

## THE COMPANIES ACT OF 2008

### ADVISORY NOTE

#### 1. INTRODUCTION

The Companies Act No 71 of 2008 ('the Act') will come into **effect on 1 May 2011**. This will replace the Companies Act of 1973 in its entirety. The Act, in its current form, was amended by the Companies Amendment Act of 2010. In addition to the Act, **179 regulations** have been promulgated that form an integral part of the Act and as a result of which the Act can never be read in isolation.

The Act substantially changes the landscape as far as the incorporation, administration and management of companies are concerned. A **transitional period of 2 years** has been provided for to allow companies to align their practices, procedures and constitutional documents with the provisions of the Act. The purpose of this document is to alert the reader to the new Act and the regulations and to some of its pertinent provisions.

#### 2. CONTENT OF THE ACT

The content of the Act is set out in the following **Chapters and Schedules**:

- o 1: Interpretation, purpose and application
- o 2: Formation, administration and dissolution of companies
  - A: Reservation and registration of company names
  - B: Incorporation and legal status of companies
  - C: Transparency, accountability and integrity of companies
  - D: Capitalisation of profit companies
  - E: Securities registration and transfer
  - F: Governance of companies
  - G: Winding-up of solvent companies and deregistering companies
- o 3: Enhanced accountability and transparency
  - A: Application and general requirements of Chapter
  - B: Company secretary
  - C: Auditors
  - D: Audit committees
- o 4: Public offerings of company securities
- o 5: Fundamental transactions, takeovers and offers
  - Approval for certain fundamental transactions
  - Authority of Panel and Takeover Regulations

- Regulation of affected transactions and offers
- o 6: Business rescue and compromise with creditors
  - Business rescue proceedings
  - Practitioner's functions and terms of appointment
  - Rights of affected persons during business rescue proceedings
  - Development and approval of business rescue plan
  - Compromise with creditors
- o 7: Remedies and enforcement
  - General principles
  - Rights to see specific remedies
  - Voluntary resolution of disputes
  - Complaints to Commission or Panel
  - Powers to support investigations and inspections
  - Companies Tribunal adjudication procedures
- o 8: Regulatory agencies and administration of the Act
  - A: Companies and Intellectual Property Commission
  - B: Companies Tribunal
  - C: Takeover Regulation Panel
  - D: Financial Reporting Standards Council
  - E: Administrative provisions applicable to Agencies
- o 9: Offences, miscellaneous matters and general provisions
- o Schedules
  - 1: Provisions concerning non-profit companies
  - 2: Conversion of close corporations to companies
  - 3: Amendment of laws
  - 4: Legislation to be enforced by Commission
  - 5: Transitional arrangements

Some of the more **interesting highlights** are the following:

- The “memorandum and articles of association” will be replaced by the “**memorandum of incorporation**” and the Act provides a substantial degree of flexibility for companies as far as the content of the memorandum of incorporation is concerned – a company's board of directors will be well advised to carefully consider the content of the memorandum of incorporation to ensure that the flexibility provided for is use to the best advantage of the company.
- A **shareholders' agreement** may no longer override the memorandum of incorporation.
- The Act provides for **only 2 categories of companies**:
  - Profit companies:
    - Public companies (Limited)
    - State owned companies (SOC)
    - Limited liability companies (Incorporated)
    - Private company ((Pty) Ltd)
  - Non-profit companies (NPC)
- The current limitation on the number of shareholders (50) in a private company has been removed.

- Public companies and SOC's, as well as those companies that have to audit their annual financial statements, have to comply with the **enhanced accountability and transparency provisions** set out in Chapter 3.
- **Audit committees**, as provided for in terms of Chapter 3, will in future be appointed by shareholders at the AGM and require a minimum of 3 members.
- Shares created after the effective date of the Act will **no longer have a par value** but par value shares that existed prior to the effective date may remain in place.
- No **close corporations** may be registered after the effective date of the Act.
- **Directors' duties** as per the common law have now been codified and the **liability of directors** has been extensively addressed.
- **Directors' resolutions** will have to be dated and sequentially numbered.
- A board of directors needs to very carefully consider the provisions in respect of **business rescue** when a company is in financial distress.
- **Reckless trading**, which includes trading under **insolvent** circumstances, is specifically prohibited.
- A company may prepare and provide shareholders with **summarised annual financial statements**.
- Only the company name and registration number has to appear on all official company documentation.
- Unless the Memorandum of Incorporation provides otherwise, directors will to a large extent have the automatic authority to **issue shares**, subject to some limitations.
- All **distributions** (which includes the declaration of a dividend) must be authorised by the board and only after the "solvency and liquidity test" has been done.
- At least 50% of all directors and alternate directors have to be appointed by the shareholders.
- A director with a **personal financial interest** in a matter before the board has to, in addition to declaring the interest and relevant information, recuse himself from the meeting.
- The **company secretary** is said to be accountable to the board and must have the requisite knowledge of the relevant laws.
- In the event of **fundamental transactions**, including mergers and acquisitions, only non-interested directors may participate in the process.
- There is a **general moratorium on legal proceedings** against a company that is in business rescue mode.
- Application may be made by a number of role players, including a union, to have a director declared **delinquent or under probation**.
- The board of directors should consider **alternative dispute resolution**.
- **Penalties** for contravening some of the provisions of the Act could result in imprisonment of 12 years.
- Provision is also made for **administrative fines** which could in certain instances be a substantial amount.

- In terms of the **civil action** provision, any person who contravenes any provision of this Act will be liable to any other person who has suffered any damages as a result of such contravention.

The **regulations** enhance the content of the Act and address issues such as the identity of “prescribed officers” of a company, which companies, in addition to public and state owned companies, have to audit their annual financial statements and a host of additional items.

### **3. CONCLUSION**

A number of the provisions of the Act have been widely criticised and the implications and effect of these and other provisions will only become evident over time. As indicated above, companies have a 2 year period to “get their house in order”. However, all companies will be well advised to carefully consider the relevant provisions of the Act and to align internal documents, processes and procedures with the Act rather sooner than later to avoid unnecessary frustrations, uncertainty and potential disputes.

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