

Life is like a coin. You can spend it any way you wish, but you only spend it once.- **Lillian Dickson.**

Ring Fenced Companies under the new Act

The doctrine of **constructive notice** applied under the old Companies Act. In terms of this doctrine, and because the constitutional documents of a company were (and still is) in the public domain, outsiders were presumed to have knowledge of any limitations on the powers and capacity of a company and or office bearers.

Under the new Companies Act (since May 2011) a company has the full legal capacity and powers of a natural person to the extent that a juristic person is capable of exercising any such power and/or having such capacity. The New Act furthermore partially excludes the operation of the doctrine of constructive notice. Under this Act, a third party will only be deemed to have knowledge of any limitations or restrictions on a company if the company includes the letters "RF" (referring to "Ring Fenced") in its name.

According to a non-binding opinion published during December 2011, the Companies and Intellectual Property Commission recommends that the expression "RF" be used in a company's name in all cases where -

- the purpose or objectives of the company is restricted or limited in the Memorandum of Incorporation (MOI);
- the powers of the company is restricted or limited in any way in its MOI;
- any other limiting or restricting condition is contained in the MOI;
- any requirement in addition to those set out in section 16 of the 2008 Act, for the amendment of any of the abovementioned restrictions or limitations is contained in the MOI;
- a special resolution to approve any matter (not contemplated in section 65(11) of the 2008 Act) is prescribed by the MOI;
- the MOI imposes on the company a higher standard, greater restriction, longer period of time or any similarly more onerous requirement, than would apply in terms of an unalterable provision of the 2008 Act; and
- the MOI contains a prohibition on the amendment of any particular provision of the MOI.

Law & Laughter

A man is innocent until proven broke.

Derivative action in terms of the Companies Act

The new Companies Act (the “Act”) provides for a far more effective derivative action than was permitted under the previous Companies Act. The primary purpose of a derivative action is to allow a person (or group of persons), who believes that a company should take legal action, to compel the company to initiate such action in events where the company has failed to do so.

The new derivative action will be extremely broad in a number of respects. Firstly, persons permitted to institute a derivative action include the shareholders, those persons entitled to be registered as shareholders of the company (or a related company), the directors or prescribed officers of the company (or a related company), registered trade unions and/or a party who has been granted leave by the court to do so. Furthermore, section 157 of the Act states that, if any matter can be brought before a court in terms of the Act the right to do so “may be exercised by a person acting as a member of, or in the interest of, a group or class of affected persons”. As such it will be entirely possible for a class action to be instituted by way of derivative proceedings.

Secondly, Section 165 broadens the scope of the derivative action considerably by empowering any of the abovementioned persons to initiate derivative proceedings in order to “protect the legal interests of the company”. The term “legal interests” is potentially extensive and will cover a wider range of matters than simply enforcing a legal right.

Thirdly, Section 165 provides that a person simply has to serve a demand on the company in order to commence a derivative action. The company may apply to court to set aside such a demand, but only on the very narrow grounds that the demand is “frivolous, vexatious or without merit”. If it does not do so, the company is obliged to appoint an independent and impartial person or committee to investigate the demand.

For example, the employees or minority shareholders as affected persons demand action to stop: an acquisition, expansion of business interests, appointment of management, purchase/sale of certain assets, change of business policy, moving of premises, etc. Companies can face significant costs in dealing with these demands, and it is important that companies set aside funds to fight future battles.

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