

However, in other instances, three years after the order of delinquency is made, the delinquent director may apply to court to suspend the order, and substitute an order of probation (with or without conditions).

If the order of delinquency is suspended, the court may, on application, set it aside after two years of suspension.

A person subject to an order of probation may apply to court to set aside the order at any time two years after it is made.

TERMINATION OF OFFICE

A Director's Term of Office may terminate when:

- It has expired as per the MOI (where applicable)
- The director resigns
- The death of the director
- If he is declared delinquent or becomes disqualified
- If he is removed by a shareholders' resolution or the board or a court order

Resignation

Section 137(5): Removal of Director During Business Rescue Proceedings

At any time during business rescue proceedings, the business rescue practitioner may apply to a court for an order removing a director from office on the grounds that the director has (a) failed to comply with the requirements of Chapter 6, or (b) by act or omission, has impeded or is impeding (i) the practitioner in the performance of his powers and functions (ii) the management of the company by the practitioner, or (iii) the development or implementation of a business rescue plan. This is in addition to any right of a person to apply to a court for an order contemplated in section 162.

Directors may resign by tendering a letter of resignation.

Removal by the Shareholders

Section 71 (1): 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.

Before the shareholders may consider such a resolution, the director concerned must be given notice of the meeting and the resolution (at least equivalent to that which a shareholder is entitled to receive), and must be afforded a reasonable opportunity to make a presentation in person or through a representative to the meeting, before the resolution is put to vote.

Removal by the Board

Section 71: Under certain specific circumstances, the board (provided the company has more than two directors) may remove a director without shareholder approval. Section 71 cannot be amended in a company's MOI.

The board of directors may remove a director from office if there are two or more directors, and one of the following applies:

- The director has become disqualified or ineligible to act
- The director has become incapacitated to the extent that the director is unable to perform the functions of a director, and is unlikely to regain that capacity within a reasonable time
- The director has neglected or been derelict in performance of his duties.

When one of the above assertions has been made in relation to a director, the Board (other than the director concerned) must determine the matter by resolution, and may then begin proceedings to remove the director.

The board must call a meeting of directors to determine the matter. The director must be given notice of the meeting and the proposed removal, including a copy of the proposed resolution and a statement stating reasons for the resolution, with sufficient specificity to reasonably permit the director to prepare and present a response. He must be given a reasonable chance to make presentation personally (or by a representative) at the meeting before the resolution is put to a vote.

Removal by the Companies Tribunal

A director may be removed from the board by the Companies Tribunal. Where there are fewer than three directors, and in any circumstances similar to those set out in section 71(3), the Companies Tribunal must determine the removal of the director on application by any shareholder or director.

Compensation

A person who is removed from office as director in terms of section 71 may have a right at common law or other right that a person may have to apply to a court for damages or other compensation for loss of office as a director, or loss of any other office as a consequence of being removed as a director.

DUTIES AND RESPONSIBILITIES OF DIRECTORS

Overview of Directors' Responsibilities

Common Law Duties and Partially Codified Duties (Section 76)

- Fiduciary duties:
  - to act bona fide in the interests of the company
  - to exercise powers for their proper purpose
  - to exercise independent judgement in decision making
  - not to use corporate property information or opportunities for personal profit.
- Duty to disclose any conflict of interest
- Duty to position and information for company's benefit
- Duty to disclose of material information
- Duty to perform duties in good faith, in the best interests of the company and with due care, skill and diligence

Duties in Terms of Strategy and Conduct

- Duty to comply with the Act in relation to different types of companies (Section 8)
- Duty to comply with the company's Memorandum of Incorporation (Section 13)
- Duty to manage the business affairs of the company (Section 66(1))
- Duty to carry on the business without trading recklessly or under insolvent conditions (Section 22)
- Duty to comply with Solvency and Liquidity Test (Section 4)
- Duty to implement business rescue proceedings if necessary

Duties Relating to the Board,Shareholders and Administration

- Duty to appoint board committees (Section 72)
- Duty to appoint an audit committee where applicable (Section 94)
- Duty to appoint a company secretary where applicable (Section 84 & 86)
- Duty to facilitate shareholders' meeting (Section 61)
- Duty to facilitate directors' meetings (Section 73)
- Duty to enable shareholders to exercise their voting powers and rights (Section 2(2) & 58)
- Duty to operate in the best interest of the shareholders (Section 20(6) & (7) & 76(3))

Duties Relating to Keeping of Records and Audit

- Duty to keep company records (Section 24)
- Duty to keep accounting records (Section 28)
- Duty to provide for the Proper Conduct of Audit or Independent Review where applicable (Sections 90 & 92)

Duties Relating to Accountability, Transparency and Disclosure

- Duty to prepare financial/ annual financial statements (Section 29 & 30)
- Duty to prepare a directors' report (Section 30(3))
- Duty to issue a prospectus (Section 100)
- Duty to disclose director's remuneration information (Section 30)
- Duty to disclose director's financial Interests (Section 75)
- Duty to file an annual return (Section 33)

Other Duties and Responsibilities

- Duty to operate within the framework of King IV™ (Corporate Governance, Ethical Leadership and Corporate Citizenship)
- Duty to comply with all other legislation

REMUNERATION OF DIRECTORS

Unless the MOI provides otherwise, the company may pay remuneration to its directors for their service as directors, subject to the fact that remuneration contemplated in this section, may be paid in accordance with a special resolution approved by the shareholders within the previous two years.

THE BOARD, COMMITTEES AND MEETINGS

Main Objectives of the Board

The main "best interest" objectives of the board, are:

- To operate in the best interests of the shareholders
- To operate in the best interests of the company.

These objectives may be achieved by implementing a framework of corporate strategy and good corporate governance.

The board is responsible for determining the company's strategic direction, which includes determining:

- The business model
- Which legal entity to trade through
- The capital structure
- Strategic planning.

Corporate governance is the implementation and execution of the corporate strategy, as managed by the board of directors in terms of conformance and performance standards.

Directors have a duty to operate in the best interest of the shareholders at all times. Directors have numerous administrative duties within the company, such as facilitating meetings of the shareholders and the board, and a duty to make sure that shareholders are able to exercise their voting rights.

Structure and Delegation of Duties

The “board” refers to the collective word used to designate directors when they act together as a group.

A balanced board of non–executive, independent non-executive and executive directors ensures good corporate governance, which is more likely to achieve the “best interest” objectives, and will ensure a clear separation of ownership from control and reward structures.

The Act, however, only requires that at least three non-executive directors are appointed to the audit committee of a public company or State owned company.

The Act refers to alternate and ex officio directors. Alternate directors act on behalf of a director when he cannot personally fulfil his duties.

Executive Directors: salaried, involved with the day to day running of the company. Many executive directors enter into a fixed term service agreement with the company, which further regulates their relationship with the company.

Non-executive Directors: board members who do not have any day-to-day management role in the business. They usually only attend board meetings and are paid directors fees for their service as director on the board, not a monthly salary. A non-executive director may be a shareholder in the company.

A Non-executive Independent Director has limited or no financial interest in the organisation, or any interests that could influence the company.

Delegation of Authority

The board may delegate to the committee any of the authority of the board.

The creation of a committee, delegation of authority or action taken does not alone satisfy or constitute compliance by a director with the required duty of a director to the company.

While many of the directors’ duties may be delegated to management, the directors retain overall responsibility over management, and have a duty to monitor management’s performance.

Section 73(1): Board Meetings

A director authorised by the board of a company, may call a board meeting at any time. A board meeting is obligatory if called for by:

- At least two of the directors, or
- 25% of the directors where board comprises 12 or more directors. (The MOI may specify a different number or percentage.)

The board may determine from time to time the requirement for notice for meetings, as long as this complies with the MOI or rules and no meeting may be convened without notice to all the directors subject to certain exceptions.

Board meetings may be held with certain or all the directors using electronic communication (EC), as long as the EC facility enables all persons participating in that meeting to communicate concurrently with each other without an intermediary and to participate effectively in that meeting (and as long as the MOI allows for it).

A majority of the directors must be present in person or by electronic communication before a vote may be called at the meeting.

Each director has one vote on a matter before the board, and a majority of votes cast on a resolution is sufficient to approve that resolution. In the case of a tied vote, the chair may cast a deciding vote if he has not previously voted. In all other instances the motion is not carried.

Board Committees

Unless the MOI provides otherwise, the board may appoint any number of committees of directors, or may consult with or receive advice from any person.

The board may appoint non-directors to a committee (as long as they are not disqualified or ineligible). Such persons shall not have a vote on a matter to be decided by the committee, but may nevertheless incur the same liabilities as directors in terms of the Act.

Statutory Committees

The Minister has prescribed that a listed public company or SOC Ltd or any other company that has in any two of the previous five years achieved a Public Interest Score above 500 points is obliged to have a social and ethics committee, unless exempted in terms of Regulation 43 (2).

Section 61: Shareholders' Meetings

Directors have a duty to call and convene shareholders' meetings.

In general, there are two types of shareholders' meetings, the annual general meeting (AGM) and ordinary general meetings.

A public company is required to have an AGM which must take place within eighteen months after incorporation, and then every calendar year, within fifteen months of the last meeting.

Proper notice of the meeting must be given of the date, place and purpose of the shareholders' meeting. The notice periods for calling of meetings are: fifteen business days for public companies, and ten business days for private companies.

In order to conduct business at a shareholders' meeting, a quorum (minimum number of members) must be present. Where a quorum is not present, the meeting must be adjourned.

In terms of Section 61(3), the board is required to convene a shareholders' meeting on receipt of one or more written and signed demands.

The board can determine the location for the meeting, which can either be within South Africa's borders, or located overseas.

If a company is unable to convene a meeting because it has no directors, or because all of its directors are incapacitated, then any other person authorised by the company's MOI may convene the meeting.

If no person has been authorised, then the Companies Tribunal, on a request by any shareholder, may issue an administrative order for a shareholders' meeting to be convened.

If a company fails to convene a meeting for any reason other than the above, the Act allows the Court to call a shareholders' meeting.

RIGHTS AND POWERS OF DIRECTORS

Rights

- To discharge their duties without interference from co-directors
- To receive reasonable notice of meetings
- To claim reimbursement for expenses incurred
- To inspect the company's accounting records, assisted by an accountant
- To take independent professional advice at the expense of the company
- To participate in the strategic management of the company and attend and vote at board meetings.

Powers

Listed below are some of the sections in the Act which empower directors.

Section 66(1): To exercise unfettered powers: The board 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 MOI of the company provides otherwise.

Section 15: To make additional rules except to the extent that a company's MOI provides otherwise.

Section 21: To ratify Pre-Incorporation contracts.

Section 38: To issue shares: (but only within the classes, and to the extent, that the shares have been authorised by or in terms of the company's MOI, in accordance with section 36).

Section 129: To resolve to institute business rescue proceedings.

Section 44–45: To authorise the provision of financial assistance for subscription of securities and loans or other financial assistance to directors, provided certain conditions are met.

Section 46: To authorise distributions provided all requirements of the Act have been complied with.

Section 48: To acquire company or subsidiary shares in terms of the Act.

LIABILITY OF DIRECTORS

Generally, the directors are not personally liable for the debts of the company.

In a personal liability company (incorporated), the directors and past directors are jointly and severally liable together with the company for the debts and liabilities of the company that were contracted during their respective terms of office.

Directors may be exposed to personal liability in the event that they do not discharge their duties properly.

When a company becomes financially distressed or is trading in insolvent circumstances, it is the duty of directors to take legal and financial advice and if necessary place their company into either business rescue proceedings or into liquidation, or to cease trading.

Should the company continue to incur debts, where in the opinion of a reasonable businessman, there would be no reasonable prospect of creditors receiving payment when due, it could be inferred that the company is being carried on recklessly or negligently, and the provisions of section 22 may come into play.

The Act sets out the circumstances in which a director can be held liable for loss, damages or costs of the company, incur civil liability to shareholders and third parties and/or criminal sanctions.

Codified Liability

Section 77 codifies liability for directors and prescribed officers. It sets out civil liability (delict and breach of fiduciary duty), and then in sub-section 3, sets out specific statutory liabilities.

- Section 77 is applicable to an extended definition of director.
- The liability that is incurred in terms of section 77 is joint and several with any other person who may be held liable for the same act.
- Any person with a claim can thus bring it against all the directors or any one particular director.
- An action to recover loss, damages or costs may not commence more than three years after the act or omission.

Criminal Liability

The Act aims to de-criminalise sanctions where possible and rather to enforce company law administratively via appropriate bodies.

There are very few remaining offences – only those arising out of a refusal to respond to a summons, to give evidence and perjury.

In addition, in order to improve corporate accountability, the Act (section 216) states that it will be an offence, punishable by a fine or up to ten year's imprisonment (or both) for a director who:

- Commits a breach of confidence
- Makes to false statements, or participates in reckless conduct and non-compliance
- Is party to the falsification of any accounting records of a company
- Knowingly, and with a fraudulent purpose provides false or misleading information in any circumstances required by the Act
- Knowingly is party to an act or omission by a company calculated to defraud a creditor or employee of the company, or a holder of the company's securities or with another fraudulent purpose
- Is a party to the preparation, approval, dissemination or publication of a prospectus or a written statement contemplated in section 101, that contains an untrue statement as defined and described in section 95.

It is an offence to fail to satisfy a compliance notice issued in terms of this Act, however should an administrative fine have been imposed by a court in respect of the non-compliance, then no person can also be prosecuted for such an offence.

In terms of Section 214(4), if a company contravenes section 99(1) (2), (3), (4), (5), (8) or (9) (which deals with general restrictions on offers to the public), then every director or prescribed officer of the company who knowingly was a party to the contravention is guilty of an offence and liable to any other person for any losses sustained as a consequence of that contravention.

Such offences may also lead to directors also incurring civil liability.

All other offences may lead to a fine up to twelve months (or both).

Civil Liability

A Breach of Fiduciary Duty

A director is generally liable for a breach of fiduciary duty (in accordance with the common law principles relating thereto), for any losses damages or cost sustained by the company from breach of sections 75, 76(2), 76(3)(a) or (b) (relating to non-disclosure of personal financial interests, misusing the position as director to gain personal advantage, or not acting in good faith and for proper purpose or in the best interests of the company).

Delict

A director is generally liable, in accordance with the principles of common law relating to delict for any loss, damages or costs sustained by the company as a consequence of any breach by the director of a duty contemplated in section 76(3)(c) (acting with the degree of care, skill and diligence that may be reasonably expected of such a person), or a duty as set out per the MOI, or any provision of the Act not otherwise mentioned in section 77.

The code of conduct for directors as set out in section 76 of the Act is extended to members of committees even if the member is not a director on the board, and thus the consequent liability relating to the transgression of any such duties will also apply to members of the committees.

A derivative action is when the shareholders sue a third party (such as a director or officer) on behalf of the company.

A class action is when a group of people take a person (such as a director or officer) to court.

Section 157 of the Act simplifies the application for a class action which can be made to a Court, the Companies Tribunal, the Take-Over Panel, or the Commission.

For example: A class action complaint from outside investors stating that directors failed to disclose material information, which could have indicated that the company would eventually be liquidated.

Specific Statutory Liability

A director is liable for loss, damages or costs sustained by the company as a direct or indirect consequence of the director having:

- **Section 77(3)(a)** – acted in the name of the company despite knowing he did not have the authority to do so.
- **Section 77(3)(b)** – acquiescing to carrying on of company's business despite knowing that it was being conducted recklessly.
- **Section 77(3)(c)** – being party to an act or omission by the company despite knowing that it was calculated to defraud a creditor, employee or shareholder, or had another fraudulent purpose.
- **Section 77(3)(d)** – for signing or consenting to the publication of any financial statements that were false or misleading in a material respect or a prospectus which contained an untrue statement, despite knowing that the statement was false, misleading or untrue (conditions apply).
- **Section 77(3)(e)** being present at a meeting of the board, or participating in the making of a decision in terms of section 74, and failing to vote against:
  - the issuing of unauthorised shares, despite knowing that those shares had not been authorised in accordance with section 36
  - the issuing of authorised securities despite knowing that such issue was inconsistent with section 41
  - for granting unauthorised options
  - the provision of financial assistance to any person contemplated in section 44 for the acquisition of securities of the company despite knowing that this financial assistance was inconsistent with section 44 or the company's MOI
  - the provision of financial assistance to a director despite knowing that this financial assistance was inconsistent with the Act or the company's MOI
  - a resolution approving a distribution despite knowing that the distribution was contrary to section 46, subject to sub-section (4)
  - the acquisition by the company of any of its shares or the shares of its holding company despite knowing that the acquisition was contrary to section 46 or section 48
  - an allotment by the company despite knowing that the allotment was contrary to any provision of Chapter 4 of the Act.

Civil Liability – Other Actions Available to Shareholders and Stakeholders

Sections 20 and 218 of the Act enable shareholders to sue directors/officers for civil damages, or any losses suffered by them.

Restraining Orders

Section 20(4): One or more shareholders, directors or prescribed officers or trade union representing employees of the company may apply to the High Court for an appropriate order to restrain a company from doing anything inconsistent with the Act.

Section 20(5): One or more shareholders or directors or prescribed officers may apply to the High Court for an appropriate order to restrain the company or its directors from doing anything inconsistent with any of the limits, restrictions or qualifications of the MOI, (without prejudice to any rights to damages of a third party who obtained such rights in good faith and did not have actual knowledge of the limit, restriction or qualification).

Section 20(6): Each shareholder may have a claim for damages (a personal claim) against any person including a director who intentionally, fraudulently or due to gross negligence causes the company to do anything inconsistent with the Act, or any limitation, restriction or qualification in terms the MOI (unless the action has been ratified by shareholders). (Note: an action may not be ratified if it is in contravention of the Act).

Section 218: A shareholder (and any other stakeholder, including an employee) can also have a claim.

The Act does however provide some form of relief to directors – by way of Indemnification and Insurance for directors.

In terms of the Act, a possible defence known as 'the business judgement rule' is available to a director who asserts that he had no financial conflict, was reasonably informed and made a rational business decision in the circumstances.

INDEMNIFICATION AND DIRECTOR'S INSURANCE

Section 78 applies to the extended definition of a director.

Section 78(2): Director may not be Relieved of Liability

Subject to sub-sections (4) to (6), any provision of any agreement, the MOI, or rules of the company, or resolution adopted by a company, whether express or implied, is void to the extent that it directly or indirectly purports to:

- Relieve a director of:
  - a duty contemplated in section 75 or 76, or
  - liability contemplated in section 77, or
- Negate, limit or restrict any legal consequences arising from an act or omission that constitutes willful misconduct or willful breach of trust on the part of the director.

Section 78(3): Fines

Subject to subsection (3A), a company may not directly or indirectly pay any fine that may be imposed on a director of the company, or on a director of a related company, as a consequence of that director having been convicted of an offence, unless the conviction was based on strict liability.

Section 78(3A): subsection (3) does not apply to a private or personal liability company if –

- A single individual is the sole shareholder and sole director of that company, or
- Two or more related individuals are the only shareholders of that company, and there are no directors other than one or more of those individuals.

Section 78(4): Indemnity of Directors/Company may Advance Legal Expenses

Except to the extent that a company's MOI provides otherwise, the company:

- May advance expenses to a director to defend litigation in any proceedings arising out of his service to the company.
- May directly or indirectly indemnify the director for such expenses, irrespective of whether it has advanced those expenses, if the proceedings are abandoned or exculpate the director or arise in respect of any liability for which the company may indemnify the director.

Section 78(6): The company may not indemnify a director in respect of any liability resulting from:

- The director's failure to act in good faith and for a proper purpose or in the best interests of the company or with the degree of care, skill and diligence required
- Wilful misconduct or wilful breach of trust
- An offence or fine in terms of national legislation

Section 78(7): Directors' Insurance

Except to the extent that the MOI of a company provides otherwise, a company may purchase insurance to protect:

- A director against any liability or expenses for which the company is permitted to indemnify a director
- The company against any contingency including, but not limited to:
  - any expenses:
    - that the company is permitted to advance in accordance with subsection (4)(a), or
    - for which the company is permitted to indemnify a director in accordance with subsection (4)(b), or
  - any liability for which the company is permitted to indemnify a director in accordance with subsection (5).

In terms of Section 78 of the Act, there are two types of insurance available:

Insurance where the director is the insured: The director himself is covered should he incur liability.

Insurance where the company is the insured: The company is covered in case of loss resulting from a director's breach of duty towards the company, or in case of the company being sued by a third party for the acts of a director.

PROTECTION OF WHISTLE-BLOWERS

The Act introduces a new regime to protect whistle-blowers and introduces new statutory remedies and regulatory bodies.

Right to Seek Specific Remedies

Application can be made to Court in matters such as protecting the rights of security holders, declaring a director delinquent or on probation, or relief from oppressive or prejudicial conduct.

Application can be made to Companies Tribunal or Human Rights Commission in disputes concerning reservation or registration of company names.

Voluntary Resolution of Disputes – filing of complaint to Company Tribunal or Alternative Dispute Resolution Agent.

Complaints to Commission or Take-Over Regulation Panel – a person can file a complaint with the Panel (relating to fundamental transactions, takeovers and offers) or Commission (regarding any other matter arising in terms of the Act) who may direct that an investigation is conducted.

Administrative Fines

A court, on application by the Commission or Panel, may impose an administrative fine for failure to obey a compliance notice. The fine may not exceed the greater of:

- 10% of the respondent's turnover for the period during which the company failed to comply with the compliance notice, and
- The maximum prescribed in terms of subsection (5). Regulation 163 prescribes this as R1 million.

Under certain circumstances, the court may refer the matter to the National Prosecuting Authority.

Section 159 (Protection for Whistle Blowers) requires that state owned and public companies establish a system to receive and deal with disclosure by whistle-blowers and to publicise the availability of such system.

In terms of this Section 159, the Following People ('Whistle Blowers') are Offered Protection

Shareholder, director, company secretary, prescribed officer, employee, registered trade union that represents employees, another representative of employees, supplier, employee of a supplier.

Disclosures can be Made to the Following Bodies/People

The Commission, the Companies Tribunal, the Panel, a regulatory authority, an exchange (such as JSE Ltd), a legal adviser, a director, a prescribed officer, a company secretary, an auditor, board or committee of the company.

Disclosures Include

- Contravention of this Act or any act as stated in Schedule 4 (including legislation such as the CC's Act, Share Blocks Control Act, Co-operatives Act).
- Failure to comply with statutory legislation
- Engaging in activities which endanger the health and safety of people or the environment
- Unfairly discriminating against a person
- Contravention of any legislation that could lead to an actual or contingent risk to the company.

The whistle-blower has qualified privilege in respect of that disclosure and will be immune from any civil, criminal or administrative liability for that disclosure, if the conditions set out in section 159 are met.

The whistle-blower also has recourse to the person to whom the disclosure was made, if that person in any way threatens or causes detriment to the whistle-blower as a result of the disclosure.

If a person who has made such a disclosure is subjected to express or implied threats or conduct that causes detriment to him by any other person, then (s)he will be entitled to compensation for damages suffered.

Any provision of a company's MOI or an agreement is void to the extent it purports to limit or negate this section 159.

EASIER ACCESS TO REMEDIES

The Commission or Panel acting on its own motion and in its absolute discretion may commence proceedings in a court in the name of a person who filed a complaint and made a written request that the Commission or Panel do so, or apply for leave to intervene in any court proceedings arising in terms of the Act in order to represent an interest that would not otherwise be represented.

Minority shareholders and other stakeholders, such as employees have better protection, powers and remedies under the Act, including the ability to bring class actions.

Any stakeholder, including a shareholder, has free recourse to lay a complaint against a director or company with the Tribunal.

Section 165 allows for a general derivative notice whereby an aggrieved party, such as a shareholder, director or even a representative of a trade union to send a notice to the company to enforce its rights and to demand to protect its or the company's legal interests.

Section 20(6) provides a specific remedy for shareholders – each shareholder of a company has a claim for damages against any person, including a director, who intentionally, fraudulently or due to gross negligence causes the company to do anything inconsistent with the Act or the MOI, unless the action has been ratified by shareholders by special resolution.

Section 218(2) provides a general remedy to any person, stakeholder – including a shareholder to bring a civil action against a person who contravenes the Act for any loss or damages suffered by that person as a result of that contravention.

Section 81(1)(d) gives significant power to minority shareholders stating that the company, one or more directors or shareholders may apply to court for the winding-up of a solvent company on the grounds that either:

- The directors are deadlocked in the management of the company and the shareholders are unable to break the deadlock which is causing irreparable harm to the company or

- The shareholders are deadlocked in voting power and have failed for a period that includes at least two consecutive AGM dates, to elect successors to directors whose terms have expired, or
- It is otherwise just and equitable for the company to be wound up.

Section 81(1)(e) provides that one or more shareholders can apply to wind up a solvent company if the directors or prescribed officers or other persons in control of the company are acting in a manner that is fraudulent, or illegal or that the company's assets are being misapplied or wasted.

Section 163 – a shareholder or director may apply to court for relief if the powers of a director or prescribed officer or a person related to the company are being exercised in a manner that is oppressive, unfairly prejudicial or unfairly disregards the interests of the applicant.

DEFENCES AND RELIEF FOR DIRECTORS

Ignorance of the law is no excuse, and will not hold up as a defence for directors.

The Business Judgement Rule

The Business Judgement Rule is regarded as the main form of protection for directors. It is based on the idea that a director should not be held liable for bad outcomes as long as such decisions were made in good faith, with due diligence and on an informed basis, and which the director thought were in the best interests of the company.

In theory, directors should be held liable for decisions which have an adverse effect on a company. However, certain situations may arise where a director would be unfairly prejudiced by the provisions of 'Standards of Directors' Conduct'.

The business judgement rule can only be used if all of the requirements of the Act are met. Where a director ignores relevant information or advice given to him and conducts business in bad faith, the business judgment rule will not apply.

Retention of Records and Making Records Available to Shareholders

Any documents, accounts, books, writing, records or other information that a company is required to keep in terms of the Act or any other public regulation must be kept in written form, or in a form or manner that allows the documents and information that comprise the records to be convertible into written form within a reasonable time for a period of at least seven years or any longer period of time specified in any other applicable public regulation.

Section 24 states that every company must maintain –

- A copy of its MOI, any amendments or alterations to it, and any rules of the company.
- A record of its directors including all the information required in respect of each current director at any particular time and with respect to each past director.
- Copies of all reports presented at an AGM of the company, including annual financial statements and accounting records.
- Notice and minutes of shareholders' meetings including resolutions adopted and any document made available by the company to the holders of securities in relation to each resolution.
- Copies of any written communications sent generally by the company to all holders of any class of the company's securities.
- Minutes of all meetings and resolutions of directors, directors committees or the audit committee.

Every company must maintain a securities register or its equivalent as required by section 50 in the case of a profit company, or a members register in the case of a non-profit company, that has members and also the records required in terms of section 85 (where applicable).

A company must notify the Commission of the location or of any change in the location of any company records that are not located at its registered office.

Access to Information

Section 26 of the Act states that a person who holds or has a beneficial interest in any securities issued by a profit company or who is a member of a non-profit company has a right to inspect and copy without any charge for any such inspection or upon payment of no more than the prescribed maximum charge for any such copy, the information contained in the records of the company.

Any other person has a right to inspect or copy the securities register of a profit company, or the members register of a non-profit company that has members, or the register of directors upon payment of an amount not exceeding the prescribed maximum fee for any such inspection.

Any such right of access may be exercised only in accordance with The Promotion of Access to Information Act 2000.

A company's record of directors must include in respect of each director, that persons full name, former names, identity number or date of birth, (if not a South African, then passport number and nationality), occupation, date of most recent election as director, name and registration number of every other company or foreign company of which the person is a director, and the nationality of the foreign company (if applicable), and any other prescribed information.

In addition, with respect to each director, the company must keep a record of addresses for service, and, in the case of a company that is required to have an audit committee, any professional qualifications and experience of the director.

If a company receives a request for access, it must within 14 business days comply with the request. It is an offence for a company to fail to accommodate or impede any reasonable request. This also applies in the case of access to financial statements.

Registered Office

Every company and external company must have a registered office at which their documents are maintained. This office must be indicated on the Notice of Incorporation.

Subject to the requirements of the MOI, a Notice of Change of Registered Office must be filed with the Commission where applicable.

Annual Returns

Annual returns must be submitted by every category of company including external companies in the prescribed form with the prescribed fee and within 30 business days after the anniversary date of its date of incorporation (in the case of a company that was incorporated in the Republic, or the date that its registration was transferred to the Republic, in the case of a domesticated company).

Companies which are required to have their financial statements audited must file a copy of the latest approved audited financial statements together with its annual return.

A company that is not required to have its annual financial statements audited, may file a copy of its audited or reviewed statements together with its annual return.

A company that is not required to file annual financial statements and does not elect to file a copy of its audited or reviewed annual financial statements must file a financial accountability supplement to its annual return.

Each year, in its annual return, every company must designate a director, employee or other person who is responsible for the company's compliance with the transparency and accountability provisions in the Act.

Section 32: Use of Registered Name and Number

A company or external company must:

- Provide its full registered name or registration number on demand.
- Not misstate its name or registration number in a manner likely to mislead or deceive any person.

The company's registered name and registration number must be clearly displayed in legible characters on all forms, notices and correspondence, electronic or otherwise.

This requirement applies to all bills of exchange, promissory notes, cheques and orders for money or goods and in all letters, delivery notes, invoices, receipts and letters of credit of the company.

It is an offence to mislead the public in this regard.

Section 75: Disclosure of Personal Financial Interests

Based on a director's fiduciary relationship with the company, directors have a duty to disclose their personal financial interests in the business of the company.

Section 75 applies to an extended definition of 'director' and includes:

- An alternative director, prescribed officer and board committee member;
- Related persons (including a second company or CC of which a director or related person is a director or member).

In terms of the Act, "personal financial interest" comprises a direct material interest of a financial, monetary or economic nature, or to which a monetary value may be attributed.

A director is not only obliged to disclose his own personal financial interests but also those of parties related to him (including natural and juristic persons).

A director must disclose his interest in advance, before it is considered by a meeting of the board and must recuse himself by leaving the meeting, without taking part in the discussion.

A director is required to deliver a written notice to the board (or shareholders where there is only one director, but a number of holders of beneficial interest in issued securities) setting out the nature and extent of that interest, to be used generally for the purposes of this section until changed or withdrawn by further written notice from that director.

Consequences of non-disclosure

- The resolution and the transaction is void
- Director could be personally liable for losses, damages or costs sustained by the company, shareholders or third parties.

Section 75 will not apply where:

- The sole director is also the sole holder of all the company's securities (including shares)
- Where decisions generally affect all of the directors in their capacity as such
- Where the decision relates to a class of persons even if that director belongs to that class (exceptions apply)
- Where there is a proposal to remove a fellow director from office.

IMPORTANT LAWS AFFECTING BUSINESSES IN SOUTH AFRICA

Knowledge of and compliance with legislation is essential for good governance.

Not only do directors need to be aware of and comply with legislation, but it is important that they have a working knowledge of the guidance provided in King IV™.

While the list below is not exhaustive, important legislation includes:

- The Companies Act
- The Close Corporation's Act
- The South African Income Tax Act
- The Labour Relations Act
- The Occupational Health and Safety Act
- The Employment Equity Act
- Promotion of Access to Information Act
- Financial Intelligence Centre Act
- Trade Marks Act
- Business Names Act
- Consumer Protection Act
- The Competition Act
- Electronic Communications and Transactions Act
- National Credit Act
- Basic Conditions of Employment Act
- Broad-Based Black Economic Empowerment Act
- Industry or sector specific legislation
- Listed companies must adhere to JSE securities exchange regulations
- The Protection of Personal Information Act (POPI)

POPI is aimed at bringing South Africa in line with international standards of protection of personal data.

A few limited sections of POPI have already been implemented. It is expected that POPI will commence during 2017 following which there will be a one-year grace period to become compliant.

LENDING AND FINANCIAL ASSISTANCE TO DIRECTORS

"Financial assistance" in section 44 and 45 excludes lending money in the ordinary course of business by a company whose primary business is the lending of money. "Financial assistance" includes the lending money, guaranteeing a loan or other obligation and securing any debt or obligation, but excludes an accountable advance to meet company-related legal expenses or anticipated expenses to be incurred by the person on behalf of the company or an amount to defray the person's expenses from removal at the company's request.

Section 44: Financial Assistance for Subscription of Securities

Unless a company's MOI provides otherwise, the board may authorise the company to provide financial assistance by way of a loan, guarantee, 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 (subject to certain conditions).

Section 45: Loans or Other Financial Assistance to Directors

Unless a company's MOI provides otherwise, the board may authorise the company to provide direct or or indirect financial assistance to a director or prescribed officer of the company or of a related or inter-related company, or to a related or inter-related company or corporation, or to a member of a related or inter-related corporation, or to a person related to any such company, corporation, director, prescribed officer or member, subject to specific requirements.

If the board adopts a resolution to provide financial assistance, written notice must be given to all shareholders (unless every shareholder is also a director of the company), and to any trade union representing its employees:

- Within ten business days after the board adopts the resolution, if the total value of all loans, debts, obligations or assistance together with any previous such resolution during the financial year, exceeds one-tenth of 1% of the company's net worth at the time of the resolution, or
- Within 30 business days after the end of the financial year, in any other case.

Section 28: Maintaining and Keeping of Accounting Records

It is the duty of directors to ensure that the company keeps accurate and complete accounting records in one of the official languages of RSA at its registered office.

The accounting records must be kept in the prescribed manner and form and must provide adequate information to enable the company to satisfy all reporting requirements applicable to it and to provide for:

- The compilation of financial statements
- The proper conduct of an audit or independent review of its annual financial statements (where applicable).

Electronic records must comply with the requirements of the Act.

Non-profit companies must maintain adequate records of all revenue received from donations, grants and member's fees, or in terms of funding, contracts or arrangements with any party.

Regulation 25(3) sets out what is required to be included in the accounting records of a company.

Records which must be kept include:

- A record of the company's assets and liabilities including but not limited to:
  - a register of company's non-current assets
  - a record of any loan by the company to a shareholder, director, prescribed officer, employee or any related person
  - a record of any liabilities and obligations of the company
- A record of any property held by the company in a fiduciary capacity or in any capacity or manner contemplated in section 65(2) of the Consumer Protection Act 2008
- A record of company's revenue and expenditure
- A record of inventory and stock in trade where the company trades in goods

Sections 29 and 30: Financial Statements & Annual Financial Statements (AFS)

It is the duty of directors to cause the financial statements or annual financial statements of the company to approved by the board and signed by an authorised director, and be presented to the first shareholders meeting after the statements have been approved by the board.

Financial statements must not be false, misleading or incomplete in any material respect. Summaries must comply with prescribed requirements for summaries.

It is an offence to prepare or be party to the preparation, approval, dissemination or publication of any financial statement including any annual financial statements knowing that those statements fail in a material way to comply with the requirements of the Act, or are materially false or misleading. The Act places increased onus and liability on preparers of financial statements.

Audit and Independent Review

Directors are obliged to comply with Sections 28–30 of the Act. They have a duty to ensure that the company has an effective and independent audit committee (where applicable).

All companies must produce AFS each year within six months after the end of their financial year. AFS of all public and state-owned companies must be audited.

In the case of any other profit or non-profit company:

- AFS must be audited if so required by the regulations made in terms of subsection 7, taking into account inter alia whether it is desirable in the public interest, having regard to the economic or social significance of the company as indicated by any relevant factors including its annual turnover, the size of its workforce and the nature and extent of its activities.
- AFS can be either audited voluntarily if the company's MOI or a shareholders' resolution so requires or if the company's board has so determined, or independently reviewed in terms of subsection 7.

Regulation 26(1)(d) relating to "Independent Review", states the minimum requirement for a professional person to conduct an independent review.

Exemption of Owner-Managed Companies

If every person in a particular company both holds, or has a beneficial interest in, any securities issued by that company and is also a director of that company, then that company is exempt from the requirement to have its annual financial statements audited or independently reviewed. This exemption:

- Does not apply to the company if it falls into a class of company that is required to have its annual financial statements audited in terms of the regulations contemplated in subsection 7(a), and
- Does not relieve the company of any requirement to have its financial statements audited or reviewed in terms of another law or in terms of any agreement to which the company is a party.

The 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, and any prescribed information, and be approved by the board and signed by an authorised director, and be presented to the first shareholders meeting after the statements have been approved by the board.

Regulation 26 sets out the criteria for determining the Public Interest Score (PIS) which must be calculated at the end of the financial year by every company. The PIS of a company determines the financial reporting standards that must be adopted and also determines whether the company is required to appoint a Social and Ethics Committee (whether or not that company is listed).

Annual General Meeting Requirement

A public company must call an AGM of its shareholders within eighteen months of its date of incorporation and thereafter once in every calendar year, but no more than fifteen months of the date of the previous AGM to present the audited annual financial statements to the shareholders.

The Act does not require a private company to have an AGM.

However, the board is required to approve the AFS, and these are required to be presented to the first shareholders meeting after they have been so approved (there is no time frame stipulated), unless exempted.

ACTIONS REQUIRING SHAREHOLDER APPROVAL

The directors are ultimately responsible to the shareholders. They act as their "agents", and are required at all times to act in the shareholder's best interests.

The doctrine of separation of powers, whereby the directors are ultimately responsible and answerable to shareholders, has always been entrenched in South African law. This doctrine ensures that the correct checks and balances on power and control are upheld in a company.

The Act does provide for shareholder approval for certain transactions carried out by directors, including (but not limited to):

- Disposal of greater part of assets or undertaking
- Amendment of MOI
- The issue of shares in certain cases
- Making additional rule/s permanent

The company's MOI can also list additional scenarios when shareholder approval will be required for director actions.

General Ratification by Shareholders of Directors' Actions

Section 20 (2) – (3): The shareholders may ratify by special resolution any action by a company or the directors that is inconsistent with any limitations, restrictions or qualifications listed in the MOI of the company. The action of the director cannot be ratified if it is in contravention of the Act.

A director must act within the powers and authority conferred on him.

Where a director acts beyond his legal power or authority, the shareholders may ratify the transaction retrospectively by special resolution. Alternatively, the shareholders 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.

The Act sets out a comprehensive list of actions requiring authorisation by special resolution of shareholders in section 65(11).

ENHANCED ACCOUNTABILITY REQUIREMENTS

The Act contains provisions aimed at enhancing the self-regulation and accountability of certain companies.

These 'Chapter Three Provisions' are binding on:

- Public companies
- State-owned companies (SOC Ltd)
- Private, personal liability and non-profit companies which are required to have their annual financial statements audited under the Act; and
- Private, personal liability and non-profit companies where their MOI requires

The above categories of companies must appoint:

- A person to serve as a company secretary
- A person to serve as an auditor
- An audit committee.
- Every SOC Ltd company and every listed public company, and any other company that has in any two of the previous five years, scored above 500 points must also appoint a Social and Ethics Committee (unless exempted).

Company Secretary

Must be permanently resident in South Africa, have the requisite knowledge and experience to perform duties as set out in the Act, and is accountable to the board.

Duties of a Company Secretary include:

- Providing the directors of the company with guidance
- Making directors aware of relevant laws and any failure to comply
- Recording minutes as required by the Act
- Certifying in the annual financial statements of the company that the company has lodged all returns required of a public company in terms of the Act
- Ensuring that the company's AFS are distributed to every person who is entitled
- Filing information returns in terms of the annual transparency and accountability report.

Section 90: Appointment and Rotation of Auditor

Public and state-owned companies must appoint an auditor upon incorporation and each year at the annual meeting. Where the audit of any other company is required in the public interest (as indicated by prescribed criteria in any financial year), those annual financial statements must be audited.

The auditor must be a registered auditor and must be acceptable to the company's audit committee as being independent of the company.

The auditor must not be:

- A director, prescribed officer, or employee or consultant of the company.
- Anyone who was or has been engaged for more than one year in the maintenance of any of the company's financial records or the preparation of any of its financial statements.
- A director, officer or employee of a person performing the secretarial work for the company.
- A person who is disqualified in terms of section 69(8) to serve as a director of any particular company.
- 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.

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 or designated auditor, that individual may not be appointed again until after the expiry of at least two further financial years.

Section 93 sets out the rights and restricted functions of auditors who may not perform any services that would place him in a conflict of interest as determined by the Independent Regulatory Board for Auditors (IRBA) in terms of the Auditing Profession Act or any other services determined by its audit committee.

Section 94: Election of an Audit Committee

At each AGM, a SOC Ltd, public company or one that is required only by its MOI to have an audit committee must elect an audit committee. The shareholders and not the board of directors must elect an audit committee for the following financial year (subject to certain exemptions).

The audit committee must have at least three members who must also be independent non-executive directors of the company. In terms of the Act, members of the audit committee must also meet specific qualifications.

At least one third of the members of a company's audit committee at any particular time must have academic qualifications or experience in, economics, law, corporate governance, finance, accounting, commerce, industry, public affairs or human resource management.

The audit committee is required to comply with specific statutory duties as are clearly set out in the Act in section 94(7), in respect to each financial year for which it is appointed.

The audit committee is required to report on the processes that were followed in appointing auditors and in carrying out their responsibilities.

They are also must comment on the annual financial statements and the policies and procedures that were followed by the company and the appointed auditors, detailing whether the audit process was conducted independently.

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).

If a holding company has an audit committee, the subsidiary does not require one, if the audit committee of the holding company will perform the functions required under this section on behalf of that subsidiary company.

Additional Sections in Act relating to Enhanced Accountability and Transparency Requirements

A public company or SOC Ltd company must directly or indirectly –

- Establish and maintain a system to receive confidential disclosures of any person as contemplated in section 159 and act on them, and
- Routinely publicise the availability of that system to directors, secretaries, other officers, employees, registered trade unions of the company, a supplier of goods or services to a company or an employee of such a supplier.

Appointment of a Social and Ethics Committee

This is compulsory for those companies prescribed by the Regulation 43 to have a Social and Ethics Committee unless:

- It is a subsidiary of another company that has a social and ethics committee which will perform the functions required by the regulation on behalf of that subsidiary company, or
- Has been exempted by the Tribunal on application. (Revocable exemptions for five years at a time are allowed on grounds of redundancy or no basis for public interest considering the company's activities or because the company already has a formal mechanism within its structures that substantially performs the same functions).

The committee must comprise not less than three directors or prescribed officers of the company, at least one of whom must be a director who is not involved in the day-to-day management of the company's business, and must not have been so involved within the previous three financial years.

A company required to have a Social and Ethics Committee is required to elect members to that Committee at each AGM of the company.

The board must appoint an advisory panel to the committee who represent the community and public interest having regard to the location and nature of the company's activities.

Regulation 43(5) sets out the functions of the committee in detail.

THE SOLVENCY AND LIQUIDITY TEST

Directors have a duty to monitor the company's financial position and ensure that the company meets the solvency and liquidity test.

Solvency relates to the net worth or net asset value of the business, where assets are valued on the basis of their market values and realisable values. The balance sheet should reflect the solvency position of the business.

Liquidity is used to describe how easily the assets can be converted into cash, and to describe the relationship between a company's liquid assets and short-term financial obligations, when and as they become due.

The Solvency and liquidity test is an accounting exercise. The Act states how the various values are to be calculated and what assets and liabilities are to be taken into account.

Some of the transactions that will require that the solvency and liquidity test be satisfied include:

- The provision of financial assistance to third parties for the acquisition of the company's own shares – for example, where the company lends money to a person to enable the latter to acquire the company's shares (section 44).
- Loans or other financial assistance to related parties, including subsidiary companies, holding companies and directors (section 45).
- Dividends or other "distributions" (as defined in sections 1 and 46).
- The issuing of capitalisation shares on terms whereby the recipient can choose whether to take the shares or to take cash (section 47).
- Share buy-backs – in other words, where the company buys back its own shares (section 48).
- An amalgamation or merger with another company (section 113).

In order to remain compliant with the Act, directors must constantly monitor whether a transaction that the company proposes to enter into will require that the statutory liquidity and solvency test be satisfied as well as the additional provisions of each particular section of the Act.

Directors must then take account of the necessary information to enable them to make the requisite determination of the company's solvency and liquidity.

In terms of the Act, a director will be personally liable for any loss, damage or costs sustained by the company if the director acquiesced in the conduct of the business of the company in insolvent circumstances, or otherwise failed to vote against a resolution to which the solvency and liquidity test was applicable in circumstances where the company did not satisfy that test.

Such personal liability extends not only to board members but also to prescribed officers.

Liability is joint and several with any other person who may be liable for the same act or omission. Being present at a meeting means that the director is required to either vote for or against the proposed resolution, for example, the declaration of a dividend or distribution. The recording of the vote should be minuted, for record purposes.

A court, on application, can also place such a director on probation in terms of section 162(7)(a)(i).

A director could also be seen to be engaging in reckless trading as per section 22, and incur consequences as per that section.

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 as fairly valued, equal or exceed the 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 twelve months after the date on which the test is considered, or in the case of a distribution, twelve months following that distribution.

Any financial information to be considered concerning the company must be based on:

- Accounting records which satisfy requirements of section 28
- Financial statements which satisfy requirements of section 29

BUSINESS RESCUE PROVISIONS

The introduction of the business rescue provisions means that directors are duty bound to constantly monitor the company's financial position, to determine whether voluntary business rescue proceedings need to be initiated.

Failure to implement business rescue proceedings could result in the director being charged with reckless trading and be exposed to personal liability.

It is incumbent upon directors to ensure that they place their companies into either business rescue or liquidation, or to cease trading, when the warning signs become evident.

Directors should be aware of the practicalities of business rescue, and the duties and powers of the business rescue practitioner.

Where the director has reasonable grounds to believe that:

- The company is financially distressed, and
- There is a reasonable prospect of rescuing the company

business rescue proceedings must be initiated by the directors by board resolution.

Such resolution must be filed with the Commission before it is of any force or effect, and may not be adopted if liquidation proceedings have already been initiated against the company.

If a company is financially distressed and directors decide not to place it into business rescue, the directors will be under a statutory obligation to deliver a written notice to each affected person, confirming that the company is financially distressed and is not being placed into business rescue and providing reasons for this.

The 'Business Rescue' clause in the Companies Act 71 of 2008, also applies to CC's.

RECKLESS TRADING

A company must not carry on its business recklessly, with gross negligence with intent to defraud any person or for any fraudulent purpose.

If the Commission has reasonable grounds to believe that a company is engaging in reckless conduct or is unable to pay its debts as they become due and payable in the normal course of business, it may issue a notice to the company, to show cause why the company should be permitted to continue carrying on its business, or to trade, as the case may be.

The company is required to provide information to the Commission within 20 business days of having received the notice. If the company fails to satisfy the Commission that it is not engaging in prohibited conduct or that it is able to pay its debts as they become due and payable in the normal course of business, the Commission may issue a compliance notice to the company requiring it to cease carrying on its business or trading.

The Commission could also accept the information and confirm the company's right to continue carrying on business.

If a person to whom a compliance notice has been issued fails to comply with the notice, the Commission or the Executive Director (in the case of the Take-over Regulation Panel), as the case may be, may either:

- Apply to a court for the imposition of an administrative fine, or
- Refer the matter to the National Prosecuting Authority for prosecution as an offence in terms of section 214(3),
  but may not do both in respect of any particular compliance notice.
- A director could still be subject to significant civil liabilities for any loss, damage or cost suffered by the company as a result of a contravention of section 22.
- Directors have a duty to initiate voluntarily Business Rescue Proceedings where it seems the company will become insolvent, so as to avoid the serious consequences contemplated in this section.

WINDING-UP OF SOLVENT COMPANIES AND DEREGISTRATION

Despite the repeal of the 1973 Companies Act, winding-up of insolvent companies will remain governed by Chapter 14 thereof, (until the Bankruptcy Act is a reality) and subject to the provision that if any conflict arises between Chapter 14 and the Act, the provisions of the Act will prevail.

The new Act governs the winding-up of solvent companies and the deregistration of companies.

Winding-up of Solvent Companies

Section 79: A solvent company may be dissolved by:

- Voluntary winding-up – initiated by the company and conducted either by the company or by its creditors as determined by special resolution of the shareholders of the company or
- By court order.

Voluntary Winding-up of Solvent Company

Section 80: A solvent company may be wound up voluntarily if the company has adopted a special resolution to do so, which may provide for the winding-up to be by the company, or by its creditors, and such resolution must be filed with the Commission with the prescribed fee.

Despite any provision to the contrary in a company's MOI, the company remains a juristic person and retains all powers as such while it is being wound up (voluntarily). However, from the beginning of the process, it must stop carrying on its business except to the extent required for the beneficial winding-up of the company.

All of the director's powers cease, except to the extent specifically authorised in the case of winding-up by the company, by the liquidator or the shareholders in a general meeting, or in the case of a winding-up by creditors, the liquidator or the creditors.

Winding-up of solvent companies by court order

Section 81: Applicants can be

- The company
- The business rescue practitioner
- Creditors
- The company, one or more directors, one or more shareholders (in the case of deadlock in the management or shareholders of the company, or where it just and equitable for the company to be wound up).
- A shareholder (where the directors, prescribed officers or other persons in control of the company are acting in a manner that is fraudulent/illegal, or where the company's assets are being misapplied/wasted).
- The Commission or the Take-over Regulation Panel

Dissolution of Companies and Removal from the Register

The Commission may deregister a company if:

- The company has transferred its registration to a foreign jurisdiction.
- The company omitted to file an annual return for two or more years in succession and has either failed to give satisfactory reasons for the failure or has failed to show satisfactory cause for the company to remain registered.
- The Commission has determined that the company appears to have been inactive for at least seven years and no person has demonstrated a reasonable interest in, or reason for, its continued existence
- The Commission has received a request that the company be deregistered because it has ceased to carry on business and has no assets or, because of the inadequacy of the assets, there is no reasonable probability of the company being liquidated.

Once the company is dissolved and deregistered, its name is removed from the companies register.

The removal of its name does not affect the liability of any former director or shareholder (or any other person) in respect of any act or omission that took place before deregistration, which may be enforced as if the company's name was never so removed from the register.

Specific requirements apply for the winding-up of an NPC.

Some Important Definitions in the Act

Accounting Records means information in written or electronic form concerning the financial affairs of a company as required in terms of this Act, including but not limited to, purchase and sales records, general and subsidiary ledgers and other documents and books used in the preparation of financial statements.

All or Greater Part of the Assets or Undertaking when used in respect of a company, means – (a) in the case of the company's assets, more than 50% of its gross assets fairly valued, irrespective of its liabilities, or (b) in the case of the company's undertaking, more than 50% of the value of its entire undertaking, fairly valued.

Audit and Auditor has the meaning set out in the Auditing Profession Act, but "audit" does not include an independent review of annual financial statements as contemplated in section 30(2)(b)(ii)(bb).

Ordinary Resolution: section 65(7): means a resolution adopted with the support of more than 50% of the voting rights exercised on the resolution, or a higher percentage as contemplated in the MOI, or one or more higher percentages of voting rights to approve ordinary resolutions concerning one or more particular matters, respectively, provided there must at all times be a margin of at least 10 percentage points between the highest established requirement for approval of an ordinary resolution on any matter, and the lowest established requirement for approval of a special resolution on any matter – (a) at a shareholders meeting or (b) by holders of the company's securities acting other than at a meeting, as contemplated in section 60.

Personal Financial Interest means when used with respect to any person means a direct material interest of that person, of a financial, monetary or economic nature, or to which a monetary value may be attributed, but does not include any interest held by a person in a unit trust or collective investment scheme unless that person has direct control over the investment decisions of that fund or investment.

Securities means any shares, debentures or other instruments irrespective of their form or title issued or authorised to be issued by a profit company.

Shareholder subject to section 57(1) means the holder of a share issued by a company and who is entered as such in the certificated or uncertificated securities register as the case may be.

Leniency of Governance for Certain Companies

A profit company (other than SOC Ltd)

Where there is Only One Shareholder:

- That shareholder may exercise any or all of the voting rights pertaining to that company on any matter at any time without notice or compliance with any other internal formalities unless the company's MOI provides otherwise r
- Reporting requirements are less onerous
- Simplified decision making and no notice requirements
- Sections 59–65 do not apply to the governance of the company

Where there is Only One Director who is also the Sole Shareholder:

- No notice requirements for board meeting
- Requirement for disclosure of director's personal financial interest does not apply if one person holds all the beneficial interests of all of the issued securities of the company and is the only director of that company

Where there is Only One Director in a Profit Company (Not a SOC Ltd):

- That director may exercise any power or perform any function of the board at any time without notice or compliance with any other internal formalities except to the extent that the company's MOI provides otherwise
- Sections 71(3) – (7), S73, S74 are not applicable to the governance of that company – company may enter into a contract in which a related person has a personal financial interest after obtaining an ordinary resolution of shareholders.

Where Every Director is Also a Shareholder of a Particular Company (Other than a SOC Ltd):

- No notice or other internal formalities unless the MOI provides otherwise and subject to the requirements of this section
- When acting in capacity as shareholders, no need to comply with sections 73–78 relating to meetings, duties, obligations, standards of conduct, liabilities and indemnification of directors
- Section 30(2A) – exempted from audit or independent review of FS or AFS (unless voluntarily required)
- Diminished need to seek shareholder approval for certain board actions

Standards of Director's Conduct

Section 76(2): Conflict of Interest

A director must not use his position or any information obtained while acting in such capacity to gain advantage for himself or any other person other than the company or a wholly owned subsidiary of the company or knowingly cause harm to the company or subsidiary. A director must communicate to the board any information that comes to his attention unless he reasonably believes the information is immaterial to the company or generally available to the public or known to other directors or is bound not to disclose the information by legal or ethical obligation of confidentiality.

Section 76(3): Degree of Care and Skill and Good Faith

A director is required to act in good faith and for proper purpose and in the best interests of the company. Each director is subject to a duty to exercise a degree of care, skill and diligence that would reasonably be expected of a person carrying out the same functions in relation to the company as those carried out by that director, and having the general knowledge skill and experience of that director.

Sections 76(4)(b) and 76(5): The Business Judgement Rule

Directors have a duty to act or exercise their powers and functions in the best of the interests of the company.

In performing their duties, directors are entitled to rely on any information, opinions, recommendations, reports or statements, including financial statements and other financial data, prepared or presented by the following specified persons:

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

Directors will have complied with their duty to act in the best interests of the company and their duty to act with the requisite skill, care and diligence if they:

- Have taken reasonably diligent steps to become informed about the matter; and
- The director had no material personal financial interest in the subject matter of the decision; and
- Had no reasonable basis to know that any related person had a personal financial interest in the matter; or
- The director complied with the requirements of Section 75 of the Companies Act with respect to the disclosure of any interest and recusal from the meeting of the board; and
- The directors made a decision, or supported a decision of a committee or the board, with regard to that matter, and the directors had a rational basis for believing, and did believe, that the decision was in the best interests of the company.

Public Interest Score
(For Purposes of Regulations 27–30, 43, 127 and 128)

Every company must calculate its public interest score for each financial year, calculated as the sum of the following:

- Number of points equal to the average number of employees of the company during the financial year
- One point for every R1 million (or portion thereof) in third party liability of the company at the financial year end
- One point for every R1 million (or portion thereof) in turnover during the financial year, and
- One point for every individual who at the end of the financial year, is known by the company:
  - in the case of a profit company, to directly or indirectly have a beneficial interest in any of the company's issued securities, or
  - in the case of a non-profit company, to be a member of the company or a member of an association that is a member of the company.

Section 65(11): Actions Requiring Authorisation by Special Resolution

Special Resolution means:

- In the case of a company, a resolution adopted with the support of at least 75% of the voting rights exercised on the resolution or a different percentage as contemplated in section 65(10) at a shareholders meeting or by holders of the company's securities acting other than at a meeting
- In the case of any other juristic person, a decision by the owner or owners of that person or by another authorised person that requires the highest level of support in order to be adopted in terms of the relevant law under which that juristic person was incorporated.

  A company's MOI may permit a different percentage of voting rights to approve a special resolution or one or more different percentages of voting rights to approve special resolutions concerning one or more particular matters respectively – provided there must at all times be a margin of at least ten 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 i.r.o. authorisation and classification of shares
- Ratify a consolidated revision of a company's MOI
- Ratify actions by the company or directors in excess of their authority
- Approve an issue of shares or grant of rights in certain circumstances
- Approve an issue of shares or securities
- Authorise the board to grant financial assistance in the certain circumstances
- Approve a decision of the board for re-acquisition of shares in certain circumstances
- Authorise the basis for compensation to directors of a profit company
- Approve the voluntary winding-up of the company
- Approve the winding-up of a company in certain circumstances
- Approve an application to transfer the registration of the company to a foreign jurisdiction
- Approve any proposed fundamental transaction
- Revoke a resolution contemplated in section 164(9)(c).

Requirements for Documents to be Held in Electronic Format

Regulation 32(5): If a company keeps its **securities register** in electronic form it must provide adequate precautions against loss of the records as a result of damage or failure of the media on which the records are kept and ensure that these records are capable of being retrieved to a readable and printable form, including by converting the records from legacy to later systems, storage media, or software, to the extent necessary from time to time.

Regulation 25(6): If a company keeps any of its **accounting records** in electronic form the company must provide similar precautions as described above.

Regulation 25(5): The accounting records must be kept in such a manner as:

- To provide adequate precautions against:
  - theft, loss or intentional or accidental damage or destruction, and
  - falsification, and
- To facilitate the discovery of falsification, and
- To comply with any other applicable law dealing with accounting records, access to information, or confidentiality.

Offence to Fail Keep Accounting Records as Prescribed

Section 28(3): It is an offence for:

- A company:
  - with an intention to deceive or mislead any person:
    - to fail to keep accurate or complete accounting records
    - to keep records other than in the prescribed manner and form, if any, or
  - to falsify any of its accounting records or permit any person to do so, or
- Any person to falsify a company's accounting records.

USEFUL WEBLINKS

Accounting Standards Board	http://www.asb.co.za/
Companies & Intellectual Property Commission	http://www.cipc.co.za/
Companies Commission	http://www.compcom.co.za
Companies Tribunal	http://www.companiestribunal.org.za/
Department of Trade and Industry	https://www.thedti.gov.za/
Department of Justice	http://www.justice.gov.za/
Financial Services Board	https://www.fsb.co.za/
Institute of Directors	http://www.iodsa.co.za/
Johannesburg Stock Exchange	https://www.jse.co.za/
National Treasury	http://www.treasury.gov.za/
SA Government Online	http://www.gov.za/
South African Revenue Services (SARS)	http://www.sars.gov.za/
Take Over Regulation Panel	http://trpanel.co.za/

Disclaimer:

The reader is advised to consult a professional adviser for further assistance and information, and for guidance on new and existing legislation which may affect directors and officers of companies.

All references to the masculine gender shall include the feminine (and vice versa).

While every care has been taken in the compilation of this guide, no responsibility of any nature whatsoever shall be accepted for any inaccuracies, errors or omissions.

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