

- directors who were aware of this and voted in favour of granting options or who had failed to vote against it:
 - become personally liable for loss, damages or costs sustained by company in consequence of unauthorised issue or option.

SHAREHOLDERS & COMPANY MEETINGS

What's the difference between a shareholder & a member of a company?

- A shareholder is only used as a term in respect of a profit company while the term member is reserved for non-profit companies that do not have shareholders.
- A shareholder is defined as a person entitled to exercise voting rights at a meeting.
- Shareholders are holders of shares issued by the company:
 - Not an automatic right to participate in management of company.
 - Have a right to vote in general meetings of members of the company.
 - Have duties towards each other in terms of a shareholder's agreement:
 - *Clutchco (Pty) Ltd v Davis...* (SCA):
 - A shareholder:
 - not entitled to see minutes of directors & manager's meetings;
 - has no automatic right to see accounting records;
 - is entitled to receive copies of company's annual financial statements and minutes of the company's general meetings
 - *Halter and Others v Halter...* (A):
 - Relationship between shareholders may be described as a quasi-partnership and one partner may not over-reach fellow partners.

How is notice of meetings given? *Page 65 Activity*

- Before a meeting of shareholders can be held, it must be properly convened
- S62 provides that a notice must:
 - Be in writing.

- Include date, time and place for a meeting;
- Explain general purpose of meeting;
- Contain a statement that a shareholder entitled to appoint a proxy to attend, participate in and vote at meeting in place of shareholder;
- Indicate that participants required to provide proof of identity at meeting;
- Be accompanied by copy of any proposed resolution to be considered at meeting;
- Give a notice of ten days before the meeting.
- Indicate percentage of voting rights required for resolution to be adopted;
- If convening annual general meeting of the company, contain a summary of financial statements that will be tabled at the meeting.
 - Explain procedure for shareholder to follow to obtain complete copy of annual financial statements for previous financial year.
- contain a prominent statement that a shareholder entitled to appoint a proxy to attend, participate in and vote at meeting in place of shareholder.
- A meeting may commence only if a quorum is present.
 - *Multiple choice*
 - The notice in a public and a non-profit company:
 - should be given at least 15 business days before date of meeting. *Business days?*
 - The notice in any other company:
 - should be sent at least 10 days before the meeting
 - MOI may prescribe a longer notice period.
- Where company failed to give notice of a meeting or a defect in the giving of notice:
 - meeting may continue if persons entitled to vote in respect of each item on agenda are at meeting, acknowledge actual receipt of notice and agree to waive notice or in the case of a material defect, ratify defective notice.
 - If a material defect relates to a matter on agenda, may be taken off the agenda and notice remains valid with respect to remaining items on agenda.
 - An immaterial defect or an accidental or inadvertent failure in the delivery of the notice to a shareholder does not invalidate any action taken at meeting.
- A shareholder who is present at a meeting is deemed to have received or waived notice of the meeting.

What is representation by proxy?

- A proxy is a person who is appointed to represent a shareholder at a meeting. *now you have to submit a proxy in advance*
- **Companies Act, 2008:**
 - Allows shareholder to appoint individual as his/her proxy (changes common law):
 - person does not have to be a shareholder in company.
 - provisions of MOI may allow appointment of two or more proxies.
 - Once appointed, proxy can attend/participate in/speak/vote at shareholder's meeting:
 - Appointment of a proxy:
 - Must be in writing and signed by shareholder appointing person;
 - remains valid for one year after it was signed;
 - may be for a specific period of time
 - may be for two/more persons concurrently exercising voting rights for different shares.
 - A proxy may delegate authority to act on behalf of the shareholder to another person;
 - A copy of the proxy form must be delivered to the company prior to proxy exercising any of shareholder's rights at a meeting.
 - Company cannot compel shareholder to make an irrevocable proxy appointment.
 - At meeting, proxy can vote as he/she thinks fit unless shareholder has indicated on the proxy form whether proxy should vote in favour of/against a particular resolution.
 - Company could invite shareholders on proxy form to appoint a proxy from a list of names provided by the company:
 - Company cannot compel this choice.

Can there be a demand to convene a shareholder's meeting?

normally done by the board

- A shareholder's meeting may be called at any time, by:
 - board of a company, or;
 - any other person specified in company's MOI or;
 - any other person specified in the rules.
- A meeting of shareholders must be convened if one/more written and signed demands for a meeting are delivered to company and the demand:
 - Specifies purpose for which meeting is proposed.
 - Is signed by holders of at least 10% of voting rights entitled to be exercised in relation to a matter proposed for consideration.
 - MOI may specify a lower percentage.
- A company/any shareholder of company may apply to a court for an order setting aside a demand for a meeting on grounds that:

Can shareholders act other than at a meeting? *yes, if everybody agrees*

- demand is frivolous or;
- calls for a meeting for no other purpose than to re-consider a matter already considered by the shareholders or;
- is vexatious.
- **Companies Act 1973:**
 - Provides that a particular AGM need not be held if all members entitled to attend consent in writing
 - Any resolution that would have been dealt with at meeting will also be deemed valid if in writing and signed by members entitled to vote at meeting
- Case law also accepted doctrine of unanimous assent whereby certain decisions may be valid without a meeting may be held:
 - If all members fully aware of facts and assented to decision (not in writing)
 - *Gohlke and Schneider v Westies Minerals (Pty) Ltd*

Companies Act 2008:

- A resolution that could be voted on at a shareholder's meeting may instead be submitted to shareholders & voted on in writing by shareholders entitled to vote:
 - Adopted if supported by persons entitled to exercise sufficient voting rights for it to be adopted as an ordinary or special resolution;
 - If adopted, has same effect as if approved by voting at a meeting.
 - Doctrine of unanimous assent no longer necessary
 - Within 10 business days after adopting a resolution: company must notify shareholders of results of vote, consent process or election.
- No business required to be conducted at an AGM may be conducted this way.

What are the requirements for the annual general meeting?

- Only public companies have a statutory obligation to convene annual general meetings.
- First AGM of a company must occur not more than 18 months after date of incorporation.
- Subsequent AGM's must occur no more than 15 months after date of previous AGM.
 - Companies Tribunal may grant an extension if good cause is shown.

Question

- The following must be discussed at the AGM:
 - Presentation of director's report;

- Presentation of audited financial statements
- Election of directors: *NCIU*
- Appointment of auditor and audit committee for ensuing financial year and Any matters raised by shareholders.

How does one convene a meeting in special circumstances? *Yes*

- S61(11) Where company cannot convene a meeting because it has no directors, or because all directors are incapacitated:
 - any other person authorised by MOI may convene meeting;
 - if no other person authorised, any shareholder may request company's tribunal to issue an administrative order for a shareholder's meeting to be convened.

- S61(12) If a company fails to convene a meeting for any reason:
 - shareholder may apply to court for an order requiring company to convene meeting on a date and subject to any appropriate terms.
 - company must compensate shareholder for costs.

Question

What is a quorum? *Section 64 1070*

- Minimum number required before a meeting can begin as well as for consideration of any specific matter:
 - For a meeting to begin, need at least 25% of voting rights that can be exercised in respect of at least one matter to be decided at meeting:
 - MOI may specify a higher or lower percentage
 - If a company has more than two shareholders:
 - A meeting may not begin, or a matter debated unless at least 3 shareholders are present at the meeting:
 - Provided that shareholders present can exercise at least 25% of voting rights entitled to be exercised.

How should meetings be conducted?

- Voting on any matter at a shareholder's meeting may be conducted by either:

Part 1070

- A show of hands or by way of a poll
- Where voting by a show of hands:
 - Any person present and entitled to exercise voting rights has only one vote, irrespective of number of shares held by that person.

- Where voting is by poll:
 - Any member including proxy must be entitled to exercise all voting rights attached to shares held.
 - Company may provide for a shareholder's meeting to be conducted entirely by electronic communication
 - must enable all persons participating in meeting to communicate without an intermediary and reasonably effectively;
 - notice convening meeting should inform shareholders of availability to shareholders/proxies to access medium/means of electronic communication

What does 'majority rule' mean?

- Not a rule in the Act itself but a common law rule
- When a person becomes a shareholder in a company, he/she agrees to be bound by decisions of majority.
- Powers of the majority are limited by certain provisions of the Act.
- Certain decisions require a larger majority (special resolution).

How do shareholders exercise their voting rights?

- The shareholder of a profit company, other than an SOE, with only one shareholder:
 - rules relating to setting a record date for determination of shareholder's rights, proxies etc do not apply

- Where a profit company, other than a SOE, has only one director:
 - director may exercise any power or perform any function of board without notice or compliance with internal formalities:
 - except to extent that MOI provides otherwise.

Where every shareholder of a particular company, other than a SOE, is also a director of that company:

- Shareholders may decide on any matter to be done by the company, without notice or compliance with internal formalities.

- Every director must have been personally present at the board meeting when matter referred to them in capacity as shareholders
- A quorum must be present and a resolution adopted by those persons in their capacity as shareholders must be accepted by enough shareholders to be either an ordinary or a special resolution.

What are shareholders resolutions?

- Companies Act provides for two types of resolutions that can be taken by the members at a shareholders meeting
- An ordinary resolution:
 - Requires support of over 50% of votes exercised.
 - MOI may require a higher percentage of voting rights
 - Except for removal of a director.
 - Must always be a margin of at least 10% between percentages required for ordinary and special resolutions.
- A special resolution:
 - Requires at least 75% of voting rights exercised
 - MOI may permit a lower percentage of voting rights
 - for one or more particular matters.
 - provided at all times there is a margin of at least 10%.

Which decisions require a special resolution?

- Amendment of company's MOI
- Approving voluntary winding up of the company
- Approval of sale of assets, merger, amalgamation or scheme of arrangement
- Any other matter as required by the MOI.

Can meetings be postponed or adjourned?

- A meeting may be postponed or adjourned for a week if:
 - Within one hour after time for meeting to begin, quorum not present
 - When no quorum at postponed or adjourned meeting, members present in person or by proxy will be deemed to constitute a quorum;
 - If other business on the agenda, consideration of that matter may be postponed to a later time in the meeting without motion or vote.
- Chairperson where a quorum not present within one hour of scheduled start time:

- may extend one hour limit for a reasonable length of time on ground that exceptional circumstances effecting weather, transportation or electronic media have effected ability of shareholders to be present or;
- one/more shareholders, being delayed, have communicated an intention to attend meeting and those shareholders, together with others in attendance, would constitute a quorum.

- The one hour rule and postponement of one week is an alterable provision.
- Company must give notice of postponement only if to a different location.
- When a quorum is not present at the postponed or adjourned meeting:
 - members of the company present in person/proxy deemed to be a quorum.
 - Unless MOI or rules provides otherwise:
 - after quorum established, meeting may continue as long as at least one shareholder with voting rights entitled to be exercised at meeting is present.
- A shareholders meeting may be postponed without further notice on motion if supported by members with a majority of voting rights at the meeting.
- An adjournment of a meeting may be either to:
 - a fixed time or place or until further notice as agreed to at meeting.
- Notice of adjournment need only be given when adjourned to a different location
- Cannot be adjourned more than 120 days after record date or 60 business days after adjournment occurred:
 - An alterable provision

Multiple choice Question

What is the meaning of the word 'director'?

- A 'director' is a member of the board of a company.
- Includes any person occupying position of a director or alternate director.
- S66:



- o Recognises different types of directors:
- o Specifically provides that a person becomes a director only after given written consent to serve as a director, after having been appointed or elected
- o Both Act and MOI can curtail powers of the board of directors.
- o The King Code recognises three types of directors:
 - o Executive:
 - Involved in day-to-day management;
 - Employees of the company or its subsidiaries;
 - o Non-executive:
 - Not involved in day-to-day management;
 - Not full time salaried employee of company or subsidiaries;
 - o Independent:
 - Non-executive director;
 - Not employed by company in an executive capacity;
 - Not a representative of a controlling shareholder;
 - No contractual or business interest in the company or group.
- o Shadow directors: are people not officially appointed as directors but can give instructions to the Board which acts on their instructions.
 - Recognised by the King Code but discouraged.
- o *Howard v Herrigel*:
 - o Unhelpful or even misleading to classify company directors as executive or non-executive for purposes of determining their duties to the company.
- o The 2008 Act recognises the following types of directors:
 - o *Ex Officio*:
 - Holds office solely as a result of holding another office/title/status
 - Not appointed by shareholders;
 - Has all powers and functions of other directors except to extent restricted by MOI;
 - o Memorandum of Incorporation Director:
 - Has all duties and subject to all liabilities of other directors.
 - o Do not have to be appointed by shareholders;
 - o MOI can specify how and by whom director is appointed.
 - o Alternate director:
 - May be appointed or elected depending on contents of MOI;

- A person elected/appointed to serve as a member of the board in substitution for an elected/appointed director
- In a profit company, at least 50% of directors must be elected by shareholders.
- o A temporary director appointed to fill a vacancy:
 - MOI can provide for appointment of a temporary director;
 - Unless MOI provides otherwise, directors can appoint.
- o Unitary board structure:
 - o Endorsed by the King Code;
 - o Two tier structure not recommended;
 - o A single board should consist of both executive and non-executive directors sitting together and making decisions at same meeting.

o The King Code recommends a majority of non-executive directors: to ensure objective decision-making; should ideally be independent and identified as such in the annual report

The distinction between the 2 were blurred
What are the differences between managers and directors?

DIRECTORS	MANAGERS
Need not be an employee but could be	Employee of the company
Board of directors provide leadership and direction at top of the organisation.	Managers carry through strategy on behalf of directors.
Responsible for leadership and direction of the company.	Managers implement decisions and policies made by the board
Have ultimate responsibility for long-term prosperity of the company.	Fewer legal responsibilities although cannot act contrary to interests of employer.
Directors required by law to apply care and skill and subject to fiduciary duties (or possible civil and criminal liability); can also be held responsible for acts of the company and owe certain duties to stakeholders.	Note however that an employee/manager has duties similar to a director's fiduciary duties towards company: <i>Phillips v Fieldstone Africa (Pty) Ltd; Robinson v Randfontein Estates Gold Mining Co Ltd; Daewoo Heavy Industries (Pty) Ltd v Banks</i>

Accountable to shareholders for performance and can be removed by them.	Usually appointed and dismissed by directors/management and do not interact with shareholders.
Directors play a key role in determining values and ethical position of company.	Managers must enact company ethos taking their direction from the board.
Directors are responsible for company administration.	Company administration can be delegated to managers, but ultimate responsibility resides with directors.
A number of provisions of the Act for penalties for directors.	Generally managers are not held responsible under the Act.
Directors can be disqualified as directors under the Act or in terms of a company's MOI.	Control over employ of a manager rests with board and is exercised in accordance with manager's employment contract.

- In terms of the **King Code**, key functions of the board of directors are to:
 - Give strategic direction to the company;
 - Ensure management implements board plans and strategies;
 - Be responsible for performance and affairs of company and to retain full and effective control over company.

What are the requirements for number of directors?

- Multiple choice question*
- A private or personal liability company:
 - Must have at least one director
 - A public or non-profit company:
 - Must have at least 3 directors
 - A person becomes a director of a company when he/she:
 - has been appointed or elected in terms of MOI or;
 - holds an office, title, designation or similar status entitling the person to be an *ex officio* director of the company
 - Only become a director after delivering a written consent accepting position.
 - S66: where company does not have prescribed minimum number of directors:
 - does not negate or limit the ability of the board;
 - nor does it invalidate anything done by the company.

What is the effect of the Act and the company's MOI on directors?

- Certain provisions in the Act may be varied by the MOI while others may not.
- Provisions of the Act which may be varied by the MOI:
 - Higher number of directors can be specified;
 - Any person can have power to appoint and remove one/more directors (whereas Act states that MOI must provide that shareholders will be entitled to elect at least 50% of the directors and 50% of any alternate directors).
 - Can provide that person be regarded as an *ex officio* director (not insisted on in the Act).
 - Can provide for appointment of one/more persons as alternate directors (not insisted on in the Act).
 - Can provide for payment of remuneration to directors.
 - Can provide for term of office of a director.
 - Can provide additional grounds of ineligibility/disqualification of directors;
 - Can provide for minimum qualifications to be met by directors.

Provisions of the Act which may not be varied by MOI:

- A lower number of directors;
- Cannot invalidate acts done where acts without required number of directors;
- Cannot entrench position of a director and override will of ordinary shareholders as expressed in an ordinary resolution (S71 provides that director may be removed by an ordinary resolution at a shareholders meeting)
- Cannot override grounds in Act for ineligibility of directors.

Question - cannot be a director at all Who are persons ineligible to be directors and who are persons disqualified to be directors?

- Certain people are ineligible to be appointed as a director while certain people are disqualified to be a director of a company:
 - Person who are ineligible are absolutely prohibited, with no exceptions.
 - Persons who are ineligible:
 - A juristic person *get to be a juristic person*
 - A trust;
 - An unemancipated minor or person under a similar legal disability;
 - Any person who does not satisfy a requirement in MOI.

Persons who are disqualified: if you apply to court of High Court you need to see

- o Prohibited by a court of law from becoming a director:
 - Absolute prohibition
 - Declared to be delinquent by a court of law
 - Absolute prohibition
- o Unrehabilitated insolvent: *not yet*
 - Court has a discretion to allow appointment
- o Prohibited in terms of any public regulation:
 - Court has a discretion to allow appointment
- o Removed from an office of trust because of dishonesty:
 - Court has a discretion to allow appointment;
 - Shareholders can also avoid this disqualification.
- o Convicted and imprisoned without option of a fine for theft, fraud, perjury or various other offences:
 - Court has a discretion to allow appointment;
 - Shareholders can also avoid this disqualification.
- o Disqualified in terms of a company's MOI.

Law

Approval of a high court

What are the exemptions to disqualifications of directors?

- o S69(11) gives court a discretion and S69(12) shareholders of certain private companies, an opportunity to avoid a disqualification.
- o Exemptions which can be granted by a court
 - o An unrehabilitated insolvent;
 - o Person removed from an office of trust for dishonest misconduct;
 - o Person convicted of a crime with an element of dishonesty.
 - Application made *ex parte*;
 - Applicant will need to show that rehabilitated from wrongful ways.
- o Director disqualifications: exemptions for certain private companies
 - o Despite being disqualified, a person may act, iio S69(12) as a director of a private company if:
 - o All shares are held by that disqualified person alone; or
 - o All shares held by disqualified person and related persons and each related person has consented in writing to person being a director.
- o *Ex parte Barron*

How do you declare a person delinquent or under probation?

S162: A court can order a person to be a 'delinquent' or 'under probation'. *can be director for time*

- o The following persons can apply to court for such an order: *to declare a person delinquent*
 - o A company;
 - o A shareholder;
 - o A director;
 - o A company secretary or prescribed officer of a company;
 - o A registered trade union that represents employees of the company;
 - o Any other representative of the employees of a company;
 - o The Commission; or
 - o The Takeover Regulation panel.

company that has a direct interest

Question 2/2

A company/shareholder/director/company secretary/prescribed officer of a company/registered trade union that represents employees or any other representative of employees of the company can apply to court on ground that:

- o person consented to serve as director/acted in capacity of director/ prescribed officer, while ineligible or disqualified; OR
- o person acted as a director whilst under probation and in contravention of an order under Companies Act or CC Act;
 - o declaration unconditional & lasts for lifetime of person declared delinquent.
- o person while a director grossly abused position of director OR *person liable to compel*
- o person took advantage of information/opportunity contrary to S76(2)(a) OR
- o person intentionally/by gross negligence inflicted harm on company or subsidiary contrary to S76(2)(a); OR
- o person acted in a manner that amounted to gross negligence, wilful misconduct or breach of trust; OR *not Robinson - disbarred*
- o person acted in a manner in S77(3)(a)(b) or (c).
 - o declaration of delinquency with any conditions court considers appropriate;
 - o seven years from the date of the order;
 - o court may also order that a director:
 - undergoes programme of remedial education relevant to nature of person's conduct as a director;
 - carries out community service or;

- pays compensation to any person adversely affected by conduct as a director, to extent victim does not otherwise have a legal basis to claim compensation.
- person, whilst serving as a director, was present at meeting and failed to vote against a resolution despite inability of company to satisfy solvency and liquidity test; OR *what the director did*
- person acted in a manner materially inconsistent with duties of a director; OR
- person acted in or supported decision of the company to act in a manner set out in S163(1) (acted in an oppressive or unfairly prejudicial manner)
 - declaration placing a person under probation may be made subject to any conditions court considers appropriate;
 - subsists for a period not exceeding five years;
 - A court may also order that director:
 - Undergo remedial education relevant to nature of person's conduct as a director:
 - carries out community service or;
 - pays compensation to any person adversely affected by conduct as a director, to extent victim does not otherwise have a legal basis to claim compensation or;
 - if a probation order, be supervised by a mentor in any future participation as a director while the order remains in force or
 - be limited to serving as a director of a private company or a company of which that person is sole shareholder.
- The Commission or the Takeover Regulation Panel:
 - Order sought is delinquency;
 - May be made subject to any conditions court considers appropriate including limiting application to one/more particular categories of companies and;
 - declaration lasts seven years from date of order or longer as determined by court.
- Additional grounds open to Commission or to the Takeover Regulation Panel to apply for an order of delinquency are that person has:
 - repeatedly been personally subject to a compliance notice/similar enforcement mechanism for substantially similar conduct;
 - at least twice been personally convicted of an offence or subjected to an administrative fine/similar penalty in terms of legislation;

- as a director of one/more companies or a managing member of one/more CC's or controlled/participated in control of a juristic person:
 - been convicted of an offence/subject to an administrative fine or similar penalty within five years.
- must be proven that person a director/managing member/responsible for management of a juristic person at time of contravention that resulted in conviction, administrative fine or other penalty.
- Court will grant a delinquency order only if satisfied that declaration of delinquency justified
- Court will take into account nature of contravention and person's conduct in relation to management, business or property of any company, close corporation or juristic person at the time prior to making its decision.

Can a person apply to court to suspend/set aside a delinquency order?

Yes

- A person who has been declared delinquent (unless order unconditional and lasts for lifetime), may apply to a court:
 - To suspend order and substitute order of probation, with/without conditions, *not allowed*
 - To set aside order more than two years after it was suspended.
- On considering application:
 - court may not grant order applied for unless applicant satisfied conditions related to order and;
 - may grant order if, considering circumstances leading to original order, and conduct of applicant in ensuing period, satisfied that applicant has demonstrated satisfactory progress towards rehabilitation and;
 - reasonable prospect that applicant would be able to serve successfully as director in future.

Who are the first directors of a company?

- Every incorporator of company deemed to be a director until enough directors appointed to meet required minimum number of directors.
- If number of incorporators of a company, plus *ex officio* directors and appointed directors is less than minimum number of directors required for that company.

- o board must call a shareholders' meeting within 40 business days after date of incorporation to elect directors to fill all vacancies on board.

What about vacancies on the board?

- o A person ceases to be a director and a vacancy arises on board of a company when:
 - o period in MOI for a fixed term contract expires;
 - o director resigns;
 - o director dies;
 - o position of an *ex officio* director becomes vacant if person ceases to hold office/title that entitled person to be a director;
 - o no longer lives in SA when no other directors of company resident in SA;
 - o becomes incapacitated to extent that unable to perform functions of a director and unlikely to regain capacity within a reasonable time;
 - o declared a delinquent;
 - o placed on probation under conditions inconsistent with continuing to be a director of a company;
 - o becomes ineligible or disqualified from being a director; or
 - o removed from office by resolution of shareholders/board or by order of court:
 - if board removes a director: vacancy does not arise until expiry of time for filing an application for review/granting of a court order;
 - o director suspended from office during that time
- How do you fill vacancies on the board?**
- o If a vacancy arises in the board, other than as a result of an *ex officio* director ceasing to hold that office:
 - o must be filled by a new appointment or by an election at next AGM.
 - o In any other event: vacancy must be filled within six months after vacancy arose at a shareholders meeting called to elect a director or by a poll of persons entitled to exercise voting rights.
 - o Where, as a result of a vacancy, there are no remaining directors or no remaining directors resident within SA, any shareholder with voting rights may convene a meeting to elect directors.
 - o A company must file a notice within ten business days after a person becomes or ceases to be a director of the company.

How are directors removed?

Question

- o A director can be removed by:
 - o shareholders, and, in some circumstances, by the board of directors.

Removal by shareholders 5/1

- o A director may be removed by an ordinary resolution adopted at a shareholder's meeting:
 - o no matter what the terms of any director's contract may provide.
- o Notice of meeting and resolution must be given to director before considering resolution to remove director:
 - o period of notice equivalent to that which shareholder entitled to receive when convening meeting.

- o Director must be given an opportunity to make a presentation in person/through a representative, to the meeting, before resolution put to a vote.

Removal by the board of directors

- o Grounds to remove a director by a resolution of board of directors are:
 - o Company has more than two directors and:
 - alleged by shareholder/director that director ineligible or disqualified;
 - Where a director has become incapacitated:
 - to extent that director unable to perform functions of a director and;
 - is unlikely to regain capacity within a reasonable time;
 - o director no longer resident in SA when no other directors resident within SA;
 - o director has neglected or been derelict in performance of functions of director

- o Where board has taken a resolution to remove director, director may apply to court to review determination of the board:
 - o must be brought within twenty business days after decision taken by board.

- o Court may confirm determination of board or remove director from office, if satisfied that director ineligible/disqualified/incapacitated/non-resident/negligent/derelict.
- o These rules don't apply to a company that has less than three directors.
- o Any director/shareholder may apply to companies tribunal for a determination.

What about removal where there is breach of contract?

- o Removal as a director could nevertheless constitute breach of contract.

- Particular director will retain right to institute any claim in common law for damages or compensation for loss of office as a director or loss of any other office as a consequence of being removed as a director.

Question
NEW

What about board committees?

- S72:
 - Except to extent MOI provides otherwise, board of directors may appoint any number of committees and delegate any authority of board to a committee.
 - The King code:
 - Clear that board is focal point of corporate governance system.
 - While board may delegate authority, important to distinguish between a delegation and an abdication of powers.
 - The Companies Act:
 - Board responsible for carrying out its duties properly and a director cannot avoid responsibility for e.g. by shielding behind a committee:
 - Board of directors remains liable for proper performance of a director's duty despite delegation to a committee.
 - Committee may include non-directors but person on committee cannot be ineligible/disqualified to be a director.
 - Non-director appointed to a board committee will not have any voting rights on any matter to be decided upon by that committee.
 - S72(4) entitles Minister of Trade and Industry to prescribe that a company/category of companies must have a social and ethics committee if desirable in the public interest having regard to:
 - Its annual turnover.
 - Size of its workforce.
 - Nature and extent of its activities.
- ### What about committees and the King Code?
- Public listed company should at least have:
 - an audit committee and a remuneration committee
 - Establishment of a nomination committee is a strong recommendation.
- ### What about board meetings?
- Director authorised by board may call a meeting of the board at any time

- Directors meeting must call a meeting if required:
 - by number/percentage of directors specified in MOI;
 - by at least 25% of directors where board has at least 12 members;
 - when board has less than 12 members and requested by at least two directors.

Electronic communications - Cm

- Possible to conduct board meetings by electronic communication;
- Also possible for one/more directors to participate in meeting by electronic communication, provided facility used allows all persons participating to communicate concurrently with each other without an intermediary and to participate effectively.

Notice

- The form of the notice and the periods are determined by board of directors;
- Only requirement is that should comply with requirements in MOI or rules.
- No board meeting may be convened without notice to all directors.
- If all directors present at a meeting and acknowledge actual receipt of notice or waive notice, meeting may proceed even if company failed to give notice or notice defective.

Quorum

- Majority of the directors of the board must be present at a meeting before a vote may be called.

Voting

- Every director has one vote.
- Majority of votes on a resolution are sufficient to approve the resolution.
- If a tie: chair may cast a deciding vote if did not initially cast a vote or matter being voted on failed.

Minutes and resolutions

- Minutes of all board and committee meetings must be kept by the company.
 - must include declarations given by directors & resolutions adopted by board.
- Resolutions must be dated and sequentially numbered and are effective as of date of resolution, unless resolution states otherwise.
- Minutes of board and committee meetings and resolutions signed by the chair are evidence of proceedings of meeting or adoption of that resolution.

Directors acting other than at meeting

- A decision that could be voted on at a meeting of the board may be adopted by written consent of a majority of directors in person or by electronic communication provided that each director received notice of the matter to be decided.
 - same effect as if voted on in a meeting.

Common Law & Statutory Law

What are the duties of directors?

governed by 4 aspects

- Four sources from which the duties of directors arise:
 - Their contracts with the company (if any); + (2)
 - The company's constitution (M.O.D.);
 - The Companies Act; and
 - Common law.

The 1973 Companies Act:

- No clear rules regarding corporate governance and duties/liabilities of directors.
 - Largely left to common law and codes of corporate practice.

The 2008 Companies Act:

Codified duties of directors are:

- To disclose to board any personal financial interest in matters affecting company (S75)

- Not to use position of director/information obtained as director to gain an advantage for himself/another, or to knowingly cause harm to company/subsidiary (S76(2)(a)) - *Personal Advantage*
- To disclose to board any material information that comes to a director's attention (S76(2)(b)) *Personal Advantage*
- To act in good faith and for a proper purpose (S76(3)(a)) *set up another company with direct competition*
- To act in the best interest of the company (S76(3)(b))
- To act with a reasonable degree of care, skill and diligence (S76(3)(c))

- Provisions in 2008 Act do not substitute duties of a director under the common law.
 - Courts may still have regard to common law including past case law (therefore a partial codification of the law).

What are the standards of a director's conduct?

- Directors must not abuse possession of information (S76(2)) and must act in a certain way when there is a personal financial interest (S75).

Question
NB

Directors must not abuse their position or information (S76(2)) and must act in a certain way when there is a personal financial interest (S75).

- S75 - Related parties - direct financial interest, retention of interest
- If a director is the only director but not the only shareholder of company:
 - must disclose any personal interest in an agreement/other matter of company to shareholders and obtain their prior approval by an ordinary resolution before he enters into the agreement or deals with the matter.
- In all other cases:
 - Disclosure must be made to board of any personal financial interest of director in a matter to be considered at a board meeting and director may not be present at or take part in discussion.
 - A director may also make an advance general disclosure of personal financial interest to the shareholders or the board.

- S76(2)(a)
 - A director may not abuse position as director, or information obtained while acting as a director, to gain an advantage for himself/another person other than company/wholly-owned subsidiary, or to knowingly cause harm to the company/subsidiary.

- A director has a duty to disclose any information that comes to his attention, unless the director reasonably believes that the information is:
 - immaterial to the company;
 - generally available to the public;
 - known to other directors.

Regal Hastings Ltd V Gulliver

- Directors should avoid placing themselves in a position where their duty to the company conflicts with their own interests

Robinson v Randfontein Estate Gold Mining Co Ltd

- Where one man stands in a position of confidence involving a duty to protect interests of another he is not allowed to make a secret profit at other's

expense or place himself in a position where his personal interest conflict with his duty.

- *Chersi v Timber Developments (Pty) Ltd*
 - facts of each case important in determining whether or not a person has acted in breach of the fiduciary duty owed to the company.

- For purposes of disclosure 'director' has an extended meaning:
 - Includes alternate director/prescribed officer/person who is a member of a board committee/committee:
 - irrespective whether also a member of the company's board.

S76

Acting in good faith with a certain degree of care, skill and diligence

- A director of a company must exercise powers and functions of director in good faith and in best interests of company. *Brench of Fidelity duty*
- *Philorex v Snyman*
 - Although test objective, takes subjective elements into account in that knowledge, skill and experience of that particular director taken into account.

S76(4)

- Introduces business judgment rule into South African law
- A director will be regarded as having acted in the best interest of company and with required degree of care, skill and diligence if director:
 - Took reasonable steps to become informed about the matter and: *relevant*
 - has no personal financial interest in subject matter of decision/had no reasonable basis to know any related person had a financial interest in matter made or supported a decision in belief that in best interest of company.
- A director is also entitled to rely on:
 - One/more employees whom director reasonably believes to be reliable and competent in functions performed;
 - Information, opinions, reports or statements provided by legal counsel, accountants or other professional persons retained by company;
 - Board/committee as to matters involving skills/expertise that director reasonably believes are matters within particular persons profession, or

expert competence or as to which person merits confidence or a committee of the board of which the director is not a member:

- unless director has reasons to believe that actions of the committee do not merit confidence.

Fisheris Development Corporation v Jorgenson held that:

- extent of a director's duty of care and skill largely depends on nature of company's business;
- law does not require director to have a special business acumen and;
- director's may assume that officials will perform their duties honestly.

What about the liability of directors and prescribed officers?

- Company may recover loss/damage/costs sustained by company from director when:
 - No common law or delict relating to breach of fiduciary duties: *Alva Vireo contract*
 - Director acted in name of company/signed anything on behalf of company while knowing he lacked necessary authority: *Perseus v Whittier*
 - Director conducted company's business in contravention of 2008 Act relating to pre-incorporation contracts:
 - Director a party to an act/omission by company despite knowing it was calculated to defraud a creditor/ employee/shareholder of company, or had another fraudulent purpose;
 - Director signed, consented to, or authorised publication of financial statements that were false/misleading in a material respect;
 - Director signed, consented to or authorised publication of a prospectus or written statement that contained an 'untrue statement' or a statement that a person had consented to be a director of the company, when no such consent had been given, despite knowing statement was false, misleading or untrue.
 - Director present at a meeting or participated in making of a decision other than at a meeting where there was:
 - non-compliance with formalities prescribed by Act;
 - Director failed to vote against issuing of any unauthorised shares, despite knowing shares not authorised;
 - Director participated in issuing unauthorised securities, despite knowing non-compliance with provisions of Act;

- Director participated in granting options despite knowing shares for which options could be exercised or into which securities could be converted had not been authorised;
- Director participated in decision to grant financial assistance for acquisition of securities of company, despite knowing provision of financial assistance was inconsistent with S44 or company's MOI:
 - A company may provide financial assistance for acquisition of shares provided:
 - satisfies solvency and liquidity test;
 - terms under which financial assistance proposed are fair and reasonable to company;
 - company can provide financial assistance for acquisition of shares for an employee share scheme or after a special resolution of shareholders which within previous two years approved assistance for a specific recipient/category of potential recipients;
- Director provided with a loan or granted financial assistance despite knowledge that financial assistance inconsistent with S45 or company's MOI:
 - Includes lending money, guaranteeing a loan or other obligation and securing any debt/obligation;
 - A company can provide a director with a loan/financial assistance if:
 - pursuant to an employee share scheme or;
 - pursuant to a special resolution of shareholders within previous 2 years which approved assistance, either for specific recipient/category of potential recipients;
 - specific recipient falls within category and;
 - board satisfied that immediately after providing financial assistance, company would comply with solvency and liquidity test, and;
 - terms under which financial assistance proposed are fair and reasonable to the company.
- A director participated in a resolution approving a distribution despite knowing distribution contrary to S46:
 - A company may make a distribution provided:
 - pursuant to an existing legal obligation of company, or;
 - in terms of a court order, or;
 - board by resolution has authorised distribution.

- Board of company:
 - should be satisfied that reasonably appears company will satisfy solvency and liquidity test immediately after completing distribution, and
 - must by resolution acknowledge that applied solvency and liquidity test.
- liability of a director who failed to vote against a resolution arises only if:
 - immediately after making distribution, company does not satisfy solvency and liquidity test and unreasonable at time of decision to conclude it would.
 - liability of a director does not exceed:
 - difference distribution exceeded amount that could have been distributed without causing company to fail test and;
 - amount, if any, recovered by company from persons to whom distribution was made;
- Acquisition by the company of any of its shares, or shares of its holding company, despite knowing contrary to S46 or S48:
 - A company may acquire its own shares provided passes solvency and liquidity test;
 - Any subsidiary of a company may acquire shares of that company but not more than 10% of issued shares of holding company;
 - No voting rights attached to shares are acquired by subsidiaries.
- Allotment of shares contrary to any provision of Chapter 4 of the 2008 Act.
 - Director liable jointly and severally with any other person liable for same act:
 - Proceedings to recover any loss/damages/costs may not start more than 3 years after act/omission that gives rise to liability occurred.
- In any proceedings against a director, other than for wilful misconduct or wilful breach of trust:
 - court may relieve director, either wholly or in part, from any liability or on any terms the court considers just.
 - If appears to court that director has acted honestly and reasonably.

Can a company indemnify a director or take out insurance?

- S78
- A company cannot undertake not to hold a director liable for breach of fiduciary duties:
 - Any provision in an agreement, MOI or rules of a company, or a resolution adopted by a company, whether express or implied, is void:
 - to extent it directly/indirectly purports to relieve a director of duty.
 - Except to extent that a company's MOI provides otherwise:
 - company may advance expenses to a director to defend litigation in any proceedings arising out of the director's service to company.
- Company can take out indemnity insurance to: cover a potential loss
 - protect director against any liability/expense for which company permitted to indemnify a director;
 - insure itself against any expenses that company permitted to advance to a director and for which company permitted to indemnify a director. *was respect in things he is allowed to do*
- A company may not:
 - Directly/indirectly pay a fine imposed on director of company/related company, convicted of an offence in terms of any national legislation;
 - indemnify a director in respect of liability where he/she:
 - acted in company's name or signed any doc's on behalf of company knowing he had no authority to do so;
 - participated in carrying on business in insolvent circumstances knowingly;
 - was party to an act/omission by company despite knowing it was calculated to defraud a creditor/employee/shareholder, or had another fraudulent purpose;
 - caused loss/liability to company as a result of willful misconduct/willful breach of trust;
 - is liable to a fine for an offence contravening any national legislation.
- S78(8):
 - company can claim restitution from director of company/related company for any money paid directly/indirectly by company to or on behalf of director in any manner inconsistent with above restrictions.

Chapter 8

AUDITORS AND THE COMPANY SECRETARY

What effect does the 'solvency and liquidity' test have on financial statements and records?

- The solvency and liquidity test must be applied:
 - When a company intends to provide financial assistance for subscription of its securities (S44);
 - If a company grants loans/other financial assistance to directors (S45);
 - Before a company makes any distribution (S46);
 - If a company wishes to pay cash in lieu of issuing capitalization shares (S47);
 - If a company wishes to acquire its own shares (S48).

- Historic cost-accounting methods may be insufficient; current accounting concepts may need adaptation, including disclosure of assets at 'market values'.
- In terms of solvency and liquidity test, a company's assets must be 'fairly valued' and all reasonable foreseeable financial circumstances of company at the time must be considered.

Must companies file an annual return?

- Every company/external company conducting activities within SA must file an annual return with commission including a copy of company's annual financial statements if required to have financial statements audited in terms of 2008 Act.

Are there accountability and transparency requirements?

- Imposes additional accountability and transparency requirements on certain companies, particularly on:
 - a public company;
 - a private company that has received the relevant administrative notice from commission and;
 - state-owned companies not exempted from these provisions.

Who must appoint an auditor?

- A public company and state-owned enterprise must:
 - Appoint a company secretary
 - Appoint an auditor
 - Appoint an audit committee
- Every company that appoints a company secretary or auditor (whether required to or voluntarily) must maintain a record of its secretaries and auditors, including name (and former name) of each person, date of appointment etc and any changes.

What are audit requirements & req's for independent review?

- Annual financial statements of a public company must be audited.
- Annual financial statements of other companies must either be audited or subjected to an independent review unless company exempt from independent review.
- S90(2) disqualifies certain people from being appointed as auditor of a company:
 - Cannot be a director/employee of the company;
 - Cannot be an officer of company although name must be included in records.

How is an auditor appointed?

- A public company and certain private companies must appoint an auditor every year at the AGM.
- Other companies may voluntarily appoint an auditor.
- To be appointed as an auditor of a company:
 - A person/firm must be a registered auditor and:
 - Must not be:
 - director/ company secretary/prescribed officer of company, or;
 - employee/consultant of company engaged for more than one year in maintenance of financial records or preparation of financial statements.
 - a person who, alone/with a partner/employees, habitually or regularly performs duties of accountant/bookkeeper/secretarial work for company.
- Prohibition includes any person who, during 5 financial years immediately before appointment, acting in a capacity that prevented person from being appointed as auditor.

Pg 102 r/b

Multiple Questions

- Person appointed as auditor of a company must be acceptable to company's audit committee as being independent of company.
- A retiring auditor may be automatically re-appointed at an AGM, without a resolution being passed, unless:
 - retiring auditor no longer qualified for appointment;
 - retiring auditor no longer willing to accept the appointment;
 - retiring auditor required to stop being auditor in terms of rotation of auditors;
 - company's audit committee objects to reappointment;
 - company has notice of an intended resolution to appoint some other person/s in place of the retiring auditor.
- If AGM of a company does not re-appoint an auditor, directors must fill vacancy within 40 business days after date of the meeting.

How do auditors resign and what happens if there is a vacancy?

- Resignation of an auditor is effective when notice of resignation is filed.
- If a vacancy arises in office of an auditor of a company:
 - board must appoint a new auditor within 40 business days after filing resignation.
 - board must propose to company's audit committee, within 15 days after vacancy, name of at least one registered auditor to be considered for appointment.
- Board can appoint person proposed to audit committee if, within 5 business days after proposal, audit committee does not reject proposed auditor in writing.
- If company appoints a firm as its auditor, a change in membership of the firm does not create a vacancy as long as not less than half of members remain after change in composition.

How does rotation of auditors work?

- Same individual may not serve as auditor/designated auditor of a company for more than 5 consecutive financial years:
 - Individuals only, not firms and does not apply to private companies.
- If an individual has served as auditor/designated auditor of a company for 2/more consecutive financial years and then ceases to be auditor/designated auditor:
 - may not be appointed again as auditor/designated auditor of company until expiry of at least two further financial years.

- If company has appointed two or more persons as joint auditors, company must manage rotation so that all joint auditors do not relinquish office in same year.

What are the rights and the restricted functions of auditors?

- Auditor of a company is entitled to:
 - access at all times to accounting records/books/documents of company;
 - require from directors/prescribed officers any information and explanations necessary to perform auditor's duties.
- In the case of auditor of a holding company entitled to:
 - right of access to all current and former financial statements of any subsidiary;
 - require from directors/officers of holding company/subsidiary any information and explanations regarding statements/accounting records/books/documents of subsidiary necessary to perform auditor's duties.

new rule auditor can now write a letter to directors to get court order to get info.
- Auditor entitled to attend any general shareholder's meeting and to be heard on any part of the business of the meeting that concerns auditor's duties/functions.
- May apply to court for an order to enforce rights as an auditor:
 - Court may make an order that is just and reasonable to prevent frustration of auditor's duties by company/any of its directors/prescribed officers/ employees.
- An auditor appointed by a company may not perform any services for that company that would place the auditor in a conflict of interest:
 - As determined by Independent Regulatory Board for Auditors, S44(6) of the Auditing Professions Act 26 of 2005 or company's audit committee.

What are audit committees?

- At each AGM, a public company/state-owned enterprise/any other company voluntarily decided to have an audit committee, must elect an audit committee unless:
 - company is a subsidiary of another company that has an audit committee; and
 - audit committee of other company will perform functions required to Act.
- Must have at least 3 members who are non-executive directors not involved in the day-to-day management of the company in the previous 3 financial years
- Members cannot be:

- prescribed officer: full-time executive employee of company/inter-related company; material supplier or customer of company; person who holds or controls more than 5% of general voting rights associated with securities issued by company/holding company;
- It is therefore obvious that a member of an audit committee should be an independent person who is able to act objectively and without bias.
- The board can, considering education, skills and experience of its directors who are members of the audit committee, appoint, as an additional member, a person who is not a director but who has, in directors' opinions, requisite knowledge and experience in financial matters to better equip audit committee to carry out its functions:
 - person cannot be ineligible or disqualified.
- Functions of the audit committee are to:
 - Nominate appointment of a registered auditor independent of company;
 - Determine fees to be paid to auditor and terms of engagement;
 - Ensure appointment complies with provisions of Act and other legislation;
 - Determine, taking Act into account, nature and extent of any non-audit services that auditor may/may not provide to a company/related company;
 - Pre-approve any proposed agreement with auditor for provision of non-audit services to company;
 - Prepare a report, to be included in annual financial statements for the year describing how the audit committee carried out its functions and whether:
 - satisfied that auditor independent of the company and;
 - commenting on financial statements, accounting practices and internal financial control of company;
 - Receive and deal appropriately with any concerns or complaints, whether from within or outside the company or on its own initiative, relating to:
 - accounting practices and internal audit of the company;
 - Content or auditing of company's financial statements;
 - Internal financial controls of the company or
 - Any related matter.
 - Make submissions to board re company's accounting policies, financial control, records and reporting.
 - Perform other functions determined by board such as development and implementation of a systematic, disciplined approach to evaluate and

- improve effectiveness of risk management, control, and governance processes within company.
- In considering whether a registered auditor is independent of a company, audit committee must ascertain that auditor does not receive any direct/indirect remuneration or other benefit from the company, except as auditor, or for rendering others services to company, to extent permitted in terms of Act.
- Consider whether auditor's independence may have been prejudiced:
 - As a result of any previous appointment as auditor; or
 - Having regard to extent of any consultancy, advisory or other work undertaken by the auditor for that company.
 - Consider compliance with other criteria relating to independence or conflict of interest and any other company within group.
- Nothing precludes appointment by a public company at its AGM of an auditor other than one nominated by audit committee, but if such auditor appointed, valid only if audit committee satisfied that proposed auditor is independent of the company.

Which companies must appoint a company secretary?

- Chief administrative officer of a company.
- A public company or state-owned enterprise must appoint a company secretary.
- A juristic person/partnership may be appointed as long as every employee of that partnership is not disqualified from being appointed company secretary.
- The first company secretary may be appointed by:
 - Incorporators of the company; or
 - Within 40 business days after incorporation by either directors or an ordinary resolution of shareholders.
- A person will be disqualified from being appointed company secretary if:
 - Court prohibited person from being a director or declared person a delinquent; or
 - Removed from office of trust on grounds of misconduct involving dishonesty; or
 - An unrehabilitated insolvent
 - Convicted, in SA/elsewhere and imprisoned without option of a fine or fined more than prescribed amount, for theft, fraud, forgery, perjury or an offence involving fraud, misrepresentation or dishonesty;
 - In promoting/forming/managing a company or under various legislation.

- Disqualification (except for probation and delinquent directors) ends five years after removal from office/completion of sentence

- A company secretary is accountable to the company's board;
- Duties include, but are not restricted to:
 - Providing directors with guidance as to duties, responsibilities and powers;
 - Making directors aware of any law relevant to or affecting company;
 - Reporting to board any failure on part of company/director to comply with Act;
 - Ensuring minutes of all shareholder's meetings/board meetings/committees of directors/audit committee, are properly recorded in accordance with Act;
 - Certifying in company's AFS whether company has filed required returns and notices in terms of Act and whether they appear to be true, correct and up to date;
 - Ensuring copy of AFS sent, to every person entitled to it; and
 - Carrying out functions of a person designated in terms of S33(3).

- Board of directors of a company can take a resolution to remove the secretary.
- Where company secretary is removed by company, secretary may insist a statement be included in AFS setting out secretary's content as to circumstances resulted in removal.
- The statement of the company secretary must be included in the director's report in the company's annual financial statements.

Is it necessary to register secretaries and auditors? (Company Comm 538)

- Every company that makes an appointment of a company secretary or auditor, even if voluntarily, is required to maintain a record of its secretaries and auditors, including:
 - name, (and former name); and
 - Date of every appointment.
- If a firm or juristic person is appointed then:
 - name, registration number and registered office of firm/juristic person;
 - name of any individual contemplated in S90(3), if applicable, and
 - Any changes in particulars with date and nature of change.

REMEDIES, ENFORCEMENT AGENCIES AND ADR

Unit 9

- Companies Act 1973 relied extensively on criminal sanctions as a means of ensuring compliance with its provisions.
- The 2008 Act:
 - Seeks to decriminalise company law;
 - Necessary to provide effective private-law remedies which discourage gross mismanagement and abuse of power
- Three specific remedies:
 - 1) ◦ **Against directors who have blatantly abused their position:**
 - Court can disqualify directors or put them onto probation;
 - Member has statutory right to bring proceedings on behalf of company where the company:
 - prejudiced by acts of controlling directors &;
 - failed to take action to bring directors to account.
 - 2) ◦ **Available to shareholders to protect their own rights:**
 - e.g. victims of oppressive/prejudicial conduct by company/related person
 - 3) ◦ **Piercing corporate veil and imposition of personal liability where abuse of the separate juristic personality of a company.**

What remedies are there against directors who have abused their position?

- S162
- A court may declare a director to be a delinquent director or place a director under probation.
 - Includes a person who was a director within two years before the application;
 - Can be brought by:
 - Company/shareholder/director/employee representative/Commission

- Serious consequences for the director:
 - If placed under probation:
 - may not serve as director except to extent permitted by probation order;
 - If declared a delinquent:
 - Disqualified from being a director (normally for 5 years)
- The court is obliged to order a director delinquent when he/she:
 - Consented to act as director while ineligible/disqualified;
 - While under probation, acted in a manner that contravenes order; or
 - While a director, acting in a manner that amounts to gross negligence, wilful misconduct or breach of trust.
- A court may place a director under probation if he/she:
 - Acts in a manner materially inconsistent with being a director;
 - Is present at a meeting and fails to vote against a resolution despite inability of company to satisfy the solvency and liquidity test.
- Probation order not longer than five years and subject to conditions, such as:
 - Supervised by a mentor/limited to serving as director of private company
- May be made subject to conditions, such as:
 - undergoes remedial education or performs community service.
- The Commission must establish and retain a public register of persons who are subject to an order declaring them to be delinquent or under probation.

What is the derivative action?

Since the company won't act upon itself the shareholders have to open the derivatives

- Under Common law, company must act to have wrong against company redressed:
 - *Foss v Harbottle*
 - But company is unlikely to act when wrongdoers control the company.
- A member/s could therefore institute court action on behalf of company i.e. the derivative action:
 - member derived right to bring action from right of the company;
 - Could also give rise to a personal remedy to enforce members individual rights against company/fellow shareholders.
- Unsatisfactory for a number of reasons:
 - Members could incur substantial legal costs;

- o Info required to launch action often only in hands of wrongdoers/company.
- o Scope unclear as uncertain what conduct could not be ratified by a simple majority. *Section 163(2)(b) or more minority*
- o 1973 Act: introduced a statutory derivative action as an alternative: *Section 266 of 1973 Act*
 - o Member could apply to court for appointment of a provisional curator to investigate matter and report to court;
 - o Only available to redress wrongs committed by current or former directors and officers.

- o 2008 Act: *Section 165* *new* *Court vs the last resort*
 - o Abolishes common law right of a person other than company to bring legal proceedings on company's behalf;
 - o Can be used by:
 - shareholder/director/representative of employees/any other person with leave of court;
 - o Typically available against an alleged wrongdoer in control of company.
 - o Company must, after demand being served on it, appoint an independent and impartial person/committee to investigate demand and report back to Board. *Settlement is possible going to court is not best*
 - o Fact that shareholders of a company have ratified or approved any particular conduct of the company does not prevent a person from making a demand or applying for leave under S165, but court may take ratification/approval into account in making any judgment or order.

What are the statutory remedies for shareholders? ← Personal actions

- 1. **Relief from oppressive or prejudicial conduct in terms of s163**
 - o 1973 Act: Section 252:
 - o Providing a statutory remedy to minority shareholders who were victims of oppressive conduct by majority in their control of company
 - Additional to personal/private action which minority shareholders could bring under common law.
 - o 2008 Act: **Section 163**: *personal*
 - o Extended to provide a remedy to directors as well as members;
 - o More broadly and clearly defined circumstances:

- Applicant must establish that an act/omission of company/related person has had result that is oppressive/unfairly prejudicial to or unfairly disregards interests of applicant OR
- Applicant must establish that business of company/related person is being/had been conducted in manner that is oppressive/unfairly prejudicial to, or unfairly disregards interests of applicant;
- Available as a result of a single act/omission or a course of dealing;
- Need not be an act by company but could be by person controlling company.
- o Intended as relief for applicant member/director and not for company.
- o New category of relief: **S163(c)**:
 - Where powers of a director/prescribed officer/person related to company are exercised in a manner that is oppressive/unfairly prejudicial to/unfairly disregards interests of applicant:
 - o Usually where abuse of power by managing director/executive director/person controlling company, but not necessary to show that director's act constituted an act of company.
- o Court appears to have a less restricted discretion:
 - Could make an order without it being proved that one of the grounds available or it's just and equitable.
- o Type of relief which the court may give, whether interim/final: *even if*
 - Order restraining conduct complained of;
 - Direct company to amend MOI or amend a shareholders' agreement;
 - Appoint replacement or additional directors or;
 - Declare any person delinquent or under probation;
 - Order varying/setting aside transaction to which company a party and compensation for company/other party to transaction/agreement;
 - Direct rectification of the registered or orders of the company.
- o **S163(2)(b)**:
 - Court, as an alternative form of relief, may appoint a liquidator 'if the company appears to be insolvent'. If not insolvent it is restricted to relief that will enable the company to continue in existence:
 - o decision in *Robson v War Works (Pty)Ltd*

2. Dissent

- o **S163(1):**
 - Shareholder/director may approach court by application;
- o **S163(2)(D):**
 - expressly empowers court to make an order for trial of any issue as determined by court.
- o **1973 Act: S102:**
 - o Permitted dissenting shareholders of a company with different classes of shares who were aggrieved by decision of company to vary their class rights to apply to court for a relief under S252 (could include purchase of their shares by company).
- o **2008 Act: S164**
 - o An appraisal right is right of shareholder to require his company to buy his shares at their fair value if company takes any of listed triggering actions.
 - o Dissenting shareholder who wants option of exercising appraisal rights must notify company in writing of opposition before resolution put to vote.
 - o If resolution passed: shareholder, to exercise appraisal rights, must demand payment of fair value of shares from company;
 - o Fair value must be determined by company, as all dissenting shareholders of same class are entitled to same amount per share.
 - o Dissenting shareholders who do not accept company's offer can either:
 - allow offer to lapse (then reinstated to their full rights as shareholders) or apply to court for a determination of fair value.
 - o Once again, shareholders can choose between surrendering their shares for the amount determined by the court or withdrawing their respective demands, if they regard the fair value determined by court as unacceptable.
 - Value applied by court does not apply to dissenting shareholders who accepted company's original determination of fair value.
 - o Resolution must adversely affect rights/interest of shareholders against the company or relative to other shareholders before remedy available.
 - o Resolution to amend MOI in a way which affects commercial value of shares without altering rights of shareholders or terms on which shares held not subject to protection of this section.

- o **2008 Act envisages that class rights may be altered in one of two ways:**
 - o By amendment to MOI by a special resolution or;
 - o By board but only to extent MOI expressly grants board authority to do so:
 - S164 does not apply where board authorised to change class rights;
 - In line with purpose of S163 which is to provide minority shareholders with a means of protection against certain actions of majority shareholders rather than against actions of the directors.
 - o **S164 applies to resolutions concerning 3 other situations:**
 - o Company considering adopting a resolution concerning disposal of greater part of undertaking or;
 - o An amalgamation or a merger or
 - o A scheme of arrangement.
 - o Does not apply to:
 - Transaction/agreement/offer pursuant to a business rescue plan.
 - o If reasonable grounds for believing that payment by company of the fair value would result in company being unable to pay debts as they fall due in ensuing 12 months:
 - company may apply to court for an order that is just and equitable to ensure dissenting shareholders receive payment at earliest possible date compatible with company satisfying other financial obligations.
- Triggering mechanisms, only apply to dissenting shareholder. They then can demand to buy back shares.*
- not required*
- 3. Application to protect rights of securities holders in terms of s161**
- o **S161:**
 - o Provides a new remedy to protect rights of holders of issued securities in addition to other rights under Act or in terms of common law.
 - o Holder of issued securities may apply to court for a declaratory order regarding person's rights, company's MOI, any rules of company or relevant debt instrument.
 - o Alternatively holder of securities can apply for an appropriate order to protect those rights or to rectify any harm done to securities holder by company or any of its directors.

What liability is there for abuse of separate juristic personality of a company?

- In terms of S16(4) of 2008 Act: *Airport damage vs. Airchem. They held members responsible for the damage. Therefore the shareholders were not liable.*
- Whenever a court finds incorporation of, or any act by/on behalf of/any use of, a company constitutes unreasonable abuse of juristic personality of company as a separate entity:
 - *Follows 3 scenarios like it was*
 - may declare company deemed not to be a juristic person in respect of rights, own responsibility, abuse obligations or liabilities of company, or of a member or shareholder thereof, or of juristic person *is that correct?*
 - court may give such further order/s as deems fit to give effect to such declaration.
- Declaration can be made by court on application by an interested person, or in any proceedings in which a company is involved.

What enforcement agencies are there and how does Alternative

Dispute Resolution (ADR) work?

- One of the objectives of the new Act is predictably regulation. *Moved away from criminal court into registrar of companies intellectual property commission*
- The 2008 Act uses a system of administrative enforcement. *CIPRO - company intellectual property commission*
- Companies and Intellectual Property Commission usually responsible for enforcement of Act (unless within jurisdiction of Takeover Regulation Panel)
- Companies Tribunal functions include review of certain decisions of the Commission.
- 2008 Act envisages four alternatives for addressing complaints regarding alleged contraventions of Act or for enforcement of rights, whether in Act or under a company's MOI or rules. The aggrieved party can:
 - Attempt to resolve dispute using ADR procedures; or
 - Apply to Companies Tribunal for adjudication but only in certain issues, or
 - Apply to High Court or
 - File a complaint with the Commission.
- Parties who approach court directly, except where Act clearly indicates court the only avenue, run risk court will decline to hear matter or penalise party until alternatives attempted.

Companies and Intellectual Property Commission: establishment and functions

- An organ of state within the public administration.
- Jurisdiction throughout Republic;

Independent; must perform functions impartially and in most cost-effective and efficient manner;

Must establish a company's register and make information available to public.

Companies and Intellectual Property Commission: investigation of complaints

if party disagrees go to court

- Plays a central role in enforcement of the 2008 Act;
- Accepts written complaints or may initiate complaints directly on its own motion or at the request of another regulatory authority
- May respond to a complaint in one of three ways:
 - Notify complainant will not investigate a complaint that appears to be frivolous, vexatious or without sufficient grounds;
 - Recommend complainant resort to ADR; or
 - Direct an inspector/investigator to investigate complaint.

Companies Tribunal: composition and functions

(CCM1) For companies before go to court, parties in dispute must agree

- Two main tasks are to:
 - Serve as a forum for voluntary ADR in any matter under the Act and;
 - Carry out reviews of administrative decisions made by Commission.
- Functions of the tribunal are to:
 - Adjudicate any application that may be made to it in terms of the Act;
 - Assist in resolution of disputes in ADR provisions of Act and
 - Perform any other function assigned to it in terms of the 2008 Act.

The Companies Tribunal: adjudication

- Person seeking to address an alleged contravention of Act or to enforce rights under Act or MOI or rules can apply to tribunal for adjudication.
- Must conduct its adjudication proceedings expeditiously and in accordance with natural justice and may conduct them informally;
- Presiding member must issue a decision together with reasons;
- Binding on Commission subject to any review by the court.

Voluntary resolution of disputes

- Applicant can refer matter instead to Companies Tribunal or to an accredited entity for resolution by mediation, conciliation or arbitration.
- No appeal against an arbitrators award but court may review on limited grounds.
- Both parties must agree to use the process as it is voluntary.

CLOSE CORPORATIONS

What is a close corporation?

- The Close Corporations Act 69 of 1984 (the Act):
 - A CC has its own legal personality;
 - enjoys benefits of perpetual succession;
 - has capacity and all powers of a natural person;
 - is a separate legal person and is distinct and apart from its members.
 - Members (and others) can be liable for debts in certain circumstances:
 - S65: court can ignore separate juristic personality if abuse of CC as a juristic person;
 - S23: liability if name of CC not used properly;
 - S52: prohibits making of certain loans;
 - S64: personal liability on those who have acted recklessly or fraudulently.
 - *Haygro Catering BK v Van der Merwe en andere*:
 - failure to display name of the CC anywhere (on business premises or on documentation) constituted a gross abuse.
- ## Who can be a member of a CC?
- No 'shareholders' but rather 'members'.
 - from one to ten members.
 - Only natural persons may be members of a CC
 - No juristic person may hold a members interest in a CC.
 - trustee of a trust ('testamentary' or an *inter vivos* trust) can be a member in capacity of trustee:
 - If *inter vivos*, no juristic person can be a beneficiary of trust
 - No restriction on number of employees, turnover, assets or types of business.

How do you form a CC?

- Incorporation requires one document, i.e. a 'founding statement' known as a CK1;
 - No obligation for anything more:
 - but may have an 'association agreement' between themselves.
 - On formation of a CC:
 - Each person who intends to become a member must make a contribution:
 - Money/other assets/services relating to formation of CC;
 - Particulars of contributions must be included in founding statement;
 - Can be increased/reduced;
 - Details of changes must be shown in amended founding statement;
 - Not necessarily proportionate to size of member's interest.
 - A member ceases to be a member after disposing of his/her membership and after registration of an amended founding statement
 - Could also occur by court order
 - Legal nature of a members interest:
 - Moveable property transferable in the manner provided for in the Act;
 - Incorporateal;
 - Personal right against CC entitling member to:
 - proportionate share in aggregate member's interests;
 - participate in distribution of profits and share in distribution of assets on liquidation, once all creditors paid.
 - Unless otherwise provided for:
 - Members voting rights and right to participate in distribution of profits and other payments will be in proportion to their member's interests.
- ## How do you acquire and dispose of a member's interest?
- New members who join after registration must acquire a member's interest either from an existing member or by making a contribution (money or assets).
 - If making a contribution: percentage of interest for new member is agreed and interests of existing members must be reduced proportionately/agreed.

- Act makes provision for disposals of a member's interest in event of death/insolvency of a member etc but all other dispositions must be in accordance with association agreement if any, or with consent of every other member.
 - could be subject to right of pre-emption in favour of other members of CC.
- In the case of an insolvent member:
 - Act contains a mandatory procedure for disposal of a member's interest:
 - Members interest may be sold to CC, to other members, or to an outsider who qualifies for membership
 - A sale to an outsider is subject to a right of pre-emption in favour of CC and other members
- In sale of a members interest in execution pursuant to attachment to satisfy a debt:
 - Same procedure as for insolvency above
- In the case of disposal of the members interest of a deceased member:
 - The arrangement in the association agreement applies and if none:
 - Transfer of interest to legatee/heir of deceased member requires consent of other members
 - If consent not given within time frame, executor may sell member's interest subject to same restrictions in case of an insolvent member.

What duties to members owe to the CC?

- Act imposes two specific duties on members towards the corporation as follows:
 - A fiduciary skill, and
 - A duty of care and skill.
- The Act states several instances where the fiduciary relationship applies but not intended to be exhaustive. The member must:
 - act honestly and in good faith and;
 - exercise powers in interests of, and for the benefit of, the CC;
 - not exceed his/her powers
 - avoid a material conflict of interest;
 - not compete in any way with CC in its business activities;
 - notify other members as soon as practicable of nature/extent of interest in a contract with CC;

- contract voidable at instance of CC but court can order it binding if it considers it fair.
- A member who breaches a duty arising from his/her fiduciary relationship is liable to the CC for:
 - any loss suffered by the CC or;
 - any economic benefit derived by member.
- A member of a CC stands in a fiduciary relationship to the CC itself.
 - If a member breaches this duty, personally responsible for any loss suffered by CC and must repay any benefit obtained as a result of breaching that duty.
 - Conduct will not constitute a breach of fiduciary relationship if it has the written approval of all members and they were aware of all material facts.
- Act imposes this fiduciary duty on each member and does not provide that members owe any specific duties to each other:
 - but an association agreement can impose such a duty as can common law.
- As far as the breach of duty of care and skill is concerned:
 - A member will be liable for a breach of care and skill in carrying on business only if this has resulted in a loss for the CC:
 - The standard of care is that which may reasonably be expected from a person with that member's knowledge and experience:
 - Introduces a subjective element into the test
 - No liability if conduct has written approval of all the members and they were aware of all material facts.
- Usually a member instituting court proceedings in name of CC requires a member's resolution, passed by members holding at least 51% of member's interest:
 - In certain circumstances, S50 authorises another member to institute proceedings on behalf of CC, irrespective of size of member's interest.
 - Proceedings can be brought against a member/former member in default concerning making an initial/additional contribution or liable to CC through breach of fiduciary duty or duty of care and skill.
- S51 provides a statutory derivative action with CC being the plaintiff:
 - Once instituted, cannot be settled/withdrawn without court consent

- A safeguard for members against abuse of remedy on frivolous/vexatious grounds.

How do you cease a member's membership by court order?

- The Act has two main remedies for members against other members, namely:
 - Termination of offending member's membership by an order of court (S36) and;
 - Assistance from court where a member/s has been found guilty of unfairly prejudicial conduct (S49).
- Remedy under S36:
 - Allows any member to apply to court for an order that any member (including him/herself) will cease to be a member of CC.
 - Numerous uses including ending a deadlock between members.
 - Where applicant uses S36 to oppose application for winding-up, applicant bears onus of providing sufficient evidence of requirements to enable court to grant relief.
 - Applicant must establish one/more grounds against member whose membership is to be terminated:
 - Permanent inability of member to perform part in carrying out business;
 - Conduct on part of member likely to have prejudicial effect on carrying on of business;
 - Conduct making it reasonably impossible for other members to associate with him/her in carrying on business;
 - Circumstances making it just and equitable that should cease to be a member.
 - Cessation of membership necessarily affects relevant member's interest in CC.
 - Applicant must provide court with enough evidence to award member's interest to the CC or to other members.
- Remedy under S49:
 - Available in event of a single act/omission by CC or by one/more of its members;
 - Also available because of way affairs of CC are being/have been conducted:
 - In both cases, members applying for relief will have to establish that there is unfairly prejudicial conduct on part of CC/by another member/s.
 - Court must be satisfied that:

- Such conduct did or is taking place and
- It would be just and equitable for the court to intervene.
- Court may order:
 - Not just and equitable where unclear how CC will pay a major creditor;
 - May have effect of amending or adding to an existing founding statement or association agreement;
- If applicant cannot establish grounds for relief under S36 or S49 and:
 - clear the corporation is in serious financial difficulties or;
 - members are deadlocked:
 - court can wind up CC where an application for winding up in addition to a S36 or S49 application.
 - Winding up on just and equitable grounds:
 - The mere existence of a deadlock does not per se entitle an applicant to a winding up order under the just and equitable provision (S68(d)).

Can the CC acquire a member's interests?

- Special requirements apply when a member's interest is acquired by CC itself.
 - Must have at least one other member at the time of acquisition
 - Member's interest must be added to interests of other members to keep aggregate at 100%:
 - CC may pay for the interest only if:
 - previously obtained written consent of other members to specific payment and
 - if it complies with the statutory solvency and liquidity requirements.
 - After payment, CC's assets fairly valued must exceed its liabilities:
 - CC must be able to pay its debts as they become due in ordinary course of business;
 - Payment must not render CC unable to pay debts in ordinary course of business.

Can the CC give financial assistance to enable a member to acquire a member's interests?

- Special requirements also apply when CC gives financial assistance to another person to enable that person to acquire a members' interest in CC:
 - Must be previously obtained written consent of every member to specific assistance and;
 - Compliance with solvency and liquidity requirements.

How does an association agreement regulate internal relations?

- The Act makes no distinction between the providers of capital and its managers.
- All members are in principle entitled to participate in management.
- An association agreement:
 - Is defined as an association agreement entered into by members (to S44;
 - Is a written agreement signed by or on behalf of each member;
 - Regulates any matter under Act which may be regulated and any other aspect of internal relationships;
 - Binds new members as if he/she had signed or been a party;
 - Any amendment must be in writing and signed by each member
 - Must be kept at the registered office;
 - Non-members not entitled to inspect it;
 - No person dealing with CC is deemed to have constructive knowledge;
 - N. lodged with the commission
 - Should clearly state that it is an association agreement to distinguish it from other agreements;
 - Binds CC to every member in that capacity and every member in that capacity to CC and to every other member.
- Certain matters cannot be changed/alterd by an association agreement:
 - Manner in which insolvent member's interest disposed of (S34);
 - Disqualification of certain members taking part in the management of a corporation (in terms of S47).

- Certain rules will automatically apply unless they are varied by the terms of an association agreement:
 - Every member of CC is entitled to participate in carrying on business and management of CC (unless disqualified in terms of the Act);
 - Decisions of members will be by majority vote;
 - Payments to members by reason of membership will be in proportion to their interests in the CC.

What power do members have to contract on behalf of CC?

- Purpose of S54 is to ensure that every member of a CC, merely as a member, is to be an agent of the CC for all purposes, including even a purpose which has nothing to do with carrying out the business of the CC, in relation to a person who is a non-member and who is dealing with the CC.
- *J & K Timbers (Pty) Ltd v G L & S Furniture Enterprises CC 2005 (3) 223*:
 - existence of a resolution or a unanimous consent of all members is not a pre-requisite to a CC being bound to a third party by one of its members.

Can a CC make payments to its members?

- S51 provides that:
 - Any payment by a CC to any member by reason only of membership may be made only if CC meets solvency and liquidity requirements after payment made;
 - 'payment' includes distribution/repayment of whole/part of any contribution to a member:
 - Not only cash payments but includes delivery/transfer of any property.
 - A repayment of whole/part of a contribution requires:
 - Lodging an amended founding statement.
 - A distribution of income requires:
 - Approval of a formal resolution of members holding at least 51% of member's interest.
- In terms of S51(2), a member is liable to CC for any payment received contrary to solvency and liquidity requirements:
 - With onus being on CC to show that requirements not met.
 - If CC is being wound up because it cannot pay its debts, onus reversed.

- o Member liable to repay payment made by reason only of membership within 2 years before commencement of winding up, unless member can prove that CC complied with solvency and liquidity requirements after payment made.

Are there prohibitions on loans and security to and on behalf of members?

- o In terms of S52, without express prior consent of all its members in writing, a CC may not make a loan directly/indirectly:
 - o To any of its members;
 - o To any other CC in which one/more members together hold more than a 50% interest; or
 - o To a company/other type of juristic person controlled by one/more CC's members.
- o The same restriction applies to provisions of security by CC on behalf of those persons:
 - o A loan/security in breach of restriction is invalid and cannot subsequently be ratified.

What are the accounting requirements for a CC?

- o Act says annual financial statements of a CC must consist of:
 - o A balance sheet;
 - o An income statement; and
 - o The report of the accounting officer.
- o Suggested that the reference to 'generally accepted accounting practice' and need to make specific disclosures to S58(2)(c) require that AFS of a CC should consist of:
 - o A balance sheet (together with appropriate notes);
 - o An income statement (with appropriate notes);
 - o A statement of changes in equity;
 - o A cash flow statement;
 - o The accounting officer's report;
 - o A statement of member's net investment in CC and movements therein and;
 - o A schedule of transactions with members.
- o Must be approval of annual financial statements by or on behalf of members who hold at least 51% of the interest in the CC.

- o Act contains a number of sections that refer to 'fair value' of assets and to 'assets exceeding liabilities' all of which suggest that assets should be disclosed on a revalued or current market basis rather than on the basis of historic costs.

- o S39: payment by CC for members interests acquired shall be made only if:
 - o after payment, CC's assets fairly valued exceed liabilities.
- o S40: Financial assistance by CC in respect of the acquisition of a member's interest:
 - o A CC may give financial assistance in respect of acquiring a member's interest provided that, after assistance, CC's assets, fairly valued, exceed liabilities.
- o S51: payments by a CC to members by reason of membership.
 - o A payment to a member shall only be made if, after such payment, the corporations assets, fairly valued, exceed all its liabilities
- o S62: Duties of accounting officers.
 - o If accounting officer finds AFS incorrectly indicate that at end of financial year, assets of CC exceed liabilities, or has reason to believe incorrect indication given:
 - o must issue a report to the Registrar.

When can members and others be liable for a CC's debts?

- o A member of a CC and other persons can be personally liable for the debts of a CC under a variety of different circumstances.
 - o S65: Abuse of separate juristic personality;
 - o S23: Use and publication of name and registration number;
 - o S26: Deregistration (while having outstanding liabilities);
 - o S's 52 and 55: Prohibition of certain loans;
 - o S63: Joint liability for corporation's debts.