The 2008 Companies Act
and
the “enlightened shareholder" approach

Professor Walter Geach
CA (SA) BA LLB (Cape Town) MCOM FCIS

2012
1973 Act and 2008 Act

1. Traditional shareholder model
2. The ‘pluralist’ approach
3. The ‘enlightened shareholder’ approach
The 2008 Companies Act: Chapters and Schedules
The new Companies Act: Chapters

1. Definitions and purpose
2. Formation, administration and dissolution of companies
3. Auditors, audit committees and the company secretary
4. Public offerings
5. Fundamental transactions, takeovers, offers
6. Business rescue and compromise with creditors
7. Remedies and enforcement
8. Regulatory agencies and administration of the Act
9. Offences and general provisions
New Companies Act: Underlying Principles

- One Companies Act for all companies
The enlightened shareholder approach
2 types of Company

1. “For profit” company

2. Non-profit company: (name) NPC
1973 Act and 2008 Act

“profit company”

means

a company incorporated for the purpose

of financial gain

for its shareholders
Enlightened Shareholder Approach

Well entrenched in many sections of the Act
The enlightened shareholder approach: Purpose and Interpretation of the Act
The Companies Act 2008: Interpretation

Section 5 (1) provides that the Act must

be interpreted and applied

in a manner that gives effect to the purposes set out in section 7
Purposes of the new Companies Act

7. Purposes of Act.—The purposes of this Act are to—

(a) promote compliance with the Bill of Rights as provided for in the Constitution, in the application of company law
Purposes of the new Companies Act

7. Purposes of Act.—

Meaning......................

Actions of private bodies must conform to the Bill of Rights:

*Cannot pursue profits at the expense of human rights*

Also the right to belong to a trade union is entrenched (and the Companies Act gives lots of rights to trade unions)
7. **Purposes of Act.** —The purposes of this Act are to—

(b) promote the development of the South African economy by—

(iii) encouraging transparency and high standards of corporate governance as appropriate, given the significant role of enterprises within the social and economic life of the nation
Purposes of the new Companies Act

7. Purposes of Act.—The purposes of this Act are to—

(d) reaffirm the concept of the company as a means of achieving *economic and social benefits*
7. Purposes of Act.—The purposes of this Act are to—

(f) promote the development of companies within all sectors of the economy, and encourage

*active participation* in economic organisation, management and productivity
7. Purposes of Act.—The purposes of this Act are to—

(k) provide for the *efficient rescue and recovery* of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders.
**Enlightened Shareholder Approach**

**Section 20 (4)**

- Shareholders and/or directors
- A trade union representing employees

may take proceedings **to restrain the company** from doing anything inconsistent with the Act

*This for example gives employees rights to participate in the governance of companies*
Enlightened Shareholder Approach

Section 72 (4) (a): Social and Ethics Committee

The Minister, by regulation, may prescribe—

(a) a category of companies that must each have a social and ethics committee, if it is desirable in the public interest, having regard to—
   (i) annual turnover;
   (ii) workforce size; or
   (iii) the nature and extent of the activities of such companies;
Enlightened Shareholder Approach

- Provides lots of remedies to employees and trade unions
- Provides lots of remedies to minority shareholders including the appraisal remedy
- Allows for class actions
Enlightened Shareholder Approach

- **Any person:** Initiating a complaint (s 168)
- **Stakeholders:** Relief from abuse of a company as a legal entity (s 20 (9))
- **Stakeholders:** Application for delinquency or probation (s 162)
- **Stakeholders:** Derivative action (s 165)
- **Shareholder or director:** Minority oppression action (s 163)
- **Minorities:** Appraisal remedy (s 164)
- **Whistleblowers:** Protected (s 159)

Professor Walter Geach: Companies Act seminar for CIS 2012
Enlightened Shareholder Approach

➢ Any person: Initiating a complaint (s 168)
Initiating a Complaint:
The *Commission can* ...

1. Issue notice that it will not investigate

2. Refer the complaint to the Tribunal or to an accredited entity

3. Appoint an inspector to investigate the complaint as quickly as possible
Enlightened Shareholder Approach

Class action: Section 157 (1) (c)

- When, in terms of this Act, an application can be made to court
- the right to make the application may be exercised by a person acting as a member of,
  or in the interest of,
  a group or class of affected persons
Enlightened Shareholder Approach

- It largely decriminalizes the Companies Act
Enlightened Shareholder Approach

Section 77 (3)
A director of a company is liable for
- any loss,
- damages or
- costs

Having failed to vote against a resolution despite
knowing that the distribution was contrary to
section 46
Enlightened Shareholder Approach

Section 45: Loans or other financial assistance to directors

- Special resolution of shareholders
- Apply solvency and liquidity test
- Comply with MOI
Enlightened Shareholder Approach

Section 45: Loans or other financial assistance to directors

- to a director and prescribed officer of the company or
- of a related or inter-related company, or
- to a related or inter-related company
Enlightened Shareholder Approach

1. Special resolution (within the previous 2 years)
2. Solvency and liquidity test
3. Terms are fair and reasonable to the company
4. Compliant with MOI
5. Disclosure to shareholders
6. Disclosure to trade unions
Enlightened Shareholder Approach

new Companies Act:
What is not there?
Enlightened Shareholder Approach

New Companies Act:
What is not there?

- Triple bottom-line reporting
- Profit vs. sustainability
Common law change:
Enlightened Shareholder Approach
Enlightened Shareholder Approach

Common law change: the derivative action

- Certain persons can bring a demand upon a company to commence legal proceedings or to take steps against anyone.

- It is brought in order to protect the legal interests of the company.

- Company must appoint an independent person to investigate the demand (or apply to court to dismiss it because it is frivolous, vexatious or without merit).
Enlightened Shareholder Approach: the derivative action

Who can bring the demand?

- Shareholder (related company)
- Director (related company)
- Trade union or other employee representative

Any other person approved by court to protect a legal right
Derivative action: section 165

MOURITZEN v GREYSTONES ENTERPRISES (PTY) LTD (June 2012)

- Brought against a person who has caused harm to the company
- This action was brought by a director against a fellow director
- Issue: abuse of credit card
- Director sought an order to institute an action in the name of the company
Derivative action: section 165

*Kukama v Lobela* (April 2012)

- Court allowed applicant (a director of Company Ä) to take action against another company which had wrongly received funds which should have been paid to company A
Enlightened Shareholder Approach
Liability of directors
Specific Liability of directors: Enlightened Shareholder Approach

Section 77

- A director **IS LIABLE** to the company for any loss, damage or costs **by the company** arising FROM ..................

being a party to an act or omission knowing that it was **calculated to defraud**

- a creditor,
- **employee** or
- shareholder, or
- had another fraudulent purpose;
Enlightened Shareholder Approach

Directors: delinquency and probation
Enlightened Shareholder Approach

Application for delinquency and probation

can be brought by employees or trade unions
Delinquency: section 162

*Kukama v Lobela* (April 2012)

- Consequence of being declared delinquent: (a) barred from acting as a director of companies and (b) court may order compensation to be paid

- If delinquent a court does not have to order the removal as a director: automatic
Enlightened Shareholder Approach
Shares: issued for future payments and services
The old section (s 92) stating that shares may not be issued unless paid for in full, not in new Act.

Shares can be issued for future payments or future services: Issued to a trust.
Enlightened Shareholder Approach

Financial Statements
Enlightened Shareholder Approach

Financial Statements

Requirements

There **must** be

✓ ‘fair presentation'

and

the financial statements **must not** be

X (a) false or

X (b) misleading or

X (c) incomplete
Enlightened Shareholder Approach

Financial Statements

Section 29 (6): Criminal Offence

A person is guilty of an offence if the person is a party to
- the preparation
- approval
- dissemination or
- publication

of any financial statements knowing that those statements
(i) do not comply with the requirements of the Act;
or
(ii) are materially false or misleading
Trade unions must, through the Commission, be given access to company financial statements for purposes of initiating a business rescue process.
Enlightened Shareholder Approach

Business Rescue Provisions
Enlightened Shareholder Approach

Business Rescue

- Application to court by an affected person
  - Shareholder
  - Creditor
  - Trade union
  - Employee
Application to court by affected person

- The application even after proceedings for the liquidation of the company have commenced
- Liquidation suspended
Application granted if court is satisfied

1. the company is financially distressed; or
Application granted if court is satisfied..................

2. the company has failed to pay over any amount due

• to a government authority in respect of its employees
• or
• money due in terms of a contractual obligation (for example, a salary to an employee, or a contribution to a medical aid fund); or

3
Application granted if court is satisfied..............

3. it is otherwise *just and equitable* to do so for financial reasons.
Preference after business rescue: creditors

1. BR practitioners fees and costs of BR
2. Post BR remuneration due to employees
3. Post-commencement *secured* finance/claims
4. Post-commencement *unsecured* finance/claims
5. Pre –BR *secured* claims
6. Pre- BR remuneration due to employees
7. Pre-BR unsecured claims
• If liquidation later replace BR the creditors that have obtained preferential rights under BR will retain these rights under the liquidation proceedings.

• This means that a new order of preference for the payment of creditors can be created by using BR, overriding even the statutory order of preference set out in the Insolvency Act.
Enlightened Shareholder Approach

The rights of stakeholders summarised
RIGHTS OF STAKEHOLDERS

1. Shareholders
2. Employees
3. Trade unions
4. Directors
5. Creditors and suppliers
6. The public
RIGHTS OF SHAREHOLDERS

• Initiation of derivative proceedings (the derivative action: s 165 (2))

• Application based on “unconscionable abuse” of the company as a separate entity (s 20 (9))

• Initiating a complaint (s 168)

• Application to restrain a company from acting in conflict with the Act (s 20 (4))
• Application to restrain a company from acting in conflict with the MOI (s 20 (5))

• Claim against anyone who acted contrary to MOI unless ratified (s 20 (6))

• If a shareholder is a whistle-blower they are protected (s 159) if they disclose irregularities or contraventions of the Act

• Every share has an irrevocable right of the shareholder to vote on any proposal to amend the preferences, rights, limitations and other terms associated with that share (s 37 (3) (a))
RIGHTS OF SHAREHOLDERS (continued)

• Business rescue: can only vote on a plan if their rights are affected
• Appraisal rights: if a change to an MOI changes their rights
• Appraisal rights: fundamental transactions
• Financial assistance to (a) acquire shares and (b) to directors, and inter-company loans: special resolution (s44; s 45)
• Relief from oppressive or prejudicial conduct (s 163 (1))
Oppression remedy: section 163

KUDUMANE INVESTMENT HOLDING LTD v NORTERN CAPE MANGANESE (PTY) LTD
(June 2012)

• The 49% minority shareholder sought an order removing some of the directors appointed by the majority

• The order was granted
RIGHTS OF EMPLOYEES

• Initiation of derivative proceedings (the derivative action: s 165 (2))

• Initiating a complaint (s 168)

• Application based on “unconscionable abuse” of the company as a separate entity (s 20 (9))
RIGHTS OF EMPLOYEES

• Business rescue: non-unionised employees can apply to court to initiate (s 131)

• Business rescue: employees must continue to be employed

• Business rescue: employees are preferred unsecured creditors in respect of unpaid pre-business rescue remuneration
RIGHTS OF EMPLOYEES (continued)

• Business rescue: employees vote with creditors on the business plan

• Business rescue: employees have the right to buy out creditors if plan is rejected by creditors

• Business rescue: employees have the right to buy out shareholders if the plan is rejected by creditors
RIGHTS OF EMPLOYEES (continued))

• If an employee is a whistle-blower they are protected (s 159) if they disclose irregularities or contraventions of the Act

• Employees can apply to Court to declare a director delinquent or be put on probation (section 162)

• Any document that must be given to an employee under the Act, must be provided either in (a) the prescribed form or (b) if not prescribed, in “plain language” (section 6 (4))
RIGHTS OF A TRADE UNION

• Initiation of derivative proceedings (the derivative action: s 165 (2))

• Application based on “unconscionable abuse” of the company as a separate entity (s 20 (9))
RIGHTS OF A TRADE UNION

• Initiating a complaint (s 168)

• Application to restrain a company from acting in conflict with the Act (s 20 (4))

• Can apply to Court to declare a director delinquent or be put on probation
RIGHTS OF A TRADE UNION (continued)

• May institute class action proceedings on behalf of employees

• Must be given access to a company’s annual financial statements to initiate business rescue

• Business rescue: can apply to court to initiate (s 131)
• If there is a directors’ resolution to provide financial assistance to a director, the union must be given written notice of the resolution.

• If a trade union is a whistle-blower they are protected (s 159) if they disclose irregularities or contraventions of the Act.

• Financial assistance to directors, and inter-company loans: notice must be given to trade unions in certain circumstances (s 45).
RIGHTS OF A DIRECTOR

• Relief from oppressive or prejudicial conduct (s 163 (1))

• Initiation of derivative proceedings (the derivative action: s 165 (2))

• Application based on “unconscionable abuse” of the company as a separate entity (s 20 (9))
RIGHTS OF A DIRECTOR

• Initiating a complaint (s 168)

• Application to restrain a company from acting in conflict with the Act (s 20 (4))

• Application to restrain a company from acting in conflict with the MOI (s 20 (5))

• If a director is a whistle-blower they are protected (s 159) if they disclose irregularities or contraventions of the Act.
RIGHTS OF A CREDITOR AND SUPPLIER

• Initiating a complaint (s 168): “any person”

• If a supplier is a whistle-blower they are protected (s 159) if they disclose irregularities or contraventions of the Act

• Initiation of derivative proceedings (the derivative action: s 165 (2)) if the applicant can show it is necessary to protect a legal right
RIGHTS OF A MEMBER OF THE PUBLIC

• Initiating a complaint (s 168): “any person”

• Initiation of derivative proceedings (the derivative action: s 165 (2)) if the applicant can show it is necessary to protect a legal right
General Comments and Observations