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Companies Act, No 71 of 2008

Session 4: Shares and Shareholders

Presented by : Caryn Maitland CA(SA) RA

Agenda

- How do you become a shareholder
 - Capitalisation of the company
- Governance with respect to shareholders
- Protection of Minorities

Capitalisation of the Company

Capitalisation of Profit Companies

- No par value shares
- Company can't hold shares in itself
- Rights held by shares only initiated once issued
- Share buy backs/surrendered to Co = Authorised share capital
- Pre existing shares per 1973 Acts = Rights remain as before subject only to
 - Amendments to MOI from effective date
 - Share's bought back

S36 Authorisation of shares

- MOI sets out details
 - Class, number and that co authorised to issue
- Per class MOI must set out
 - Distinguishing designation
 - Preferences, rights, limitations and other
- May authorise a stated no of unclassified shares that are subject to classification later by BoD
- May set out classes of shares
 - without preferences etc
 - That BoD must determine
 - Only available for issue once preferences etc determined

- May change classification, authorisation and preferences etc set out in MOI by
 - Special resolution
 - By BoD where allowed by Act except if MOI doesn't permit
- Except if MOI provides differently BoD can
 - Increase or decrease No of authorised shares (any class)
 - Reclassify authorised but not issued shares
 - File notice of amendment setting out changes effected by BoD

S37 Preferences, rights, limitations and other share terms

- All shares in same class must be equal
- Each share = 1 general vote unless provided by
 - Act
 - MOI
- Vote always holds if matter effects that class of share's preferences etc
- Only 1 class
 - s/h can vote on all matters
 - Share in liquidation
- Multiple classes
 - At least 1 class allocated votes
 - At least 1 class has the right to share in liquidation

- Subject to MOI, Act, other law or preferences etc a Co can create shares that
 - Confer special/limited voting rights
 - Redeemable vs convertible
 - Cumulative vs non cumulative
 - Preferential rights over other classes
- If rights of S/h amended to “materially or adversely alter” rights can seek relief
 - Give notice of intent to oppose resolution
 - Have been present at meeting

- Get rights wrt to share
 - Details entered into Certified Securities Register
 - Uncertified securities – Central Securities Depository
- Ceases
 - Transfer/ buy back etc recorded in Register/Depository

- S38 Share issues
 - BoD can issue provided authorised in MOI
 - If don't have authorised shares per MOI
 - Retroactively authorised within 60 b days
- S39 Subscription of shares
 - Applies to (Pty) Ltd & personal liability Co's
 - Fresh issues
 - All s/h have the right to take up shares per existing holdings
 - Can adjust right per class
 - Unless MOI says otherwise s/h can take up fewer shares (shares not taken up can be offered to others per MOI)

- S40 Consideration of shares
 - BoD determine consideration
 - Fully paid up shares
 - rendering of services = meet obligation
 - Held in trust
- S41 Shareholders approval for issuing shares in certain circumstances
 - Directors or related parties
- S42 Options for subscription of securities
 - BoD level

- S43 Securities other than share
 - Debt
 - Provided MOI allows BoD can issue secured or unsecured debt
- S44 Financial assistance for subscription of securities
 - Refer week 1
- S45 Loans and Financial Assistance to Directors
 - Related parties
 - Week 1

- S45 Loans or other financial assistance to directors
 - Special resolution
 - Liquidity & solvency
 - Fair & reasonable to company
 - Provide written notice to s/h & trade unions
 - 10 bus days of resolution if total value (toget with any previous similar assistance) exceeds 1/10 of 1% of Co's net worth
 - Within 30 days of financial year
- S46 Distributions must be authorised by BoD
 - Solvency & Liquidity

- S47 Capitalisation of shares
 - MOI provides for
 - Cash in lieu requires S&L test
- S48 Company or subsidiary acquiring Co Shares
 - Not more than 10%
 - Lose votes
- Companies Act Amendment Bill Proposal
 - Securities Register
 - Financial Assistance

Shareholder Governance

Governance - Shareholder

- Part F of the Act and Shareholder includes person who exercises vote attaching to share.
- Includes members of NPC.
- 57(2): A Co. with 1 shareholder (not NPC or SOC):
 - No formalities wrt to exercise of voting rights and
 - Sections 59 to 65 don't apply.
- 57(3): A Co. with 1 director (not NPC or SOC):
 - No formalities wrt Board meetings and
 - Sections 71(3) to (7), 73 and 74 don't apply.

Governance - Shareholders

- 57(4) if all shareholders are directors then there are no formalities for referring a board decision to the shareholders provided that sufficient shareholders support the decision.
- S58 – Proxies, in writing, valid for 1 year. MOI.
- S60* Resolution
 - 20 days to decide on.
 - Can elect directors (poll)
 - 10 days to deliver result to shareholders
 - Cannot use s60 for any decision specified for a general meeting. – Inc.

Governance - Shareholders

- Meeting may be called by Board or qualifying shareholders, Inc. has to have an AGM.
- AGM???

 - Appointment of auditor?

- MOI very important in setting mechanisms for meetings.
- If no board then the MOI can set mechanism else Tribunal does.
- S62* – Notice of meetings,
 - 15 business days Ltd. and NPC, 10 business days rest,
 - all shareholders can waive notice requirements.

Governance - Shareholders

- Material defect in notice, item severed from agenda, immaterial doesn't invalidate action.
- If present then deemed adequate notice period.
- Meeting can be conducted electronically unless prohibited in MOI.
- Voting by either:
 - Show of hands, equal votes, or
 - Poll, votes proportional.
 - Poll can be call by 5 persons or 10% - UnAlt

Governance - Shareholders

- Quorum is three shareholders and 25% of votes.
- Resolution may be proposed by Board or by 2 shareholders.
- Percentages for normal and special resolutions – except normal resolution ito s71 can be varied.
 - What about a super resolution

Special Resolutions....

Section 65(11) A special resolution is required to—

(a) amend the company's Memorandum of Incorporation to the extent required by section 16 (1) (c) and section 36 (2) (a);

(b) ratify a consolidated revision of a company's Memorandum of Incorporation, as contemplated in section 18 (1) (b);

(c) ratify actions by the company or directors in excess of their authority, as contemplated in section 20 (2);

(d) approve an issue of shares or grant of rights in the circumstances contemplated in section 41 (1);

(e) approve an issue of shares or securities as contemplated in section 41 (3);

Special Resolutions....

(f) authorise the board to grant financial assistance in the circumstances contemplated in section 44 (3) (a) (ii) or 45 (3) (a) (ii);

(g) approve a decision of the board for re-acquisition of shares in the circumstances contemplated in section 48 (8);

(h) authorise the basis for compensation to directors of a profit company, as required by section 66 (9);

(i) approve the voluntary winding up of the company, as contemplated in section 80 (1);

(j) approve the winding up a company in the circumstances contemplated in section 81 (1);

(k) approve an application to transfer the registration of the company to a foreign jurisdiction as contemplated in section 82 (5);

(l) approve any proposed fundamental transaction, to the extent required by Part A of Chapter 5; or

(m) revoke a resolution contemplated in section 164 (9) (c).

Any other requirement set out in the MOI

Governance - Shareholders

- Fundamental Transactions are:
 - to dispose of all or the greater part of its assets or undertaking;
 - to amalgamate or merge with another company; or
 - to implement a scheme of arrangement,
- Require Special Resolution with at least 25% of votes present and, if more than 15% of those object then requires a court order.
- May require Panel Approval, Ltd. and SOC. Pty Ltd if MOI else if securities transfer threshold reached.

Protection of Minorities

Protection of minority shareholders...

- **S163: Relief from oppressive or prejudicial conduct or from abuse of separate juristic personality of company**

- (1) A shareholder or a director of a company may apply to a court for relief if
 - (a) any act or omission of the company, or a related person, has had a result that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant;
 - (b) the business of the company, or a related person, is being or has been carried on or conducted in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant; or
 - (c) the powers of a director or prescribed officer of the company, or a person related to the company, are being or have been exercised in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant.

- (2) Upon considering an application in terms of subsection (1), the court may make any interim or final order it considers fit, including
- (a) an order restraining the conduct complained of;
 - (b) an order appointing a liquidator, if the company appears to be insolvent;
 - (c) an order placing the company under supervision and commencing business rescue proceedings in terms of Chapter 6, if the court is satisfied that the circumstances set out in section 131 (4) (a) apply;
 - (d) an order to regulate the company's affairs by directing the company to amend its Memorandum of Incorporation or to create or amend a unanimous shareholder agreement;
 - (e) an order directing an issue or exchange of shares;
 - (f) an order
 - (a) (i) appointing directors in place of or in addition to all or any of the directors then in office; or
 - (b) (ii) declaring any person delinquent or under probation, as contemplated in section 162;
 - (g) an order directing the company or any other person to restore to a shareholder any part of the consideration that the shareholder paid for shares, or pay the equivalent value, with or without conditions;

- h) an order varying or setting aside a transaction or an agreement to which the company is a party and compensating the company or any other party to the transaction or agreement;
- i) an order requiring the company, within a time specified by the court, to produce to the court or an interested person financial statements in a form required by this Act, or an accounting in any other form the court may determine;
- j) an order to pay compensation to an aggrieved person, subject to any other law entitling that person to compensation;
- k) an order directing rectification of the registers or other records of a company; or
- l) an order for the trial of any issue as determined by the court.

- (3) If an order made under this section directs the amendment of the company's Memorandum of Incorporation
- (a) the directors must promptly file a notice of amendment to give effect to that order, in accordance with section 16 (4); and
 - (b) (b) no further amendment altering, limiting or negating the effect of the court order may be made to the Memorandum of Incorporation, until a court orders otherwise.

S77 Directors Liability

QUESTIONS

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THANK YOU FOR YOUR PARTICIPATION



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