



A WORKING GUIDE TO THE
**Administration of
Private Companies**

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to the

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Companies

(In Terms of the Companies Act, 1973)



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Foreword

This book represents, in the opinion of the Institute, a most valuable guide for the person concerned with the day to day administration of private companies and with this in view it should satisfy a wide market.

Whilst we would agree that students preparing for the Institute's own examinations would find this useful as supplementary reading, such students should still base their studies on the Institute's much more detailed official manual on Company Secretarial Practice.

The book receives our *imprimatur* and we wish the author and publishers a deserved success.

D. M. PRICE

Chief Executive

The Southern African Institute of Chartered Secretaries and
Administrators

Acknowledgements

This book was originally written as a dissertation for my MBA degree. In order to satisfy the requirements for the MBA degree, the book had to be an original contribution or an original approach to an existing body of knowledge. I believe it is in the latter respect that the book succeeds.

By presenting the subject of the secretarial practice requirements of the Companies Act in the form of a practical working guide, the book will, hopefully, fill a real need of the administrators of a private company in the day-to-day administration of the company.

I would especially like to thank my wife and children for their unstinted support; this is really their book.

To Mrs Coleman and Mrs Sweeney, I wish to express my sincere appreciation for the long hours of diligent checking.

R. H. GAMBLE

January 1981

Abstract

The objective of this book is to provide the administrator of a private company with a practical working guide to the company secretarial practice requirements of the Companies Act No. 61 of 1973, as amended. An extensive literature search indicated that the specific requirements of the company administrator are not exclusively covered in a single work. Furthermore, where the company secretarial practice and procedures for a private company are dealt with, these have not been presented as a quick-reference working guide. As the duties of a company secretary are only part of the many functions of the administrator in a company, a need exists for such a practical, quick-reference working guide.

The guide opens with a general note on company law in order to introduce the reader to the fundamental principles of modern company law. This has been done to enable the administrator to more readily understand the many requirements of the Companies Act. A brief note on the administration of the Act by the office of the Registrar of Companies is also given.

The main body of the guide deals with the procedure for the formation of a private company. This is followed by a detailed description of the company secretarial procedures which must be attended to upon the formation of the company and those matters which recur annually thereafter. The other matters which may be encountered in the administration of the company and which do not necessarily occur each year are also dealt with in detail. The annual financial statements, including the requirements in respect of the directors' report are dealt with in a separate chapter.

The guide concludes with the procedure for the deregistration of the company in the event that it has served the purpose for which it was formed. This deregistration procedure must not be confused with the procedure for the liquidation of an insolvent company which is beyond the scope of this guide. Finally, an index by page number to the Companies Act references in the guide is given in Appendix 3. This has been done to facilitate the procedure described in the introduction to the guide for updating it

consequent upon amendments to the Companies Act from time to time. An index to the specimen agendas, minutes, resolutions and other procedural requirements of the Companies Act is given in Appendix 4 at the end of the guide.

The reader will notice that footnote references appear throughout the guide. The references corresponding to each footnote are given at the end of each chapter. This method has been used to avoid cluttering the text with numerous references. A detailed bibliography of all the source material used to produce the guide is given at the end of the guide. The footnote references and bibliography have been retained to help those readers who may wish to explore a particular aspect of company law and secretarial practice in greater depth. It is also hoped that the inclusion of these detailed references will make the working guide a useful bridge between theory and practice for students writing the examinations of the Institute.

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Introduction

1. The Scope, Purpose and Use of the Working Guide

The duties of a company secretary are only one part of the many functions of the administrator in a company. Consequently, he is able to spend only part of his time attending to the many statutory requirements of the Act. A need therefore exists for a practical, easy-reference working guide which will assist him to expeditiously carry out these requirements.

The aim of the working guide is to provide the company secretary/administrator of a private company with a practical, easy-reference guide to the secretarial practice requirements of the Companies Act No. 61 of 1973, as amended. (The statute is referred to as 'the Act' throughout this guide.) The guide does not deal with public companies nor with guarantee companies (which are treated as public companies in the Act).

The requirements of the Act in respect of external companies are dealt with in appendix one at the end of the guide rather than in a separate chapter. This arrangement has been used as most of the procedures, records and requirements in respect of private companies incorporated in the Republic apply equally to external companies which have a place of business in the Republic. Rather than reproducing these procedures, records and requirements in a separate chapter on external companies, they will be dealt with in appendix one and referenced to the relevant chapters in the body of the guide.

The guide begins with the procedure for the formation of a private company, moves through the many procedures encountered in administering a company, and concludes with

the procedure for deregistering the company when it has served the purposes for which it was formed and operated. Each chapter gives a step-by-step guide to the applicable secretarial practice procedure dealt with in that chapter. In most instances, specimens of the procedures (for example, the first board meeting minutes) are given in the text immediately after the Act's requirements in respect of that procedure have been dealt with. The specimens are distinguished in the text by their smaller type-face. References to the specific provisions of the Act for each procedure are given in the left-hand margin of each page. Where appropriate, a procedural checklist is also given at the end of the chapter to enable the administrator to check that all the required steps in a procedure are being implemented without having to re-read the chapter each time.

The working guide is not intended to be a substitute for using the Act. No reference work on company law and secretarial practice should be used in isolation of the Act. At all times, the working guide should be read together with the Act to ensure that the administrator understands precisely the requirements in respect of each procedure dealt with in the guide. It is for this reason that the references to the Act for each procedure have been given in the outer margins throughout the guide.

2. General Note on Company Law

Any treatment of the subject of company law would be incomplete without first introducing the reader to the fundamental principles of modern company law. The secretarial procedures and requirements of the Act may be more readily understood and appreciated in light of these principles. In essence, company law provides the legal structure necessary for the smooth functioning of the modern capitalist system.¹

2.1 FORMS OF ENTERPRISE AND THE COMPANY

There are basically three forms of business enterprise today, namely: the sole proprietorship; the partnership; and the

incorporated company. In both the sole proprietorship and the partnership the proprietors of the business undertaking contribute the capital and personally carry the full risk of business failure. They are therefore jointly and severally liable for the debts of the business which may in turn result in the sequestration of their personal estates.²

The incorporated company, on the other hand, is distinguished from the sole proprietorship and the partnership by its separate existence in law from its members. Upon incorporation the company acquires rights and duties quite apart from those of its members and thus becomes a separate legal entity. The company, and not its members, owns the assets and carries the liabilities recorded in its books of account.³ The shares which the members own in the company merely denote their claim to that portion of the company's share capital which they have contributed.⁴ Consequently, the liability of the members for the debts of the company does not extend beyond the amount which they have contributed in cash or moneys worth to the share capital of the company.⁵

2.2 MEMORANDUM OF ASSOCIATION AND THE OBJECTS CLAUSE

The memorandum is the basic constitution of the company and, when registered with the Registrar of Companies, is evidence of the company's incorporation. The company's constitution sets out the powers and duties of the company as a separate legal person.

The objects clause of the memorandum determines what the company may and may not do in the pursuit of the purpose for which it was incorporated. If, prior to the repeal of the Companies Act, 1926, a company transacted some business which was not within its capacity as determined by the objects clause of the company, any contract arising out of that business could not be enforced by or against the company. This was because the contract was 'ultra vires' (beyond the powers and capacity of) the company.

As modern business became increasingly complex and wide-ranging, the objects clause of a company was couched in ever wider terms to ensure that there was virtually no business which the company could not pursue. In framing the Companies Act, 1973 (which repealed the 1926 Act), the legislature took cognisance of this development and introduced two important innovations in the Act.⁶ The first innovation was to considerably reduce the ambit of the 'ultra vires' rule. Thus, acts which are beyond a company's objects are now as valid and enforceable by or against the company as any act which is within the company's objects.

Why then even have an objects clause, the administrator may ask? The 'ultra vires' rule invariably operated against third persons dealing with the company, rather than against the company. The interests of these persons (notably the creditors of the company) have now been effectively protected in the Act. However, section 36 only applies to transactions with third parties. It does not operate in respect of the internal interests of the members as between themselves, as between the members and the company, and as between the members and the directors. A member or director of the company will thus still be able to rely as against the other on the fact that an act which was beyond the capacity of the company is void.⁷

The second innovation introduced to deal with the unrealistically wide objects clause is the provision for every company to have unlimited objects ancillary (subordinate) to the main object. Furthermore, if the main business actually carried on by the company falls within its capacity only by virtue of an ancillary object, that main business automatically becomes the new main object of the company. However, since the 'ultra vires' rule still applies in respect of the internal interests of the company, the Act allows the promoters (the persons

forming the company) to exclude specific ancillary objects in the memorandum. The effect of this is to enable the members to hold the directors and the company to pursuing the business for which the company was formed.

2.3 ARTICLES OF ASSOCIATION

The regulations covering the internal administration of a company are contained in its articles of association.⁸ Table B in Schedule 2 of the Act contains a model set of articles for a private company. These articles are quite adequate for most private companies. All references to articles of association in this guide are in respect of Table B. Both the memorandum and articles of association are dealt with in considerable detail in chapter one of the guide.

2.4 ADMINISTRATION OF THE ACT

The Act is administered by the office of the Registrar of Companies in Pretoria. The postal and office address of the Registrar is given in appendix two at the end of the guide. All documents and forms required to be lodged in terms of the Act must be sent to the Registrar. As every copy of the Act contains a specimen of each of these forms they have not been reproduced in the guide. The prescribed fee required on each original lodged is stated on the form.

All references in the guide to the 'court' mean the court which has jurisdiction under the Act in respect of the company and in respect of the offence referred to in the text. Generally speaking, the court is the local division of the Supreme Court of South Africa in which the company's registered office is situated. However, certain offences fall within the jurisdiction of the lower courts. All matters for which the company must apply to court refer to an application to the appropriate local division of the Supreme Court.

3. Updating the Working Guide

In writing the guide, the latest amendments to the Act have been incorporated. Thus, at the time of printing the working

guide is completely up to date. The Act will invariably continue to be amended from year to year as has been the case since its promulgation in January, 1974. If the working guide is to remain accurate it is essential that it be kept up to date with all future changes in the Act. It is, therefore, intended to introduce a revision service in order to keep the guide completely up to date with relevant amendments to the Act and company secretarial practice from time to time.

In the interim the administrator should ensure that he receives a copy of each week's edition of the Government Gazette from the office of the Government Printer in Pretoria. Every amendment to the Act is promulgated in the Gazette. The Gazette gives explicit instructions as to which sections in the Act are being changed and what each change comprises. By cross-checking the Gazetted changes with his copy of the Act and extending the cross check to the references in the outer margin of the text of the guide, he can ensure that both his copy of the Act and the guide are kept up to date. In order to simplify the search for the relevant references in the guide, a list of these references to the Act is given in appendix three at the end of the guide. The references are listed numerically with the corresponding page number in the guide.

REFERENCES

- 1 Tom Hadden, *Company Law and Capitalism*, (London: Weidenfeld and Nicolson, 1972), p 3.
- 2 H.S. Cilliers and M.L. Benade, *Company Law*, 2nd edition, (Durban: Butterworths, 1973), p 1.
- 3 Hadden, *Company Law and Capitalism*, p 144.
- 4 Cilliers and Benade, *Company Law*, p 83.
- 5 L.C.B. Gower, *The Principles of Modern Company Law*, 3rd edition, (London: Stevens and Sons, 1969), p 72.
- 6 Commission of Enquiry into the Companies Act, Main Report of the Commission, *The Companies Act*, (Pretoria, 1970), p 26.
- 7 Cilliers and Benade, *Company Law*, p 56.
- 8 Gower, *Modern Company Law*, p 16.

CHAPTER ONE

Formation of a Private Company

This chapter describes, in detail, everything that needs to be done in order to form a private company. The procedural checklist (Annexure 1.3) gives a step-by-step guide to all the formalities required by the Act. The Companies Act forms required to be lodged in respect of each procedure are given in brackets at the end of the description of each procedure.

1. Memorandum and Articles of Association

Every company must have a memorandum of association and a set of articles which must be registered with the Registrar of Companies. Upon incorporation, the memorandum and articles of association constitute a contract between each member and the company (as if the memorandum and articles had been signed by each member). Furthermore, they regulate the rights of the members between themselves, but only in their capacity as members.¹ In this way the relationship of the members and their company is regulated, each having a separate existence in law.

Memorandum of Association — is the charter of the company and sets out what the company may and may not do. The memorandum must contain the following information:

- The name of the company — a shortened form (maximum of 7 letters) and a translation in the other official language may also be registered. (Forms CM 2 and CM 7)

42(1),(2) It is advisable for the promoter (the person who wants to form the company) to apply to the Registrar to reserve the name of the company (and its shortened form and translation, if desired) before lodging the memorandum in case the name is rejected. Annexure 1.1 contains a summary of the Registrar's directive concerning company names. (Forms CM 5 and CM 6)

52(1) • The purpose of the company — a statement describing the main business which the company intends to carry on. The purpose is the economic purpose which the promoters wish to pursue as an incorporated association rather than in their personal capacities.² (Form CM 2A)

33(1) • The main object of the company — a statement describing the general nature of the main business (purpose) which the company is to carry on. (Form CM 2A)

Whilst it appears that the purpose of the company and its main object are in effect the same thing, this is not so. The difference is that the purpose is *what the company intends to do*; whereas the main object is much wider and defines the extent of the company's capacity (in law) to transact its business i.e. *what the company may do*.³ The following example illustrates this difference:

'The purpose of the company may be to manufacture spark plugs; the main object would be to engage in all aspects of the automotive components industry.'

33(2) • Ancillary objects excluded — the Act imputes an unlimited set of objects ancillary (subordinate) to the main object of the company. What this means is that once the main object has been stated all activities related to the main object of the business are automatically included therein. However, where the promoters wish to limit the company's capacity to act to the specific