



**Chartered
Secretaries**
Southern Africa

CSSA Best Practice Guide

Shares

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July 2019

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Published: July 2019
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Introduction

The role of the company secretary has evolved over the years. In South Africa, all public companies and SOCs are mandated to have a company secretary. A private company is not obliged to have a company secretary unless required in terms of its memorandum of incorporation (Mol).

The duties of a company secretary are diverse and are included in s88 of the Companies Act. As part of the company secretary's duties, the company secretary is responsible for maintaining the company's registers in respect of shareholders, share transfers and the allotment of shares.

Shares and share capital are one of those areas that is sometimes difficult to understand and/or apply in practice. Many queries are received from members in respect of this subject. The technical committee of the CSSA has thus taken the decision to publish this best practice guide on shares and share capital. This guide will look at the general position of shares and share capital in terms of the 2008 Companies Act (Companies Act) and will then discuss the company secretary's role in regard to shares with some practical examples, where applicable, to assist in understanding the theory around shares and share capital.

While this document has in the main, primarily used the term "share", it must be noted that the term securities appears in the Companies Act and stock exchange requirements and while the two terms are used interchangeably, the term "securities" includes not only shares but debt instruments as well, such as, derivative instruments, debentures, debt securities/notes and bonds.



Shares in a company are an incorporeal movable property. The Companies Act defines a share as “one of the units into which the proprietary interest in a profit company is divided”. In the case of *Borland’s Trustee vs Steel Brothers and Company Ltd* (1901) 1 Ch 279 the court defined a share as “an interest of a shareholder in the company measured by a sum of money, for the purpose of liability in the first place, and of interest in the second, but also consisting of a series of mutual covenants entered into by all the shareholders *inter se*.”¹ In other words, such interest is composed of rights and obligations as defined in terms of our common law, company law and per the Mol of the company. A shareholder is the holder of a share issued by a company and who is entered as such in the certificated or uncertificated securities register, as the case may be.²

At the outset it must be noted that all companies require funding. This funding is generally made up of a ratio of debt and equity.³ The extent to which funding will be obtained through debt and/or equity is a very important aspect in the area of corporate finance. Debt is money or assets obtained by a company when it issues debt instruments or obtains loans or overdraft facilities from a bank.⁴ Equity, on the other hand, consists of shares and retained income. A company can therefore obtain funding for its business operations by issuing shares.

It is important that a company has sufficient capital for its needs and over-capitalisation or under-capitalisation should be avoided. Over-capitalisation occurs when the capital of the company is in excess of its needs, measured by the earning capacity of its assets and under-capitalisation occurs when the company finds itself short of funds and growth is restricted.

The following should be taken into account to arrive at a realistic assessment as to how much capital is required:

- The amount paid in cash by shareholders;
- Expenses involved in the incorporation of the company;
- Proposed capital expenditure;
- Amount of working capital required; and
- Availability of borrowings.

This will determine the amount of authorised and issued share capital required. Before a company can issue shares, its Mol must identify the classes of shares and the number of shares of each class that a company is authorised to issue.

¹ <https://www.vdma.co.za/shares-and-the-new-companies-act-2008/>

² S1 of the Companies Act.

^{3,4} <https://www.investopedia.com/terms/d/debtequityratio.asp>

⁵ S36(2) of the Companies Act.

⁶ <https://fspinvest.co.za/articles/stocks/investing-101-the-characteristics-of-ordinary-shares-6015.html>

Authorised share capital

As the term implies, this is the capital with which a company is authorised by its Mol and it consists of the amount share capital with which the company is registered, in the case of shares having a nominal (par value) for example R1 000 made up of 1 000 ordinary shares of a par value of R1 each, or the number of registered shares having no par value for example 1 000 ordinary shares of no par value.

Issued share capital

This is the number of shares which have actually been issued and taken up by shareholders. This may be a portion of the whole of the authorised share capital but cannot exceed it.

Unissued share capital

This represents the portion (if any) of the authorised share capital that has not yet been issued. The authorisation and classification of shares, the numbers of authorised shares of each class, their rights, limitations and other terms associated with each class of shares must be set out in the company’s Mol and may only be changed by way of an amendment to the Mol by special resolution of shareholders, or the board, unless the Mol states otherwise.⁵

Classes of shares

Shares can typically be divided into three categories namely:

- Ordinary shares;
- Preference shares which may be cumulative, non-cumulative, participating, redeemable and/or convertible.
- Deferred shares which may be founders’ shares, vendors’ shares, promoters’ shares and/or management shares.

Ordinary shares constitute the usual type of share and generally form the largest proportion of a company’s share capital and have the following characteristics:⁶

- (a) Dependent upon the terms of the ordinary shares, there is usually no date of maturity that is attached to ordinary shares and thus they continue to exist indefinitely unless the company goes into liquidation.
- (b) Shareholders of ordinary shares may only be entitled to all the remaining profits of the company after the necessary provision for taxation has been made and the allocation to reserves as determined by the directors has been set aside.

- (c) As an ordinary shareholder, the right exists to purchase more shares should the company decide to issue more shares.
- (d) Should the company not make a profit or go into liquidation or be deregistered, the liability of an ordinary shareholder is limited to the amount of capital so invested.
- (e) Voting rights attached to ordinary shares are usually in proportion to the number of shares owned.

Ordinary shares while ranking equally *inter se* so far as participation in profits/losses are concerned, may be divided into separate classes with different voting rights such as low voting shares.

Preference shares usually rank ahead of ordinary shares for dividend purposes, and though bear characteristics of debt securities such as a loan, are not debt securities. Preference shares usually carry no voting rights in a general meeting. But there are exceptions. This relates to if the preference share dividend (or any part thereof) or any redemption payment remains in arrear or unpaid for at least 6 months or where there is proposed resolution that would directly affect the rights attached to the preference shares. Dividends attached to preference shares are usually fixed percentages, and payment thereof is subject to a solvency and liquidity test being applied.⁷

The JSE has suspended Steinhoff's preference shares – but its Frankfurt listing is keeping it afloat

The JSE said because Steinhoff had not made the 28 February deadline to publish its annual report, it had suspended the variable rate, cumulative, non-redeemable, non-participating preference shares for Steinhoff Investment Holdings, one of the companies in the complex multinational structure that makes up Steinhoff.

Source: <https://www.businessinsider.co.za/jse-suspends-steinhoff-preference-shares-2018-3>

Redeemable preference shares

Preference shares may either be redeemable, whereby the company would consider buying the shares back at a future date or non-redeemable, whereby there will be no buy-back of these shares by the company.⁸ The terms would be contained in the MoI and redemption could be at the request of the holder thereof. Preference shares are redeemed in accordance with s46 of the Companies Act, and must thus meet a solvency and liquidity test imposed by s4 of the Companies Act. It is also strongly recommended that the accounting and tax treatment is taken into account before any redemption. Therefore the matter should be discussed with the accounting and tax team(s). It is possible given the nature of the issue of the preference share, the tax treatment for redemption may require a share repurchase process in accordance with s48 instead.

Participating preference shares

Participating preference shares usually mean that they participate in the dividend declared to ordinary shareholders, or they also participate in winding up just like the ordinary shareholders. Again, a solvency and liquidity test needs to be met prior to any distribution.

Convertible shares

Terms of conversion are clearly stipulated in the MoI, and allow the company to convert shares to any other class of share at a future date.⁹

Example of a preference share resolution

ABC Limited had issued 100 000 redeemable preference shares of no par value each to Nedbank Limited in exchange for funding of R10 million. Three years have passed since this issue and in accordance with the terms of the redeemable preference shares as set out in ABC's MoI, ABC is required to redeem the shares in full on 31 May 2019.

IT WAS RESOLVED THAT the company redeem on 31 May 2019 100 000 redeemable preference shares of no par value as issued to Nedbank Limited on 1 June 2016 at a redemption distribution value of R10 million and which redemption value would be redeemed out of profits that would otherwise be available for distribution to shareholders.

IT WAS FURTHER RESOLVED THAT immediately following the redemption as referred to in the foregoing resolution, the company will satisfy the solvency and liquidity test as set out in section 4 of the Companies Act where, in consideration of all reasonably foreseeable financial circumstances of the company, (a) the company's assets, fairly valued, will exceed the company's liabilities, fairly valued and (b) the company will be able to pay its debts as they become due for a period of twelve months following the aforesaid redemption.

All companies have authorised share capital, which refers to the number of shares decided upon in the company's MoI. This process of 'creating' shares normally occurs at registration of the company and is displayed on the incorporation

⁷ Company Secretarial Practice, Juta, page 12 – 5.

⁸ <https://www.fin24.com/money/jargon-buster-preference-shares-20080903>

⁹ Company Secretarial Practice, Juta, page 12 – 6.

documents of the company. For private companies, there must be at least one share and one shareholder, and there is no limit to the number of shares a private company may create in its Mol. Authorised shares bear no rights until they have been issued by the company. Issued shares are those issued to the shareholders, which then bear certain rights as specified in the company's Mol.

The Companies Act has changed the basis on which companies are capitalised. Shares issued in terms of the 2008 Act have no nominal or par value, and as such a pre-existing company may not authorise any new par value shares, authorise any shares having a nominal value, or do any subdivision thereof. Companies that had par value shares

as at the effective date (1 May 2011) of the Companies Act may retain such existing shares.

Where more shares are issued than are authorised, the board may retroactively authorise such an issue within 60 business days of issue, but this is not recommended. Failure to obtain authorisation renders the share issue void to the extent that it exceeds the authorised share capital. In such circumstances, the company must return to the relevant person the fair value of the consideration received in terms of such share issue, with interest, and the directors could be held liable for any loss, damage or costs sustained by the company as a consequence of knowingly issuing unauthorised shares.

Dutch law firm starts legal action against Steinhoff

Dutch law firm BarentsKrans has started legal proceedings against Steinhoff, the group said in an update to shareholders on Tuesday.

This comes after the firm initially invited shareholders in September last year to join a potential class action suit in the district court in Amsterdam against the retailer.

According to a statement issued by BarentsKrans at the time, investors who bought shares in Steinhoff or its predecessor entity Steinhoff International Holdings Limited (SIHL) on either the JSE or the Frankfurt Stock Exchange would qualify. The shares would have had to be bought between June 26, 2013 and December 6, 2017 or the shareholders must have held some shares on December 5 or 6, 2017.

In Tuesday's update to shareholders, Steinhoff says that a writ of summons was received from BarentsKrans on June 21 on behalf of Hamilton BV. This initiates legal proceedings against Steinhoff and others "for declaratory relief relating to currently unquantified damages arising from alleged wrongful acts".

Source: <https://www.fin24.com/Companies/Retail/dutch-law-firm-starts-legal-action-against-steinhoff-20190702>

Solvency and liquidity test

Under the Companies Act, shares are regulated in various sections. In terms of the Companies Act, a share does not have a nominal or par value, and authorised shares of a company have no rights associated therewith until they have been issued.¹⁰ Adequate consideration for the issue of authorised shares needs to be decided by the board beforehand. The term "adequate" implies that the board needs to apply its mind when determining the value to be attached to shares.

Where the company wishes to increase its authorised share capital this amounts to an amendment of the company's Mol and needs to be authorised by the directors and shareholders of the company in accordance with s36(2), read with s16(1)(c)

(i), of the Companies Act. The amendment needs to then be registered with CIPC.¹¹

It is important to note that all shareholders of a company are subject to the solvency and liquidity test throughout the lifespan of the company. Thus any distributions must be subject to this test, which is as follows as per s4 of the Companies Act, which states that:

- "a company satisfies the solvency and liquidity test at a particular time if, considering all reasonably foreseeable financial circumstances of the company at that time;
- the assets of the company, as fairly valued, equal or exceed the liabilities of the company, as fairly valued; and

¹⁰ S35 of the Companies Act.

¹¹ <https://www.cliffedekkerhofmeyr.com/en/news/publications/2019/Corporate/corporate-and-commercial-alert-20-march-preference-share-funding-structures-an-overview-of-the-application-of-the-relevant-companies-act-and-income-tax-act-provisions-.html>

→ it appears that the company will be able to pay its debts as they become due in the ordinary course of business for a period of 12 months after the date on which the test is considered, or in the case of subsection (a) of the definition of a distribution in section 1, 12 months following that distribution.”

A distribution to shareholders must be approved by the board subject to a solvency and liquidity test.¹² A share buy-back is a form of distribution and thus also falls in this category. A buy-back is where the company repurchases shares from its shareholders. If authorised by the Mol, a share buy-back only needs board approval via a resolution subject to the solvency and liquidity test. However, if the company is listed on the JSE or if any of the shares are to be acquired by the company from a director or prescribed officer, or a person related to such persons, and the acquisition by the company amounts to more than 5% of the issued shares, a special resolution is required.¹³

A special resolution by shareholders is required for a company to issue shares to a:

- director, future director, prescribed officer, or future prescribed officer of the company;
- person related or inter-related to the company, or to a director or a prescribed officer; or
- a nominee of such persons.¹⁴

A special resolution by shareholders is also required for a company to issue shares if the voting power of the class of shares that are issued equal or exceed 30% of the voting power of all the shares of that class.¹⁵ A special resolution by shareholders requires at least 75% of the voting rights exercised on the resolution, unless the Mol provides for a lower percentage.¹⁶

The JSE listings requirements require directors to obtain clearance before they may buy or sell shares in companies they lead.

Christo Wiese could be in hot water again with the JSE

Less than a month after it settled a hefty R750 million tax bill, industrial holding company Invicta, in which Christo Wiese is a major shareholder, could be in hot water again with the JSE.

In another blow for Invicta, whose subsidiaries include the distributors of capital equipment, spare parts and engineering consumables in Southern Africa, the JSE has reopened a 2016 investigation that resulted in it receiving a public censure at the time.

News of the JSE probe sent Invicta’s share price down 8.57% to R32 on Tuesday, and adds to a difficult year for Wiese. The billionaire businessman is also a major shareholder in Steinhoff, which is under investigation by various authorities in SA and Europe following revelations of accounting fraud in December 2017, which wiped out more than R190 billion of its market value.

Wiese, who stepped down as Steinhoff chair a week after the allegations came to light, is suing the furniture retailer for R59 billion in damages.

The JSE censured Invicta two years ago because two of its CEOs — incumbent Arnold Goldstone and former CEO Charles Walters, who now heads Assore — had sold shares to Invicta’s subsidiary, Humulani Marketing, without getting the required shareholder approval.

Source: <https://www.businesslive.co.za/bd/companies/industrials/2018-10-10-christo-wiese-could-be-in-hot-water-again-with-the-jse/>

Par value shares

Companies that were registered before 1 May 2011, may still have par value shares. This means the share has a nominal value attached to it. For instance R1.00. This would be reflected in the Mol, share register and on the face of any share certificates so issued. As the nominal value is usually a low amount, when par value shares are issued, it is usual to issue these at a premium.

For instance if ABC Limited wished to receive funding of say R1 million – then it could issue 100 ordinary shares of R1 each at a premium of R9 999 each:

100 x R1	R100	Nominal value
100 x R9 999	R999 900	Share premium
Total	R1 000 000	

¹² S46 of the Companies Act.

¹³ S48(8) of the Companies Act.

¹⁴ S41(1) of the Companies Act.

No par value shares

No par value shares do not have a nominal indicator/value. Shares having no par value are issued for the full consideration. There is no split between nominal value and share premium. Using the above example, ABC would just issue 100 ordinary no par value shares for R1 million. If one wished to calculate how much per share one paid – then it is simply taking R1 million and dividing by 100 = R10 000 per share. Whereas with nominal shares while in theory one paid R10 000 per share, it would always be split between nominal value and the premium so paid.

Creation, issue and conversion of shares

The company secretary must ensure that the Mol of the company records the classes of shares, the number of authorised shares, rights, limitations and any other terms pertaining to the classes of shares. This is mandatory as per the Companies Act.¹⁷ Unlike the 1973 Companies Act, which always required shareholder approval to issue additional shares, the 2008 Companies Act only requires a shareholder special resolution in exceptional instances as mentioned above in s41 of the Companies Act, unless the Mol provides otherwise. It is thus vital that the company secretary ensures that terms are stipulated in the Mol to protect minority shareholders by making a special resolution by shareholders a requirement.

Except to the extent that a company's MOI provides otherwise, directors are authorised to issue the shares of a company, provided that the shares issued have been authorised by or in terms of a company's MOI and such shares are within the classes authorised and adequate consideration is received by the company for such shares. Generally speaking, issuing shares in a company is a simple process in that all that is required is for the directors to pass a resolution authorising the company to issue the shares to a particular individual or juristic person, subject of course to specific requirements in the MOI or shareholders' agreement. This is different from the 1973 Act, as the 1973 Act always required a shareholders' resolution for the issue of additional shares to protect shareholders against dilution. The Companies Act now only requires the approval of shareholders by special resolution in exceptional circumstances, namely where a company intends on issuing shares to a director or prescribed officer of that company or a person related or inter-related to that company or a director or prescribed officer or if the shares to be issued will constitute 30% or more of the voting rights in that specific class, a special resolution will also be required. Minority shareholders may therefore wish to negotiate better protection

with regard to issue of shares, in the MOI, to prevent the board from diluting the minority, without having to seek the minority's approval.

Whereas the 1973 Act required that the subscription price had to be paid in full before the shares could be issued, the Companies Act now provides for a mechanism for a shareholder to subscribe for shares without having paid for such shares in full at the time. S40 provides that, if the consideration for any shares that are issued or to be issued is in the form of an instrument such that the value of the consideration cannot be realised by the company until a date after the time the shares are to be issued, or is in the form of an agreement for future services, future benefits or future payment by the subscribing party, the company may issue the shares notwithstanding, subject to a trust agreement being entered into between the company, the subscriber and a third party, for the third party to hold the shares in trust until full consideration has been received. The Companies Act provides for the rights of the subscriber, in the absence of a contrary provision in the aforesaid trust agreement, and facilitates the subscription for shares if a subscriber is not in a position to fund the subscription price on the date of subscription and has proven useful in private equity transactions where a private equity shareholder wishes to advance the subscription price in tranches subject to the performance and financial requirements of the company in question, as well as in empowerment transactions to facilitate vendor financing. Utilisation of this mechanism will also require compliance with the financial assistance requirements of s44 of the Companies Act.

The Companies Act provides that shares do not have a par or nominal value under the Companies Act, subject to the transitional arrangements contained in schedule 5 of the Companies Act. Despite the abolishment of the concept of par value, all shares issued with a par value by a company which was in existence before 1 May 2011, and held by a shareholder continue to have the same rights associated with the shares, including that the shares will remain to have a par value, subject to any regulations promulgated in this regard.

The regulations provide that par value shares that were authorised by a company incorporated before 1 May 2011 are dealt with in the Companies Act in two ways. If, before 1 May 2011, a pre-existing company had any authorised class of par value shares which had not been issued (that is, no shares in that class have been issued), the pre-existing company would be prohibited from issuing any of the shares until such shares have been converted from par value shares to no par value shares in terms of regulation 31 of the Companies Act. On the other hand, if before 1 May 2011 a company had authorised

¹⁵ S41(3) of the Companies Act.

¹⁶ S65(9) of the Companies Act.

¹⁷ S36(2) of the Companies Act.

par value shares from which any shares were issued (for example it had 1 000 authorised ordinary shares with a par value of R1.00 each, of which 100 have been issued), the company may continue to issue further shares of the class (up to the 1 000 authorised ordinary shares) at the par value of R1.00 at any time after 1 May 2011 and may do so until it has utilised the full number of authorised shares (1 000 in our example) or has published a proposal to the company to convert that class of par value shares into no par value shares. However, pre-existing companies are prohibited from authorising any new par value shares or shares having a nominal value (that is, in our example, they may not authorise ordinary shares in excess of 1 000 without first having converted all the shares of that class from par value shares to no par value shares).¹⁸

Interesting to note is that the prohibition as regards creating new shares applies to the increase of the number of authorised shares, without having first converted the shares from par value to no par value shares, has much broader application than first meets the eye. Any increase in numbers of authorised shares by creating additional shares is hit by this prohibition, including an increase by subdividing existing shares. No new shares may be created of that class without the conversion having taken place but also, in our example, the 1 000 shares may not be subdivided into a higher number of shares without first converting the shares to no par value shares. Some companies have, in an endeavour to avoid a conversion, simply subdivided their number of authorised shares to allow for additional shares to be capable of being issued (that is, in our example subdivided the 1 000 shares into 1 million shares). Such subdivision is however also not allowed until a conversion has taken place.

When a company intends to convert its par value shares to shares of no par value, it should consider the share certificates issued to shareholders, bearing the par or nominal value of the shares. The Companies Act requires that each share certificate bears the name of the issuing company, the name of the person/entity to whom the shares are issued, the number and class of shares and any restriction on the transfer of the shares. It should also be noted that the transitional provisions provide that where a share certificate issued by a pre-existing company fails to satisfy the above requirements, as set out in s51 of the Companies Act, it will neither constitute a contravention of s51 nor invalidate the share certificate. Accordingly, a company is not obliged to cancel the existing

share certificates bearing a par value on the shares and to issue new share certificates after the conversion. However, to err on the side of caution and from a corporate governance perspective, the existing share certificates should preferably be cancelled and new certificates issued which comply with the new requirements.

The conversion of shares from par value to no par value aside, companies and shareholders should be reminded of the new requirements for share certificates, namely that each share certificate should now also record the restrictions on transferability of the shares in question, on the share certificate itself. Failure to do so would be a contravention of the Companies Act.

Where the company had, prior to the effective date of the 2008 Companies Act, par value shares, which had not been issued, the company is prevented from issuing the shares until such time as they have been converted to no par value shares. Where the company had, for example, 2000 authorised par value shares of which 300 had been issued prior to the effective date of the 2008 Companies Act, the company would be able to issue the remaining 1700 authorised shares at par value. Any new shares created by the company would have to be created at no par value. Companies cannot subdivide authorised par value shares in an attempt to escape conversion of the shares to no par value.¹⁹

Regulation 31 provides the process for converting existing par value shares to no par value shares and can be summarised as follows:

- If no shares have been issued or are no longer in issue, the filing of a form CoR 31 and a board resolution to convert the shares is required (regulation 31(3)).
- If shares have been issued and are still in issue, filing of the following is required (regulation 31(5) to (11)):
 - Form CoR 15.2;
 - A special resolution by shareholders;
 - A director's report required in terms of regulation 31(7).²⁰

For listed companies, the JSELR set out the requirements for issues of shares for cash in JSELR 5.50 to 5.57 for both specific and general issues for cash. Both are required to be approved by an ordinary resolution achieving 75% majority of the votes cast in favour by all shareholders.²¹

¹⁸ Regulation 31 of the Companies Act.

¹⁹ <https://www.accountancysa.org.za/analysis-creation-issue-and-conversion-of-shares-under-the-new-companies-act/>

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An overview of shares *(continued)*

Iqbal Surve, his three companies and his friends

The Financial Sector Conduct Authority (FSCA) is investigating possible share manipulation between May and October 2018 at all three of Iqbal Survé's companies listed on the Johannesburg Stock Exchange (JSE): AYO, African Equity Empowerment Investments (AEEI) and Premier Fishing. The FSCA has declined to give details about its investigations – so it is not possible to link the probe to specific share trades or specific parties. The FSCA did confirm to amaBhungane that its investigations specifically deal with possible contraventions of sections 80(3) (c), (d) and (g) of the Financial Markets Act. These subsections deal with specific prohibited practices.

The first is “approving or entering on a regulated market orders to buy a security listed on that market at successively higher prices or orders to sell a security listed on that market at successively lower prices for the purpose of unduly influencing the market price of such security”.

The second is “approving or entering on a regulated market an order at or near the close of the market, the primary purpose of which is to change or maintain the closing price of a security listed on that market”.

The third is maintaining, at a level that is artificial, the price of a security listed on a regulated market.

Source: <https://www.dailymaverick.co.za/article/2019-07-05-iqbal-surve-his-three-companies-and-his-friend%20friends>

3

Shareholders voting at AGM or other general meeting of the company (“shareholder meeting”)

The terms around the right to attend, speak and vote at any shareholder meeting would be contained in the company's MoI. It is important that the company secretary is fully acquainted with these rights as this assists with the drafting of the notice of any shareholder meeting. A proper notice should inter alia include the following:

- Dependent upon the class of share, the right to attend, speak and vote;
- Voting rights on a show of hands or a poll;
- The minimum majority of votes required for an ordinary and special resolutions and if a listed company, any special majority required by the JSE;
- Action to take if shares are dematerialised. This relates to any instruction to a central securities depository participant (CSDP) or arrangement to obtain a letter of representation to attend the shareholder meeting;
- Appointment procedure to appoint a proxy.

S65(11) of the Companies Act requires a special resolution in respect of the following (the MoI may provide for additional instances wherein a special resolution is required):

- amend a company's MoI;
- ratify a consolidated revision of a company's MoI;
- ratify actions by the company, or its directors, in excess of their authority;
- approve an issue of shares or granting of rights;
- authorise the board to grant financial assistance;
- approve a decision of the board for re-acquisition of shares;
- authorise the basis for compensations for directors of a profit company;
- approve the voluntary winding up of a company; and
- approve any proposed fundamental transaction.

²⁰ *Company Secretarial Practice, CSSA, Page 388.*

²¹ *Company Secretarial Practice, CSSA, Page 394.*

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Share certificates

Per s49 of the Companies Act, securities (which includes shares) issued by a company must be either:

- evidenced by certificates; or
- uncertificated where certificates are not issued but the shares are held in electronic form evidenced through a record administered by CSDP in the prescribed form.

Where the company has certificated shares, a share certificate is evidence of the number of shares the shareholder owns in the company. Share certificates are normally issued through the company secretary and must include the following information:²²

- the name of the issuing company;
- the name of the person to whom the shares were issued;
- the number and class of shares;
- any restriction on the transfer of the shares evidenced by that certificate.

The share certificate must be signed by two persons authorised by the board of the company, one of whom is normally the company secretary.

Example of a share certificate

Certificate Number	Number of shares
006	100

Transfer 12
 ABC Limited
 Registration number 1996/00000/06
 Registered Office: 2 Yellow Street, Johannesburg 2001

Ordinary shares

This is to certify that Joe Bloggs of 5 Court Road, Johannesburg 2001 is the registered holder of One Hundred Ordinary No Par Value Shares in ABC Limited subject to the terms set out in the Memorandum of Incorporation of the company.

Signed at Johannesburg this 19 May 2019

Director

Secretary

5

Lost share certificates

Where a shareholder has lost a share certificate, the company secretary/the transfer secretary of the company often receives a request for a duplicate to be issued.²³ Prior to issuing a duplicate, the Mol will often require certain documents including, among others, an affidavit by the shareholder and also indemnity by the shareholder. This indemnity will indemnify the company against all claims whatsoever that may be brought in connection with the original certificate, and will also state that the shareholder will provide the funds for the company to defend any legal action brought against the company in respect of the original certificate.²⁴ The following procedure is suggested when dealing with a lost or destroyed share certificate and application has been made for a duplicate:

1. The applicant should provide a comprehensive written explanation as to the loss. This should also be accompanied by a sworn affidavit and an indemnity. This assists the directors in the understanding around the fact that the certificate has indeed been lost or destroyed and not just temporarily mislaid.

2. A “stop” or other annotation should be made in the share register so as to “record” the loss of the certificate. This is to flag the share account of the holder so as to ensure due diligence is applied should the original certificate surface and to mitigate against fraud that could be committed in respect of the said shares.
3. Application for a duplicate certificate is then submitted to the directors to resolve to authorise the issue of a duplicate certificate.
4. Once approval from the directors has been obtained, then the company secretary may proceed with the issue of the duplicate certificate. Such duplicate certificate should be endorsed “Duplicate replacing lost share certificate number _____ and that it has been issued in bona fide substitution without change of ownership”.
5. The issue of a duplicate should be recorded in a different colour ink (red) in the share register – “share certificate number _____ issued in lieu of share certificate number _____ .

²² S51(1) of the Companies Act.

²³ Company Secretarial Practice, Juta, page 12 – 18.

²⁴ Company Secretarial Practice, Juta, page 12 – 19.

5

Lost share certificates (continued)

It is preferable that legal counsel drafts up the necessary affidavit and indemnity. The indemnity should look as follows:

Example of an indemnity

Indemnity

To the directors of ABC Limited
2 Yellow Street
Johannesburg
2001

Dear Sirs

Share certificate number _____ dated _____ in respect of _____ shares in ABC Limited (the company) and registered in the name of _____ has been lost, mislaid, or destroyed.

I, _____, the registered holder of said shares, hereby declare that I have made diligent but unavailing search for same, and that I have not sold, pledged or in any other manner disposed thereof, and that same is my absolute property. In consideration of you issuing to me a new share certificate number _____ as a duplicate without surrender of the original share certificate, I hereby undertake and agree to indemnify you and the company from all loss, charges, costs of action, damages and expenses which you or the company shall or may sustain or be put to by reason of the issue of a duplicate certificate, and I hereby undertake to deliver the missing certificate to the company for cancellation should the same be found hereafter.

Dated at _____ this _____ day of _____ 2019

Name _____ Signature _____

Address _____

Witness _____ Witness _____

6

Share transfers

The Companies Act states that a share issued by a company is moveable property, transferable in any manner provided for or recognised by the Companies Act or other legislation.²⁵ A private company is prohibited from offering its shares to the public and must restrict transferability of its shares in its MoI. An example of a restriction on transferability is making the right of transfer subject to a right of pre-emption. This provision in the MOI may read as follows:

*“A shareholder who wishes to dispose of his or her shares must first offer the shares to the other shareholders of the company pro rata to their existing shareholdings at a price to be determined in a prescribed way. Transfer in terms of the MOI shall include the cession of shareholders right.”*²⁶

Share transfer duty tax known as a Securities Transfer Tax (STT) is a tax payable on all transfers of shares at a rate of

0.25% on the transfer of all shares in companies incorporated in South Africa. If Company A sells 100 shares to Company B for R5 million, the STT payable will be as follows:

$$R5\ 000\ 000 \times 0.25\% = R12\ 500$$

Though the Companies Act does not prescribe specific securities transfer forms to be used, the same format as the old Form CM42 is still followed.²⁷

The duties and responsibilities of a company secretary in matters involving shares and the share register, particularly the transfer of shares can be considered to be among the most demanding and complicated within the role of the company secretary. There is a certain amount of statute and case law on the subject together with the complexity of how corporate transactions can at times be structured. Meticulous

²⁵ S35(1) of the Companies Act.
²⁶ <http://www.onlinemoi.co.za/how-transferable-are-private-company-shares>
²⁷ Company Secretarial Practice, CSSA, page 495.

care and accuracy is required at all times to avoid potential inconvenience and financial loss to the company and to the company secretary in his personal capacity if mistakes are made.

In today's digital age, most companies have a software secretarial package that would also include the share register. For those companies who have not yet acquired a software package, the share register would still be manually processed via a "book" commonly referred to as the "red book". Listed companies, due to the sheer volume and high values involved, are required to appoint a specialist company known as a transfer secretary to manage the share register of the listed company. The two main transfer secretaries in South Africa are Computershare Investor Services and Link Market Services. More about the transfer secretary later.

Legal principles of transfer

A transfer of shares takes place only when three conditions are satisfied:

- two parties agree to part with, and to accept, respectively the legal title to shares;
- a transfer deed (Old form CM42) is completed; and
- the shares are transferred from the name of the former (transferor) to that of the latter (transferee) in the company's share register.

Full title to the shares i.e. all the rights and duties of the member of a company as set out in the Mol is conferred only by registration of the transfer. But South Africa does have the position of "nominee" holder. The usual reason for a transfer of shares is the person who bought the shares wishes to have them registered in his name. Shares however, also change hands in connection with:

the transfer of shares to a nominee of the transferee (typical in a central securities depository environment where the shares are held for the benefit of the transferee by a broker or the CSDP or where the beneficial owner does not want his name on record in the share register);

the transfer of shares to a nominee of the transferor where no beneficial interest in the share passes; or the re-transfer from the nominee's name into the name of the beneficial owner;

The registration of shares lodged as security into the name of the lender, and the re-transfer to the original transferor on repayment of the loan;

The death, insolvency or incapacity of a shareholder, when the shares may be transferred to into the name of the executor, trustee, or curator, as the case may be.

Sections 49 to 56 of the Companies Act must be noted as well as the terms and requirements as set out in the company's Mol. Failure to comply with the regulatory requirements can invalidate a share transaction and such mistakes or omission could be costly for the company. Also what is equally important is that the agreement between the parties must be fully understood and the company secretary should have a copy or access to a copy of this agreement. A company secretary that does not take the necessary care around this and blindly takes an instruction to process a share transaction without supporting documents and the relevant board resolution can be accused of negligence and gross misconduct later.

Also important with share transfers is the need to observe exchange control regulations where either of the transferor or transferee is a non-resident. A share certificate issued to a non-resident would need to be endorsed accordingly. This is usually done through an authorised bank.

Procedure on share transfers

- The transfer deed together with the accompanying share certificate or other document of title must be carefully examined to ensure that it is correct. The name of the transferor on the transfer deed must correspond exactly to the name that appears on the share certificate. If the name differs, a request should be made for an affidavit or certified copy of the identity document.
- The transfer deed should be signed by the transferor and dated accordingly. If the transferor is under legal disability, such as a minor, assistance of a parent, guardian or evidence that the minor is emancipated would be required. Where there are joint sellers, each must sign.
- Where a shareholder has died, letters of executorship must be produced by the executor of the estate and retained by the company.
- In the case of a transfer signed under a power of attorney, copy of that power of attorney must be produced and retained by the company.
- If the transferor is illiterate or has a physical handicap and cannot write and the transfer deed is executed by a mark (say X or finger print), this should be attested to the effect that the transfer has been read and explained to the transferor and it appears that the transferor understands the transaction. Such attestation should be witnessed by two other persons, preferably independent to the transaction.
- A description of the shares and of what class and number these are must be clear and without ambiguity on the transfer deed.

6

Share transfers (continued)

- The consideration paid must appear on the transfer deed. If there are agreements in place, the accuracy of the consideration can be checked against these.
- The transferee's name must appear in full together with details of a postal and residential address.
- Pre-emption rights and other restrictions that may be contained in the MoI need to be carefully checked. For instance if there are pre-emptive rights and the transferee is not an existing shareholder, then the share transfer deed cannot be processed until such time the terms and conditions surrounding the pre-emptive rights have been followed.
- Minor alterations on a transfer deed should be initialled by both the transferor and transferee. Material alterations such as a change in the number of shares, change in consideration or change in the name of the transferee should only be accepted if supported by the full signature of the transferor. If there are far too many alterations, it is recommended that a new transfer deed is completed instead.
- A check should be made on the register as to any "flag" concerning a duplicate share certificate.

- The necessary board resolution is drafted to record the share transfer;
- Entry is made in the share register (whether this on a software package or manually, the process is the same) and a new share certificate prepared and signed, the old one cancelled and securities transfer tax (STT) is settled. It is recommended that the transferee signs for the new certificate and the acknowledgement of receipt together with a photo copy of the new certificate is filed together with the cancelled certificate.²⁸

Where there is a transfer of certificated shares, such transfer must be recorded in the securities register and must include: ²⁹

- the name and address of the transferee;
- the description of the securities, or interest transferred;
- the date of the transfer; and
- the value of any consideration still to be received by the company on each share or interest.

The Companies Act goes further and states in s51(6), that entries on transfers can only be made in the securities register if the transfer is evidenced by a proper instrument of transfer (which may be a share certificate), or by operation of law.

7

Forged transfers

A forged transfer is no transfer at all. Great care must be taken by either the company secretary or the transfer secretary that diligence and care is taken around checking documents. Should a forgery of a transfer deed or accompanying share certificate be suspected, the following steps should be taken without delay:

- Advise the registered owner of the shares and give him a period of time to confirm the facts (say five working days);
- Retain the suspected documents carefully;
- Advise the transferee of the position and that the transfer is being delayed until the facts of the matter have been established and the necessary action decided upon; and
- If the circumstances warrant it, notify the police.

A transferor whose signature has been forged is entitled to have the status quo ante restored. The company has to put him back in the same position he was prior to the forged event. Consequently the company will suffer a loss in making good as this could include having to buy shares to correct the situation. The company obviously has the right to recover same from the transferee who presented the forged documents.

²⁸ *Company Secretarial Practice, Juta, page 12 – 10.*

²⁹ *S51(5) of the Companies Act.*

8

Transmission of shares

Transmission is meant by the passing of the right to deal in shares from one person to another by operation of law as opposed to the act of a transferor. Transmission occurs on death, insolvency etc., when the power to transfer no longer exists, and ensures that there will be someone in a representative capacity capable of transferring the shares held by the deceased, insolvent etc., as the case may be. Most Mols should have a transmission clause.

9

Transfer secretary

A transfer secretary acts as agent for a company in looking after its share register. Listed companies in South Africa are required to appoint a transfer secretary to manage the share register on their behalf given the volume and value of shares that could be traded on a daily basis. A transfer secretary would have the necessary system and staff to cope with such volume. For purposes of a stock exchange and a transfer secretary, a company is usually referred to as an “issuer”. The duties of a transfer secretary include the following:³⁰

1. Issuance and transfer: Issue and cancel securities to reflect changes in ownership. For example, when a company conducts a share split, the transfer secretary would issue the new shares. Transfer secretaries keep records of who owns a company’s securities and how these are held – whether by the owner in certificated form, or in uncertificated form (dematerialised).
2. Record keeping: Transfer secretaries “track, record, and maintain on behalf of issuers the official record of ownership of each issuer’s securities”.³¹
3. Registration: Transfer secretaries monitor “the issuance of [company] securities with a view to preventing unauthorised issuance, a function commonly performed by a person called a registrar”.³²
4. Paying agent: A transfer agent may also serve as the company’s paying agent to pay out interest, cash and dividends, or other distributions to shareholders.
5. Shareholder liaison: Transfer secretaries “facilitate communications between issuers and registered security holders. The transfer secretary will mail on behalf of the issuer quarterly, interims, annual, and other reports including circulars and notice of meetings to shareholders.”³³

Transfer secretaries may also run annual meetings and act as scrutineers for voting.

6. The transfer secretary is considered the official keeper of shareholder records and is usually the first port of call for a shareholder to establish what shares he owns.
7. Repository to handle lost, destroyed, or stolen certificates.
8. The transfer secretary helps with the payment of STT and dividend withholding tax to SARS.
9. Brokers and Strate generally work with the transfer secretaries in respect of the issuer’s shares.
10. Providing a set of reports to the issuer around movements in the share register and service level arrangements. This may be weekly, monthly or quarterly as determined by the issuer.

For listed companies, shares must be dematerialised in order to be traded on the exchange.³⁴ Dematerialisation is explained hereunder.

For a private company, there must be a resolution approving the transfer of the shares, an example of which is as follows:

Resolved that the company secretary be and is hereby appointed to finalise the sale and transfer of the sale of shares in terms of clause 25 of the Mol as follows:

Seller: J Brown

Purchaser: S Green

*Number of shares: 1000 ordinary no-par value shares at R1 per share.*³⁵

^{30, 31, 32, 33}

https://en.wikipedia.org/wiki/Stock_transfer_agent

³⁴

Company Secretarial Practice, CSSA, page 495.

³⁵

Company Secretarial Practice, Juta, page 12 – 11.

10 | Dematerialisation

Per the Financial Markets Act, 2012, the only way in which any security may be traded on a stock exchange is in electronic form. A share certificate is worthless for stock exchange trading purposes. To become uncertificated, the shares need to be dematerialised. Dematerialisation is described as a process whereby “paper share certificates are replaced with an electronic record of ownership”.³⁶ For dematerialisation to occur, the following steps are followed:³⁷

The shareholder will send the share certificate his CSDP or broker. The CSDP or broker has a duty of care to carry out a level of verification before the certificate is lodged with the transfer secretary who undertakes the actual dematerialisation. The transfer secretary confirms the validity of the certificate, cancels it and deletes the record in the certificated register.

The transfer secretary will then advise the Central Securities Depository (Strate) of the dematerialisation including the international securities identification number (ISIN) and quantity of shares.

Strate then credits the CSDP account in Strate and in turn the CSDP credits the shareholder’s account in the subregister.

Once the shares are dematerialised and reflect as an electronic entry, they may be traded and settled electronically. Strate is South Africa’s central securities depository and is an Financial Sector Conduct Authority (FSCA) – licensed financial market infrastructure that owns technology to securely hold equities, bonds and money market securities in electronic form so that buyers and sellers can exchange ownership of these securities once they are successfully traded.³⁸ Strate will send the shareholder confirmation of the conversion – once the share certificate has been dematerialised, the shareholder will start to receive regular statements on his/her share account.³⁹ The shareholder database held at Strate is recognised as the legal record of ownership in South Africa.⁴⁰

At the end of each month, Strate does provide at no charge to issuers what is referred to as a beneficial download (BillionD),

which is in essence the “dematerialised share register” of the company. A BillionD download is just a list of shareholders together with the number of shares held in electronic form. The list of shareholders are grouped around the various CSDPs. It does not provide any analysis of the register and is for all intents and purposes not a user friendly document. Strate can provide other reports which provide some analysis for an issuer but these come at a cost. For instance if an issuer wanted to see the movement of shares for the entire month between shareholders.

Uncertificated shares may be converted back to certificated shares via s54 of the Companies Act (i.e. be rematerialised), which states that a shareholder must then notify the relevant participant or central securities depository, which must within five business days:

- notify the relevant company to provide the certificate;
- remove the details of the uncertificated shares from the uncertificated securities register;
- enter the relevant details in the company’s securities register with a statement that the shares are no longer held in an uncertificated manner; and
- within 10 business days, deliver the certificate to the holder and notify the central securities depository that shares are no longer uncertificated.

Computershare Investor Services and Link Market Services offer an own name client service to investors who are natural persons. Such service allows the investor to be recorded as the registered holder of the shares instead of the name of the nominee (CSDP) being reflected as the holder in the register.

³⁶ *Company Secretarial Practice, Juta, page 12 – 7.*
³⁷ *Company Secretarial Practice, Juta, page 12 – 8.*
^{38, 40} <https://www.strate.co.za/about/our-company>
³⁹ <https://www.mondigroup.com/media/7938/strate-dematerialisation-process-qa.pdf>

11 Share register analysis

A company will always need some form of analysis for its share register. This relates to any one of the following:

- Who are the top 10/20/50/100 shareholders?
.....
- What has been the movement from one period to another between the top shareholders?
.....
- What type of shareholders are investing in the company? – are these institutions, retail investors and so on?
.....
- What type of institutions are investing in the company – are these asset managers, pension funds, emerging market funds and so on?
.....
- What is the geographic spread of shareholders?
.....
- What %age shareholders could be classified as black for BEE purposes?
.....

- What is the split between public and non-public shareholders for JSE purposes and where this assists with working out the company's free float?
.....
- Who are value investors and who are growth investors?
.....
- An analysis assists with investor relations and for integrated reporting purposes. For non-listed companies, but dependent on the size of the register, providing some form of analysis can be the function of the company secretary. For listed companies, it is usual practice to appoint a service provider to conduct this type of research and analysis. The cost thereof can be quite expensive dependent upon the assignment and the quality of information requested. If the company has a separate investor relations function to the company secretary, it is incumbent on the company secretary to ensure that he/she receives a copy of the shareholder analysis from the investor relations team.
.....

12 Capitalisation shares

Capitalisation shares are issued in place of dividends, where the company makes a profit and the profits are capitalised instead of being distributed, sometimes referred to as a dividend in specie. Except where the company's MoI provides otherwise, the board may pass a resolution to approve the issuing of authorised shares as capitalisation shares.⁴¹ The board must be satisfied that there is sufficient unissued share capital available, failing which the company must pass a special resolution at a shareholders meeting to increase the authorised share capital. For listed companies, the explanatory circular and SENS announcement must also be done in addition to the passing of the special resolution.⁴² After the board has passed the required resolution to make the distribution, the board is required to pass a second ordinary resolution to issue the shares to all existing shareholders pro rata to their shareholdings.⁴³

The board may also resolve to permit a shareholder to receive a cash payment instead of capitalisation shares, and the board must then determine the value of such cash payment.⁴⁴ This resolution to offer a cash payment can only be made once the board has satisfied itself that the company would satisfy the solvency and liquidity test immediately after the distribution has been made.

Example of a capitalisation share resolution

IT WAS RESOLVED:

1. THAT a capitalisation award of one fully paid up ordinary share of no par value each for every 100 ordinary shares of no par value held be issued to ordinary shareholders recorded in the register of the company on Friday 23 February 2019 ("capitalisation award").
2. THAT as an alternative to the capitalisation awarded referred to in resolution 1. above, ordinary shareholders may instead elect on Friday 23 February 2019 by no later than 10:00 to receive a cash dividend of 25 cents per ordinary share held ('cash dividend alternative').
3. THAT immediately following the payment of the cash alternative dividend referred to in resolution 2. above, the company will meet a solvency and liquidity test as contemplated by Section 4 of the Companies Act, 2008, as amended, where the company's assets, fairly valued, will exceed the company's liabilities, fairly valued;
4. THAT for 12 months immediately following the payment of the cash alternative referred to in resolution 2. above the company will be able to pay its debts as they become due in the ordinary course of business.

It must be noted that if a cash alternative is not offered then resolutions 3 and 4 are not required.

^{41, 44} S47 of the Companies Act.
^{42, 43} Company Secretarial Practice, CSSA, page 432.

“Company secretaries are advised to follow the ordinary procedures in affecting the share issue”

Where loans are converted to equity, shares are ordinarily issued by the company for an amount equal to the face value of the loan and the proceeds are used to settle the loan.⁴⁵ This process assists companies, particularly in cases where the company is experiencing financial trouble.

There are important tax considerations when implementing a loan to equity conversion and SARS has issued a number of binding private rulings in this regard.

Company secretaries are advised to follow the ordinary procedures in affecting the share issue i.e. there must be sufficient authorised share capital and the share issue must be affected by means of a special resolution of the shareholder, to the extent that it falls within the ambit of s41(1) of the Companies Act.

Another important consideration is that of possible dilution of the issued share capital and the potential effect that this would have on existing shareholders. It is therefore important for company secretaries to be mindful of the total amount of shares being issued, the timing of the issue (i.e. will it occur in tranches or all at once?) and the number of authorised but unissued shares that will remain.

Whilst the conversion of loans to equity can be an indication of financial instability, it may also be effected in order to increase value for shareholders, by means of the reduction of debt. Company secretaries should ensure that the rationale behind the conversion is clearly articulated in any relevant announcements to the market so as to avoid any unintended consequences.

Furthermore, regardless of the reason for the conversion, the covenants in respect of any additional existing debt arrangements with other lenders must be considered in order to ensure that the conversion does not trigger such covenant.

Example of an ordinary shareholder resolution

IT WAS RESOLVED

1. THAT the company be authorised to convert the Joe Bloggs Company shareholder loan of R10 million into equity, as set out in resolution 2 below.
2. THAT, subject to the passing of ordinary resolution 1. above, the company be and is hereby authorised to issue 10 000 000 new ordinary shares of no par value to Joe Bloggs Company (Joe Bloggs), at an aggregate issue price of R10 million as settlement of the Joe Bloggs shareholder loan, and that any one or more directors of the company is hereby authorised to negotiate, amend, finalise and sign any agreement, document or deed which may be necessary or desirable in order to give effect to or implement of the loan conversion into equity and generally to do all such things as may be necessary or desirable in order to give effect thereto.

It is noted that if the company did not have sufficient shares to issue 10 000 000 new shares in its authorised capital then a special resolution may have been required first to increase the authorised capital and amend the Mol.

⁴⁵ <https://www.rsm.global/southafrica/news/conversion-debt-equity>

14 | Dividends

The payment of dividends amounts to a distribution by the company, which is regulated in s46 of the Companies Act. Shareholders do not have a right to share in the profits of the company, and there is no obligation on the company to declare distributions to its shareholders.⁴⁶ Where the board has resolved to make a distribution, in accordance with the requirements in s46, such distribution must be made within 120 days of the resolution, failing which, the board must then reconsider the solvency and liquidity test and must take a further resolution to effect the distribution.

The procedure to declare a dividend is as follows:

- A company should have a dividend policy in place. This guides management around the calculation and frequency of payment. For instance the policy may say “at the discretion of the directors, an annual dividend of 50% of earnings may be declared to shareholders”. Such a policy will be tweaked if payment is quarterly or every six months.
- Following finalisation of the accounting period, management taking the dividend policy into account will put forward a proposal to the Board. This will include a solvency and liquidity test to support the calculation as well as a proposed payment date taking cash flows into consideration.

- If the company has an audit committee, it is usual for the audit committee to review management’s proposal and then recommend same to the Board.
- The Board will review management’s proposal as well as any recommendation from the audit committee and then either approve or approve with changes or decline on the basis that the funds are needed elsewhere in the business. Therefore it always important that with any dividend policy, it is at the discretion of the directors.
- Obviously for a preference share dividend, there is a legal obligation to pay and unless the company is not in a financial position to pay (trading in a loss situation and cash flows are negative), the Board would approve the payment of a preference share dividend.
- Once board approval is obtained, the necessary dividend declaration is then published and arrangements put in place to pay the dividend. It must be noted that the listings requirements of the stock exchange concerned must be observed if the company is listed. This is more around timing, namely, the record date and payment date.
- Arrangements to pay a dividend include bank accounts, dividend register, working with the accounting team and transfer secretary (if the company is listed).

Old Mutual fires embattled CEO Moyo for ‘contravening his fiduciary duties’

Top of Form

A committee established by Old Mutual raised concerns relating to Moyo’s conduct in relation to his conflict of interest.

In particular, one of the concerns raised involved two declarations of ordinary dividends by NMT Capital during 2018 totalling R115 million, which saw R30.6 million paid to Moyo and his personal investment company.

“These dividends were declared in breach of Old Mutual’s rights as preference shareholder, since arrear preference dividends were unpaid at the time and, at the time of the second dividend declaration, the preference share capital was redeemable. The preference share capital remains unpaid,” Old Mutual said.

“Mr Moyo chaired the board meeting of NMT Capital at which the second ordinary dividend of R105 million was declared,” the group said.

“The board has not been provided with an acceptable explanation why, in clear contravention of the relevant preference share agreement with Old Mutual as well as Mr Moyo’s employment obligations, ordinary dividends were declared whilst debt to Old Mutual was outstanding,” Old Mutual said.

Source: <https://city-press.news24.com/Business/old-mutual-fires-its-embattled-ceo-moyo-for-contravening-his-fiduciary-duties-20190618>

⁴⁶ <https://dommisseattorneys.co.za/blog/companies-act-71-2008-series-part-7-distributions-important-points-consider/>

Example of a dividend board resolution

→ THAT dividend No _____ of [amount] cents per share for the financial year ended 31 March 2019 be and is hereby declared payable on Monday 27 May 2019 to shareholders registered in the books of the company on Friday 24 May 2019;

→ THAT, it be noted, that dividend No _____ for purposes of the current dividend withholding tax of 20% is split between a gross dividend of (amount) cents per share as declared above and a net dividend of (amount) cents per share after adjusting for the dividend withholding tax for those shareholders who are liable for the tax.

→ THAT immediately following the payment of dividend No _____ to in resolution 1. above, the company will meet a solvency and liquidity test as contemplated by Section 4 of the Companies Act, 2008, as amended, where the company's assets, fairly valued, will exceed the company's liabilities, fairly valued;

→ THAT for 12 months immediately following the payment of dividend No _____ referred to in resolution 1 above the company will be able to pay its debts as they become due in the ordinary course of business;

Example of a board resolution for an unlisted company

THAT dividend No _____ of [amount] cents per share or the financial year ended 31 March 2019 be and is hereby declared payable on Monday 27 May 2019 to shareholders registered in the books of the company on Friday 24 May 2019.

It must be noted that some Mols may have a clause where shareholders must approve a proposed dividend as put forward by the directors – in this instance directors do not have the authority to approve the dividend, they can only recommend. The recommendation would then be included in the annual financial statements and notice of annual general meeting to be posted to shareholders. Only after shareholders have approved the dividend in general meeting, can shareholders then expect to receive their dividend. Notwithstanding that shareholders must approve the dividend, such dividend can never be higher than what is proposed by the directors, but it can be lower. This is because the directors sign off the annual financial statements not shareholders.

Steinhoff declares additional preference share dividend

Shares in financially troubled Steinhoff International Holdings rose 1.63% on the JSE yesterday to close at R2.40, after subsidiary Steinhoff Investment Holdings announced an increased additional dividend to preference shareholders.

Steinhoff Investment Holdings, which was only exposed to the group's African assets and South African debt and dominated by the former Pepkor business, said yesterday it had decided to declare a gross dividend of 414.02568 cents a preference share, which will be payable on August 20 to preference shareholders recorded in the company's book at the close of business on August 17.

This dividend is payable to the holders of 15 million preference shares issued by the company for the period from January 1 to June 30 this year.

The company referred to its previous dividend declaration announcement on June 29 and reported that it would increase the preference dividend by a gross amount of 10.03132c a share.

Source: <https://www.iol.co.za/business-report/companies/steinhoff-declares-additional-preference-share-dividend-16272970>

Share schemes are subject to legal, regulatory and administrative compliance provisions, which often form part of the company secretary's portfolio. An example of a share scheme is an employee share scheme, which is regulated by s97 of the Companies Act. In terms of s97, the company must appoint a compliance officer (normally the company secretary) for the scheme, who is then accountable to the board. The company must also, in its annual financial statements, indicate the number of specified shares that it has allotted during the respective financial year in terms of the scheme.

Under s97, the compliance officer has certain tasks, which are summarised as follows:

- the compliance officer is responsible for the administration of the scheme;
- the compliance officer must send a written statement to an employee who receives an offer in terms of the scheme, and such statement must indicate the nature of the transaction and any risks involved; company information and its profit history over the past three years, and any material changes in respect of the information contained in the written statement that may arise;
- the compliance officer must file copies of all documents containing information in the written statement provided, within 20 business days after the scheme has been established.

- where the scheme is an employee share scheme, the compliance officer does not need to file a certificate within 60 days after each financial year end, certifying that he/she has complied with all obligations.

Share incentive schemes of listed companies are regulated by JSELR 16.32, 3.92, and Schedule 14 of the JSELR. The JSELR require that employee share schemes of listed companies must be approved by the shareholders passing an ordinary resolution with 75% majority.⁴⁷

The company secretary, in managing the employee share scheme should do the following:⁴⁸

- Maintain the register of employee participants, taking into account the protection of personal information requirements in terms of PoPI;
- Issue grant documentation and keeping abreast of critical information such as maturity dates and dates of expiration;
- Advise the board and participants as per any queries received;
- Deal with third parties such as SARS;
- Provide participants with regular information and ensure that all participants are made aware of the detail of their incentives and available choices.



⁴⁷ *Company Secretarial Practice, CSSA, page 451.*

⁴⁸ *Company Secretarial Practice, CSSA, page 464.*

16 | Share buy-backs (also known as a repurchase of shares)

Share buy-backs are treated in the same way as dividends in that a distribution is made by the company, thus the requirements in s48 read together with s46 need to be complied with. The company may buy back its shares provided this has been authorised in the Mol and all that is required is a board resolution. If the company is listed or the shares to be acquired are from a director or prescribed officer then shareholder approval by way of a special resolution is required. Similarly if the buy-back forms part of a scheme of arrangement where the requirements of sections 114 and 115 must be complied with, the company itself can acquire the shares or a subsidiary company. A subsidiary company is however restricted in how many shares can be acquired. This is limited to 10% of the issued share capital of the holding company concerned. Where shares are bought back, the affected shareholders must return their share certificates, and the share register must then be updated. With a listed company, there must be consultation with the Sponsor, and an explanatory circular and notice to shareholders must be prepared.⁴⁹ Dependent upon how shares have been bought back they are either cancelled and revert to unissued capital (i.e. authorised) or if they are acquired by a subsidiary company, they become known as treasury shares.⁵⁰ Treasury shares can be re-issued. If the company is a listed company on the JSE, the JSE will treat this as a new issue of shares and the JSE LRs must be observed around this. It must also be noted that share repurchases do have accounting and tax implications. Both the accountant and tax person would need to be consulted to ensure minimal impact to the company.

Example of a share buy-back resolution

Special resolution number 1

“RESOLVED THAT the company, or any of its subsidiaries, be and they are hereby authorised, by way of a general authority, to acquire ordinary shares in the company, subject to the provisions of the Companies Act, No 71 of 2008, as amended (“the Act”), and the Listings Requirements of the JSE Limited (“the JSE”), provided that:

- (a) the general authority in issue shall be valid only until the company’s next annual general meeting and shall not extend beyond 15 (fifteen) months from the date of this resolution;
- (b) any general repurchase by the company and/or any of its subsidiaries of the company’s ordinary shares in issue shall not in aggregate in one financial year exceed 5%

“The general authority may be varied or revoked by special resolution of the members prior to the next annual general meeting of the company”

- (five%) of the company’s issued ordinary share capital at the time that the authority is granted;
- (c) no acquisition may be made at a price more than 10% (ten%) above the weighted average of the market price of the ordinary shares for 5 (five) business days immediately preceding the date of such acquisition;
- (d) the repurchase of the ordinary shares are effected through the order book operated by the JSE trading system and done without any prior understanding or arrangement between the company and the counterparty (reported trades are prohibited);
- (e) the company may only appoint one agent at any point in time to effect any repurchase(s) on the company’s behalf;
- (f) the authorisation thereto is given by the company’s memorandum of incorporation;
- (g) the company or its subsidiary may not repurchase ordinary shares during a prohibited period unless it has in place a repurchase programme where the dates and quantities of securities traded during the relevant period are fixed (not subject to any variation) and has been submitted to the JSE in writing. The company must instruct an independent third party, which makes its investment decisions in relation to the company’s securities independently and uninfluenced by the company, prior to the commencement of the prohibited period to execute the repurchase programme submitted to the JSE;
- (h) the general authority may be varied or revoked by special resolution of the members prior to the next annual general meeting of the company; and
- (i) should the company or any subsidiary cumulatively repurchase, redeem or cancel 3% (three%) of the initial number of the company’s ordinary shares in terms of this general authority and for each 3% (three%) in aggregate of the initial number of that class thereafter in terms of this general authority, an announcement shall be made in terms of the Listings Requirements of the JSE.”

⁴⁹ *Company Secretarial Practice, CSSA, page 402.*

⁵⁰ *Company Secretarial Practice, CSSA, page 403.*

Having considered the effect on the company of the maximum repurchase under this general authority, the directors are of the opinion that:

- the company shall meet a solvency and liquidity test as contemplated in the Act;
- the company and the Group will be able to pay its debts for a period of 12 (twelve) months after the date of this notice of annual general meeting;
- the assets of the company and the Group will be in excess of the liabilities of the company and the Group for a period of 12 (twelve) months after the date of this notice of annual general meeting which assets and liabilities have been

valued in accordance with the accounting policies used in the audited consolidated annual financial statements of the Group for the year ended 31 March 2019;

- the share capital and reserves of the company and the Group will be adequate for the ordinary course of business purposes for a period of 12 (twelve) months after the date of this notice of annual general meeting;
- the working capital of the company and Group are considered adequate for ordinary business purposes for a period of 12 (twelve) months after the date of this notice of annual general meeting.

17 | Rights issues (offers)

When a company wishes to raise further capital, it can either invite the public at large to subscribe for shares (public offering) or it can approach its existing shareholders and give them rights to acquire additional shares in the company in proportion to their existing holdings. This is known as a rights offer. The rights that are given to existing shareholders could be renounceable – this allows shareholders to sell their rights to subscribe for shares to third parties – or non-renounceable – where if the shareholder does take up his rights, it falls away.

It is important that the company secretary familiarises himself with Chapter 4 of the Companies Act. In terms of the definitions in Chapter 4, a non-renounceable offer made only to existing shareholders is not a public offer. Similarly a rights offer that satisfies the prescribed requirements and an exchange has granted or agreed to grant a listing for the securities that are subject to the offer and the rights offer complies with the listings requirements of that exchange will also not be categorised as public offer. If at any time a rights offer is deemed to be a public offer in terms of the Companies Act, then the requirements for a prospectus must be complied with.

Procedure for a rights offer

1. If the company does not have sufficient authorised capital (need to check the MoI), then a general meeting to pass a special resolution increasing the authorised capital is required.
2. If the directors do not have authority to increase the issued capital (need to check the MoI), then a general meeting to pass an ordinary resolution giving the directors this authority would be required.

3. 1 and 2 above can be achieved in one general meeting.
4. If 1 and 2 are in place, then a board meeting be convened to approve a draft circular to shareholders which would inform the following:

- Total amount of capital the company wishes to raise and the rationale therefore (why the company needs to raise money and what it intends to do with it);
- How many shares on offer and at what price and in what proportion;
- record date on which registered shareholders would qualify to participate in the offer;
- the period for which the offer is open for (usually 3 weeks);
- where copies of the offer and forms of acceptance and/or letters of renunciation may be obtained;
- bank account details;
- details of any underwriting;
- information on the company for shareholders to make an informed decision;
- details of the financial effects of the rights offer;
- if the company has non-resident shareholders that exchange control approval has been obtained;

17 | Rights issues (offers) *(continued)*

→ if the company is listed, details of the approval of the stock exchange around the listing of the shares on offer and details on how shareholders can trade their rights; and

→ closing date.

5. Allocation/allotment register is drafted – if a listed company this is managed by the transfer secretary.
6. Board approves the allotment/allocation of shares.

7. A results announcement is published which would also include details of when certificates would be posted to shareholders or when share accounts would be credited.
8. Share register is updated to include the additional shares and company now has access to the funds so raised.

Omnia's woes mount amid looming losses

Johannesburg – Chemicals company Omnia told investors on Friday that it anticipated hefty losses for the year to March as it grappled with impairments, mounting debt and liquidity woes in Zimbabwe.

The stock closed 0.39% weaker on Friday at R38.01 a share, valuing the company at R2.63 billion.

“In the 2019 financial year, Omnia experienced adverse market conditions, marked by droughts and late rains, a volatile rand currency, changes in the local and international mining industry, and overall difficult global trading conditions,” the company said in a statement.

Omnia, which intends to launch an R2 billion rights offer to reduce debt, said on Friday that headline earnings a share would plunge by 160%.

Headline earnings would also take a 120% knock to between 139 cents and 59 cents a share in 2019 from 991 cents a share in the previous year.

Source: <https://www.iol.co.za/business-report/companies/omnias-woes-mount-amid-looming-losses-26589608>

18 | Clawback offer

In the eyes of the shareholder this is essentially the same as a rights offer however the shares are first sold to a third party who then offers to sell them to the issuer's shareholders in proportion to their shareholdings, i.e.: An issue of securities for cash by an applicant (issuer) to persons/entities where the securities are then offered by such persons/entities to the

applicant's shareholders i.e. registered owners (and where applicable for the benefit of the beneficial owners) in proportion to their holdings. This is usually done to reduce a debt position or repay the capital loan made by the person/entity to whom the claw back offer is made. The company is in essence clawing back ownership.

19 | Issues for cash (Listed companies)

An event where the company issues shares for cash to the general market. This is usually done in order to increase the company's capital through a new issue for cash. The extra cash raised from such an issue can be used for expansion or to take advantage of opportunities presented by market conditions. This is not in proportion to shareholder rights. The shareholders will have waived their rights to retain their percentage holdings at an earlier general meeting. The authority to conduct an issue for cash is usually obtained at an annual general meeting. An issue for cash may be specific or general. It is becoming increasingly difficult for companies to have these type of resolutions passed as investors do not like to waiver any of their rights in advance.

Example of an ordinary resolution for a general authority to issue shares for cash

"Resolved that the directors of the company be authorised, by way of general authority, to issue the authorised but unissued shares in the capital of the company for cash, as and when they in their discretion deem fit, subject to the provisions of the Companies Act, JSE Listings Requirements and the company's Mol, when applicable and with the following limitations:

- The number of shares issued for cash in any one financial year shall not exceed 16 331 056 ordinary shares, which represents 3% of the total issued share capital of 544 368 530 ordinary shares in the company;

→ This authority is valid until the company's next AGM, provided that it will not extend beyond 15 months from the date that this authority is given;

→ The shares which are the subject of the issue for cash must be of a class already in issue or, where this is not the case, must be limited to such securities or rights that are convertible into a class already in issue;

→ Any such issue shall only be made to public shareholders (as defined in the JSE Listings Requirements) and not to related parties (as defined in the JSE Listings Requirements) unless the JSE agrees otherwise; and

→ The maximum discount permitted at which ordinary shares may be issued is 10% of the weighted average traded price on the JSE of the company's ordinary shares over the 30 business days prior to the date that the price of the issue is agreed in writing between the company and the party subscribing for the ordinary shares."

20 | Convertible securities

Conversions arise when convertible securities are converted in accordance with the relevant trust deed. Holders of convertible debentures, convertible preference shares, deferred shares and options have the right to convert all or part of such instruments into ordinary shares each year and by a certain closing date. Sometimes holders of such instruments have to pay a conversion take-up price. The securities are compulsorily convertible. Convertible securities may be listed or unlisted. The portion of the convertible securities so converted is withdrawn from the company's listing (if they are listed). Securities taken up as a result of the conversion are then listed on the JSE by way of an additional listing. That part of the option not taken up, falls away. A conversion (full/partial) is an event where all/part of the issued

securities of a class are automatically converted into new securities of a different class by the issuer, without election i.e. the holder of the security receives a new security in place of the old one. Not all securities are converted in the case of a partial conversion. Conversions may be triggered as per security proposal e.g. time lapse, dividend ceiling, etc. A conversion- election (full/partial) is an event where the registered owners, where applicable acting on instructions of beneficial owners, are entitled to elect whether they wish to convert all or a specified portion of the issued securities of a class held by them into new securities of a different class. The holder of the security receives a new security in place of the old security. The holder has the election to convert if and when the shareholder chooses to, in line with the terms.

20 | Convertible securities *(continued)*

Market sees rise in sale of convertible bonds by big companies

At \$43 billion, techno stocks including Twitter lead largest sale of the convertible securities since 2008 financial crisis.

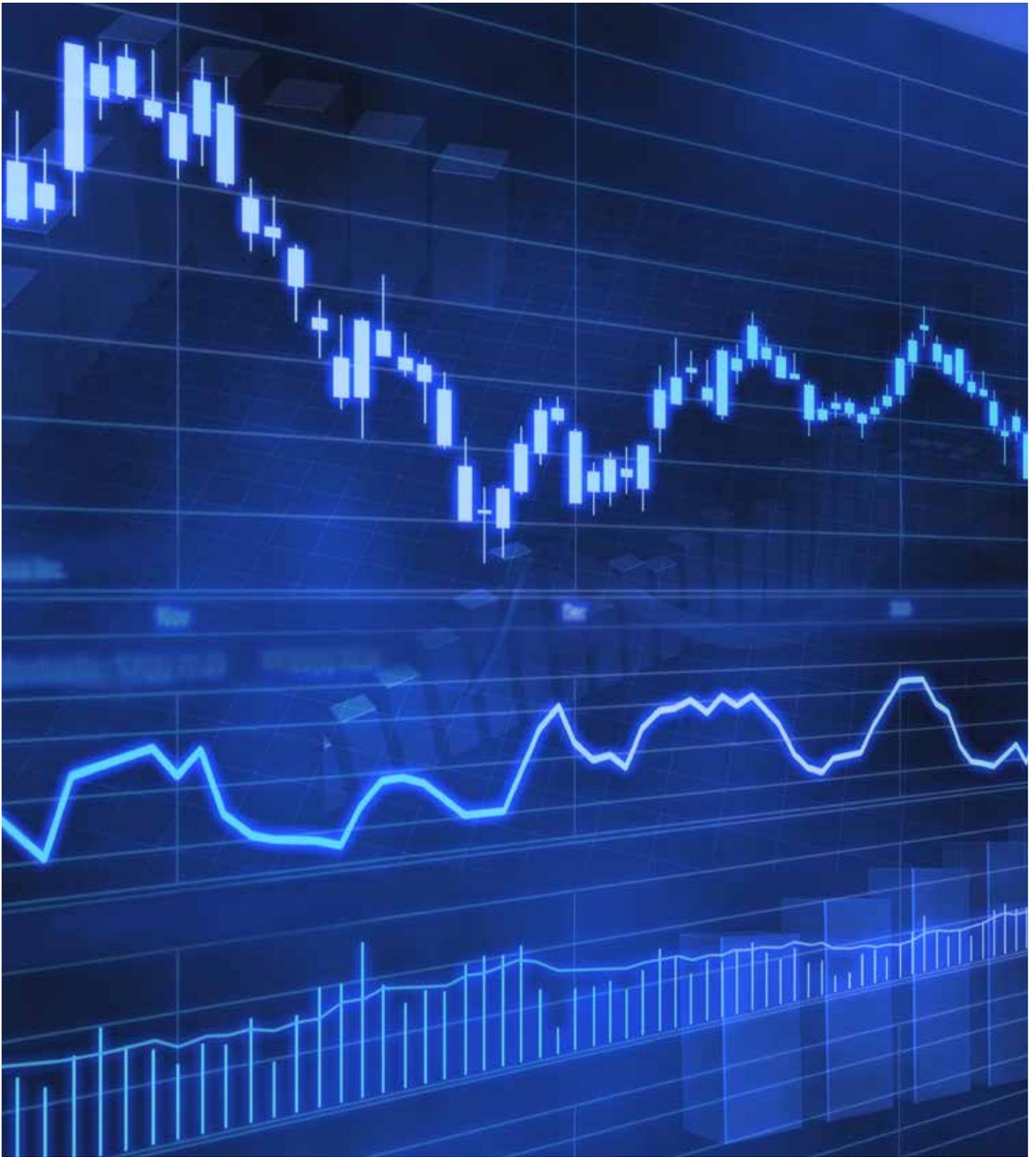
Companies are on pace this year to sell the most bonds that convert to equity since the financial crisis, an indication that investors still see potential for big gains in risky companies even as debate intensifies on the direction of the economy. Companies including Twitter, Sempra Energy and Akamai Technologies had raised almost \$43 billion in convertible bonds by Friday. That figure is on pace to beat 2014's \$44.1 billion, which was the most since 2008, according to Dealogic. Convertible bonds, which grant investors the right to swap their securities for equity at predetermined prices and offer the potential for much larger gains than typical high-yield debt. Investors can still get their money back if the borrower's stock sputters, though defaults remain a risk. The debt is also appealing to companies because it carries lower interest rates than traditional bonds, and, unlike a traditional stock offering, doesn't immediately dilute existing shareholders. The surge in convertible-debt issuance worries some investors, however, because such issuance soared ahead of the financial crisis, and many have already grown concerned about the longevity of the bull market. Others believe conditions are still ripe for strong returns.

Source: <https://www.businesslive.co.za/bd/companies/2018-12-11-market-sees-rise-in-sale-of-convertible-bonds-by-big-companies/>

21 | Conclusion

Shares are a complex and highly regulated area, which all company secretaries need to know and understand. The company secretary will invariably deal with shares and share capital and will need to know how to apply all theory in practice via resolutions; drafting of the Mol etc. This guide is meant to provide company secretaries with a basic understanding of shares with the use of some practical

examples, and does not constitute legal advice in any form whatsoever. We encourage company secretaries to attend training sessions on the topic of shares on an ongoing basis. As the professional body for company secretaries, CSSA remains committed to assisting all company secretaries to make their daily tasks easier to understand and implement, by providing ongoing training and advice.



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