

Van Greunen & Associates Inc.

BLITZ BULLETIN

DECEMBER 2011

THE MEMORANDUM OF INCORPORATION

Under the new Companies Act, Act 71 of 2008, the memorandum of association and memorandum of articles have been replaced by one comprehensive document, (hereinafter referred to as "the MOI"). The form, contents and changes to this document are regulated by the Act, which aims to eradicate shareholders creating conflicting provisions between that and any other contract or document, ensuring transparency and legal certainty, among other benefits, within the company structure.

The Act which came into effect on 1 May 2011 (hereinafter referred to as the "effective date") effectively changed all Memorandums of Association to MOI's. The Act also provides for a **transitional period of 2 (two) years** in which companies are allowed to change their "newly founded" MOI's and to ensure that it is in line with the requirements set forth by the Act.

There are certain requirements with regards to company finance and governance that has become effective immediately:

- A person holding office as a director, company secretary or auditor before the effective date will continue in that office, subject to any changes in the MOI;
- Any person who is not eligible to be director, company secretary or auditor in terms of the Act will be regarded as having resigned that position on the effective date;
- All companies will have to comply with the new number of board members required in terms of the Act and if they do not have the required number they must fill the positions in the manner required by Section 70 of the Act;
- If a company does not have a director, company secretary or auditor, then the position must be filled in accordance with the new Act;
- The requirements of the Act will be applicable to companies in the following instances, even if the MOI states anything to the contrary:
 - Duties, conduct and liabilities of directors apply to all directors from the effective date,
 - The rights of shareholders to receive information or notices shall immediately apply on the effective date,
 - Chapter 5 relating to fundamental transactions and takeovers will apply immediately to all pre-existing companies.
- Any approval for distribution, financial assistance, insider share issues or options will be subject to the Act, even if the transactions were approved prior to the effective date;
- A person can use the Act's remedy procedures, unless the proceedings have commenced in court prior to the Act becoming effective;
- A company would not be in contravention of section 24 stating the time period that records should be kept if the records were disposed of before the effective date;
- Any special conditions that an existing company has have the same validity after the effective date, despite failure of the company to draw attention to the provision;
- Section 19(4) is applicable to any provision of the MOI of a pre-existing company: this is the abolishment of constructive notice where information is not deemed to be known if it has been filed with the relevant authority. It would however be deemed to be knowledge if the MOI / Notice of Incorporation draws attention to this.

All decisions taken by the company before the effective date will be binding provisions and those provisions will continue to have force and effect for two years after the effective date. After the two year period, those provisions will only be binding only to the extent that they are consistent with the Act.



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