

# Companies Amendment Acts, 2024 What is in Force?

16 January 2025



# Seminar Agenda



**Yaniv Kleitman**

Director  
Corporate & Commercial Law

- What is and isn't in force
- Share buy-backs
- Director breaches: prescription
- Employee share schemes
- Landlord's position in business rescue



**Roxanne Bain**

Professional Support Lawyer  
Corporate & Commercial Law

- MOI filings
- Share issuances for future consideration
- Financial assistance
- Social and ethics committee



## Yaniv Kleitman

Director

Corporate & Commercial Law

### TOPICS:

- What is and isn't in force
- Share buy-backs
- Director breaches: prescription
- Employee share schemes
- Landlord's position in business rescue



## What did NOT come into force?

- New sections 30A and 30B: remuneration report approval and "two strike rule" in respect of the remuneration committee
- Section 25 amendments: access to companies' annual financial statements
- Section 118: the test for when private companies are "regulated companies" (takeover law)
- New section 38A: application to court to validate irregular share creations / issues

## Share buy-backs

- Overhaul of section 48(8)
- Old position was:
  - Buy-backs from directors and prescribed officers: special resolution
  - Buy-backs of more than 5%: subject "to the requirements of" ss114 and 115
- Amendments now delink buy-backs from ss114/115: not schemes of arrangements, no takeover law, and no appraisal rights
- Special resolution to be required for all buy-backs – except if on stock exchange or *pro rata* offer
- Practical effect:
  - JSE listed companies: largely business as usual
  - Non-listed companies: both good and bad; greater scope now for "general" buy-back resolutions at AGMs
  - Consider MOI amendments

## Prescription regarding director breaches

- Section 77(7) Companies Act
- Hard time-bar which ran from date of act or omission
- Compare to ordinary prescription laws: reasonable knowledge of material facts underlying cause of action
- See *Nebavest 1 (Pty) Ltd t/a Minster Consulting v Central Plaza Investments 202 (Pty) Ltd and Others* [2023] 2 All SA 795 (WCC) – held that section 77(7) is a special time-bar
- Companies Second Amendment Act introduces relaxation by a court on good cause shown
- Practical effect: No positive action required from companies... but will D&O insurance premiums go up?

## Employee share schemes

- Definition of ESOP in s95: will now include share schemes where shares are purchased (not just subscribed for)
- Significance: ESOPs which comply with ss95 and 97 have the benefit of carve-outs under various sections of the Companies Act:
  - Sections 44 and 45 (financial assistance) – only relevant to the extent the scheme actually involves "financial assistance" in the first place
  - Chapter 6 (public offers and prospectus)
- Practical effect: companies' s44/45 AGM resolutions to be modified

## Landlord's position in business rescue

- Section 135: post-commencement finance
- Post-commence contractual claims for public utility services, rates and taxes, electricity, water, sanitation, sewer charges now have preferential ranking
- NB: the rankings in s135 apply to a subsequent liquidation as well
- Drafting in the new s135(3)(a) leaves much to be desired! –
  - Clearly the utilities claim rank above all pre-commencement claims, whether secured or not, and below post-commencement employment claims
  - But what about as between "ordinary" PCF and utilities?





### Roxanne Bain

Professional Support Lawyer  
Corporate & Commercial Law

#### TOPICS:

- Social and ethics committee
- Share issuances for future consideration
- MOI filings
- Financial assistance





## Social & Ethics Committee – section 72 and 61

- Material changes are with regard to public companies and SOCs
- Members of SEC:
  - Previous position – at least 3 directors or prescribed officers, one of which must be non-executive director at least for the last 3 financial years
  - Amendment – members of SEC of public co and SOC will have to be, in majority, non-executive directors at least for the last 3 financial years
    - All other companies – 3 directors or prescribed officers, 1 non-executive
  - Note: Non-executive does not have to be independent
- Election of members of SEC:
  - Previous position – appointed by board
  - Amendment – members will have to be elected by shareholders at the AGM, like audit committee (public co and SOC)

## Social & Ethics Committee – section 72 and 61

- Practical effect:
  - AGM notices to be tweaked going forward
  - No lead time –
    - Non-compliance with composition requirements?
    - AGM notices distributed pre-amendment?
- Applying for exemption to the Tribunal from having to appoint a Social and Ethics Committee:
  - Grounds for exemption no longer require that “formal mechanism that performs the duties of the social and ethics committee” be required in terms of legislation
    - Potentially useful for multi-national groups, for example



## Share Issuances for Future Consideration – section 40(5)

- Shares may only be issued once "fully paid"
- But s40(5) exception (previous position): If consideration is in the form of an instrument such that the value cannot immediately be realised by the company or in the form of an agreement for future services, benefit or payment, THEN:
  - Consideration only deemed received when value is actually realised / payment received
  - In the interim the shares must be issued and transferred to third party to be held "in accordance with a trust agreement"
- S 40(6) – certain default terms apply unless the trust agreement provides otherwise (relating to voting rights, distributions, restrictions on transfer)



## Share Issuances for Future Consideration – section 40(5)

- Unclear what kind of "trust" arrangement the old s40(5) and (6) envisaged (was it a trust which is subject to the Trust Property Control Act?)
- Amendment clarifies this:
  - Shares transferred to a "stakeholder" to be held in trust in terms of a "stakeholder agreement"
  - "Stakeholder" is an independent third party who has no interest in the company or subscriber in the form of an attorney, notary public or escrow agent
  - "Stakeholder agreement" – a written contract between a stakeholder and the company
- Practical effect – greater certainty around nature of mechanism
- NB to note: Section 40(5) not available for JSE-listed companies as JSE LRs require shares to be fully paid up



## MOI Filings – section 16

- Previous position:
  - s16(9)(b): An amendment to a company’s Memorandum of Incorporation takes effect on the later of:
    - the date on, and time at, which the Notice of Amendment is filed; or
    - the date, if any, set out in the Notice of Amendment.
- Definition of “file” in section 1 – refers to “delivery” to the Commission
- Deemed delivery to Commission: Companies Regulations Annexure 3 (Table CR 3)

## MOI Filings – section 16

- Amendment:
  - MOI amendment effective date:
    - 10 business days after receipt of the Notice of Amendment by the Commission, unless endorsed or rejected with reasons by the Commission prior to the expiry of the 10 business days period; or
    - such later date, if any, as set out in the Notice of Amendment.
- Practical effect – certainty as to when MOI amendment takes effect

## Financial Assistance – section 45

- Unless pursuant to employee share scheme (as defined), financial assistance for any reason to directors, prescribed officers, related parties or corporations requires –
  - Special resolution of shareholders
  - Solvency and liquidity test to be passed by board
  - Board satisfied that terms of financial assistance are fair and reasonable
  - Any conditions or restrictions in MOI to be satisfied
  - Notice to shareholders and trade unions in certain circumstances
- Net cast very wide, unnecessary compliance burden
- Amendment:
  - s45(2A): The provisions of this section do not apply to the giving by a company of financial assistance to, or for the benefit of its subsidiaries.



## Financial Assistance – section 45

- NB to note:
  - Financial assistance by subsidiary to co-subsiary; and from subsidiary to holding company, still requires special resolution and compliance with other requirements in section 45
  - “Subsidiary” = South African subsidiary i.e. downward financial assistance to foreign subsidiaries is still subject to the requirements in s45 (Trevor v Steinhoff).
  - Section 44 financial assistance provisions do not have the same carve out (financial assistance for the acquisition of securities)
- Practical effect – consider MOI amendments

## Contact details



**Yaniv Kleitman**  
Director  
Corporate & Commercial Law  
[Yaniv.Kleitman@cdhlegal.com](mailto:Yaniv.Kleitman@cdhlegal.com)



**Roxanne Bain**  
Professional Support Lawyer  
Corporate & Commercial Law  
[Roxanne.Bain@cdhlegal.com](mailto:Roxanne.Bain@cdhlegal.com)



## **COPYRIGHT**

---

All rights reserved. This presentation and/or any part thereof is intended for personal use and may not be reproduced or distributed without the express permission of the author/s.

© 2025

[cliffedekkerhofmeyr.com](http://cliffedekkerhofmeyr.com)

