



GUIDE TO HOME OWNERS ASSOCIATION (HOA) MANAGEMENT



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INDEX

1. **The HOA Concept**
2. **Definitions**
 - 2.1 Common Definitions
3. **Formation of the HOA**
 - 3.1 Registration of the company
 - 3.2 Memorandum of Incorporation
 - 3.3 Record Keeping
 - 3.4 Location of company records
 - 3.5 Access to Company Records
 - 3.6 Financial year
 - 3.7 Accounting records
 - 3.8 Annual Financial Statements
4. **Governance of the HOA**
 - 4.1 Right to be represented by proxy
 - 4.2 Record date for voting
 - 4.3 Members acting other than at meetings
 - 4.4 Members Meetings
 - 4.5 Notice of meetings
 - 4.6 Annual General Meetings (AGM)
 - 4.7 Defective notices
 - 4.8 Conduct of meetings
 - 4.9 Meeting Quorum and Adjournment
 - 4.10 Resolutions
 - 4.11 Ordinary Resolutions
 - 4.12 Special Resolutions
 - 4.13 Board of Directors and Prescribed officers
 - 4.14 Directors
 - 4.15 Ineligibility and Disqualification of persons

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1. THE HOA CONCEPT

Commonly known as gated communities, or group housing development schemes.

In the case of a **group housing scheme**, the formation of a home owners association normally forms part of the municipalities zoning and subdivision requirements. Home owners purchasing individually subdivided residential portions of the scheme automatically become members of the Home Owners Association (HOA) by virtue of their individual properties registered title deed. Adherence to the Home owners associations conduct rules and regulations are legally enforceable.

The HOI becomes the owner and administrator of all the common property within the scheme and is responsible for the upkeep, maintenance, general infrastructure and conduct within the borders of the said community. The individual home owner enjoys the benefits of exclusive full title ownership, but simultaneously becomes part of the community and its resulting benefits. Security, maintenance, infrastructure, roadways, public facilities, legal issues, communal facilities and common property gardens are controlled and all form part of the HOI's responsibility. Residents are required to contribute towards the Home Owners Association by virtue of a monthly levy or special levy, which is pre-determined at an annual general meeting of members on a yearly basis.

Home owners association or **gated communities** also, arises on a voluntary basis. Residents form Home Owners Association's with the best interest of a community at heart. Security, road closures, access control points, walled enclosure, electric fences and legal matters are typically found on the agenda. Communities stand together to provide a better quality of life within the realms of their home environment.

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2. DEFINITIONS

Home owners associations are legislated in accordance with the Companies Act, 1973 as amended.

2.1 Common Definitions

“accounting records” means information in written or electronic form concerning the financial affairs of a company as required in terms of this Act, including but not limited to, purchase and sales records, general and subsidiary ledgers and other documents and books used in the preparation of financial statements;

“acquiring party”, when used in respect of a transaction or proposed transaction, means a person who, as a result of the transaction, would directly or indirectly acquire or establish direct or indirect control or increased control over all or the greater part of a company, or all or the greater part of the assets or undertaking of a company;

“advertisement” means any direct or indirect communication transmitted by any medium, or any representation or reference written, inscribed, recorded, encoded upon or embedded within any medium, by means of which a person seeks to bring any information to the attention of all or part of the public;

“agreement” includes a contract, or an arrangement or understanding between or among two or more parties that purports to create rights and obligations between or among those parties;

“alterable provision” means a provision of the Companies Act in which it is expressly contemplated that its effect on a particular company may be negated, restricted, limited, qualified, extended or otherwise altered in substance or effect by that company’s Memorandum of Incorporation;

“alternate director” means a person elected or appointed to serve, as the occasion requires, as a member of the board of a company in substitution for a particular elected or appointed director of that company;

“annual general meeting” means the meeting of a public company required by section 61(7)

“audit” has the meaning set out in the Auditing Profession Act, but does not include an **“independent review”** of annual financial statements

“Auditing Profession Act” means the Auditing Profession Act, 2005 (Act No. 26 of 2005);

“auditor” has the meaning set out in the Auditing Act;

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“beneficial interest”, when used in relation to a company’s securities, means the right or entitlement of a person, through ownership, agreement, relationship or otherwise, alone or together with another person to-

- (a) receive or participate in any distribution in respect of the company’s securities;
- (b) exercise or cause to be exercised, in the ordinary course, any or all of the rights attaching to the company’s securities; or
- (c) dispose or direct the disposition of the company’s securities, or any part of a distribution in respect of the securities,

but does not include any interest held by a person in a unit trust or collective investment scheme in terms of the Collective Investment Schemes Act, 2002 (Act No. 45 of 2002);

“board” means the board of directors of a company;

“close corporation” means a juristic person incorporated under the Close Corporations Act, 1984 (Act No. 69 of 1984);

“Commission” means the Companies and Intellectual Property Commission

“Commissioner” means the person appointed to or acting in the office of that name

“Companies Tribunal” means the Companies Tribunal established in terms of section 193

“companies register” means the register required to be established by the Commission in terms of section 187(4)

“company” means a juristic person incorporated in terms of this Act, a domesticated company, or a juristic person that, immediately before the effective date-

- (a) was registered in terms of the-
 - (i) Companies Act, 1973 (Act No. 61 of 1973), other than as an external company as defined in that Act; or
 - (ii) Close Corporations Act, 1984 (Act No. 69 of 1984), if it has subsequently been converted in terms of Schedule 2;
- (b) was in existence and recognized as an „existing company“ in terms of the Companies Act, 1973 (Act No. 61 of 1973); or

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- (c) was deregistered in terms of the Companies Act, 1973 (Act No. 61 of 1973), and has subsequently been re-registered in terms of this Act;

“consideration” means anything of value given and accepted in exchange for any property, service, act, omission or forbearance or any other thing of value, including-

- (a) any money, property, negotiable instrument, securities, investment credit facility, token or ticket;
- (b) any labour, barter or similar exchange of one thing for another; or
- (c) any other thing, undertaking, promise, agreement or assurance, irrespective of its apparent or intrinsic value, or whether it is transferred directly or indirectly;

“Constitution” means the Constitution of the Republic South Africa, 1996;

“Co-operative” means a juristic person as defined in the Co-operatives Act, 2005 (Act No. 14 of 2005);

“Council” means the Financial Reporting Standards Council established by section 203

“director” means a member of the board of a company, as contemplated in section 66, or an alternate director of a company and includes any person occupying the position of a director or alternate director, by whatever name designated;

“effective date”, with reference to any particular provision of this Act, means the date on which that provision came into operation in terms of section 225

“electronic communication” has the meaning set out in [section 1](#) of the Electronic Communications and Transactions Act;

“Electronic Communications and Transactions Act” means the Electronic Communications and Transactions Act, 2002 (Act No. 25 of 2002);

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“exercise”, when used in relation to voting rights, includes voting by proxy, nominee, trustee or other person in a similar capacity;

“ex officio director” means a person who holds office as a director of a particular company solely as a consequence of that person holding some other office, title, designation or similar status specified in the company’s Memorandum of Incorporation;

“financial reporting standards”, with respect to any particular company’s financial statements, means the standards applicable to that company, as prescribed in terms of section 29(4) and (5)

“financial statement” includes-

- (a) annual financial statements and provisional annual financial statements;
- (b) interim or preliminary reports;
- (c) group and consolidated financial statements in the case of a group of companies; and
- (d) financial information in a circular, prospectus or provisional announcement of results, that an actual or prospective creditor or holder of the company’s securities, or the Commission, Panel or other regulatory authority, may reasonably be expected to rely on;

“general voting rights” means voting rights that can be exercised generally at a general meeting of a company;

“Human Rights Commission” means the South African Human Rights Commission established in terms of [Chapter 9](#) of the Constitution;

“incorporator”, when used-

- (a) with respect to a company incorporated in terms of this Act, means a person who incorporated that company, as contemplated in section 13; or
- (b) with respect to a pre-existing company, means a person who took the relevant actions comparable to those contemplated in section 13 to bring about the incorporation of that company;

“individual” means a natural person;

“juristic person” includes-

- (a) a foreign company; and
- (b) a trust, irrespective of whether or not it was established within or outside the Republic;

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“Master” means the officer of the High Court, referred to Administration of Estates Act, 1965 (Act No. 66 of 1965), who has jurisdiction over a particular matter arising in terms of this Act;

“material”, when used as an adjective, means significant in the circumstances of a particular matter, to a degree that is-

- (a) of consequence in determining the matter; or
- (b) might reasonably affect a person’s judgement or decision-making in the matter;

“Memorandum of Incorporation”, or **“Memorandum of Incorporation”**, means the document. As amended from time to time that sets out rights, duties and responsibilities, members, directors and others within and in relation to a company, and other matters as contemplated in section 15 of the Companies Act, 1973 and which-

- (a) The company was incorporated under this Act, as contemplated in section 13;
- (b) A pre-existing company was structured and governed before the later of the
 - (a) Effective date; or
 - (b) Date it was converted to a company in terms Schedule 2
 - (c) A domesticated company is structured and governed

“nominee” has the meaning set out in [section 1](#) of the Securities Services Act, 2004 (Act No. 36 of 2004);

“non-profit company” means a company-

- (a) incorporated for a public benefit or other object as required by item 1(1) of Schedule 1; and
- (b) the income and property of which are not distributable to its incorporators, members, directors, officers or persons related to any of them except to the extent permitted by item 1(3) of Schedule 1;

“Notice of Incorporation” means the notice to be filed, by which the incorporators of a company inform the Commission of the incorporation of that company, for the purpose of having it registered;

“official language” means a language mentioned in section 6(1) the Constitution;

“ordinary resolution” means a resolution adopted with the support of more than 50% of the voting rights exercised on the resolution, or a higher percentage

- (a) at a member meeting; or
- (b) by holders of the company’s securities acting other than at a meeting

“participant” has the meaning set out in [section 1](#) of the Securities Services Act, 2004 (Act No. 36 of 2004);

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“**person**” includes a juristic person;

“**personal financial interest**”, when used with respect to any person-

- (a) means a direct material interest of that person, of a financial, monetary or economic nature, or to which a monetary value may be attributed; but
- (b) does not include any interest held by a person in a unit trust or collective investment scheme in terms of the Collective Investment Schemes Act, 2002 (Act No. 45 of 2002), unless that person has direct control over the investment decisions of that fund or investment;

“**pre-existing company**” means a company contemplated in paragraph (a), (b) or (c) of the definition of „company“ in this section;

“**pre-incorporation contract**” means a written agreement entered into before the incorporation of a company by a person who purports to act in the name of, or behalf of, the proposed company, with the intention or understanding that the proposed company will be incorporated, and will thereafter be bound by the agreement;

“**premises**” includes land, or any building, structure, vehicle, ship, boat, vessel, aircraft or container;

“**prescribed**” means determined, stipulated, required, authorized, permitted or otherwise regulated by a regulation or notice made in terms of this Act;

“**prescribed officer**” means a person who, within a company, performs any function that has been designated by the Minister in terms of section 66(10);

“**present at a meeting**” means to be present in person, or able to participate in the meeting by electronic communication, or to be represented by a proxy who is present in person or able to participate in the meeting by electronic communication;

“**private company**” means a profit company that-

- (a) is not a public, personal liability, or state-owned company; and
- (b) satisfies the criteria set out in section 8(2)(b)

“**profit company**” means a company incorporated for the purpose of financial gain for its shareholders;

“**public company**” means a profit company that is not a state-owned company, a private company or a personal liability company;

“**public regulation**” means any national, provincial or local government legislation or subordinate legislation, or any licence, tariff, directive or similar authorisation issued by a regulatory authority or pursuant to any statutory authority;

“**records**”, when used with respect to any information pertaining to a company, means any information as contemplated in companies ACT, 1973

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“record date” means the date established under which a company determines the identity of its shareholders and their shareholdings for the purposes of this Act;

“registered auditor” has the meaning set out in the Auditing Profession Act;

“registered external company” means an external company that has registered its office as required by section 23, and has been assigned a registration number in terms of that section;

“registered office” means the office of a company, or of an external company, that is registered as required by section 23;

“registration certificate”, when used with respect to a-

- (a) company incorporated on or after the effective date, means the certificate, or amended certificate, issued by the Commission as evidence of the incorporation and registration of that company;
- (b) pre-existing company registered in terms of-
 - (i) the Companies Act, 1973 (Act No. 61 of 1973), means the certificate of incorporation or registration issued to it in terms of that Act;
 - (ii) the Close Corporations Act, 1984 (Act No. 69 of 1984), and converted in terms of Schedule 2 to this Act, means the certificate of incorporation issued to the company in terms of that Schedule, read with section 14; or
 - (iii) any other law, means any document issued to the company in terms of that law as evidence of the company’s incorporation; or
- (c) registered external company, means the certificate of registration issued to it in terms of this Act or the Companies Act, 1973 (Act No. 61 of 1973); or
- (d) a domesticated company, means the certificate issued to it upon the transfer of its registration to the Republic in terms of section 13(5) to (11);

“regulated person or entity” means a person that has been granted authority to conduct business by a regulatory authority;

“regulation” means a regulation made under this Act;

“regulatory authority” means an entity established in terms of national or provincial legislation responsible for regulating an industry, or sector of an industry;

“related”, when used in respect of two persons, means persons who are connected to one another

“relationship” includes the connection subsisting between any two or more persons

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who are related or inter-related, as determined in accordance with Section 2;

“rules” and **“rules of a company”** means any rules made by a company as contemplated in section 15(3) to (5);

“securities” means any shares, debentures or other instruments, irrespective of their form or title, issued or authorized to be issued by a profit company;

“securities register” means the register required to be established by a profit company in terms of Section 50(1);

“special resolution” means –

- (a) in the case of a company, a resolution adopted with the support of at least 75% of the voting rights exercised on the resolution, or a different percentage contemplated in section 65(10)
 - a. at a shareholders meeting; or
 - b. by holders of the company’s securities acting other than at a meeting, as
- (b) in the case of any other juristic person, a decision by the owner or owners of that person, or by another authorized person, that requires the highest level of support in order to be adopted, in terms of the relevant law under which that juristic person was incorporated;

“unalterable provision” means a provision of this Act that does not expressly contemplate that its effect on any particular company may be negated, restricted, limited, qualified, extended or otherwise altered in substance or effect by a company’s Memorandum of Incorporation or rules;

“voting power”, with respect to any matter to be decided by a company, means the voting rights that may be exercised in connection with that matter by a particular person, as a percentage of all such voting rights;

“voting rights”, with respect to any matter to be decided by a company, means-

- (a) the rights of any holder of the company’s securities to vote in connection with that matter, in the case of a profit company; or
- (b) the rights of a member to vote in connection with the matter, in the case of a non-profit company;

“voting securities”, with respect to any particular matter, means securities that-

- (a) carry voting rights with respect to that matter; or
- (b) are presently convertible to securities that carry voting rights with respect to that matter; and

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3. **FORMATION OF THE HOA**

3.1 Registration of the company

The company is formed by virtue of a Notice of incorporation in terms of section 13 (1) of the companies act of 1973

The commissioner must

- assign to the company a unique registration number
- enter the prescribed information concerning the company in the company register
- endorse the notice of Incorporation and copy of the memorandum of Incorporation filled with it
- issue a registration certificate with
 - the date & time at which the Commissioner issued the certificate
 - the date, if any , stated by the incorporators in the Notice of Incorporation
- If the name of the company, as entered on the Notice of Incorporation is not satisfactory, the commissioner may alter the name accordingly or if prohibited or reserved then
 - An interim name is issued
 - the company is invited to amend the name
- a registration certificate issued is considered to be conclusive evidence of the newly formed or incorporated company

3.2 Memorandum of Incorporation

Each provision of a company's MOI

- must be consistent with the companies Act of 1973
- is void to the extent that it contravenes or is inconsistent with the Act
- includes provisions not covered by the Act
- imposes higher standards, greater restrictions, or longer time periods
- contains the restrictive conditions applicable to the company
- prohibits the amendment of any particular provision of the MOI
- must not negate, restrict ,limit, qualify, extend or alter the substance of the Act
- The board may amend or repeal any necessary incidental rules relating to the governance of the company in the prescribed manner
- A company's MOI may also be amended in the prescribed manner

3.3 Record Keeping

Any documents, accounts, books, writing, records or information that a company is required to keep in terms of the Act must be kept

- In written form or in a manner that is convertible to a written form
- For a period of 7 years after incorporation

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Every company must maintain:

- A copy of the MOI and any amendments
- A record of its directors and their respective information as required
- Copies of all reports presented at AGM's
- Annual financial statements
- Accounting records
- Notices & minutes of member meetings & resolutions adopted
- Resolutions adopted
- Copies of communication
- Minutes of directors meetings & resolutions
- Members register
- Company's record of directors

3.4 Location of company records

A company's record must be accessible from the company's registered office or another location within South Africa

3.5 Access to Company Records

Any member of a nonprofit Company has the right to inspect and copy the following records of the company:

- MOI
- Records in respect to directors
- Reports to annual meetings and annual financial statements
- Notices minutes of annual meetings and communications
- Meetings of members or communication to members

A non member also has the right to inspect or copies the members or Directors on payment of the prescribed amount

3.6 Financial year

A company must have a financial year, ending on a date set out in the companies Notice of incorporation

The board may change the financial year end by filing the appropriate notice thereof

3.7 Accounting records

A company must keep accurate accounting records in one of the official languages as is deemed necessary to:

- Enable the company to satisfy its obligations in terms of the ACT
- Include any accounting records, which must be kept in the prescribed manner
- Ensure records are accessible from the companies registered office

3.8 Annual Financial Statements

Each year, a company must prepare audited annual financial statements within six months after the end of its financial year, or shorter period as may be appropriate to provide notice of an annual general meeting

4. GOVERNANCE OF THE HOA

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4.1 Right to be represented by proxy

- In Terms of the companies Act, a member of a nonprofit home owners' association may at any time appoint any person, who need not be a member, as a proxy
- A proxy's appointment must be in writing, signed and dated
- A proxy's appointment is only valid for 1 year after which it was signed or any other period specifically set out in the appointment document.
- A proxy's appointment may also be revoked, in writing, unless otherwise stated
- A invitation to appoint a proxy must be sent to all the members concerned
- Should the member act directly and in person, the proxy's appointment becomes immediately suspended
- A proxy is entitled to exercise, abstain from exercising, any vote of a member without discretion, except to the extent that the Memorandum of incorporation, or the instrument appointing the proxy, provides otherwise

4.2 Record date for voting

The board of a company may set a record date for the purposes of determining which members are entitled to:

- Receive notice of a member meeting
- Participate in and vote in a member meeting
- Decide any matter by written consent or by electronic communication

A record date determined by the board may not be

- Earlier than the date on which the record date is determined
- More than 10 business days before the date of the event or action

Must be published to the members in a prescribed and satisfactory manner

In the event that the board does not determine a record date for any action or event, the record date is

- In the case of a meeting, the latest date required to give notice
- the date of action or event for all other cases
- as specified by the MOI, where relevant

4.3 Members acting other than at meetings

A proposed resolution that could be voted on at a members meeting may instead:

- be submitted to members for consideration
- voted on in writing, within 20 business days after the resolution was submitted to them
- Adopted if it is supported by persons entitled to exercise sufficient voting rights for it to have been adopted as an ordinary or special resolution, as the case may be, at a properly constituted meeting.
- if adopted, have the same effect as if it had been approved by voting at a meeting
- used to elect a director

Within 10 business days after adopting a resolution, or conducting an election of directors, the HOA must deliver a statement describing the results of the vote, consent

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process, or election to every member who was entitled to vote or consent to the resolution, or vote in the election of the director, as the case may be

For greater certainty, any business of a company that is required by this Act or the company's Memorandum of Incorporation to be conducted at an annual general meeting of the company may not be conducted in the manner contemplated in this section.

4.4 Members Meetings

- The board of a company, or any other person specified in the company's Memorandum of Incorporation or rules, may call a members meeting at any time.
- a company must hold a members meeting at any time that the board is required by this Act or the Memorandum of Incorporation to refer a matter to members for decision;
- whenever required to fill a vacancy on the board
- when otherwise required
- whenever required by the company's Memorandum of Incorporation.
- the board of a company, or any other person specified in the company's Memorandum of Incorporation or rules, must call a members meeting if one or more written and signed demands for such a meeting are delivered to the company
- each such demand describes the specific purpose for which the meeting is proposed
- in aggregate, demands for substantially the same purpose are made and signed by the holders, as of the earliest time specified in any of those demands, of at least 10% of the voting rights entitled to be exercised in relation to the matter proposed to be considered at the meeting.
- A company's Memorandum of Incorporation may specify a lower percentage in substitution and fall below the minimum percentage of voting rights required to call a meeting.
- A company, or any members of the company, may apply to a court for an order setting aside a such demands on the grounds that the demand is frivolous, calls for a meeting for no other purpose than to reconsider a matter that has already been decided by the members, or is otherwise vexatious.
- a members who submitted a demand for that meeting may withdraw that demand
- the company must cancel the meeting if, as a result of one or more demands being withdrawn, the voting rights of any remaining members continuing to demand the meeting, in aggregate, fall below the minimum percentage of voting rights required to call a meeting.

4.5 Notice of meetings

For a nonprofit company notices must be delivered

- 15 business days before the meeting is to begin
- The Memorandum of incorporation may provide for a longer or shorter period
- Less notice may be required if every person entitled to vote is present or votes to waive the required minimum notice of the meeting
- Notice must be in writing and must include
 - Date, time and place of meeting, and the record date for the meeting
 - The general purpose of the meeting
 - Any special purpose contemplated

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- A copy of any proposed resolution of which the company has received notice, and which is to be considered at the meeting, and a notice of the percentage of voting rights that will be required for the resolution to be adopted

4.6 Annual General Meetings (AGM)

In addition to the above notice of meeting requirements, the AGM notice must also include:

- Annual financial statements or summaries must be presented
- Directions for obtaining a copy of the complete financial statements for the preceding financial year must be made available
- A prominent statement that entitles members to attend, vote at the meeting, appoint a proxy to attend, participate in and vote at the meeting in place of the member, or two or more proxies if the MOI so permits

4.7 Defective notices

- Any defective notice must be ratified by the members by votes
- Any defective matter relating to one or more matters on the agenda, may be severed from the agenda and the notice remains valid
- The meeting may consider a severed matter, if the defective notice in respect of that matter has been duly ratified
- An immaterial defect in the form or manner of giving a notice of a members meeting, or accidental or inadvertent failure in the delivery of the notice to any particular member to whom it was addressed, does not invalidate any action taken at the meeting

Any member who is present at a meeting, either in person or by proxy

- is regarded as having received or waived notice of the meeting, if at the very least the minimum required notice was given
- has a right to
 - allege a defect in the form of notice for a particular item on the agenda for the meeting
 - participate in the determination whether to waive the requirements for notice if less than the required minimum notice was given, or ratify a defective notice
- except to the extent set out above, is regarded as having waived any right based on actual or alleged defect in notice of the meeting

4.8 Conduct of meetings

Before a meeting can proceed

- Members must present reasonable identification
- Meetings may be conducted electronically unless prohibited by the MOI
- If voting is by show of hands, any person who is present at the meeting, whether as a member or as proxy for a member and entitled to exercise voting rights has one vote, irrespective of the number of voting rights that person would otherwise be entitled to exercise.

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- If voting on a particular matter is by polling, any person who is present at the meeting, whether as a member or as proxy for a member, has the number of votes determined in accordance with the voting rights associated with the securities held by that member.

Despite any provision of a company's Memorandum of Incorporation or agreement to the contrary, a polled vote must be held on any particular matter to be voted on at a meeting if a demand for such a vote is made by -

- at least five persons having the right to vote on that matter, either as a member or a proxy representing a member; or
- a person who is, or persons who together are, entitled, as a member or proxy representing a member, to exercise at least 10% of the voting rights entitled to be voted on that matter.

4.9 Meeting Quorum and Adjournment

- a meeting may not be held until at least 25% of all the voting rights are entitled to be exercised in respect of at least one matter to be decided on at the meeting
- a matter to be decided may begin to be decided until at least 25% of all the voting rights are entitled to be exercised on that matter at the time the matter is called on the agenda
- the MOI may specify a higher or lower percentage
- a minimum of 3 members must be present at a meeting
- if the above requirements are not met within an hour the meeting is postponed without motion, vote or further notice, for one week
- if the above requirements are not met for consideration at the time to consider a particular matter on the agenda, then the matter may be postponed to a later time in the meeting, without motion or vote
- If there is no other business on the agenda the meeting is adjourned for one week, without motion or vote
- The 1 hour limit may be extended on reasonable grounds
- The MOI may also specify different times in substitution
- No further notice is required for a meeting that is postponed, unless the location changes or is announced at the time of adjournment
- In the event that a meeting was adjourned "until further notice" a new notice is required
- A meeting cannot be postponed longer than 120 business days after a record date was determined or 60 days after an adjournment, whichever is the earlier
- The MOI may provide for different maximum periods of adjournment

4.10 Resolutions

Every resolution is either an **ordinary resolution** or a **special resolution**

- The board may propose any resolution to be considered, and may determine whether the resolution will be considered by members, and may determine whether that resolution will be considered at a meeting, or by vote or written consent
- Any two members may propose a resolution concerning any matter in respect of which they are entitled to exercise voting rights
- A resolution must be considered
 - At a meeting demanded by a member
 - At the next meeting

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- By written vote
- A proposed resolution must be expressed with sufficient clarity and explanatory material to enable a member to vote
- A member or director, who believes that the form of the resolution does not satisfy the necessary requirements, may before the start of a meeting, seek to restrain the company from putting the resolution to vote by applying to court for relief.
- Once a resolution has been approved it may not be challenged by any person

4.11 Ordinary Resolutions

- Require 50 percent of the voting rights exercised on the resolution
- An ordinary resolution for the removal of a director requires 50 percent of the voting rights
- The MOI may specify a higher percentage of voting rights for all ordinary resolutions or for one particular matter respectively
- A 10 Percent margin must be maintained between ordinary and special resolutions at all times

4.12 Special Resolutions

- A special resolution requires 75 percent of the voting rights exercised
- The MOI may specify a different percentage of voting rights for all special resolutions or for one particular matter respectively
- A 10 Percent margin must be maintained between ordinary and special resolutions at all times
- A special resolution is required to
 - Amend the MOI
 - Ratify a consolidated revision of the MOI
 - Ratify actions by the company or directors in excess of their authority
 - Grant rights in special circumstances
 - Authorize the board to grant financial assistance
 - Approve the voluntary winding up of the company
 - Approve any major proposal
- The MOI may require a special resolution to approve any other matters not contemplated above

4.13 Board of Directors and Prescribed officers

- 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 of the powers and perform any of the functions of the company, except to the extent that this Act or the company's Memorandum of Incorporation provides otherwise.
- The board of a company must comprise-
 - in the case of a private company, or a personal liability company, at least one director; or
 - in the case of a public company, or a non-profit company, at least three directors
- in addition to the minimum number of directors that the company must have to satisfy any requirement, whether in terms of this Act or its Memorandum of Incorporation
- A company's Memorandum of Incorporation may specify a higher number in

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substitution for the minimum number of directors required by subsection (2).

A company's Memorandum of Incorporation may provide for-

- the direct appointment and removal of one or more directors by any person who is named in, or determined in terms of, the Memorandum of Incorporation;
 - a person to be an *ex officio* director of the company as a consequence of that person holding some other office, title, designation or similar status, subject to subsection (5)(a); or
 - the appointment or election of one or more persons as alternate directors of the company; and
- A person contemplated in subsection (4)(a)(ii)-
 - may not serve or continue to serve as an *ex officio* director of a company, despite holding the relevant office, title, designation or similar status, if that person is or becomes ineligible or disqualified in terms of [section 69](#); and who holds office or acts in the capacity of an *ex officio* director of a company has all the-
 - powers and functions of any other director of the company, except to the extent that the company's Memorandum of Incorporation restricts the powers, functions or duties of an *ex officio* director; and
 - duties, and is subject to all of the liabilities, of any other director of the company.
 - The election or appointment of a person as a director is a nullity if, at the time of the election or appointment, that person is ineligible or disqualified in terms of [section 69](#).
 - A person becomes entitled to serve as a director of a company when that person
 - has been appointed or elected in accordance with this Part, or holds an office, title, designation or similar status entitling that person to be an *ex officio* director of the company, subject to subsection (5)(a); and
 - has delivered to the company a written consent to serve as its director.
 - Except to the extent that the Memorandum of Incorporation of a company provides otherwise, the company may pay remuneration to its directors for their service as directors, subject to subsection (9).
 - Remuneration contemplated in subsection (8) may be paid only in accordance with a special resolution approved by the members within the previous two years.
 - Any failure by a company at any time to have the minimum number of directors required by this Act or the company's Memorandum of Incorporation, does not limit or negate the authority of the board, or invalidate anything done by the board or the company.

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- Save as otherwise provided elsewhere in this Act or in the company's Memorandum of Incorporation, any particular director may be appointed to more than one committee of the company, and when calculating the minimum number of directors required for a company in terms of subsections (2) and (3), any such director who has been appointed to more than one committee must be counted only once.

4.14 Directors

- Each incorporator of a company is a first director of the company, and serves until sufficient other directors to satisfy the minimum requirements of this Act, or the company's Memorandum of Incorporation, have been-
 - first appointed, as contemplated in [section 66\(4\)\(a\)\(i\)](#); or
 - first elected in accordance with [section 68](#) or the company's Memorandum of Incorporation.

If the number of incorporators of a company, together with any *ex officio* directors, or directors to be appointed as contemplated in [section 66\(4\)\(a\)\(i\)](#), is fewer than the minimum number of directors required for that company in terms of this Act or the company's Memorandum of Incorporation, the board must call a members' meeting within 40 business days after incorporation of the company for the purpose of electing sufficient directors to fill all vacancies on the board at the time of the election.

4.14 Ineligibility and disqualification of persons

- A person is ineligible to be a director of a company if the person-
 - is a juristic person;
 - is an unemancipated minor, or is under a similar legal disability; or
 - does not satisfy any qualification set out in the company's Memorandum of Incorporation.

- A person is disqualified to be a director of a company if-

a court has prohibited that person to be a director, or declared the person to be delinquent in terms of [section 162](#), or in terms of [section 47](#) of the Close Corporations Act, 1984 (Act No. 69 of 1984); or subject to subsections (9) to (12), the person-

- is an unrehabilitated insolvent;
- is prohibited in terms of any public regulation to be a director of the company;
- has been removed from an office of trust, on the grounds of misconduct involving dishonesty; or
- has been convicted, in the Republic or elsewhere, and imprisoned without the option of a fine, or fined more than the prescribed amount, for theft, fraud, forgery, perjury or an offence-

- involving fraud, misrepresentation or dishonesty;

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- in connection with the promotion, formation or management of a company, or in connection with any act contemplated in subsection (2) or (5); or
- under this Act, the Insolvency Act, 1936 (Act No. 24 of 1936), the Close Corporations Act, 1984, the Competition Act, the Financial Intelligence Centre Act, 2001 (Act No. 38 of 2001), the Securities Services Act, 2004 (Act No. 36 of 2004), or [Chapter 2](#) of the Prevention and Combating of Corruption Activities Act, 2004 (Act No. 12 of 2004).

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