DLA CLIFFE DEKKER HOFMEYR

CORPORATE AND COMMERCIAL ALERT

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DTI FIXES UP STANDARD FORM MOIS

Anyone who wishes to incorporate and register a new company in South Africa under the Companies Act, No 71 of 2008 can use either the standard form memorandum of incorporation (MOI) which is prescribed in the Companies Regulations, or a customised/unique MOI which caters for the incorporator's specific needs and requirements and which would typically be prepared for him by a legal advisor. This is also the case for those who wish to adopt a new MOI for a pre-existing company.

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In many instances, the incorporator wishes to establish the company as speedily and inexpensively as possible and is not too fussed (at that stage, at least) about having a customised, detailed MOI – instead, the standard form MOIs are used. These are contained in forms CoR 15.1A to 15.1E in the Companies Regulations and they vary from 'short form' MOIs to 'long form' MOIs for the various categories of companies, namely profit companies (further divided into private and public companies) and non-profit companies. The previous Companies Act, No 61 of 1973 had standard forms for private and public companies in its Schedule 1.

A problem however with the standard forms under the 2008 Act is that they contain numerous errors, omissions and inconsistencies. These were identified by many practitioners and academics almost immediately after the forms were published and put into use. Now the Department of Trade and Industry (DTI) has published amending Companies Regulations in Government Gazette No. 36759 (20 August 2013) which are aimed at rectifying those issues. Interestingly, according to the Minister's notice "*[t]hese amendments must be deemed to have become effective on 1 May 2011*" which is the date on which the Companies Act and the Companies Regulations (which contain the standard form MOIs) came into force, and therefore the amendments are intended to apply retrospectively as if they were there as at 1 May 2011. This in itself may lead to some interesting legal debates in the event that companies and their shareholders happened to have implemented any transactions or other matters on the basis of the original form of the standard MOIs (although the provisions relating to the transferability of shares constitute the main substantial amendment, so any disputes in this regard will most likely arise in that area if at all). That aside, the purpose of this note is to highlight the material and practically relevant amendments.

- The most material problem with the prescribed standard form MOIs for **private** companies is that they did not contain a restriction on the transferability of the securities of the company ('securities' means shares, debentures or any other instrument issued or authorised to be issued by a profit company). Section 8 of the Companies Act states that to be classified as a private company (as opposed to a public company) your MOI needs to contain two things: a prohibition on the company from offering its securities to the public, and a restriction on the transferability of the company's securities. A typical restriction one uses is a pre-emptive right (or 'right of first refusal') in favour of existing shareholders which operates in instances where someone wants to sell his shares. The short form did not

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contain a restriction on transfer, whereas the long form for profit companies omitted both requirements if one selected a private company. This meant that one had a public company and not a private company (with the consequence that the numerous enhanced accountability and transparency provisions of the Companies Act (chapter 3), as well as the takeover laws (chapter 5, parts B and C), automatically apply to the company). A restriction on transferability has now been introduced in the short form as follows:

"an issued share must not be transferred to any person other than –

(a) the company, or a related person;

(b) a shareholder of the company, or a person related to a shareholder of the company;

(c) a personal representative of the shareholder or the shareholder's estate;

(d) a beneficiary of the shareholder's estate; or

(e) another person approved by the company before the transfer is effected."

However, one notes that the amendment only speaks to the transferability of the shares (and not all securities) of the company. If the company at any stage happens to authorise any securities other than shares, one should ensure that the MOI states that those securities are restricted in terms of their transfer if the private company status is to be maintained.

- The long form MOI for profit companies has been amended to include, for private companies, a prohibition on offering securities to the public and it now also gives the incorporator the option to insert, in the annexure to the long form, restrictions on transferability as he deems fit. Thus if one is using the long form to incorporate a private company one should make sure that the relevant part of the annexure is completed otherwise you could again land up with a public company.

- The short form for private companies provided that an ordinary resolution of shareholders needed at least 50% of the shareholders' votes exercised in order to be properly passed. That is not correct as there needs to be a majority. This has now been corrected to read "more than 50%".

- The long form for profit companies, which is structured such that the incorporator can select a number of alternative clauses, has inserted the possibility of selecting a state-owned company which is a new category of company introduced by the Companies Act. The original form did not have that option.

- If one were to use the long form for profit companies in order to incorporate a personal liability company (or 'Inc' company, where the directors and past directors are liable for the company's debts contracted during their terms of office), there was no statement in the MOI on the directors' liability (which is a requirement for the company to be categorised as a personal liability company). Such statement has now been inserted in the long form MOI and can be selected if one wishes to incorporate this category of company.

- Otherwise, a number of cross-referencing and other drafting errors and inconsistencies have been attended to. The long form MOI for profit companies was particularly problematic in this regard because as one selected various clauses/options in the MOI one sometimes found that the subsequent clauses did not speak to, or were not harmonious with, selections made earlier in the document, and sometimes the alternatives were incomplete. This problem has been picked up in many instances and fixed.

The amending regulations do go some way in addressing the various issues with the standard form MOIs. That being said, anyone who intends incorporating a new company (or adopting a new MOI for a pre-existing company) should obtain legal advice on the best way to go about it and the appropriate MOI to be utilised for such purposes.

Yaniv Kleitman

CONTACT US

For more information about our Corporate and Commercial practice and services, please contact:

Willem Jacobs
National Practice Head
Director
Corporate and Commercial
T +27 (0)11 562 1555
M +27 (0)83 326 8971
E willem.jacobs@dlacdh.com

David Thompson
Cape Town Regional Practice Head
Director
Corporate and Commercial
T +27 (0)21 481 6335
M +27 (0)82 882 5655
E david.thompson@dlacdh.com

Roelof Bonnet
Director
T +27 (0)11 562 1226
M +27 (0)83 325 2185
E roelof.bonnet@dlacdh.com

Tessa Brewis
Director
T +27 (0)21 481 6324
M +27 (0)83 717 9360
E tessa.brewis@dlacdh.com

Cézanne Britain-Renecke
Director
T +27 (0)21 481 6333
M +27 (0)82 674 1302
E cezanne.britain-renecke@dlacdh.com

Michael Bromley
Director
T +27 (0)21 405 6021
M +27 (0)82 826 3493
E michael.bromley@dlacdh.com

Andrew Curnow
Director
T +27 (0)11 562 1230
M +27 (0)83 728 7215
E andrew.curnow@dlacdh.com

André de Lange
Director
T +27 (0)21 405 6165
M +27 (0)82 781 5858
E andre.delange@dlacdh.com

Chris Ewing
Director
T +27 (0)11 562 1158
M +27 (0)83 325 0588
E chris.ewing@dlacdh.com

Lilia Franca
Director
T +27 (0)11 562 1148
M +27 (0)82 564 1407
E lilia.franca@dlacdh.com

Johan Green
Director
T +27 (0)21 405 6200
M +27 (0)73 304 6663
E johan.green@dlacdh.com

Allan Hannie
Director
T +27 (0)21 405 6010
M +27 (0)82 373 2895
E allan.hannie@dlacdh.com

Peter Hesseling
Director
T +27 (0)21 405 6009
M +27 (0)82 883 3131
E peter.hesseling@dlacdh.com

Quintin Honey
Director
T +27 (0)11 562 1166
M +27 (0)83 652 0151
E quintin.honey@dlacdh.com

Roelf Horn
Director
T +27 (0)21 405 6036
M +27 (0)82 458 3293
E roelf.horn@dlacdh.com

Johan Latsky
Director
T +27 (0)11 562 1149
M +27 (0)82 554 1003
E johan.latsky@dlacdh.com

Banzi Malinga
Director
T +27 (0)11 562 1100
M +27 (0)82 469 5758
E banzi.malinga@dlacdh.com

William Midgley
Director
T +27 (0)11 562 1390
M +27 (0)82 904 1772
E william.midgley@dlacdh.com

Matshipi Mongoai
Director
T +27 (0)11 562 1171
M +27 (0)83 601 7414
E matshipi.mongoai@dlacdh.com

Anita Moolman
Director
T +27 (0)21 405 6122
M +27 (0)72 252 1079
E anita.moolman@dlacdh.com

Jo Neser
Director
T +27 (0)21 481 6329
M +27 (0)82 577 3199
E jo.neser@dlacdh.com

Francis Newham
Director
T +27 (0)21 481 6326
M +27 (0)82 458 7728
E francis.newham@dlacdh.com

Gasant Orrie
Director
T +27 (0)21 405 6044
M +27 (0)83 282 4550
E gasant.orrie@dlacdh.com

Verushca Pillay
Director
T +27 (0)11 562 1800
M +27 (0)82 579 5678
E verushca.pillay@dlacdh.com

David Pinnock
Director
T +27 (0)11 562 1400
M +27 (0)83 675 2110
E david.pinnock@dlacdh.com

Peter Prinsloo
Director
T +27 (0)11 562 1212
M +27 (0)82 739 6284
E peter.prinsloo@dlacdh.com

Allan Reid
Director
T +27 (0)11 562 1222
M +27 (0)82 854 9687
E allan.reid@dlacdh.com

Thina Siwendu
Director
T +27 (0)11 562 1326
M +27 (0)83 345 6679
E thina.siwendu@dlacdh.com

Ben Strauss
Director
T +27 (0)21 405 6063
M +27 (0)72 190 9071
E ben.strauss@dlacdh.com

Roux van der Merwe
Director
T +27 (0)11 562 1199
M +27 (0)82 559 6406
E roux.vandermerwe@dlacdh.com

Charl Williams
Director
T +27 (0)21 405 6037
M +27 (0)82 829 4175
E charl.williams@dlacdh.com

DLA CLIFFE DEKKER HOFMEYR

BBBEE STATUS: LEVEL THREE CONTRIBUTOR

JOHANNESBURG

1 Protea Place Sandton Johannesburg 2196, Private Bag X40 Benmore 2010 South Africa
Dx 154 Randburg and Dx 42 Johannesburg

T +27 (0)11 562 1000 **F** +27 (0)11 562 1111 **E** jhb@dlacdh.com

CAPE TOWN

11 Buitengracht Street Cape Town 8001, PO Box 695 Cape Town 8000 South Africa
Dx 5 Cape Town

T +27 (0)21 481 6300 **F** +27 (0)21 481 6388 **E** ctn@dlacdh.com

www.cliffedekkerhofmeyr.com