

9 DECEMBER 2021

REAL ESTATE ALERT

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The relevance of a company's memorandum of incorporation for a real estate transaction

In terms of the Companies Act 71 of 2008, as amended (Act), the memorandum of incorporation (MOI) of a company means the document that sets out rights, duties and responsibilities of shareholders, directors and others within and in relation to a company and all companies are therefore required to have a MOI.

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INCORPORATING
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The relevance of a company's memorandum of incorporation for a real estate transaction

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In terms of the Companies Act 71 of 2008, as amended (Act), the memorandum of incorporation (MOI) of a company means the document that sets out rights, duties and responsibilities of shareholders, directors and others within and in relation to a company and all companies are therefore required to have a MOI.

Section 66(1) of the Act states that the business and affairs of a company must be managed by or under the direction of its board, which has the authority to exercise all the powers and perform any of the functions of the company, except to the extent that the Act or the company's MOI provides otherwise.

In terms of the Act, there are various alterable and unalterable provisions which must be contained in an MOI and an alterable provision is defined as a provision of the Act in which it is expressly contemplated that its effect on a particular company can be negated, restricted, limited, qualified, extended, or otherwise altered in substance or effect by that company's MOI.

Private companies may therefore be registered with a standard or a customised MOI and a customised MOI could contain provisions which limit the powers of the company and its board of directors.

Why is the company's MOI important for real estate transactions?

When dealing with a real estate transaction, the conveyancing attorney would generally check the following provisions contained in the MOI:

- Whether the purposes and powers of the company are subject to any restriction, limitation or qualification.

- The requirements relating to shareholders' and directors' meetings and the passing of resolutions.
- Whether the MOI contains customised provisions requiring a special shareholders' resolution for any additional matters which are not specified in section 65(11) of the Act.
- Whether the MOI contains customised provisions limiting or restricting the authority of the company's board of directors to manage and direct the business and affairs of the company. For example, when dealing with a mortgage finance transaction there could be customised provisions in the MOI requiring shareholders' approval by way of an ordinary or special shareholders' resolution for the borrowing by the company in excess of a certain amount or the encumbrance of the assets of the company as security for a loan.
- Whether the MOI contains customised provisions amending the percentage of the voting rights required for an ordinary shareholders' resolution and special shareholders' resolution for certain transactions.

Implications of non-compliance with MOI provisions

Section 77 of the Act deals with the liability of a director of a company and includes that a director can be held liable for any loss, damages or costs sustained by the company as a direct or indirect consequence of the director having acted in the name of the company, signed anything on behalf of the company, or purported to bind the company or authorised the taking of any action by or on behalf of the company despite knowing that he or she lacked the authority to do so.

The relevance of a company's memorandum of incorporation for a real estate transaction...*continued*

Section 20(6) provides that each shareholder of a company has a claim for damages against any person who intentionally, fraudulently or due to gross negligence causes the company to do anything inconsistent with the Act or a limitation imposed in terms of the company's MOI.

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Section 20(7) provides that a person dealing with a company in good faith, other than a director, prescribed officer or shareholder of the company, is entitled to presume that the company, in making any decision when exercising its powers, has complied with all of the formal and procedural requirements in terms of the Act, its MOI and any rules of the company unless, in the circumstances, the person knew or reasonably ought to have known of any failure by the company to comply with any requirement. Any person who knew or should have reasonably known that the board did not in fact have proper authority to authorise a transaction or act on behalf of a company in a particular transaction might be unsuccessful in enforcing the transaction against the company.

Conclusion

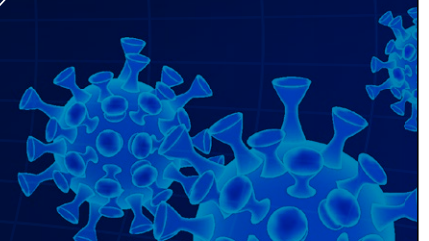
Non-compliance with the provisions of a company's MOI could pose a risk to the valid conclusion of a transaction or result in a property transaction being delayed if the non-compliance is discovered by the relevant conveyancer when dealing with the conveyancing aspects of the transaction in due course. There is also the possibility of personal liability for a director.

In order to minimise potential complications or delays in a real estate transaction, it is advisable for the board of directors of a company and third parties contracting with a company to take cognisance of the possibility that the company's MOI may have been customised and could accordingly contain additional restrictions on the powers of the board of directors of the company insofar as the real estate transaction is concerned.

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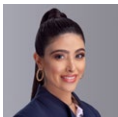
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