

# Ensure the way you set up a firm serves your interests

**E**STABLISHING a private company in South Africa has never been easier, what with an entire industry committed to new company registrations.

Many private companies are registered with a standard form Memorandum of Incorporation (MOI, the founding document of a company).

A MOI is appropriate for companies with single shareholders. Where there is more than one shareholder, many relevant issues are not addressed in the MOI and shareholders may be left unnecessarily exposed.

#### Share transferability:

A common misconception is that shareholders believe they have a right under the Companies Act or the MOI to be offered the shares of a selling shareholder before that shareholder may sell its shares to a third party. This is known as a right of pre-emption.

Neither the Companies Act nor the standard form MOI provide shareholders with a pre-emptive right on share transfers.

For this reason, customised



**Jenna Padoa and Pravania Reddy** give advice on how to do it and the pitfalls to avoid

MOIs and shareholder agreements contain a pre-emptive rights clause to regulate who can acquire shares in the company and how shares can be transferred.

#### Forced sales:

One of the most important mechanisms available to shareholders to safeguard their interest in a company is what is known as a "forced sales clause".

This clause provides that when particular events happen (for example, the sequestration or death of a shareholder) that shareholder is deemed to offer their shares in the company to the remaining shareholders at an agreed price.

Without a clause like this, a number of undesirable situations may arise. For example, the shares of a deceased shareholder may pass to a relative who would then have rights to be involved in the business.

As another example, a shareholder who is also an employee of the company may retain shares after having been dismissed by the company.

Neither the MOI nor the Companies Act contain a forced sales clause and shareholders should consider what circumstances would warrant a

shareholder being forced to sell their shares in the company.

#### Unrestrained board powers:

Under the Act, the board has extremely wide powers to manage and direct the affairs of the company without shareholder involvement. The MOI does not limit these powers and the board is free to issue shares in the company, conclude key contracts and distribute dividends without shareholder involvement.

For this reason, many companies adopt more personalised MOIs and shareholder agreements that provide for certain key decisions to be made by the shareholders of the company.

A customised MOI and shareholders' agreement can also provide protection for minority shareholders by providing that certain decisions can only be made with the unanimous approval of the shareholders or a defined percentage shareholding.

The MOI does not cover a number of important issues that must be considered by

shareholders to protect their interest in the company and for those companies with two or more shareholders, a personalised MOI and possibly a shareholders agreement can be critical.

● **JENNA PADOA** is an associate at Cox Yeats Attorneys and practising in the commercial and natural resources law team. With her experience as internal legal counsel for a leading multinational company in South Africa, Jenna's field of focus lies in commercial agreements and memoranda of incorporation, consumer protection law, company law and general business law issues. Call Padoa at 031 536 8500 or e-mail: [jpadoa@coxyeats.co.za](mailto:jpadoa@coxyeats.co.za)

● **PRAVANIA REDDY** is a candidate attorney at Cox Yeats and is part of the commercial and natural resources law team. Call Reddy at 031 536 8500 or e-mail: [preddy@coxyeats.co.za](mailto:preddy@coxyeats.co.za)

*Note: This column is being rerun to correct errors that slipped through last week. The errors are regretted.*