

Companies Act, 71 of 2008

Memorandum of Incorporation

Part B of Chapter 2 of the Companies Act of 2008 (the "Act") regulates the incorporation and legal status of companies.

Under the 1973 Act the required documentation for the formation of a company was the Memorandum of Association and Articles of Association which have now been replaced by the Act with the Memorandum of Incorporation ("Moi").

The company's Memorandum of Incorporation and any rules of the company are binding in the exercise of the respective functions within the company of the following entities:

- between the company and each shareholder;
- between or among the shareholders; and
- between the company and each director, prescribed officer or any other person serving the company as a member of a committee of the board.

The transitional provisions as provided for in Schedule 5 of the Act makes provision for pre-existing companies to continue to exist as a company as if it had been incorporated and registered in terms of the Act, with the same name and registration number assigned to it.

Companies should however replace their Memorandum of Association and Articles of Association with a Memorandum of Incorporation before 30 April 2013 to ensure that it is consistent with the provisions of the Act. It is worth noting that in terms of the Act, the memorandum and articles of association in place prior to 1 May 2011 are now regarded as the company's Moi in terms of the Act and the Act thus only refers to "amendments" to the Moi to align this with the provisions of the Act prior to 30 April 2013.

What you should do:

Companies must commence with the process to replace its' current registration documents (Memorandum of Association and Articles of Association) with a Memorandum of Incorporation.

What you should know:

The Memorandum of Incorporation sets out the rights, duties and responsibilities of shareholders, directors and other entities. During the transitional period a company may, free of charge, file a new Memorandum of Incorporation with the Companies and Intellectual Property Commission in order to comply with the provisions of the Act.

A proper assessment of the existing documents should be undertaken and all companies should attend to the formulation and filing of a new/ revised Memorandum of Incorporation as soon as possible rather than waiting until the end of the Transitional Period in order to avoid any conflict between the current documents and the Act.

The Memorandum of Incorporation must be consistent with the Act and is void to the extent that it contravenes or is inconsistent with the Act. Should a conflict, however, exists between a company's existing documentation and the Act during the Transitional Period, the provisions in a company's existing documents will prevail, except in respect of the following issues:

- Duties, conduct and liability of directors (sections 75, 76, and 77);
- Rights of shareholders to receive notice or have access to information (section 26);
- Provisions of the Act regarding shareholders' meetings and board meetings (sections 61 to 65 and section 73); and
- Provisions regarding fundamental transactions (Chapter 5).

It therefore makes sense to immediately ensure that you are aware of the significant issues to be dealt with in the Memorandum of Incorporation and do the necessary to ensure that the Memorandum of Incorporation is consistent with the Act.

What you should know:

In terms of the Act there are several alterable and unalterable provisions to be adopted in the Memorandum of Incorporation. Should a company adopt a new Memorandum of Incorporation, they can amend such alterable provisions as deemed fit for purposes of the company. It is thus important to carefully consider the alterable provisions to be included in the Memorandum of Incorporation.

Depending on the company's Memorandum of Incorporation, the board of directors may also in terms of the Act issue, amend or repeal any necessary or incidental rules relating to the governance of the company that are not addressed in the Act or the Memorandum of Incorporation and such rules will become effective 10 (ten) days after being published but have to be put

to shareholders at the next Annual General Meeting for approval by an ordinary resolution. If such a rule is not ratified when put to a vote, the company's board may not make a substantially similar rule within the following 12 (twelve) months, unless it was approved in advance by ordinary resolution of the shareholders.

In terms of section 15(2) of the Act the Memorandum of Incorporation may include any provision dealing with a matter that the Act does not address or altering the effect of any alterable provision of the Act. The Memorandum of Incorporation may further contain any restrictive or procedural requirement in addition to the requirements as contemplated in section 16 in respect of the amendment of the Memorandum of Incorporation or prohibit the amendment of any particular provision of the Memorandum of Incorporation.

What you should know:

The directors of a company will have the authority to regulate the provisions of the shareholder agreement to an extent, as any provision in the shareholder agreement will be void if it is inconsistent with the Memorandum of Incorporation after 30 April 2013.

Section 164 (Chapter 7) of the Act grants a shareholder that has given a company written notice objecting to a special resolution to amend its Memorandum of Incorporation by altering the preferences, rights, limitations or other terms of any class of its shares in any manner materially adverse to the rights or interest of holders of that class of shares, as contemplated in section 37(8), and has voted against the resolution, the right to demand that the company pay to such dissenting shareholder the fair value for all the shares of the company held by that dissenting shareholder. The necessary procedural requirements must be met in this regard.

What you should do:

The notice to shareholders of a meeting to consider adopting a resolution to amend its Memorandum of Incorporation as previously mentioned, must include a statement informing shareholders of their rights under section 164 of the Act.

Dissenting minority shareholders therefore have been granted a valuable right to force the sale of their shares in certain circumstances and the effects thereof on the company must be considered.

What you should do:

To amend the Memorandum of Incorporation as contemplated in section 16 of the Act, (after the new Memorandum of Incorporation was registered):

- *If required by a court order, an amendment must be effected by an ordinary resolution of the company's board; or*
- *File a Notice of Amendment of its Memorandum of Incorporation that sets out the changes effected by the board; or*
- *at any other time, In respect of profit companies, when a special resolution to amend it was proposed by the board of the company or shareholders entitled to exercise at least 10% of voting rights and such proposal was adopted at a shareholders meeting.*

What you should know:

In respect of amending the Memorandum of Incorporation as contemplated in section 16 of the Act:

An amendment may take the form of a new Memorandum of Incorporation that substitutes the existing Memorandum or contain one or more alterations to the existing Memorandum of Incorporation by:

- *changing the name of the company;*
- *deleting, altering or replacing any of its provisions;*
- *inserting any new provisions into the Memorandum of Incorporation; or*
- *making any combination of alterations.*

A further important point to note is that a company will not be able to enter into a shareholders' agreement with effect from 1 May 2011 that conflicts with the company's Memorandum of Incorporation and any existing shareholders' agreement will have to be aligned with the provisions of the Act and the Memorandum of Incorporation by no later than 30 April 2013. Also, section 66 of the Act provides that the business and affairs of a company must be managed by or under the direction of its board, which has the authority to exercise **all** of the powers and perform any of the functions of the company, except to the extent that the Act or the company's Memorandum of Incorporation provides otherwise. Matters that are therefore typically reserved in shareholder agreements for approval by shareholders (in addition to those matters required by the Act) will also have to be incorporated into the Memorandum of Incorporation.

Companies subject to shareholders' agreements will be well advised to consider the required amendments to the agreement and its Memorandum of Incorporation rather sooner than later.

NEED ASSISTANCE WITH THE IMPLICATIONS OF THIS ACT?

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