

# COMPANIES ACT, 71 OF 2008

## CLASSIFICATION OF COMPANIES

Part B of Chapter 1 of the Companies Act of 2008 (the "Act") regulates the categories of companies.

While the essential nature of a company will not change, the Act introduces a new classification of companies. The Act also makes a distinction between profit and non-profit companies.

The Act determines in section 8 that there are 2 (two) types of companies, namely profit companies or non-profit companies.

A pre-existing company whose object is, amongst others, to make a profit, will be regarded as a "profit company" and must be classified as one of the following companies:

- a state-owned company "SOC Ltd";
- a private company "(Pty) Ltd";
- a personal liability company "Inc"; or
- a public company "Ltd".

### **What you should do:**

*Classify the company as a state-owned company, a private company, a personal liability company, a public company or a non-profit company.*

*Review current articles of association (now called memorandum of incorporation) and replace with new document that is aligned with provisions of the Act.*

### **What you should know: In terms of section 1 of the New Act:**

*State-owned company means an enterprise that is registered in terms of the Act as a company, and either:*

- \* *is listed as a public entity in Schedule 2 or 3 of the Public Finance Management Act, Act 1 of 1999; or*
- \* *is owned by a municipality, as contemplated in the Local Government: Municipal Systems Act, Act 32 of 2000, and is otherwise similar to an enterprise referred to as above.*

*Private company means a profit company which is prohibited from offering securities to the public and which restricts the transferability of its shares in its Memorandum of Incorporation. It is also not a public, personal liability or state-owned company.*

*Personal liability company means a profit company that meets the criteria of a private company whose directors are jointly and severally liable for debts of the company in terms of its Memorandum of Incorporation.*

*Public company means a profit company that is not a state-owned company, a private company or a personal liability company.*

*Non-profit company means a company incorporated for a public benefit object, or an object relating to one or more cultural or social activities, or communal or group interests and where the income and property are not distributable to its incorporators, members, directors, officers or related persons except in regards to:*

- \* reasonable remuneration;*
- \* reimbursement for expenses incurred to advance the object of the company;*
- \* payment in terms of a bona fide agreement;*
- \* payment in respect of rights of a person, which rights are administered by the company; or*
- \* legal obligations of the company..*

The non-profit companies "NPC" refer to pre-existing Section 21 companies and Schedule 1 of the Act contains provisions relating to the object and policies, fundamental transactions, incorporators, members and directors of such companies. A non-profit company is not required in terms of item 4 of Schedule 1 of the Act to have members. In addition to the above, section 10 of the Act lists those provisions of the Act that will not be applicable to non-profit companies. In terms of Schedule 5 to the Act, the transitional arrangements, every pre-existing company incorporated in terms of section 21 of the previous Act is deemed to have amended its Memorandum of Incorporation (articles of association) with effect from 1 May 2011 to expressly state that it is a non-profit company, and to have changed its name (to include NPC) in so far as required to comply with the criteria for company names.

In terms of section 9 of the Act, a state-owned entity has to apply the provisions applicable to public companies unless such entity has been granted exemption from one or more of the applicable provisions by the Minister on the grounds that such provisions overlap or duplicate an

applicable regulatory scheme established in terms of any other national legislation.

When reading the Act it is important to pay careful attention to whether the relevant provision refers to a profit company, a public company or a private company. In instances where the provision refers to "profit" companies, this will include all four categories of profit companies as listed above.

**What you should know:**

- A public company that has a restriction on the transferability of its shares no longer meets the definition of a public company and must therefore convert to a private company.

**NEED ASSISTANCE WITH THE IMPLICATIONS OF THIS ACT?**

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