

Companies Act, 2008 – Approval required for directors remuneration

(Section 66(9))

The Companies Act, 2008, (the Act) requires directors' remuneration to be approved by special resolution prior to being paid.

The Act states in section 66(8) and (9):

(8) *"Except to the extent that the Memorandum of Incorporation of a company provides otherwise, the company may pay remuneration to its directors for their service as directors, subject to subsection (9)."*

(9) *"Remuneration contemplated in subsection (8) may be paid only in accordance with a special resolution approved by the shareholders within the previous two years"*

The MOI cannot amend the requirements of subsection (9).

Directors' remuneration is not defined in this section, but in section 30(6) (which deals with disclosure of remuneration) "remuneration" is defined as follows:

(6) *For the purposes of subsections (4) and (5), remuneration' includes-*

- (a) *fees paid to directors for services rendered by them to or on behalf of the company, including any amount paid to a person in respect of the person's accepting the office of director;*
- (b) *salary, bonuses and performance-related payments;*
- (c) *expense allowances, to the extent that the director is not required to account for the allowance;*
- (d) *contributions paid under any pension scheme not otherwise required to be disclosed in terms of subsection (4)(b);*
- (e) *the value of any option or right given directly or indirectly to a director, past director or future director, or person related to any of them, as contemplated in section 42;*
- (f) *financial assistance to a director, past director or future director, or person related to any of them, for the subscription of options or securities, or the purchase of securities, as contemplated in section 44; and*
- (g) *with respect to any loan or other financial assistance by the company to a director, past director or future director, or a person related to any of them, or any loan made by a third party to any such person, as contemplated in section 45, if the company is a guarantor of that loan, the value of-*
 - (i) *any interest deferred, waived or forgiven; or*
 - (ii) *the difference in value between-*

- (aa) the interest that would reasonably be charged in comparable circumstances at fair market rates in an arm's length transaction;*
- and*
- (bb) the interest actually charged to the borrower, if less.*

The above clearly differentiates between fees paid to directors for services as directors and other payments including salaries, bonuses, performance-based payments, expense allowances, pension contributions, share options, financial assistance and soft loans.

The Act requires directors' fees for services as a director to be proposed upfront to shareholders for approval by way of special resolution. This must have been done for remuneration within in the past two (2) years.

These fees for non-executive directors would have to be approved as these fees would fall into the category of "fees for services as directors". The remuneration for executive directors who are also employees or providing other services to the company must be split and companies should ensure that the relevant fees be approved. The other amounts paid to directors such as the salary and bonuses do not need to be approved and can be paid.

From a practical point of view, we would suggest that companies have these fees approved by the annual general meeting or if that is not in the near future, a special general meeting should be called. Companies should ensure that, until they have passed this special resolution, no payments are made for directors fees for services as directors as they would be in contravention of the Act. Any contravention of the Act could render directors liable to actions by shareholders and other interested parties.