SOME BACKGROUND TO THE CIPC COMPLIANCE FORM

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1 INTRODUCTION

With the introduction of the new compliance procedures by the CIPC it is now a pre-requisite for directors, managers of companies, company secretaries and company secretarial practitioners to have a really good understanding of the background to the compliance required. The compliance form that one has to complete on the CIPC website is really only the tip of the iceberg. The law sections supplied by the CIPC are not compliance steps but rather sections of law that refer to other sections not even supplied on the list. A good background knowledge of company law is required to actually complete the form.

It is certainly not good enough to tick an answer without in fact doing an audit of the secretarial transactions for the previous **calendar year** as specified by the CIPC making sure you understand the transactions but also having a good understanding of the laws behind the questions.

To this end I have published this set of notes which will help you understand some of the background to company law that is required for completion of the compliance form. We cover many of the necessary sections of company law but not all of them and not in to much detail.

A very important point to know is that you as the Company Secretarial Practitioner should know exactly what has transpired because you should have done the work. You cannot rely on your client to know how to answer or even understand the law.

Some very important logic in regard to the preparation of the CIPC compliance form is that if you are running an electronic company secretarial system it will be necessary to go through the transactions in the last calendar year and see if the company complies. With Sky Sec our system will find all the transactions conducted during the last calendar year and determine some of the answers based on the information in your system.

2 SUMMARY OF COMPLIANCE FORM

2.1 SECTION 4 SOLVENCY AND LIQUIDITY TEST.

Defines the **solvency and liquidity test** in some detail. The solvency and liquidity test must be carried out when one of the following distributions have occurred. In order to understand these sections you will need to understand the sections below in detail.

1. S46 distributions of any nature including dividends
2. S 44 financial assistance for shares
3. S 45 financial assistance to directors and group companies
4. S 47 capitalization of shares with a cash alternative seven
5. S 48 buyback of shares
6. S113 amalgamations and mergers

2.2 SECTION 15 MEMORANDUM OF INCORPORATION SHAREHOLDERS AGREEMENTS RULES

Deals with the MOI, shareholders agreement and rules. It's important that shareholders agreements have been updated to comply with the new act and if there are rules that they have been properly published. Even if the company has an old MOI which was produced under the old act, the MOI is still valid.

If the old MOI is in place then there are two clauses that must be looked at and changed, the audit which still has to be done and the holding of an AGM which still has to be held.

2.3 SECTION 26 ACCESS TO COMPANY RECORDS BY SHAREHOLDERS AND OUTSIDERS

Deals with the availability of records for inspection. Shareholders (someone who has a beneficial interest in shares) are entitled to request and view the following documents;

MOI, Shareholders minutes and communications; Financial Statements; Directors Register

Any other person is entitled to view and make copies of the share register. If the company is on an electronic secretarial system and can produce these reports on demand then this is fine and can be answered as Yes.

2.4 SECTION 27 CHANGE IN THE COMPANY YEAR END

Defines the rules for changes to year end. The year-end may be changed by the directors prior to a year end but not after and may not result in the year being longer than 15 months from the preceding year end.

If no change is made then mark as Yes. As a rule, this will always be Yes.

2.5 SECTION 28 ACCOUNTING RECORDS

Accounting records must be kept in the prescribed form and standards and be accessible easily from the registered office. The accountant should advise on this.

2.6 SECTION 29 FINANCIAL STATEMENTS

If the company provides any Financial Statements they must be fairly presented and must not be false or misleading. There must be a prominent statement as to how the accounts were prepared. i.e. audited or not, financial reviewed etc. Accountants to advise.

2.7 SECTION 30 ANNUAL FINANCIAL STATEMENTS

Annual Financial Statements must be prepared for all companies within six months of the year end. Also deals with the requirement of the financials to be audited and if an AGM is to be held in terms of the Act or MOI. Owing to current workloads many companies may not be able to comply.

2.8 SECTION 32 USE OF COMPANY NAME AND REGISTRATION NUMBER

A company must use its properly registered name in conformity with the registration certificate as issued by the CIPC. In no circumstances must the name be used to create a false impression and must appear on all company notices and documentation.

2.9 SECTION 33 ANNUAL RETURN

Every company and external company must file an annual return within the prescribed period after the end of the anniversary of the date of its incorporation, within 30 days of this date. Included in that return must be Annual Financial Statements if the company is audited and any other prescribed information. If the company is not audited then the Financial Accounting Supplement must be filed.

2.10 SECTION 44 FINANCIAL ASSISTANCE FOR THE ACQUISITION OF SHARES IN THE COMPANY

Subject to the MOI financial assistance for shares must be covered by a shareholder's resolution within the last two years, which must be for a specific purpose or within category as specified. The solvency and liquidity test must be carried out by the directors and the provision of the financial assistance should be fair and reasonable to the company.

2.11 SECTION 45 LOANS OR OTHER FINANCIAL ASSISTANCE TO DIRECTORS

Subject to the MOI financial assistance to a director or prescribed officer must be covered by a shareholder's resolution within the last two years, which must be for a specific purpose or within a category specified. The solvency and liquidity test must be carried out by the directors and the provision of the financial assistance should be fair and reasonable to the company. There are other requirements if the loan is 10% of 1% of the company's net worth.

2.12 SECTION 50 SECURITIES REGISTER OF A COMPANY

The securities register must be kept in the prescribed form and must have all the details as specified in this section as well as the details contained in regulation 32.

2.13 SECTION 61 SHAREHOLDERS MEETING

Unless a company is public or an audit is done an annual general meeting does not need to be held. Direction must be taken from the companies MOI. A shareholders meeting can be called by the directors or any two shareholders having 10% of the shares. It is important to have proper compliance for a shareholders meeting. Where there is a special resolution there will be a shareholders meeting and the answer to the question is Yes.

2.14 SECTION 66 APPOINTMENT OF BOARD OF DIRECTORS AND PRESCRIBED OFFICERS

Direction must be taken from the MOI and the companies act in in regard to appointment of directors, and the correct number of directors must have been appointed.

2.15 SECTION 69 INELEGIBILITY AND DISQUALIFICATION OF PERSONS TO BE DIRECTOR OR PRESCRIBED OFFICER

Make sure that all directors, alternative directors and prescribed officers are not disqualified or not in ineligible and are not in probation. As a general rule this will be N/A.

2.16 SECTION 70 VACANCIES ON THE BOARD

Where the MOI has fixed term directors appointments and a director has vacated his/her office and the number of directors falls below the minimum number specified either in the MOI or in the rules, has the company made an additional appointment to cover the vacancy.

2.17 SECTION 71 REMOVAL OF DIRECTORS

Where there has been a removal of a director either by directors' resolution or a shareholder's resolution or by someone named in the MOI have all the requirements being complied with. It is important to note new guides on the CIPC website.

2.18 SECTION 86 MANDATORY APPOINTMENT OF COMPANY SECRETARY

A Public company or State-owned company requires the appointment of a company secretary with the requisite knowledge in compliance, company law and governance. A private company may elect to have a company secretary.

2.19 SECTION 90 APPOINTMENT OF AUDITOR

A public company, a State-owned company, a private company that has the specified the requirement for an audit in the MOI or has the required public interest score appointed a qualified registered auditor to the company.

2.19 SECTION 92 ROTATION OF AUDITORS

The same individual or designated firm may not serve the company for more than five consecutive years.

2.20 SECTION 94 AUDIT COMMITTEES

Has a Public company or State-Owned company or private company required by its MOI appointed an audit committee in terms of this section.

2.21 REGULATION 21 REGISTERED OFFICE

Has this CIPC been notified of any changes in the registered office?

2.22 REGULATION 43 SOCIAL AND ETHICS COMMITTEE

Has a social and ethics committee been appointed in compliance with this regulation to a listed company, state-owned company or other company with a PI score in excess of 500 for any of the 2 preceding 5 years, and such company is not exempt from the requirements of this regulation?

2.23 SCHEDULE 1 PROVISIONS CONCERNING NPC

Does the NPC comply with the requirements of this schedule in regard to its objects and policies, its fundamental transactions, its incorporations, members and directors?

3 CONSTITUTIONAL DOCUMENTS OF A COMPANY

3.1 INTRODUCTION

The constitutional documents are fundamental to the running of a company. It is really important all management and officers of a company understand exactly what these documents govern and how they can be changed.

The question on the compliance form that this section relates to is as follows;

Did the company comply with Section 15 during the previous calendar year?

Section 15 of the act deals with the various constitutional documents of the company which are detailed below;

- ***MEMORANDUM OF INCORPORATION OR MOI***
- ***RULES***
- ***SHAREHOLDERS AGREEMENT***

It is important to understand what each document does and how it affects the management of the company and how these documents are changed.

4 MEMORANDUM OF INCORPORATION

Going back in time to the old act it was not necessary for all companies to have all new MOI's under the new act in place by the 1st May 2013 (the new act gave a transitional period of two years). What in fact happened is that many companies neglected changing the MOI in terms of the new act. We therefore need to understand the definition of the MOI.

4.1 DEFINITION OF THE MOI

The definition of the MOI says that the MOI sets out the ***rights, duties and responsibilities*** of the shareholders, directors and others within and in relation to a company. This applies to any company that was incorporated under the New Act and for any ***pre-existing company*** i.e. a company that existed prior to the effective date of the new act 1 May 2011.

This means that the current Memorandum of Incorporation and Articles of Association of a pre-existing company, a company formed under the old act is in fact a MOI as defined in the New Act. You might say so what, why do we need to know this? Unfortunately, there are many misconceptions regarding the MOI of a pre-existing company. One of the main issues being in regard to the audit – where an old MOI was in place during the transitional period of two

years an audit did not need to be performed, but once the transitional period was over the new act kicked in and the new rules applied and an audit had to be performed.

Therefore, if a company that was formed prior to the advent of the new act and has not changed its MOI it would still need to do an audit as well as hold an AGM. If the MOI has been changed to what reflects in the legislation under the new act then the audit can be done away with and where there is no audit it is not necessary to have an AGM.

3 rules

OLD MOI	Audit Required AGM Required	Section 90 Section 61	Yes Yes
NEW MOI	May Not Require An Audit And Therefore No AGM	Section 90 Section 61	N/A N/A

There are a number of issues here that relate to the compliance form.

If the company has either a new memorandum of incorporation or an old one it definitely complies with the rule did you comply with section 15 in the last calendar year quote.

However, if there is an old MOI then the company has to comply with the audit requirement as well as the AGM and provided both of these items are carried out the answer to the question is yes.

4.2 DOCTRINE OF CONSTRUCTIVE NOTICE

The difference between the old Companies Act and the new Companies Act is that in terms of the old Companies Act is that the ***doctrine of constructive notice*** applied to the MOI and that all parties dealing with the company were deemed to know what the contents of the MOI were as there was no reason why anyone dealing with the company did not have access to the MOI at the CIPC.

Under the New Act this has changed in that the Doctrine of Constructive Notice does not apply to the MOI anymore. This means that parties dealing with the company do not need to have knowledge of the contents of the MOI.

The Doctrine of Construction now does however apply where certain conditions are ***Ring Fenced*** or **RF** conditions are placed in the MOI. These RF conditions are specified in terms of s15(2)(b) or (c) of the new act. In terms of s 11(3)(b) the name of the company must be followed by **RF**. This is notice to all parties dealing with the company that there are ring fencing conditions being conditions that they should be aware of before they do any business with the company.

4.3 CONFUSION IN THE RING FENCING PROVISIONS

If one reads the text of Section 15(2)(b) or (c) the ring-fencing provisions deals with the situations where in the MOI there is a term that ***impedes the amendment*** or there is a term that ***prohibits the amendment*** of a MOI. The act really does not deal with anything else in regard to ring fencing. The way it is worded has caused a lot of confusion as when to make use of RF. There also appears to be overuse of RF by many practices where it does not really apply as many practitioners don't really understand RF.

S 13(3) provides that if the company's MOI includes any provision contemplated in 15(2)(b) or (c) the notice of incorporation must include a prominent statement drawing attention to each such provision and its location in the MOI. It is necessary to advise the CIPC as to what the RF conditions are. This is done by Special Resolution and by completing form CoR 15.2 and CoR 15.2 Annexure A.

In reading the text books and the Act it appears that the ring-fence provision really was for any kind of restriction placed on the amendment in the terms of the MOI as well as any kind of prohibition, however in practice this seems to have become a lot more.

Carl Steyn in the ***New Companies Act Unlocked*** talks about the fact that these ring-fence conditions were used as special purpose vehicles in BEE transactions. This could be used in the case where the ***special purpose vehicle*** could be prevented from paying a dividend until the loan or the financing, they received to acquire the stake in a company was repaid. By

making this an RF term in the MOI the financiers could protect their investment by making sure that the RF article cannot be changed and making sure that the directors can't declare dividends before the loans are repaid.

There is also no definition of the words ring-fencing, which appear on form CoR 15.2A. Ring Fencing is not mentioned in the act.

To this end the CIPC was asked to put out a ***non-binding opinion*** in terms of section 188(b) of the Companies Act to actually deal with where the term "RF" should be used as there is quite a lot of uncertainty in regard to its usage. In fact, the CIPC issued a further guide a practice notes as I think they got the **non-binding opinion** wrong which resulted in more **RF** companies being formed causing much confusion and unnecessary work.

4.4 EVENTS LIKELY TO ARISE IN PRACTICE

As one can see from the ***non-binding opinion*** the scope of ring-fencing has widened to include virtually any kind of disclosure that should be made to third parties, for example let us say that in order for a company to do a transaction of say over R1 million rand and the MOI says that in order for this transaction to be approved it has to be approved by ***all*** the directors of the company. As this is a term in the MOI that may require disclosure to third parties the term RF should be behind the name. If a transaction is done on this basis and only one director signs the resolution and not all the directors, then the third party dealing with the company cannot hold the company bound to the contract because the authority for the transaction is not correct. The courts will need to decide! The question that arises here is does a company need to involve outsiders in corporate governance issues in a company as it could become a nightmare when things go wrong?

Another example is if the company is prohibited from entering into any transaction with a software company and this is entrenched in the MOI then the third party cannot get out of this contract if there is no RF behind the name. If there is an RF the company may be restrained from performing under the contract, for instance by its shareholders, but the contract is not void, the shareholders may have a claim for damages against the directors. In this instance the third party would have deemed knowledge of the MOI and would not be in a position to claim for damages.

The RF provisions create complexity in the law and may cause litigation where parties believe they can use RF conditions to their advantage!

For the purpose of convenience, I have quoted the important points from the practice note on RF below dated Nov 2012!

4. It is against this background that that it must be considered whether the requirement to use (RF) in the company name is applicable or not in any particular case. In principle, ***if a limitation could have any effect on third parties***, it would be advisable to use (RF) in the name. If on the other hand**, it is of no consequence to third parties** there would also be no need to warn them.

5. Inconsiderate use of the expression "RF" in the name of a company could lead to unnecessary confusion and in the circumstances, it is submitted that the expression "(RF)" be used only in cases where it is evident that —

5.1 the purpose or objectives of the company are restricted or limited in the MoI of the company;

5.2 the powers of the company are restricted or limited in its MoI;

5.3 any other pertinent restricting condition is contained in the MoI of the company;

5.4 any requirement in addition to those set out in section 16, for the amendment of any of the abovementioned restrictions or limitations is contained in the MoI; or

5.5 the MoI of a company contains a prohibition on the amendment of any particular provision of the MoI.

6. The CIPC is further of the view that if the Memorandum of Incorporation contains a provision —

6.1 setting higher standards or more onerous requirements under section 15 (2) (a)

(iii) than would otherwise apply to the company in terms of an unalterable provision of the Act; or

6.2 requiring a special resolution to approve any matter not listed in section 65 (11);such a provision in itself is not a restriction contemplated in section 11 (3) (b) as it does not limit the powers or capacity of the company but rather prescribes a different procedure to perform the activity concerned.

4.5 SHORT FORM MOI

There were quite a few problems with the original short form MOI released with the ACT. Despite the inherent problems of the short form MOI and the fact that it has been widely used there was never a need to panic. Many parts of the short form might be quite adequate especially where the shareholders and directors are common. I will deal with the inherent problems below as there may still be many of these old short forms in circulation. If in your firm, you have any of these original inadequate short form MOI's it would be a good idea to fix them by doing a Special Resolution!

The issue about supplying a short form MOI is that it might be absolutely perfect right now for a smaller business's early requirements, but what happens when down the line the business

grows and more shareholders get involved because the company needs capital, will it then be suitable at that point in time. Based on past experience of the old act one never looked at Table B, we just left it as it seemed to be fine because as a rule everyone knew exactly what it contained and they were mostly all the same. In a situation where there was a big share transaction lawyers normally prepared a Shareholder's Agreement to cover the inadequacies of Table B.

Another important aspect of changing the MOI is what do we do about existing Shareholders Agreements as they don't seem to be as important as they used to be? All Shareholder's Agreements prior to April 2011 need to be checked for validity and that they conform to the requirements of the new act. It is suggested that you involve the company's legal advisor to make sure that the original shareholders agreements are up to date and meet with the requirements of the shareholders, that's if they want them or need them.

There is a problem when new shareholders are introduced in that a shareholder's agreement does not apply to the new shareholder unless the new shareholder actual signs the agreement together with everyone else. Each time there is a transaction there needs to be a new shareholders agreement which everyone has to sign.

4.6 SHORT FORM MOI DOES NOT DEAL WITH PAR VALUE SHARES

The short form MOI as published on the CIPC website does not indicate that shares are ***par value shares*** as it only indicates ***no par value shares***. The problem here is that many firms wanting to upgrade the MOI submitted the standard short form without taking into consideration the conversion procedures in regard to Regulation 31. This meant that the MOI which mentioned ***no par value shares*** never went through a conversion of shares in terms of Regulation 31. The short Form MOI as it stands is really aimed at the formation of new companies and should not be used for pre-existing companies with par value shares. In this case, it would be necessary to make a modification of the MOI in regard to its shares.

Regulation 31 sets out the procedure to convert from ***Par Value*** to ***No Par Value Shares***. All pre-existing companies who have Par Value Shares who filed a short form MOI did not realise that their shares have been listed incorrectly as ***No Par Value.*** In order to rectify this, it is recommended that one just changes the respective clause to deal with par value shares rather than going through the whole conversion of the share capital class in terms of Regulation 31 as a much easier step. Both steps involve a special resolution, but by keeping the par value shares you only have to file the special resolution with the CIPC and not SARS. Only if you increase the authorised shares that you need to run the conversion procedure in terms of Regulation 31.

4.7 WHO HAS THE POWER TO ISSUE SHARES?

Another potential area for conflict in the future is the fact that the issue of shares is in the hands of the single shareholder/director or even in a company where the directors and the shareholders are the same. It may very well be a problem later on down the line where the company grows and where the shareholders are not fully represented on the board and the board has the power to issue shares. So insofar as the Short Form is concerned, I think that this clause is okay. In terms of the Long Form MOI (for a larger company) it may be that it needs to be strengthened. Perhaps it is a good idea to insert a clause to the effect that where the directors and the shareholders do not align then the power to issue shares ***must be with the shareholders by special resolution***. This special resolution does not have to be filed at the CIPC. S41 of the act deals with shareholder approval to issue shares where they are ***issued to a director***, a ***related or interrelated person*** to the company or a nominee of these. A special resolution is also required where the issue is more than ***30% of the company***. Where shares are issued in proportion to existing holdings then a special resolution is not necessary as nothing changes.

4.8 TRANSFERABILITY AND PRE-EMPTION RIGHTS

It should be remembered that the pre-emptive rights in the Companies Act 2008 in itself only deals with the ***issue or allotment of shares***, it does not deal with the ***transferability of shares*** i.e. when one shareholder transfers shares to another shareholder or to an outsider. This is something that needs to be addressed urgently. S39(2) deals with pre-emption rights but only for the ***subscription or allotment*** of shares and basically says that if a private company proposes to issue any of the shares of that private company, each shareholder has a right to take them up before any outsider, provided they take them up in a reasonable time period. This basically means that the voting rights before the subscription of the new shares must be the same as the voting rights after the subscription of the new shares, unless a shareholder declines to take up their share of what is offered.

This is all very well, but what happens where there are a number of shareholders in a private company and things turn a bit sour and a particular shareholder who may hold say 25 per cent or 30 per cent wishes to exit and wants to sell shares. Owing to the fact that it is a private company this becomes a very difficult situation and the way the MOI is configured now and the way the Act is configured it is probably possible for the shareholder to go and offer his shares to any outsider or third party who may in fact be a competitor and it may in fact not be in the best interest of the company concerned, unless there is some kind of restriction of the transferability clause.

The latest short form now has a clause 2.1 (2) (e) which says that a transfer needs to be approved by the company. The original one did not.

If one looks at the standard Articles of Incorporation used in the old act, table B together with various amendments that lawyers made in regard to the transferability of the shares where they put in a number of articles preventing a shareholder from basically selling the shares to a third party where the Directors do not approve.

5 RULES OF THE COMPANY

The **Rules** of a company is a new concept that comes out of the United States or Canada. Rules are very similar to bi-laws in a City Council. They are an addition to the constitution of the city council and would probably deal more with operational details not contained in the constitution of the city council.

The rules of a company are in fact an extension of the MOI and are designed to govern the internal affairs of the company. The problem with rules are that there are no examples and no definition of what should be included in the rules. The rules may deal with any corporate governance issues not contained in the act or in the MOI. The rules cannot be in conflict with the act or the MOI.

The rules and the MOI are in fact binding on the following in terms of S15(6);

- between the company and each shareholder
- between or among the shareholders
- between the company and each director or prescribed officer of the company in exercise of their functions within the company
- any other person serving the company as a member of a board committee in exercise of their respective functions of the board within the company.

The last two are new and overrides the long-established principle that the company's constitution is binding on a company and its shareholders only and only in the capacity of shareholders not directors. Owing to this change each party can enforce the MOI or the rules against one another in any lawful manner, this could be by way of an interdict or a damage claim arising from a breach.

The rules create a contract between the abovementioned parties in the abovementioned capacities. Please note that if the director or shareholder act in another capacity to the company then the rules can't be applied.

The rules can be changed or created quite easily without changing the MOI. Remember the rules are ***over and above***, or one can say an ***extension of the MOI***. It should be noted that the ***MOI will always take precedence*** over the rules. Where there are rules inconsistent with the MOI or the Act, these rules will be void to the extent of the inconsistency. The rules are still subject to anti-voidance sections of the Act. Rules cannot be used to alter the ***unalterable provisions*** of the act. One can make unalterable provisions stronger by inserting clauses in the MOI.

The advantage of having rules is that the directors can in fact ***compile*** and ***publish*** the rules and once the rules have been published, they are binding on the company. Regulation 16(1) provides that any rules of a company must be filed on Form Cor 16.1 within 10 business days after being published by the company.

See s15(4)(b), the board may change or append rules in any manner. It is important to know that the rules must be ***ratified*** at the next available shareholders meeting by way of an ordinary resolution. After the rules have been ratified the necessary form has to be filed with the CIPC. Regulation 16.2 is to indicate the rules have been ratified or rejected. It is not necessary to call a shareholders meeting to specifically ratify the rules, the ratification can wait until the next shareholders meeting.

Before the rules have been ratified, they are nevertheless still binding even though they are at an interim stage. What happens when the rules fail to be ratified (I.e. the shareholders vote against the rules or a particular rule) at the next general meeting? The position in this case is that even though they were in an interim stage everyone can rely on them to that point as everyone is bound by them. Once a rule has failed the ratification vote they are therefore no longer binding from that point in time. Once a rule has failed ratification it cannot be reintroduced by the directors for a further 12 months unless approved in advance by an ordinary shareholders resolution.

The advantage of compiling rules is that the directors can do it very easily without going to shareholders and the rules can be binding whilst waiting for ratification. In smaller companies it could be that ratification takes a long time because there are no shareholders meeting to ratify the rules.

Rules would deal with matters of meetings, the maximum number of Directors and potentially anything in relation to the corporate governance not in conflict with the MOI or the Act.

Some examples could be;

- Authority level of chairman of the board and frequency of director's meetings.

- Financial and marketing strategy
- Succession planning

6 SHAREHOLDERS AGREEMENT

6.1 GENERAL POINTS

The New Company's Act recognises a shareholder's agreement. We would need to look at s 15(7) which basically says that shareholders may enter into agreement with one another. The shareholders agreement may cover any matters ***"relating to the company"***, however this is a little vague and can cover a very wide area.

It is important to note that the ***company is not party to a shareholder's agreement*** in terms of s 15(7), but there is nothing to prevent the company from being a party to the agreement,

There are some **advantages** to shareholder's agreements and these are that they are ***private***, therefore the public cannot inspect the contents of a shareholder's agreement, and therefore they are secret.

The shareholders agreement is also binding in terms of the normal law of contract. S 15(6) governs only the legal status of the MOI and the rules and this does not extend to the shareholders agreement.

There are also some **disadvantages**; those shareholders who are party to the agreement are bound by the terms. In many situations new shareholders coming into the company who have not signed to the effect that they are bound by the agreement are not bound. There is no facility in the act to alter a shareholder's agreement; the individual parties have got to all agree with any change to the shareholders agreement. In other words, if a shareholder's agreement is amended, all the parties, that is all the shareholders have to agree with it if they are to be bound. Could some rules be created forcing all shareholders to sign the shareholders agreement?

A shareholder's agreement is useful in practice but must be consistent with the companies act and the MOI. Where there are provisions in the shareholders' agreement which are not consistent with the MOI or with the act, these are void and therefor unenforceable. It is also important to understand that the ***Act and the MOI takes preference over the shareholder's agreement.***

In the past, there were clauses in the shareholder's agreement that made the shareholders ***agreement prevail in the event of an inconsistency***. This does not apply anymore. There is a major difference between a shareholder's agreement under the old act and that of the new act. Under the old act the shareholders agreement added to the various provisions of the articles, in other words the terms of the shareholders agreements could enhance what the articles said.

The company was also a party to the shareholder agreement which could contain provisions contrary to the articles and these contrary provisions would prevail.

Under the new act there is a policy shift in the way shareholders agreements work which could have an adverse effect on the impact and value of a shareholder's agreement.

In the past shareholder's agreements dealt with minority protection and various voting rights were built into shareholder's agreement but this no longer applies.

S 65(11) defines all the special resolutions that a company has to pass but the MOI can add other situations where a special resolution is required.

A shareholder's agreement ***cannot alter the effect of the alterable provisions*** in a MOI. Where an alterable provision has been changed by a MOI the shareholder's agreement must be consistent with those provisions. This in fact makes the constitutional documents more complex.

The anti-avoidance provisions of the act may have an effect on shareholders' agreements. The shareholders agreement cannot defeat or reduce the effect of a prohibition by an unalterable provision of the act.

Voting agreements may also be supported if they are not used to change the effect of alterable or any unalterable provisions but may very well prevail in most instances.

6.2 TRANSITIONAL ARRANGEMENTS

The transitional arrangements are set out in s 15(7) and basically for 2 years from inception of the act the shareholders agreements will take preference over the act even if there are provisions that are inconsistent with the act. After the two years the inconsistent provisions of a shareholder's agreement will be void.

6.3 POINTS TO BE TAKEN INTO ACCOUNT WHEN DRAFTING SHAREHOLDERS AGREEMENTS

Carl Stein in his book ***The New Companies Act Unlocked*** talks about what the drafter of shareholder's agreements should consider on page 76. It's important to go through these points some of which are ***S46 - distributions***, ***anti-dilution clauses*** and ***pre-emptive rights***. Many corporate governance issues that used to be in the shareholders agreement must now be handled in the MOI.

7 SOLVENCY AND LIQUIDITY

7.1 INTRODUCTION

Whenever a company does a distribution it is actually critical for the company to comply with the solvency and liquidity laws as this is a high-risk area for the directors and the company. If the correct procedures are not carried out there are going to be numerous claims and the directors can in fact be sued personally. This could very well be an issue for the accounting firm that does the company secretarial work if the directors do not comply with the legislation. The company may not even know about the legislation and make a distribution without the proper procedures, which could make them personally liable if something goes wrong.

Where a distribution is carried out the directors must perform a ***solvency and liquidity test*** and where the director's lack the knowledge of what is required the accounting firm must be in a position to guide them or undertake the work on their behalf.

The problem in a smaller company, distributions are made without the management even realising that there is a distribution causing a non-compliance issue. Something that comes up quite a lot is the fact that directors make drawings in excess of their salaries and in fact this would be a distribution as it creates a director's debit loan account.

Another issue that I come across quite often is that where shareholder is bought out by another shareholder and the funds of the company are used, the directors are not sure if it's share transfer or if it's a director's loan account. Accounting firms need to deal with this and ensure that their clients before they do any of these kinds of transactions are 0up to date on the legal compliance issues.

7.2 THE SOLVENCY AND LIQUIDITY TEST

4. Solvency and liquidity test. —(1) For any purpose of this Act, a company satisfies the solvency and liquidity test at a particular time if, considering all reasonably foreseeable financial circumstances of company at that time—

(a) the assets of the company, as fairly valued, equal or exceed the liabilities of the company, as fairly valued; and

[Para. (*a*) substituted by s. 2 (*a*) of Act No. 3 of 2011.]

(b) it appears that the company will be able to pay its debts as they become due in the ordinary course of business for a period of—

(i) 12 months after the date on which the test is considered; or

(ii) in the case of a distribution contemplated in paragraph (*a*) of the definition of "distribution" in section 1, 12 months following that distribution.

(2) For the purposes contemplated in subsection (1)—

(a) any financial information to be considered concerning the company must be based on—

(i) accounting records that satisfy the requirements of section 28; and

(ii) financial statements that satisfy the requirements of section 29;

(b) subject to paragraph (*c*), the board or any other person applying the solvency and liquidity test to a company—

(i) must consider a fair valuation of the company's assets and liabilities, including any reasonably foreseeable contingent assets and liabilities, irrespective of whether or not arising as a result of the proposed distribution, or otherwise; and

(ii) may consider any other valuation of the company's assets and liabilities that is reasonable in the circumstances; and

(c) unless the Memorandum of Incorporation of the company provides otherwise, when applying the test in respect of a distribution contemplated in paragraph (*a*) of the definition of "distribution" in section 1, a person is not to include as a liability any amount that would be required, if the company were to be liquidated at the time of the distribution, to satisfy the preferential rights upon liquidation of shareholders whose preferential rights upon liquidation are superior to the preferential rights upon liquidation of those receiving the distribution.

[Para. (*c*) substituted by s. 2 (*b*) of Act No. 3 of 2011.]

It should be noted that the solvency test is at a point in time, in fact just after the distribution is made, and the liquidity test must be completed for a period of 12 months following the distribution which is a prediction of the company's cash flows over the ensuing 12-month period. The 12-month period in Section 4(1)(b) is also new. It gives Directors more certainty when applying the solvency and the liquidity test. It is also designed to protect creditors and make sure that the company survives after the distribution. The Directors must make a prediction of the company's cash flow for the period of twelve months into the future. This predication can be based on trading conditions in previous years. As we know this is quite a complicated exercise and should be conducted properly with all the necessary accountant's skill. Accfin has a software program called ***Cash Flow Forecaster*** which will help with this exercise. https://www.accfinsoftware.com/cash-flow-forecaster.html

Section 4 (1) requires an arithmetical calculation. Section 4 (2) contains some vital rules as to the method of making this calculation. All financial information concerning the company

must be considered and must be based on the ***Accounting Records and Financial Statements***. In making this determination the Board must consider a fair valuation of the company's assets and liabilities including any reasonable foreseeable contingent assets and liabilities irrespective of whether or not arising as a result of the proposed distribution or otherwise and may consider any other valuation of the company's assets and liabilities that is reasonable in the circumstances. This gives the Board some degree of flexibility into determining the value of assets or liabilities.

This in fact ***creates a severe difficulty*** in that none of the financial records are forward looking but are based on the historical records of the company. In order to do this properly it's just not good enough to look at the historical books. The directors must look at the future budgets and cash flows and funding plans that reflect the future forecasts of the business. The directors must view very carefully their capital expenditure budgets required. If this is not done then how can the liquidity test be carried out properly?

At this stage there are no standards to govern how these tests should be done, therefor the board would need to apply a high degree of skill in carrying out these tests and in the situation of private companies the directors will be leaning on their accounting firm's skill if they even realise what the risks are. Surely this is an opportunity for the accounting firm but could also be a huge risk.

In order to safeguard the creditors of the company before the company can make any distribution as defined, the board of directors must apply the ***solvency and the liquidity test*** and ***acknowledge by way of Directors Resolution*** that it has ***reasonably concluded*** that the company will satisfy the solvency and liquidity test immediately after the distribution is made. These two aspects of the solvency and liquidity tests and the acknowledgement must be met whether a distribution is pursuant to a ***board resolution*** or an ***existing obligation*** or ***a court order***.

The solvency and liquidity test are very important and there are seven instances where the directors have to ensure that the solvency and liquidity tests are carried out: -

- S44 – financial assistance and - ***this is also a compliance question***
- S45 – loan to directors, prescribed officers or related and inter-related companies ***this is also a compliance question***
- S47 - capitalisation shares with a cash alternative
- S48 – buyback of shares
- S113 – amalgamation and mergers
- foreign transfers to register a company in South Africa

- distributions mostly dividends

In terms of the solvency test the **assets must be fairly valued** and the assets must be valued at a **specific point in time just** after the distribution has taken place. This means that the assets can be revalued over and above what the balance sheet says. Properties held can be looked at, at their current market value and intangible assets undervalued on the balance sheet can be brought in at their fair value.

Failure by Director to comply with these tests could render the director personally liable under s 77 (2) for any loss sustained by the company and could render that director liable to be placed under probation.

The board must ***acknowledge*** that it has applied the solvency and liquidity test and must have reasonably concluded that the company will satisfy it. They acknowledge this by passing a director's resolution to this effect.

The liquidity test is met *"**if it reasonably appears that the company will satisfy the solvency and liquidity test, and the board has acknowledged that it had applied the solvency and liquidity test"***

7.3 120 DAY RULE

There is a time limit for the solvency and distribution test to take place.

S 46

(3) If the distribution contemplated in a particular board resolution, court order or existing legal obligation has not been completed within 120 business days after the board made the acknowledgement required by subsection (1) (*c*), or after a fresh acknowledgement being made in terms of this subsection, as the case may be—

> (*a*) the board must reconsider the solvency and liquidity test with respect to the remaining distribution to be made pursuant to the original resolution, order or obligation; and
>
> (*b*) despite any law, order or agreement to the contrary, the company must not proceed with or continue with any such distribution unless the board adopts a further resolution as contemplated in subsection (1) (*c*).

In the event that the full distribution does not take place within 120 days the board of directors have to carry out a solvency and liquidity test again as well as acknowledge that they can proceed and complete a distribution. In other words, if 120 days has expired and the distribution has not been completed in full then the test has to be completed again before the distribution can be continued.

Once the acknowledgement has taken place periodic testing must take place if the company intends proceeding with the distribution.

7.4 THE INCURRENCE OF A DEBT

If the distribution takes the form of a debt or other obligation the requirements of this section apply when the board takes the decision to take on the debt. The time when the solvency and the liquidity test is satisfied is generally immediately after completing the proposed distribution. However, there is an exception and this is in regard to the incurrence of a debt in which case the timing must be when the board resolves to incur the debt. The company must satisfy the test when the board resolution is done unless the board resolution provides otherwise.

S 46 (4) says;-

(4) If a distribution takes the form of the incurrence of a debt or other obligation by the company, as contemplated in paragraph (*b*) of the definition of "distribution" set out in section 1, the requirements of this section—

(*a*) apply at the time that the board resolves that the company may incur that debt or obligation; and

(*b*) do not apply to any subsequent action of the company in satisfaction of that debt or obligation, except to the extent that the resolution, or the terms and conditions of the debt or obligation, provide otherwise

8 BUYBACK OF SHARES

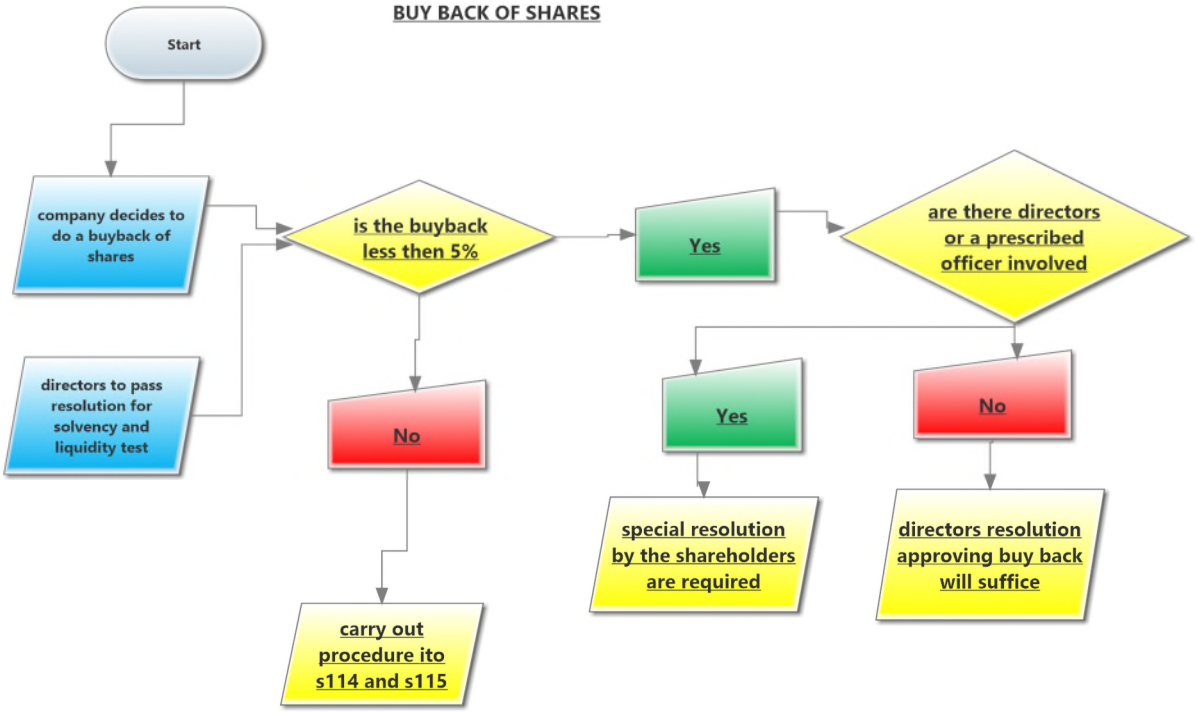
8.1 INTRODUCTION

Under the old Companies Act the buy-back procedure was quite a common procedure for companies to repay capital to their shareholders. Where the directors have made the decision that the company has excess cash and can pay it back to shareholders the obvious thing to do is to pay the capital back to shareholders by buying back shares instead of paying a dividend which is taxable. The buy back in South Africa was not always available under the old act and came about because of changes to the law.

The purpose of this section is to deal with the law and not to go through all the commercial reasons as to why a buyback procedure should be followed. There are in fact numerous commercial reasons as to why buybacks are carried out. Clearly there must be sound commercial reasons for a buy back! For a detailed discussion of the reasons and motivation please refer to Contemporary Company Law by Cassim on page 294. It is important that where a professional company secretary carries out this procedure on behalf of clients that there are sound reasons for doing so.

It is also very important to obtain the correct tax advice as it is so easy for some of the buyback to be viewed as a dividend by SARS.

8.2 DECISION CHART ON BUYBACK OF SHARES



8.3 SECTION 48

S 48 of the companies act deals with the buyback of shares.

1. S48 (1) states that this section does not apply to the situation where a shareholder ***makes a demand***, ***tendering of shares*** and payment by a company to a shareholder in terms of ***appraisal rights*** as set out in s164. Buybacks also do not apply where there is ***redemption by the company*** of any ***redeemable securities*** in accordance with the terms and conditions of those securities.

2. The board of directors may determine that a company may acquire a number of its own shares. The board of a subsidiary company may determine that it will acquire shares of its holding company, but this cannot be more than 10% in aggregate of the number of issued shares of any class of shares of a company and **no voting rights** may be attached to those shares once they are acquired.

   Shares may not be re-purchased by a company or the subsidiary of a holding company where after the transaction no shares in issue are left.

3. Any shares acquired by a company are subject to the requirements of Section 46 which deals with the insolvency and liquidity of the company.

4. S48 (8) (a) says that where a buy-back of shares are acquired from a ***director*** or a **prescribed officer** then such buy-back must be **approved by a special resolution**. Such special resolution does not have to be lodged at the CIPC.

5. In terms of s48 (8) (b) where the buyback of shares, if considered alone or together with a whole ***series of integrated transactions*** and if the total of the buyback is more than 5% of an issued share class then the buyback can only be done in terms of s114 and s115.

   This transaction then has the potential for making a private company **regulated** if certain conditions are met. Please refer to s118 (1) (c). If a buyback of more than 5% is in process and within the last 2 years an **outsider** (see definition of related and inter-related persons) has acquired at least 10% of the shares in the company, the company will then fall within the definition of a **regulated company** and a compliance certificate or exemption must be issued by the Take-over Regulation panel.

We will deal with some of the requirements of s114 below; the important thing to note is the decision that has to be made in regard to the buyback is totally in the hands of the directors unless the buy-back is more than 5% and provided that the buy-back is not from a Director or a Prescribed Officer. Where the buyback is more than 5% it falls within the ambit of s114.

Once s114 kicks in the buyback transaction becomes a ***Fundamental Transaction*** in that it is now a ***scheme of arrangement***. If the company is a private company and falls within the definition of being a ***Regulated Company*** then the Fundamental Transaction becomes an ***Affected Transaction.***

6. S48 is an unalterable provision and cannot be removed by a clause in the MOI, however the terms in the MOI can be strengthened to specify that for every buyback that takes place a special resolution is required. See s 15(2)(a)(iii) which says that the MOI may include –

   "any provision imposing on the company a higher standard, a greater restriction, longer period of time or any similarly more onerous requirement, than would otherwise apply to the company in terms of an unalterable provision of this Act;"

8.4 SOLVENCY AND LIQUIDITY –SECTION 46

A buyback falls within the definition of a distribution. It is not the purpose of this paper to deal with all the intricacies of a **distribution** but as a rule the distribution by a company must be authorised by the company's board of directors where the distribution is pursuant to an existing obligation of a company or to a Court Order.

S46 says a company must not make any proposed distribution unless the company satisfies the **solvency and liquidity test** immediately after completing the proposed distribution. If there is an agreement to buy back shares this is ***enforceable*** against the company. However, it is not enforceable if the company falls foul of the **solvency and liquidity test**. If the company alleges that it ***can't fulfill its obligations*** in terms of the agreement the company ***must apply to court*** to prove that it would be in breach of the solvency and liquidity test and if the court is satisfied that the company is in breach of this requirement then the court must make an order;

- That is just an equitable having regard to the financial circumstances of the company
- Ensures that the shareholders are paid at the earliest convenience making sure that the company satisfies its other financial obligations.

Where the company re-acquires shares, which are ***contrary to s48 and s46*** the company must apply to court for an order reversing the transaction. The transaction re- acquiring the shares from a shareholder must be reversed. The shares have to be re-issued and the shareholder has to pay the money back to the company.

If the distribution has not been completed within 120 business days after the board has made acknowledgement in terms of the solvency and liquidity the board has to reconsider the solvency and liquidity test with respect to the remaining distribution by once again passing the resolution and doing the solvency and liquidity test.

In the event that something goes wrong directors are liable as provided for in s77(3)(e)(vi)

8.5 WHERE THE BUY BACK IS MORE THAN 5% OF THE SHARE CAPITAL

Let us have a look at the requirements of s114 which deals with proposals for a **scheme of arrangement** and specifically includes as part of s114 (1) (e) a re-acquisition by the company of its own securities. If we look at ss4 this refers to the conditions as contained in s48 and applies to the situation where the buyback is less than 5% of the share capital.

When the acquisition of a company's own shares is more than 5% it then has to be approved in terms of s115 and s115 sets out the method required and in particular that a special resolution must be adopted. S115(1)(b)(iii) includes the implementation of a scheme of arrangement which as we have read in s114 would include the buy-back or re-acquisition of a company's shares.

Where there is a proposed scheme of arrangement and the company is a **regulated company** the scheme can only proceed if in terms s119 (4) (b) a compliance certificate has been issued or an exemption has been granted by the Take-over Regulation panel. In the situation where a private company does not fall within the definition of a regulated company then the compliance certificate or exemption need not be applied for. However, on a strict reading of s114 and s115 all the other terms need to be complied with as the act does not differentiate between large and small companies.

8.6 INDEPENDENT EXPERT

S114 (2) says the company must retain an **independent expert** who meets the following requirements to compile a report as required in ss 3, and basically says the qualified person must have the competence and necessary experience to understand the type of arrangement proposed, evaluate the consequences of the arrangement, and assess the effect of the arrangement on the value of the securities and on the rights and interest of a holder of any

securities or a creditor of a company and be able to express an opinion, exercise judgment and make decisions impartially.

The person that must be retained must not have any relationship with the company and must have integrity, impartiality of objectivity, cannot have a relationship with the company within the immediately preceding 2 years or be related to a person who had a relationship contemplated above.

The independent expert must prepare a report to the board and cause it to be distributed to all holders of the companies' securities concerning the proposed arrangement. The report must as a minimum state:

a. All prescribed information relevant to the value of securities effected by the proposed arrangement;
b. Identify every type and class and holder of the company securities affected by the proposed arrangement;
c. Describe the material affects that the proposed arrangement will have on the right and interest of the persons mentioned;
d. Evaluate any material adverse effects of the proposed arrangements against;
    (i) The compensation that any of those persons will receive in terms of the arrangements; and
    (ii) Any reasonable probable beneficial and significant effect of that arrangement of the business and prospects of the company.
e. State any material interest of any director of the company or trustees for security holders;
f. State the effect of the proposed arrangement on the interest and person contemplated in paragraph e; and
g. Include a copy of s115 and s116. These Sections must be included in the report that gets sent to shareholders.

8.7 CONCLUSION

The problem with the above is that all the compliance issues may easily fit into both a larger or smaller company except that I don't believe that a smaller company can afford to go the route of appointing an independent expert.

We need to ask the question what the position is with a company where there is one director and one shareholder and they decide to do a buy back. Is it then necessary for the company to retain this **independent expert** at a huge cost in order to comply with a section of the act that is not really applicable to a smaller company?

I would suggest that in a case like this the shareholders sign a resolution to the effect that it is not necessary to get an independent expert owing to the huge costs involved and as long as all the shareholders sign together with a waiver it should be sufficient. The problem with this is that after a distribution the company goes insolvent and creditors lose money then the directors could become liable.

Another issue is that if the private company is a ***regulated*** company then they have to make the application for a compliance certificate or an exemption from the Take-over Regulation Panel and it looks like if not regulated then on a strict reading of the act in terms of s114 they have to appoint the independent expert. Can the tribunal grant and exemption to the company?

9 S44 FINANCIAL ASSISTANCE TO ACQUIRE SHARES AND THE LENDING OF MONEY

9.1 SECTION 46 (1) (b) (c)

This section uses the words ***"it reasonably appears that the company will satisfy the solvency and liquidity tests"*** and the board has acknowledged that it has applied the test.

However, in regard to s 44 and s 45 different words are used and in both the instances of ss 44 and 45 the transaction must meet certain requirements one of which is ***"the board is satisfied that the company would be in compliance with the solvency and liquidity test."***

Does this mean that if the board is satisfied no matter how unreasonable they are in the way they apply the test or does it mean that if they are satisfied that the requirements for this section is met?

There appears to be no reason why there is this slight difference of wording which will cause quite a bit of inconsistency, the problem with these tests is that it is based on the predictions of the directors especially in regard to the solvency situation. The Act in itself does not really supply much help except in Section 4, the boards enquiry must be carried out from any financial information contained in accounting records and financial statements. The board must consider a fair valuation of the company's assets and liabilities including any ***reasonable foreseeable contingent assets and liabilities*** irrespective of whether or not arising as a result of the proposed distribution or otherwise. It may consider any other valuation of the company's assets and liabilities that is reasonable in the circumstances. In determining the company's assets and liabilities the board must take into account any reasonable foreseeable contingent assets and liabilities to give a true picture of the company's solvency and liquidity position.

If the company has property that is shown at cost, could the directors take into account market value? I think yes.

Contingent liability is one that will become due and payable on the happening of a particular event.

S 44 is as follows;-

44. Financial assistance for subscription of securities.—(1) In this section, "financial assistance" does not include lending money in the ordinary course of business by a company whose primary business is the lending of money.

(2) Except to the extent that the Memorandum of Incorporation of a company 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 of the company or a related or inter-related company, subject to subsections (3) and (4).

[Sub-s. (2) substituted by s. 30 (*a*) of Act No. 3 of 2011.]

(3) Despite any provision of a company's Memorandum of Incorporation to the contrary, the board may not authorise any financial assistance contemplated in subsection (2), unless—

(*a*) the particular provision of financial assistance is—

(i) pursuant to an employee share scheme that satisfies the requirements of section 97; or

(ii) pursuant to a special resolution of the shareholders, adopted within the previous two years, which approved such assistance either for the specific recipient, or generally for a category of potential recipients, and the specific recipient falls within that category; and

(*b*) the board is satisfied that—

(i) immediately after providing the financial assistance, the company would satisfy the solvency and liquidity test; and

(ii) the terms under which the financial assistance is proposed to be given are fair and reasonable to the company.

(4) In addition to satisfying the requirements of subsection (3), the board must ensure that any conditions or restrictions respecting the granting of financial assistance set out in the company's Memorandum of Incorporation have been satisfied.

(5) A decision by the board of a company to provide financial assistance contemplated in subsection (2), or an agreement with respect to the provision of any such assistance, is void to the extent that the provision of that assistance would be inconsistent with—

(*a*) this section; or

(*b*) a prohibition, condition or requirement contemplated in subsection (4).

(6) If a resolution or an agreement is void in terms of subsection (5) a director of a company is liable to the extent set out in section 77 (3) (*e*) (iv) if the director—

(*a*) was present at the meeting when the board approved the resolution or agreement, or participated in the making of such a decision in terms of section 74; and

(*b*) failed to vote against the resolution or agreement, despite knowing that the provision of financial assistance was inconsistent with this section or a prohibition, condition or requirement contemplated in subsection (4).

[Sub-s. (6) amended by s. 30 (*b*) of Act No. 3 of 2011.]

9.2 FINANCIAL ASSISTANCE TO ACQUIRE OWN SECURITIES OR THOSE OF A RELATED OR INTER-RELATED COMPANY

S 44(2) is stated for convenience

"Except to the extent that the memorandum of incorporation of a company provides otherwise, the board may authorize 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 interrelated company, or for the purpose of any securities of the company or a related or inter-related company, subject to subsection (3) or (4)".

Financial assistance is not defined except where s 44 says that financial assistance does not mean lending of any money by a company whose primary business is the lending of money. The word "securities" are widely defined in s 1 and includes shares, debt instruments as well as debentures.

S 44 (3) is an ***unalterable provision*** that has four requirements which must be met before a board can authorize financial assistance.

- *S 44 (3) (a) provides that despite anything in a company's MOI to the contrary the board may not authorize any financial assistance unless it is covered by a **special resolution** of the shareholders within the previous two years. This special resolution must be approved for a specific recipient or generally for a category of potential recipients and the specific recipient falls within that category. The special resolution is not required if the particular resolution is in terms of an employee's share scheme that satisfies the requirements of s97.*
- *The board may also not authorize any financial assistance unless immediately after providing the financial assistance the company would satisfy the **solvency and liquidity test**.*
- *The third requirement is that the board cannot authorize such financial assistance unless it is satisfied that the terms under which the financial assistance is proposed to be given is **fair and reasonable to the company**. The Board's decision cannot be challenged under the basis that the directors have not properly exercised their duties to the company and in no way would have prejudice creditors and shareholders.*
- *The board must also be satisfied that if there are any restricting conditions in the MOI that these conditions have been satisfied.*

If the directors do something wrong in terms of this section it is not a criminal offence but the directors could be held personally liable.

10 S45 - LOANS OR OTHER FINANCIAL ASSISTANCE TO DIRECTORS

10.1 INTRODUCTION

S 45 is the equivalent of S226 in the old Act and s 45(2) provides that except to the extent that the companies MOI provides otherwise and subject to s45(3) and s45(4) the board may also authorize the Board of companies direct or indirect financial assistance to

- a director or prescribed officer
- a director or prescribed officer of a company which is related or inter-related to the company
- a company or corporation who is related or inter-related to the company
- a member or corporation who is related or inter- related to the company
- a person who or which is related to the company or any of the above.

10.2 S 45

45. Loans or other financial assistance to directors. —(1) In this section, "financial assistance"—

(*a*) includes lending money, guaranteeing a loan or other obligation, and securing any debt or obligation; but

(*b*) does not include—

(i) lending money in the ordinary course of business by a company whose primary business is the lending of money;

(ii) an accountable advance to meet—

(*aa*) legal expenses in relation to a matter concerning the company; or
(*bb*) anticipated expenses to be incurred by the person on behalf of the company; or

(iii) an amount to defray the person's expenses for removal at the company's request.

(2) Except to the extent that the Memorandum of Incorporation of a company provides otherwise, the board may authorise the company to provide direct 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 subsections (3) and (4).

(3) Despite any provision of a company's Memorandum of Incorporation to the contrary, the board may not authorise any financial assistance contemplated in subsection (2), unless—

(*a*) the particular provision of financial assistance is—

(i) pursuant to an employee share scheme that satisfies the requirements of section 97; or

(ii) pursuant to a special resolution of the shareholders, adopted within the previous two years, which approved such assistance either for the specific

recipient, or generally for a category of potential recipients, and the specific recipient falls within that category; and

(*b*) the board is satisfied that—

(i) immediately after providing the financial assistance, the company would satisfy the solvency and liquidity test; and

(ii) the terms under which the financial assistance is proposed to be given are fair and reasonable to the company; and

[Para. (*b*) substituted by s. 31 (*a*) of Act No. 3 of 2011.]

(4) In addition to satisfying the requirements of subsection (3), the board must ensure that any conditions or restrictions respecting the granting of financial assistance set out in the company's Memorandum of Incorporation have been satisfied.

(5) If the board of a company adopts a resolution to do anything contemplated in subsection (2), the company must provide written notice of that resolution to all shareholders, unless every shareholder is also a director of the company, and to ***any trade union representing its employees—***

(*a*) within 10 business days after the board adopts the resolution, if the total value of all loans, debts, obligations or assistance contemplated in that resolution, 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

(*b*) within 30 business days after the end of the financial year, in any other case.

(6) A resolution by the board of a company to provide financial assistance contemplated in subsection (2), or an agreement with respect to the provision of any such assistance, is void to the extent that the provision of that assistance would be inconsistent with—

(*a*) this section; or

(*b*) a prohibition, condition or requirement contemplated in subsection (4).

(7) If a resolution or an agreement is void in terms of subsection (6) a director of a company is liable to the extent set out in section 77 (3) (*e*) (v) if the director—

(*a*) was present at the meeting when the board approved the resolution or agreement, or participated in the making of such a decision in terms of section 74; and

(*b*) failed to vote against the resolution or agreement, despite knowing that the provision of financial assistance was inconsistent with this section or a prohibition, condition or requirement contemplated in subsection (4).

[Sub-s. (7) amended by s. 31 (*b*) of Act No. 3 of 2011.]

S 45 like s 44 does not define financial assistance, all that it says is that financial assistance includes lending money, guarantee a loan or other obligation and securing any debt obligation but does not include lending money in the ordinary course of the business or of a company whose primary business is the lending of money, or an accountable advance to meet legal expenses of a matter concerning the company or to meet anticipated expenses to be incurred by the person on the person's behalf or an amount to defray the personal expenses for the removal at the company's request.

The fundamental difference between s 44 and s 45 is that s 44 is for the financial assistance for the subscription or purchase of securities whereas the purpose of s 45 is for financial assistance for ***any particular purpose***. The Act does not provide a description of financial assistance in s 45(2) and the words direct or indirect widens the type of financial assistance that may be given. One also needs to look at the definition of ***related or inter-related***.

The way the wording of the section is couched is that it applies to a much wider group of people including intergroup loans which are everyday incurrences in larger groups of companies. There is also a danger that such loans may be in the hands of controlling shareholders which if made could be detrimental to the company.

The experts feel that the situation in regard to S45 is too wide and a practical consequence is that in a group of companies the company will have to table a special resolution every second or bi-annual shareholders meeting for approval of loans to other companies that form part of the group. Another thing that has to happen is that despite the special resolution with every loan the board has to satisfy the **solvency and liquidity test** as well as the fact that the terms of the financial assistance as proposed are **fair and reasonable** to the company.

The board also has to make sure that whatever terms there are in the MOI have been complied with.

10.3 S45 – ADDITIONAL DISCLOSURES

There is also a new disclosure in terms of S45(5) which is not a requirement in S44 which provides that if a resolution in terms of S45(2) is adopted the company must provide written notice of that resolution to all shareholders unless every shareholder is also a director and to any trade union, representing its employees.

There are two conditions where this is applicable, this disclosure must be provided within 10 business days after the resolution is adopted, if the total value of all the total debts or obligations of assistance contemplated in the resolution together with any other previous resolutions 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.

In terms of S 45(6) if the granting of such financial assistance is in conflict with any term in the MOI then the transaction is void.

11 OFFICERS OF A COMPANY

What is in fact a Company? A company is referred to as a ***juristic person***. It is an entity created by company law. It can do anything or almost anything. It cannot get married; it cannot

fall pregnant. It can conduct business; it can buy and sell and employ people. It can sue and be sued. The various laws that we have mentioned and what we are still going to go through make the functioning of this company as efficient and as smooth as is possible. There are the officers of a company that we need to know about, the most important being the directors.

11.1 DIRECTORS

Every company must have at least one director to manage the company. In the case of one person running a business the person who starts the business will be the sole director. He would probably also hold a 100 percent of the shares in a company. As the company grows and raises more capital and issues more shares more directors will be added to the Board and therefore there would be whole lot of rules in the way that these directors would govern the company. A lot of these rules would be found in the MOI and rules as well as in the act and of course also in the common law.

There are various sections in the Act and Section 66(2) of the 2008 Act says that every company in particular a private company or a personal liability company must have at least one director and a public company or a non-profit company at least three. There are various rules in the way these directors can be appointed, however any person can be a director of a company and the MOI can impose minimum qualifications for being a director. There are however some people who are ineligible or could be disqualified from being a director. For disqualifications look at Section 69(8). It is the MOI that gives directors power to run the company.

Company Secretarial Practitioners must take cognisance of the voting rights between the directors and shareholders so that the power is not held in the incorrect hands and that in reality it is really the shareholders who have the power.

11.2 DUTIES AND LIABILITIES OF DIRECTORS

11.2.1 The common-law duties of Directors

The duties of a Director are both diverse and numerous. It is impossible to lay down the rules for every single situation. Each particular action by directors must be judged upon its own merits. The ***common-law*** duties which set out a unique set of obligations which are owed by the directors of the company play a crucial role in the governance of a Director's duties and liabilities. These common laws are very protective of the company. The Director in effect acts as an agent of the company and also has a fiduciary duty towards the company. This means that the director has a duty to protect the company's interest.

It should be remembered that the duties will relate not to the powers that a Director has but the way he carries out these powers.

11.2.2 Duty to exercise care and skill and diligence.

There is no question that the Director needs to ***exercise his duties with care and skill***. The question is, what is care and skill and how is it measured? It is measured on the basis of what a reasonable person would be expected to do.

It is clear from case law that a Director is ***not expected to be an expert in everything***, unless the Director is appointed for a specific reason or as a specific expert or for the purpose in which he has the necessary skills. A Director is not expected to have any knowledge or to exercise skills which they do not possess.

In making a decision a Director may ***make the use of an outside expert*** however, upon receiving such advice the Director must exercise their mind and make a proper judgement not blindly following the expert. A Director is entitled to rely on his co-directors and employees of the company, but such reliance cannot be unquestioning.

If there are ***negligent actions or fraud by an employee*** of the company, the Director can be ***held liable*** if he has failed to take reasonable care in the selection and supervision of the employees. There must be a common-sense view in regard to particular actions. A Director cannot be expected to attend to every conceivable detail, accepting reports from subordinates on routine matters, unless it can be shown that Director knew that some incorrect action was being committed and such act was unlawful. The Director will not necessarily be liable for the unlawful acts of an employee.

A Director must ***carry out their duties and functions diligently***. Diligent means the Director must devote a reasonable amount of time and attention to the company's affairs. Failure to exercise proper diligence may indicate that the Director has acted negligently and, in some cases, may even indicate that the Director has acted dishonestly. For example, if the Director failed to investigate a fraud that is reported he could be held to be negligent as well as dishonest. In a case of a listed company shareholders may be able to claim if something was not disclosed in the annual financial statements resulting in shareholder loss.

It is not necessary for a Director to attend every board meeting, but ***continuous non-attendance*** may render him guilty of negligence.

Ignorance of some facts which a Director should have been aware may also render that Director liable.

The duty to exercise care, skill and diligence is not a fiduciary duty, it is derived from the law of delict, which is why Section77(2) draws a distinction between the duty and the remaining codified duties of Directors set out in Section 75 and Section 76.

11.2.3 Duty to Act in the best interest of a company.

The common law regards the fact that a Director has a fiduciary duty to the company, this means to the general body of a Company shareholders, to the exclusion of all other stakeholders. ***The common law is now wider to include other stakeholders***.

11.2.4 Duty to act within their powers and for a proper purpose.

The Powers of a Director can only be used for the purpose for which they were granted. A Director does not have powers for any ***unauthorised or improper purpose*** and in fact this cannot be done. Where a Director carries out an action which is improper and which is unauthorised and is beyond the powers of the Act and the MOI and Common Law the transaction can be cancelled and the shareholders may make a claim against the Directors.

Any action by a Director must be within the Law, and if it is not honest it can be subject to criminal liability as well as personal liability.

A Director ***cannot use information*** for his/her own purposes or disclose confidential information to an outsider.

11.2.5 Duty to exercise independent judgement

A Director must make proper decisions and ***cannot be a puppet*** for anyone else. In the event that a majority shareholder tries to control him and tell him how to vote this cannot be done, the Director has to make his own decisions in regard to any particular matter within the Company.

11.2.6 Duty to avoid conflict of interest

A Director cannot have any ***conflict of interest*** in anything that is in conflict with the company. There cannot be any personal interest or have a duty to another party.

The Director cannot be involved in competing situations with the company. In regard to non-executive directors the legal position is not clear as there are many examples of this breach of duty, as a non-executive Director may hold positions in competing concerns.

If there is a breach of duties by the Director and there is a conflict of interest the company or the shareholders may recover damages.

A Director must make full disclosure of all his other interests.

11.2.7 Corporate opportunity and no-profit rules

A Director ***cannot make a profit*** if he enters into a transaction that was for the benefit of the company. This can only be done if there is full disclosure and he obtains the consent of the remaining Directors.

If he does so and the profit belongs to the Company the law will disregard the transaction and the company may make claims against the Director.

There are two famous cases in this regard. ***Da Silva and others vs CH Chemicals (Pty) Ltd*** and ***Robinson vs Randfontein Estates Gold Mining***.

11.3 GROUP OF COMPANIES

There is nothing in law that recognises the legal personality or legal status of a group of companies. It is a fact in law that a Director owes his fiduciary duty to that of the company that he is a director of and not to a group. When looking at inter-company transactions the director must consider his duties to the company that he is a Director of. It may be that a Director is a Director of two companies in the group where there are intercompany transactions. In this situation, each transaction must be judged according to the interest of a company he is a director of. The test to make this determination is a subjective one and the Courts will have a look at whether the Director believed that they have acted in good faith.

11.4 THE CODIFIED DUTIES OF DIRECTORS

For the first time, some of the duties of a director under common law have been partially codified by Sections 75 and 76 of the Act. These partially codified duties prevail over any conflicting common law duties. If there is no conflict with the codified laws then the Common Law remains applicable. In most instances the codification has not affected any of the common law to the duties of the Directors. Quite the opposite. The codified duties of Directors are more lenient than those of the Common law in some important instances.

The transitional arrangements provide that despite anything to the contrary in a Company's MOI and the provisions of the Act in respect of the duties, conduct and liabilities of Directors apply to a pre-existing Company as from 1 May 2011.

11.4.1 The expanded meaning of Director

In terms of Section 76(1) a director also includes an ***alternate director***, a ***prescribed officer***, a ***member of the board committee*** or a ***member of the Companies audit committee*** irrespective of whether or not a person is also a member of the Companies Board.

These persons are bound to observe the same duties of Director and the same set of standards apply.

11.4.2 Standards of a director's conduct

S76 (3) codifies what are generally regarded as the most important common-law duties of directors. A director must be subject to ss 76(4) and 76(5) when acting in that capacity and in the execution of the powers in order to perform the functions of a Director.

These functions must be:

a. In good faith and for a proper purpose;
b. In the best interest of the company;
c. With the degree of care, skill and diligence that may reasonably be expected from a Director.

11.5 LIABILITY OF A DIRECTORS

S 77 gives a clarification of the common law liabilities and consolidates most of the other sections of the act.

11.5.1 Common-law liabilities of directors

S77(2) codifies the common-law position. It provides that a director may be held liable in accordance with the principles of the common law relating to-

a. Where there is a breach of fiduciary duty for loss or damages or costs sustained by the Company, this can be claimed from the Director.
b. Delict or Law Governing wrong or unlawful acts or omissions for any loss or damage or cost sustained by the company can be claimed from the Director.

11.5.2 Statutory Liabilities of Directors

S 77(3) provides that the Director is liable for any loss, damages, or costs sustained by the company as a direct or indirect consequence of the Director having-

a. Acted in the name of the company, signed on behalf of the company and purported to have been acting for the company despite knowing that he did not act for the company and lacked the authority to do so.
b. Tacitly agreed to carry on business despite knowing it was prohibited in terms of s 22(1) because it was reckless, negligent or fraudulent behavior.

c. Being party to an act or omission despite knowing that it was calculated to defraud a creditor, employee or shareholder of the company.
d. Signed or consented to or authorised the publication of any financial statements which are false and misleading or a prospectus which was untrue.

SECTION 77(3) (e) is a consolidation of various Sections being 38(3), 41(5), 42(4), 44(6) and 45(7) 46(6) and 48(7). Listed below are the issues.

1. The issue of unauthorised shares despite knowing that those shares had not been authorised.
2. The issue of any authorised securities despite knowing that the issue of those securities was inconsistent with s 41.
3. The granting of options to any persons contemplated in s 42(4) despite knowing that any shares of which the options could be exercised or to which any securities could be converted had not been authorised in terms of s 36.
4. The provision of financial assistance to any person contemplated in s 44 for the acquisition of the company securities, despite knowing that the provision of financial assistance was inconsistent with s 44, or the Company's MOI.
5. Provision of financial assistance to Directors for the purpose contemplated in s 45 despite knowing that the provision of Financial Assistance was inconsistent with s 45 or the Company's MOI.
6. Subject to s 77(4) a resolution approving a distribution despite knowing that the distribution was contrary to s 46.
7. The acquisition by the Company of any of the Shares or the Shares of its holding company despite knowing that the acquisition was contrary to ss 46 and 48.
8. An allotment by the company despite knowing that the allotment was contrary to any provision of Chapter 4 public offerings.

12 REMOVAL OF DIRECTORS

12.1 SECTION 71 IN THE ACT IS EQUIVALENT TO SECTION 220 IN THE 1973 ACT

S71(1) is a crucial ***unalterable provision*** which entrenches the fundamental common law principal that the ***shareholder is king*** by allowing the shareholders to ***remove a director at any time and for any reason they think fit***. It provides that despite anything to the contrary

in a company's MOI or rules, or any agreement between a company and Director or between any shareholder and director, ***a director may be removed by an ordinary resolution***, adopted at a shareholders meeting by the persons entitled to exercise voting rights in the election of that director.

Only the person's entitled to exercise voting rights in election of a particular director may remove that director. The way this works is that the director must be given an opportunity to prevent removal from happening by ***stating his case at the meeting*** where the vote is going to take place. It is not necessary for the resolution to give reasons as to why the shareholders want the directors removed.

At this point it would be a good idea to understand what s 66(4) says – a company's MOI may provide for the director appointment and ***removal of one or more directors*** by any person who is ***named in the MOI***. This means that the person so named may appoint and remove directors. It appears that this person has a right to appoint 50% of the directors as the other 50% must be appointed by the shareholders.

The MOI cannot provide that a higher percentage on the voting rights for the removal of a director i.e. more than 50% of the voting rights is required to remove the director.

The old Act provided that in order to remove a director 28 days special notice was required. This requirement has been abolished in the 2008 act.

As well as the above in terms of s 71(3) the board has been given the power to remove a Director even in limited circumstances. It provides that if a company has more than two directors which is obligatory for public companies and non-profit companies and a **shareholder** or a **director** has alleged that a director has become ***ineligible*** or ***disqualified*** or has become ***incapacitated*** to the extent that the director is unable to perform the functions of a director and he is unlikely to regain that capacity within a reasonable time – (these cannot be grounds as contemplated in s 69(8)(a) which are the disqualification grounds), or has neglected or been derelict in a performance of the functions of a director, they can be removed.

The board (other than the director concerned) must determine the matter by resolution, i.e. the remaining directors may determine whether or not the allegation is correct by a simple majority vote and may remove the director.

Prior to the meeting the ***director must be given notice*** of the meeting including a copy of the proposed resolution setting out the reason for it with sufficient specificity to reasonably permit the director to prepare and present a response. The director concerned 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 the vote.

Unlike s 71(1) the board may remove a director in the circumstances described in 71(3) irrespective of whether the Director concerned was originally appointed or elected by shareholders.

Where the situation has occurred that the ***person who originally appointed the director*** as specified in s 66(4)(a) (i) or who voted in favour of the director may make an application to court who may either confirm the board's determination or remove the director from office on the grounds specified in 71(3).

One cannot remove a director by around robin resolution under S60 as in this way the director cannot present his case.

S 71(3) does not apply if a company has fewer than three directors. In the circumstances contemplated in s 71(3) any director or shareholder of such a company may apply to the tribunal to make a termination as contemplated in s 71(3). There is another innovation in that various people can apply to court to declare a Director either delinquent or thus prohibited from being a director or under **probation** and thus restrict the serving as a director within the condition of that probation.

S 162 sets out this remedy, it is available to a company, a shareholder, director, company secretary or prescribed officer of a company as well as a registered trade union that represent the company's employees or another representative of a company's employees. Any of these persons may apply to court for an order declaring a director of that company or person who within 24 months immediately preceding the application was a director of that company. For more information on this you need to read s 162.

12.2 INELIGIBILITY AND DISQUALIFICATION OF A DIRECTOR

This is governed by s 69 which applies to all types of director including alternate, ex-officio directors as well as board committee members or audit committee members in respect of whether they are directors or not.

S 69 talks about an ***ineligible person*** – such a person can never become a director whereas a ***disqualified person*** may become a director after that person's terms of disqualification ends. An ineligible or disqualified director cannot be appointed or elected to serve or continue to serve as a director.

S 66(6) provides that the election of appointment of a person as a director is a nullity if at the time of election of appointment that person is ineligible or disqualified in terms of S69. For All the reasons why, a director is ineligible etc. please have a look at S69.

12.3 COMPANY SECRETARY

Another officer of the company is in fact the Company Secretary of the company who in my opinion has a very important position. As a rule, the Company Secretary does not play a role in the smaller company but is very important in the larger listed company as he is the person responsible for corporate governance to make sure that the Directors are kept in line and conduct themselves in terms of the Act and all other laws.

A public company or State-owned company requires the appointment of a company secretary with the requisite knowledge in compliance, company law and governance. A private company may elect to have a company secretary.

By and large the person involved in the accounting firm where the accounting firm has been appointed as the Company Secretarial Practitioner has also been placed in a very important position in that they have to ensure that the company conducts itself in accordance with the Act. The company secretarial practitioner needs to ensure that they know company law so that they can guide the directors of the company. Where this is the case it's important that a mandate or engagement letter is signed in relation to secretarial duties by the client so that responsibilities are clearly defined.

The problem as to where we are today being that most people are unfamiliar with the duties and functions of the Company Secretary. There are certain things that could go wrong where the client or company could hold the Company Secretarial practitioner liable for damages. Later on, we will be dealing with the situation when a private company can become a regulated company which could result in a damage claim against the practitioner. Sections from 86 to Section 89 govern the situation of the Company Secretary. It is important to understand that the Company Secretary is accountable to the Company's Board and the duties may include providing the Directors collectively and individually with guidance as to their duties, responsibilities and powers. As a company secretarial practitioner how much of this have you taken on. We would need to look at the mandate signed with your client. An accounting firm should never appoint themselves as the company secretary, however it is absolutely essential to have a mandate that governs the relations between the firm and the client where the firm just processes secretarial transactions as I have already mentioned.

Some of the duties of the company secretary are listed below.

Reporting to the company's board any failure on the part of the company or director to comply with the **MOI** or **Rules** of the Company or the **Act**.

Ensuring that the ***minutes*** of all the shareholders meetings, board meetings and meetings of any committee of the Directors or of the Company Audit Committee are properly recorded in accordance with the Act.

Certifying the Company's Annual Financial Statements and whether the Company has filed the required returns and notices in terms of Act and whether all such notices and returns are true, correct and up to date.

Carry out the functions of a person designated in terms of s 33 - Company's Annual Return.

As you can see from the above that the Company Secretary has a large number of functions which in the listed company environment would include all the JSE listing requirements and King requirements etc. It is because of this today that most accounting firms do not appoint their firms as the company's secretary because clearly on a part time basis you cannot take on this onerous responsibility. It is therefore most important that you have a mandate for your clients where you specify exactly what aspects of secretarial practice you are going to attend to so that a client is totally aware of your responsibilities and their own responsibilities.

12.4 PRESCRIBED OFFICERS!

During consultation with clients, the question often arises as to which individuals in a company would be considered to be a Prescribed Officer in terms of the Companies Act 71 of 2008 ("the Act"), and what does this mean for such an individual? Is it merely a selection based on random function, or is there a logic and motivation driving who such individuals will be? You would have seen they have the same obligations as directors.

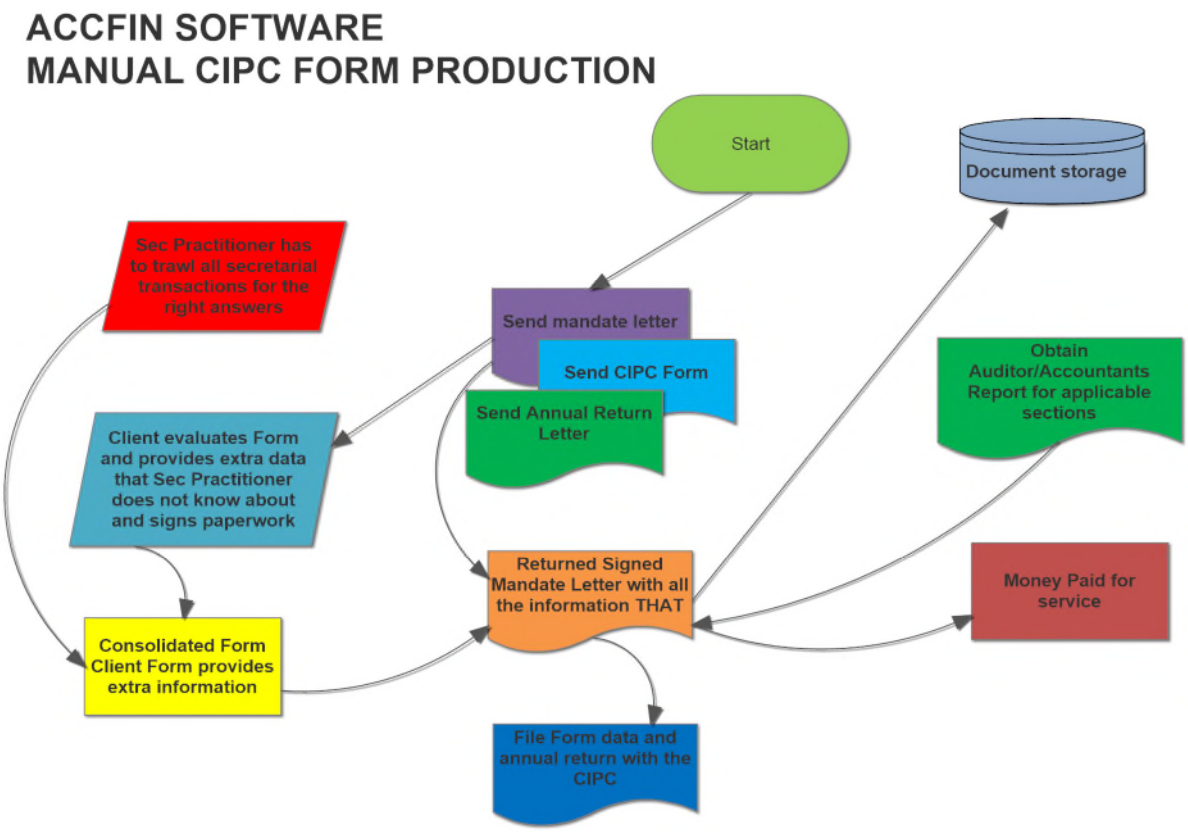
PRESCRIBED OFFICERS IN TERMS OF THE ACT

The Act introduces the definition of a Prescribed Officer which, in terms of Regulation 38 of the Act, is a person who, despite not being a director of a company, exercises general executive control and management over the whole, or a significant portion of the business activities of a company or a person who regularly participates, to a material degree, in the exercise of general executive control and management over the whole, or a significant portion, of the business and activities of the company. This is the case irrespective of any particular title given by the company to the office held by the individual in the company or the function performed by the individual in the company.

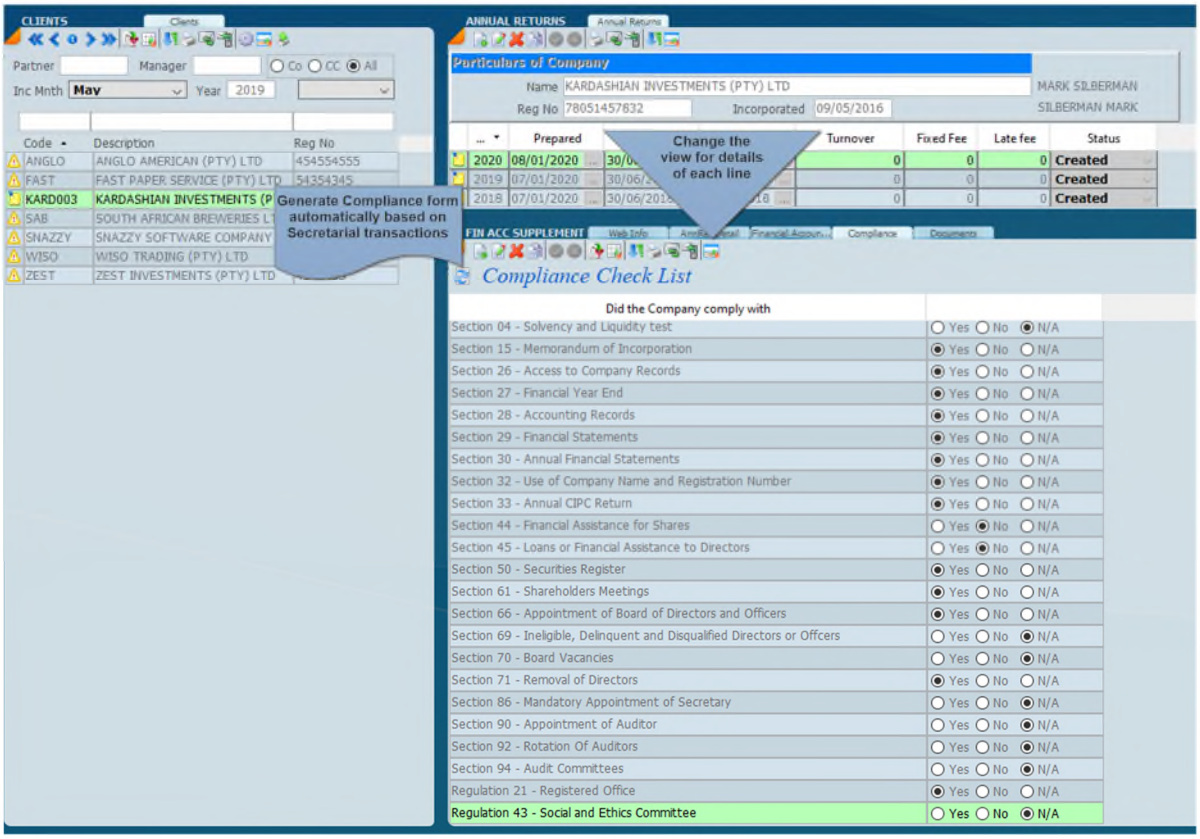
The effect of being a Prescribed Officer in terms of the Act would be that such an individual would be subject to the same duties and liabilities of directors, including adherence to Section 75 and Section 76 of the Act, relating to personal financial interests and director's standards of conduct. This would entail that such an individual would owe fiduciary duties to the company to act in the company's best interest, not to make a secret profit or misappropriate opportunities that should be opportunities of the company.

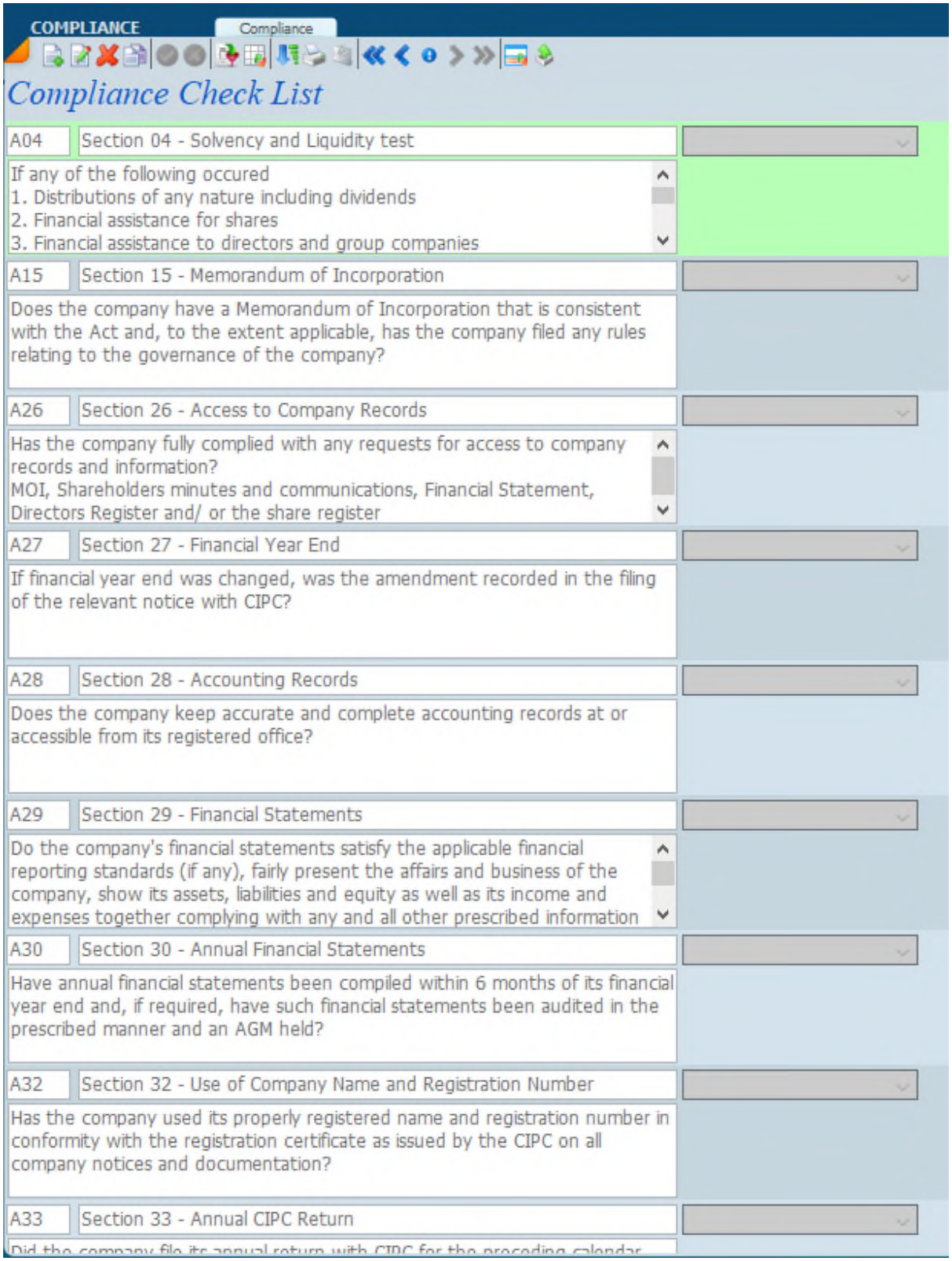
I would suggest that where a person is prescribed officer that there should be a director's resolution appointing a person as the prescribed officer.

13 COMPLIANCE FORM MANUAL PROCESS



14 SKY SEC CIPC GENERATION OF THE FORM




COMPLIANCE
Compliance
Compliance Check List
A04
Section 04 - Solvency and Liquidity test
If any of the following occured
1. Distributions of any nature including dividends
2. Financial assistance for shares
3. Financial assistance to directors and group companies
A15
Section 15 - Memorandum of Incorporation
Does the company have a Memorandum of Incorporation that is consistent with the Act and, to the extent applicable, has the company filed any rules relating to the governance of the company?
A26
Section 26 - Access to Company Records
Has the company fully complied with any requests for access to company records and information?
MOI, Shareholders minutes and communications, Financial Statement, Directors Register and/ or the share register
A27
Section 27 - Financial Year End
If financial year end was changed, was the amendment recorded in the filing of the relevant notice with CIPC?
A28
Section 28 - Accounting Records
Does the company keep accurate and complete accounting records at or accessible from its registered office?
A29
Section 29 - Financial Statements
Do the company's financial statements satisfy the applicable financial reporting standards (if any), fairly present the affairs and business of the company, show its assets, liabilities and equity as well as its income and expenses together complying with any and all other prescribed information
A30
Section 30 - Annual Financial Statements
Have annual financial statements been compiled within 6 months of its financial year end and, if required, have such financial statements been audited in the prescribed manner and an AGM held?
A32
Section 32 - Use of Company Name and Registration Number
Has the company used its properly registered name and registration number in conformity with the registration certificate as issued by the CIPC on all company notices and documentation?
A33
Section 33 - Annual CIPC Return