

# JOINT VENTURES

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*BUILDING SOLUTIONS FOR YOUR BUSINESS*

*LEADING TO SUCCESS*



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## WHAT FOLLOWS BELOW IS A CHECKLIST FOR A JOINT VENTURE

NO.	ITEM	NOTE	ANSWER
1.	DO YOU WISH TO FORM A COMPANY JOINT VENTURE OR A PARTNERSHIP JOINT VENTURE?	<ul style="list-style-type: none"> <li>• In the case of a company joint venture, the parties will be shareholders and will either buy a shelf company or incorporate a new company</li> <li>• In the case of a company an actual entity is formed</li> <li>• A company and the rights and duties of shareholders and directors are regulated by the Companies Act, 2008</li> <li>• A shareholders agreement and a Memorandum of Incorporation will be required. The MOI is a public document and is registered at CIPC, while the shareholders agreement is private and confidential and will therefore deal with matters such as funding, distribution of profits and losses, breach and disputes</li> <li>• With a company, as a separate entity is formed, the shareholders are not personally liable for the debts of the company, unless they sign as surety (or give other forms of security). Also, a company has perpetual succession, which means that if a shareholder leaves, the company will continue to exist</li> <li>• In the case of a Joint Venture partnership, a joint agreement is required, not a shareholders agreement and an MOI. The JV will therefore be regulated by the JV Agreement and not the Companies Act</li> <li>• Unlike a company, no actual entity is formed, with the effect that the partners are liable for the debts of the business. Further, unlike a company, a partnership does not enjoy perpetual succession</li> </ul>	
2.	DETAILS OF THE PARTIES	Ascertain who the contracting parties are	
3.	PURPOSE OF THE JV	<ul style="list-style-type: none"> <li>• A joint venture is formed as parties wish to combine their resources for mutual benefit</li> <li>• <b>What is this object of the JV</b></li> </ul>	
4.	DURATION	<ul style="list-style-type: none"> <li>• The parties need to <b>consider the duration</b> of the joint venture</li> <li>• Is the joint venture for a <b>fixed term or completion of a specific project, or is it indefinite</b> in duration</li> </ul>	
5.	EXCLUSIVITY	Do the parties have exclusivity	
6.	CONDITIONS PRECEDENT	<ul style="list-style-type: none"> <li>• <b>Identify if there are any conditions precedent</b></li> <li>• Board or shareholders resolutions</li> <li>• Relevant licences or approvals</li> <li>• Third party consents to participate in the joint venture</li> <li>• Due Diligence Investigation/ feasibility study</li> </ul>	
7.	TAX CONSIDERATIONS	<ul style="list-style-type: none"> <li>• <b>What is the optimal joint venture structure from a tax perspective</b></li> <li>• How will payments from the joint venture to the parties be taxed (for example dividends, distributions, interest, intellectual property royalties)</li> </ul>	

		<ul style="list-style-type: none"> <li>• Will there be any on-going supplies between the parties and the joint venture, such that VAT issues may arise</li> </ul>	
8.	<b>CONTRIBUTIONS OF THE PARTIES</b>	<ul style="list-style-type: none"> <li>• <b>What will each party be contributing to the business –money (investor), skills, services, assets, IP</b></li> <li>• <b>How will contributed assets be valued</b></li> <li>• How will adjustments be made for any shortfall or excess in relation to any contributor's proportionate funding obligation</li> <li>• If contribution is skill or assets – what happens if party wants to exit joint venture or joint venture terminates</li> <li>• Will contributions be by way of outright transfer, or a lease or licence to the joint venture for a fixed or indefinite term, or on what other terms</li> <li>• Will any party enter into any ancillary contracts to provide or take services or supplies to or from the joint venture? If so, on what terms</li> </ul>	
9.	<b>SHAREHOLDING/ PARTICIPATION INTEREST</b>	<ul style="list-style-type: none"> <li>• <b>How will ownership interests in the joint venture be held? I.e. Equally or in proportion to contribution</b></li> <li>• Therefore: If A contributes R1000.00 (necessary for working capital), B contributes an asset (office) of R10 000.00 and C contributes his expertise- unvalued (Key Man). The values are different. Will A, B &amp; C get equal shareholding</li> <li>• What rights (and obligations) do such interests confer</li> </ul>	
10.	<b>INTELLECTUAL PROPERTY</b>	<ul style="list-style-type: none"> <li>• <b>Are any intellectual property rights to be contributed by any of the parties to the joint venture? Should they be licensed or transferred outright</b></li> <li>• Who will own any new intellectual property rights developed by the joint venture and (if any) by the joint venture parties</li> <li>• What will happen to the intellectual property rights on termination of the joint venture generally or if one party leaves, but the joint venture continues between the remaining parties</li> </ul>	
11.	<b>EMPLOYMENT MATTERS</b>	<ul style="list-style-type: none"> <li>• Will employees be employed</li> <li>• Who is liable to the employees</li> </ul>	
12.	<b>FINANCING</b> <ul style="list-style-type: none"> <li>• <b>Offices/telephone/e quipment</b></li> <li>• <b>Staff</b></li> <li>• <b>Marketing</b></li> </ul>	<ul style="list-style-type: none"> <li>• <b>In what proportions and how, if at all, will the parties provide initial finance to the joint venture</b></li> <li>• How much will be provided from third party sources (for example banks), if at all</li> <li>• Will the parties be required to provide further finance later. If so, who decides when and how it is to be put in? Can decisions on this be blocked in the future by any party unwilling to finance its share? What will happen if one of the party's defaults</li> <li>• Will security be given. If third party funding is required, what security and/or recourse to the parties themselves will the lender(s) require, or will the parties commit to</li> <li>• What happens on termination to all or any of these financing arrangements, either if the joint venture comes to an end entirely or merely as between one party and the rest</li> </ul>	

13.	<b>MANAGEMENT &amp; DECISION MAKING</b> <b>In this regard:</b> <ul style="list-style-type: none"> <li>• Day to day</li> <li>• Important decisions</li> </ul>	<ul style="list-style-type: none"> <li>• <b>How will decisions be made, eg Hiring of employees, Business plan, Marketing, Bank accounts, Expenses (small – day to day)</b></li> <li>• Will decisions be by majority or unanimity</li> <li>• Will the chairman have a casting vote</li> <li>• Will the parties' respective decision-making rights be reduced or curtailed if their respective ownership interests are reduced</li> <li>• <b>What will be the structure for decision making</b></li> <li>• <b>How frequently will meetings</b> of the joint venture parties or its decision-making organs be held</li> <li>• <b>What will be the quorum</b> for such meetings</li> <li>• To what extent will powers over mundane and day-to-day decision making be delegated to an executive team</li> <li>• How is the executive team appointed, replaced, etc</li> <li>• To what extent will the parties have veto rights over decisions of the joint venture or of any body to which any of its powers are delegated, and what is the mechanism for operating them</li> <li>• <b>What protections exist for minority partners/shareholders (note: in the case of a company, the Companies Act sets out unalterable provisions relating to minority protections and which require decisions to be made by special resolution</b></li> </ul>	
14.	<b>DEADLOCK</b>	<ul style="list-style-type: none"> <li>• <b>What happens if the parties disagree on decisions? Will business come to an end</b></li> <li>• <b>Will deadlock issues be resolved:</b> <ol style="list-style-type: none"> <li>(1) By discussion between senior executives of the parties - and what happens if they cannot agree</li> <li>(2) By reference to an external expert or arbitrator - in which case how are they to be chosen, and is their decision to be binding</li> <li>(3) By conferring rights of termination</li> </ol> </li> <li>• <b>What rights will any party have on a deadlock (which is not resolved by any other means):</b> <ol style="list-style-type: none"> <li>(1) To require the termination or dissolution or winding-up of the joint venture</li> <li>(2) To require other parties to purchase its interest or to buy out the interests of other parties (and if so, on what terms)</li> </ol> </li> </ul>	
15.	<b>DUTIES OF THE PARTIES</b>	<ul style="list-style-type: none"> <li>• <b>What legal duties do the parties have to each other and to the joint venture</b></li> <li>• <b>Are the parties prevented from competing with the joint venture:</b> <ol style="list-style-type: none"> <li>(1) During the joint venture</li> <li>(2) For a period after termination</li> </ol> </li> <li>• What are the parties' expectations in respect of their role in the joint venture</li> <li>• The management structure should reflect these expectations</li> </ul>	
16.	<b>HOW WILL PROFITS BE SHARED</b>	<ul style="list-style-type: none"> <li>• Equally; or</li> <li>• In proportion to contribution &amp; shareholding</li> </ul>	

17.	<b>HOW WILL LOSSES BE SHARED</b>	<ul style="list-style-type: none"> <li>• Equally; or</li> <li>• In proportion to contribution &amp; shareholding</li> </ul>	
18.	<b>TRANSFER OF INTEREST</b>	<ul style="list-style-type: none"> <li>• If contribution is skill or assets – what happens if party wants to exit joint venture or joint venture terminates</li> <li>• If transfers are permitted, then on what terms</li> <li>• Should other parties have pre-emption rights (rights of first refusal) before any sale to a third party takes place? If so, on what terms precisely</li> <li>• Should some transfers (for example intra-group transfers or transfers to family trusts) be permitted free of pre-emption rights? What other conditions should apply</li> <li>• Should any party have the right or option to acquire the interests in the joint venture from any other party in the future? If so, when, in what circumstances and on what terms</li> <li>• How will joint venture interests be valued for the purposes of any transfer provisions</li> </ul>	
19.	<b>TERMINATION</b>	<ul style="list-style-type: none"> <li>• <b>Is the joint venture for a fixed term or completion of a specific project, or is it indefinite in duration</b></li> <li>• If the joint venture terminates, how will the assets/income be distributed</li> <li>• <b>Are there any circumstances in which the joint venture will automatically terminate, for example:</b> <ol style="list-style-type: none"> <li>(1) The loss of any regulatory approval</li> <li>(2) The loss of an asset</li> <li>(3) The insolvency of any party</li> <li>(4) The transfer of any party's interest</li> </ol> </li> <li>• <b>Are there any circumstances in which any party will be entitled to terminate the joint venture, for example:</b> <ol style="list-style-type: none"> <li>(1) A change of control of any other party</li> <li>(2) A material breach of the joint venture agreement (or perhaps an ancillary agreement) by another party; or</li> <li>(3) By notice of termination given at any time or after the expiry of a minimum fixed term</li> </ol> </li> <li>• <b>What is the effect of termination:</b> <ol style="list-style-type: none"> <li>(1) Do any provisions of the joint venture agreement survive termination</li> <li>(2) On contracts entered into by the parties and others with the joint venture</li> <li>(3) On the financing commitments of the parties to the joint venture or even one another (for example loans, guarantees)</li> </ol> </li> </ul> <p><b>NOTE:</b> One of the most important aspects of any joint venture is anticipating what precisely is to happen upon termination of the joint venture, to ancillary contractual arrangements, assets and liabilities etc</p>	
20.	<b>EXIT MECHANISMS</b>	<ul style="list-style-type: none"> <li>• <b>What exit mechanisms will be agreed</b></li> <li>• <b>What is the effect if one party subsequently leaves the joint venture in relation to:</b> <ol style="list-style-type: none"> <li>(1) Assets or other rights leased by it to the joint venture; and</li> </ol> </li> </ul>	

		(2) Contracts entered into by it with the joint venture	
21.	<b>VALUATION OF INTERESTS</b>	<ul style="list-style-type: none"> <li>• <b>If on termination generally or following a deadlock resolution procedure, one or more parties are able to buy out the interests of one or more other parties, how are such interests to be valued and is any adjustment to be made if the reason for the sale is because of breach</b></li> <li>• <b>Who decides the valuation:</b> Should it be left entirely to a third-party expert (for example an auditor or independent accountant)</li> </ul>	

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