



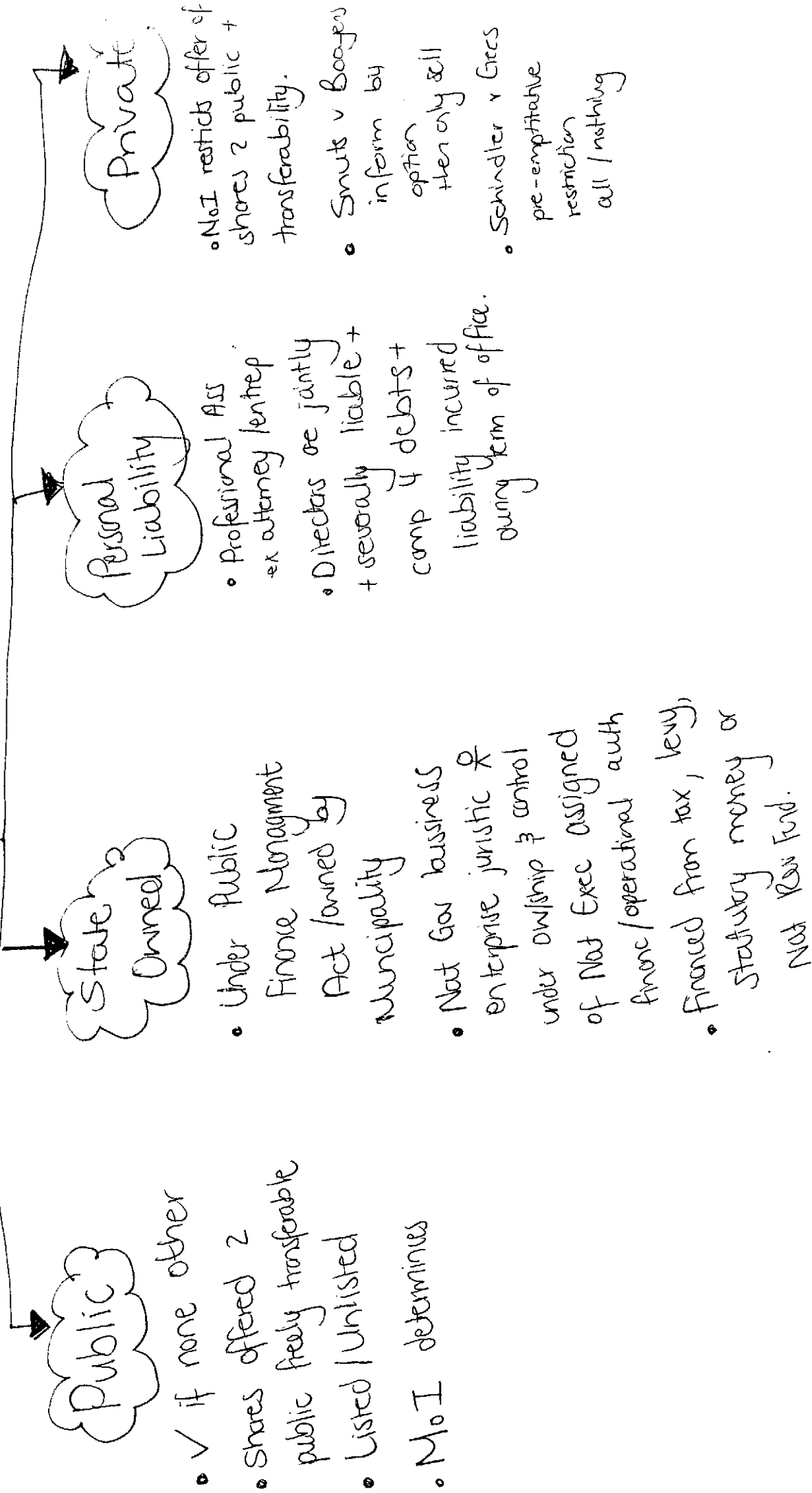
# Companies

## \* Non-Profit

- At least one of their objectives
  - public benefit object
  - object relating to 1+ cultural / social activities
  - communal / group interests
- All assets / income used to further objective
- May acquire / hold securities consistent / ancillary to objectives
- Inc / Member / Director may not receive directly / indirectly any financial benefit / gain from company other than reasonable remuneration for work done / compensation for expenses incurred.
- Wind up / dissolved no part in net value @ liabilities / debts paid, must be distributed to other NPO
- MoI members / not
  - ┌ voting
  - └ non voting

-incorporated for purpose of financial gain for shareholders

# PROFIT





## \* Pre incorporation contracts

### Requirements ito S21

- A person may enter into written agreement in ~~the~~ name of or purport to act in name of or obs entity contemplated but doesn't yet exist.
- Within 3 months after date of incorp board of company completely, partially or conditionally ratify / reject PIC
- If failure to do anything presumption of ratification
- If contract ratified it will be enforceable against the company as if the company was a party to the agreement @ time of its conclusion.
- Promoter J/S liable with company for performance ito PIC if company not registered / rejects contract.

## \* Duties of Directors (Fiduciary).

- May not approve / enter into an agreement in which the person or a related person has a personal financial interest.
- as a director determine any other matter
  - unless approved by ordinary <sup>resolutions</sup> ~~share~~ of shareholders  $\leftarrow$   $\neq$  interest
- If director acquires a personal financial interest in an agreement or other matter in which comp has material interest promptly inform  $\leftarrow$   $\neq$  interest + material circumstances
- Director may not use position to gain an advantage for himself / another other than company or knowingly cause harm to company.
- Director must communicate to board @ earliest opportunity any info that comes to his attention unless believes immaterial / general knowledge
- Must exercise powers + perform functions in good faith, for a proper purpose, in best interests of company, degree of skill + diligence RMT.
  - Companies Act partially codifies common law duties
  - Common law duties co-exist with statutory duties



## \* Distributions

- If authorized by articles of ass may make "payments" incl dividends to shareholders.
- Payment must be made to shareholders in their capacity as shareholders
- distribution = direct / indirect transfer of money / property whether out of capital / profits to SH incl share repurchase
- Must comply with test of solvency and liquidity
- Board of directors not members in GM to authorise distribution.
- No special / ordinary resolution of members required.
- Distr effected + completed 120 days or subjected afresh to S+LT
- Only directors who voted + agreed to auth of distr that failed S+LT would be jointly + severally liable 2 reimburse amount exceeded / amount recovered  $\therefore$  limited

Solvency Test: Fair value of assets @ the time = / exceeds fair value of liabilities

Liquidity Test: Pay debts as become due per period of 12 months after distribution

Types of preference shares: Cumulative / Non cumulative PS.  
Participating PS  
Convertible preference shares

May be paid out of share capital / profits



## \* Financial assistance for purchase of shares

- S38's objection is now perceived to be protection of funds against plundering corp resources and prejudice to creditors + minority SH.
- 2008 provides board of directors may auth a corp to give financial assistance if:
  - \* Any restriction in MOI complied with fully
  - \* Financial assistance given in pursuance of employee share-scheme
  - \* Special Resolution passed within prev 2 yrs approved assistance for specific recipient / class and recipient falls within
  - \* Board satisfied immediately after providing financ assistance corp would comply S+L +
  - \* Board satisfied terms are fair + reasonable.
- If not = null + void, director incurs personal liability.

### Test:

① Whether company poorer as result / exposed to risk  
- Gradwell (Pty) Ltd v Rostra Printers (Pty) Ltd

② Whether purpose of assistance was to enable person(s) to acquire shares in company - Lipschitz v UDC Bank Ltd



## \* Incorporation of a Company (MOI)

Right bestowed by the state

### - Notice of Incorporation (NI)

+ Notice to be filed into S13(1), by which the incorporators of the Comp inform Commission of incorp of comp for purpose of having it registered.

+ Filed + Prescribed fee + Copy of MOI

### - Memorandum of Incorporation (MOI)

• NB enables complete flexibility re relationship between company + stake holders

• Protect minority shareholders + withhold certain powers from board of directors

• Submit as founding document Com Act 2008

• Doc that sets out rights, duties and responsibilities of shareholders, directors and others within relation to a company and other matters as envisaged by s15.

• Act requires that each provision of a company's MOI must be consistent with provisions of Act. Any provision that is inconsistent will be regarded void to extent that it contravenes / inconsistent with Act. *Ben Taxim v Ben Taxim*

• MOI may allow rule making. Rules must be consistent with Act and MOI. If not void to extent inconsistent.

### - Binding between:

Company >< each shareholder

Shareholder >< shareholder

Company >< each director / prescribed officer

Company >< each member audit committee or committee of board of directors in performance of functions

NOTE: Relationship uncertain (contractual)



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\* ADR

Forums → Courts

CIPC

Take-over Regulation Panel

Company Tribunals

Accredited entities



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## \* Removal of Directors

S71

- Removal by shareholders

notice + opportunity

- Removal by directors by resolution of board

- 1+ directors and its alleged he become ineligible / disqualified S69
- incapacitated
- Director outside RSA and no other director in RSA
- neglected functions.



# Close Corporations

## Nature

- The CC Act 69 of 1984 provides for formation of CC with own legal personality + benefits of perpetual succession.
- CC has capacity + all powers of a natural person
- CC separate legal entity but members may be liable for its debts as follows:

\* Sect 65 → court has extensive powers to ignore existence of CC in cases where there is an abuse of a corporation as a juristic person

\* Members personally liable if

- S 23 : liability arises if none of CC not used properly

- S 52 : prohibits making of certain loans

- S 64 : personal liability on those who have acted recklessly / fraudulently.

## Number & Nature of Members

- 1 - 10 "members" → restriction emphasis intent small businesses with relationship between member similar to partners.
- Only natural persons may be members, although CC may be member of a company / partnership. (= may lead to juristic person incurring liability of certain debts of CC).
- A trustee of a trust may be a member in capacity of trustee certain restrictions
- No restriction on → # employees  
→ turnover  
→ value of assets  
→ type of business

## MEMBERSHIP OF A CC

- Incorporation of a CC = registration of a single doc i.e. founding statement (CF1), may also draw up an association agreement
- Each person to become a member is required to make a contribution money/assets/services. Particulars of contributions must be incl in FS. Size of contribution  $\neq$  member's interest.  
within 90 days of reg or liable 4 certain debts (all)
- By agreement between members contributions may be subsequently  $\uparrow/\downarrow$ .  $\rightarrow$  change must be reflected in AFS
- Member's interest is a single interest = %. Total MI = 100%.  
MI may not be held jointly.
- Person becomes member when FS reflecting membership is registered. Each member is issued a certificate of MI signed by 1000 members stating current MI (no securities register)
- Membership terminated after disposal of MI + registration of AFS reflecting loss of membership. Disposal + cessation of membership also by Court Order S36.
- Legal nature = movable incorporeal property transferable in manner provided for in Act.

**MI** = Personal Right against CC entitling member to a proportionate share in total MI, to participate in distribution of profits, and to share in distribution of assets on liquidation once all creditors paid.

## Acquisition + disposal of MI

- New Members join after registration  $\left\{ \begin{array}{l} \rightarrow \text{existing member} \\ \rightarrow \text{make a contribution} \end{array} \right.$   $\leftarrow$  money assets  
↓  
% agreed - other adjusted accordingly
- Disposal upon death / insolvency / MI sold by Sale in Execution.
- Disposition of MI  $\left\{ \begin{array}{l} \text{in whole} \\ \text{in part} \end{array} \right.$  made in accordance with association agreement or with consent of every other member. Disposition either to another qualifying person or to CC. (if to CC must 1+ members)  
May be subject to right of pre-emption in favour of members or consent.
- S 34(1) mandatory procedure for insolvent member. Aimed at balance control of membership / creditors of insolvent.
  - MI sold to CC / other members / outsider who qualifies
  - sale to outsider subject to pre-emption to other members
- Sale in Execution see insolvent
- Deceased = Statutory provision applies in absence of association agreement  
Its Act transfer to legatee / heir requires consent of all other members.  
if no consent executor sell but pre-emption.
- Disposition incl cession, obligatory agreement  $\left\{ \begin{array}{l} \text{sale} \\ \text{donation} \end{array} \right.$ , use of MI as security, pledge upon realisation.

# Duties of Members

- statutory provisions based on common law duties

## \* Fiduciary duty

- Member must act honestly + bona fide and shall exercise his powers in the interest of and for the benefit of CC
  - Member must not exceed his powers
  - Member must avoid a material conflict of interest and must not compete with CC in any way
  - Member must notify other members asap of nature + extent of any material interest he has in any contract of Corp. If member fails to do so contract is voidable @ option of Corp. Court may however find contract binding. Balance interest of Corp avoiding contract against other affected parties.
- Member who breaches fiduciary duty is liable to Corp for any loss suffered by Corp or any economic benefit derived by member.
  - Conduct not constitute breach if written approval by all members & they aware of all material facts.
- Association Agreement + common law may impose duties between members

## \* Duty of Care + Skill

- ~~Duty~~ Member only guilty if result in loss for corp
  - Standard of Care = may be reasonably expected from a person with that member's knowledge & experience. (Sub Test)
  - No liability if conduct has written approval + know material facts
- SSO authorises any other member to institute proceedings obo Corp irrespective of mI. May be brought @ member / former who in default of making contribution / liable due to breach

- SSI provide statutory derivative action with Corp = Plaintiff  
Once instituted proceedings can't be settled / withdrawn  
without Courts consent → safeguard

## 1. Powers of Members to contract for corp

SS4 → any member shall in relation to a person that is not a member and is dealing with the CC, be an agent of CC.

→ Any act of a member shall bind a corporation ~~unless~~ ~~the member so acting~~ whether or not such act is performed for the carrying on of business of corp unless the member so acting has in fact no power to act for CC in particular matter and person with whom member deals has / ought reasonably to have knowledge of fact that member has no such power.

JK *Timmins (Ry) Ltd v G.L. & S. Finance Enterprises Ltd.*

Ultra vires not app to CC's. Capacity + Powers of natural person with min restrictions. → can't perform actions closely ass with physical being of nat person. CC's capacity + powers not influenced by CC's key objectives clause as set out in FS.

No constructive notice is applicable to content of ass agreement.  
3<sup>rd</sup> party deemed unaware of content of FS / ass agreement.

## \* Cessation of Membership by Order of Court

- S36  
CC
- Subject to provisions of ass agreement that the member is permanently incapable because of unsound mind or any other reason of performing his part in carrying on business of CC
  - Member has been guilty of conduct likely to have prejudicial effect on carrying on of business
  - Member so conducts himself in matters relating to CC's business that it's not reasonably practical for other members to carry on the business of CC with him
  - Circumstances arisen which render it just & equitable that member should cease to be member of corp

## \* Payments by CC to members

SSI  
CC

• S + L + T

- if such payment will in particular circumstances not in fact render CC unable to pay its debts as they become due in ordinary course of business.