

28 JULY 2021

CORPORATE & COMMERCIAL ALERT

IN THIS ISSUE

Did you know: Companies Act edition

Even the best lawyers and business people don't know everything about the law, which sometimes leads to surprises! Below, we set out some commonly overlooked provisions of the Companies Act, 71 of 2008 (Companies Act) which may apply to your business and some other random facts that we hope you find interesting reading during these cold winter days.



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Did you know: Companies Act edition

If a company has decided to appoint an auditor, the Companies Act requires that the same individual may not serve as the auditor of a company for more than five consecutive financial years.

Did you know that the first person convicted of speeding was going 8 miles per hour (13kmph)? On 28 January 1896, Walter Arnold unintentionally made history by exceeding the speed limit by 10kmph, at a time when the speed limit was a mere 3kmph. Understandably, this caused a bit of an uproar in 19th century England. One wonders what the people of those times might have made of Usain Bolt who, at the 2009 IAAF World Championships, reached a speed of approximately 27 miles per hour on foot when he broke the 100m world record.

So what is the relevance? Walter Arnold went on to become one of the earliest car dealers in the UK and, as such, we presume he later paid better attention to the law. Below, we set out some commonly overlooked provisions of the Companies Act 71 of 2008 (Companies Act) (and other random facts) which you may (or may not) know.

Did you know ... that your auditors have to rotate every five financial years?

Although private or personal liability companies generally don't have to appoint an auditor (except in certain circumstances or if their Memorandum of Incorporation (MOI) requires it), they may choose to do so, and many do.

If a company has decided to appoint an auditor, the Companies Act requires that the same individual may not serve as the auditor of a company for more than five consecutive financial years. In addition, if an individual has served as the auditor of a company for two or more consecutive financial years and then ceases to be the auditor, that individual may not be appointed again until after the expiry of at least two further financial years. Sad news if you like your auditors.

Did you know ... that the legend of the Loch Ness monster goes back over 1,500 years?

It's a pity nobody has gotten a better picture.

Did you know ... that the issue of shares can be authorised after the fact (retroactively)?

Section 38(1) of the Companies Act stipulates that a board may resolve to issue shares of the company at any time, but only within the classes, and to the extent that, the shares have been authorised by or in terms of the company's MOI.

However, a company is permitted to issue shares that have not been authorised, or which are in excess of the number of authorised shares of any particular class,

2020 CONSISTENT LEADERS IN M&A LEGAL DEALMAKERS

2020

1st by M&A Deal Flow.
1st by BEE Deal Flow.
1st by BEE Deal Value.
2nd by General Corporate Finance Deal Flow.
2nd by General Corporate Finance Deal Value.
3rd by M&A Deal Value.
Catalyst Private Equity Deal of the Year.

2019

M&A Legal DealMakers of the Decade by Deal Flow: 2010-2019.
1st by BEE M&A Deal Flow.
1st by General Corporate Finance Deal Flow.
2nd by M&A Deal Value.
2nd by M&A Deal Flow.

2018

1st by M&A Deal Flow.
1st by M&A Deal Value.
2nd by General Corporate Finance Deal Flow.
1st by BEE M&A Deal Value.
2nd by BEE M&A Deal Flow.
Lead legal advisers on the Private Equity Deal of the Year.

2017

2nd by M&A Deal Value.
1st by General Corporate Finance Deal Flow for the 6th time in 7 years.
1st by General Corporate Finance Deal Value.
2nd by M&A Deal Flow and Deal Value (Africa, excluding South Africa).
2nd by BEE Deal Flow and Deal Value.

DealMakers

Did you know: Companies Act edition ...continued

When the board has adopted a resolution to make a distribution, the distribution must be paid out within 120 business days of the date of the resolution, failing which the board must reconsider the solvency and liquidity test

provided the issuance of those shares are retroactively authorised in accordance with section 36 within 60 business days after the date on which the shares were issued.

So, if you have recently issued shares, or are planning to do so in the future, make sure you have your authorisations in place, either beforehand (ideally) or retroactively.

Did you know ... that the payment of distributions must be completed within a specific period of time and cannot be held over indefinitely?

Section 46 of the Companies Act sets the following requirements for the declaration of distributions:

- the distribution must be pursuant to an existing legal obligation of the company, or a court order; or
- the distribution must be authorised by board resolution; and
- it must reasonably appear that the company will satisfy the solvency and liquidity test immediately after completing the proposed distribution; and
- the board of the company must acknowledge that they have applied the solvency and liquidity test, and reasonably concluded that the company will satisfy the solvency and liquidity test immediately after completing the proposed distribution.

When the board has adopted a resolution to make a distribution, the distribution must be paid out within 120 business days of the date of the resolution, failing which the board must reconsider the

solvency and liquidity test and, despite any law, order or agreement to the contrary, the company may not proceed with or continue with such distribution until this has been done.

Did you know ... that it is impossible to lick your elbow?

Did you know ... that the appointment of directors has a two-pronged requirement?

Under section 66(7) of the Companies Act, a person only becomes entitled to serve as a director when that person (i) has been appointed or elected to act as such; and (ii) has delivered to the company a written consent to serve as its director. Often the latter requirement is overlooked, which may have unintended consequences for the timing of the director's appointment.

In addition, section 68(2)(a) of the Companies Act requires the election of directors to occur on an individual basis. For example, a company cannot pass one resolution nominating several directors for appointment – it must be done individually, with one resolution per proposed appointment. The rationale for this is that, if a shareholder wants to vote in favour of the appointment of some directors and not others, they would not be able to do so if all the elections are combined into one resolution.

If you want any more information on anything mentioned above, or any other legal issues, please get in touch with us. By the way, we know you tried to lick your elbow.

Rachel Kelly and Jaco Meyer

2021 RESULTS

CDH's Corporate, Commercial and M&A practice is ranked as a Top-Tier firm in THE LEGAL 500 EMEA 2021.

Ian Hayes is ranked in the Hall of Fame in Corporate & Commercial and M&A in THE LEGAL 500 EMEA 2021.

David Pinnock is ranked as a Leading Individual in Corporate, Commercial and M&A in THE LEGAL 500 EMEA 2021.

Willem Jacobs is ranked as a Leading Individual in Corporate, Commercial and M&A in THE LEGAL 500 EMEA 2021.

Justine Krige is ranked as a Next Generation Partner in Corporate, Commercial and M&A in THE LEGAL 500 EMEA 2021.

Johan Latsky is recommended in Corporate, Commercial and M&A in THE LEGAL 500 EMEA 2021.

Peter Hesseling is recommended in Corporate, Commercial and M&A in THE LEGAL 500 EMEA 2021.

Rachel Kelly is recommended in Corporate, Commercial and M&A in THE LEGAL 500 EMEA 2021.

Vivien Chaplin is recommended in Corporate, Commercial and M&A in THE LEGAL 500 EMEA 2021.

Roux van der Merwe is recommended in Corporate, Commercial and M&A in THE LEGAL 500 EMEA 2021.

CDH's Investment Funds practice is ranked in Tier 3 in THE LEGAL 500 EMEA 2021.

John Gillmer is recommended in Investment Funds in THE LEGAL 500 EMEA 2021.

Mark Linington is recommended in Investment Funds in THE LEGAL 500 EMEA 2021.

Wayne Murray is ranked as a Rising Star in Investment Funds in THE LEGAL 500 EMEA 2021.



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500**
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**TIER 1
CORPORATE &
COMMERCIAL, M&A**

2020-2021

**IFLR
1000**

2020

FINANCIAL AND
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**DealMakers
2020**

2020 1st by M&A Deal Flow.
2020 1st by BEE Deal Flow.
2020 1st by BEE Deal Value.
2020 2nd by General Corporate
Finance Deal Flow.
2020 2nd by General Corporate
Finance Deal Value.
2020 3rd by M&A Deal Value.
2020 Catalyst Private Equity Deal
of the Year.

PRIVATE EQUITY
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★★★★ 2020
WINNER

CDH wins Single Deal Local
Legal Advisor of the Year award
for the OMPE & Footgear deal
in the 9th annual Private Equity
Africa awards

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BBBEE STATUS: LEVEL ONE CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

PLEASE NOTE

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