

CH LEGAL CONSULTING (PTY) LIMITED
Forming a Company and Shareholders Agreements

COMPANIES & SHAREHOLDERS AGREEMENTS

*BUILDING SOLUTIONS FOR YOUR BUSINESS
LEADING TO SUCCESS*



LEGAL CONSULTING

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1. INFORMATION ABOUT FORMING A COMPANY

1.1. WHAT IS A COMPANY

- (1) In South Africa, companies are regulated by the [Companies Act, 2008 and common law.](#)
- (2) A fundamental feature of a company is that it is a juristic person independent from its shareholders and directors. This means that the company itself enters into contracts, can sue and be sued, can own assets and can contract with third parties. A juristic person has perpetual succession, which means that the continued existence of the person does not depend on the continued membership of any member. A member holds a personal right in the company, which entitles them to vote, receive a dividend and share in the proceeds in the event of liquidation.
- (3) One of the most important features, is that of “limited liability”. In the case of a company (unlike a partnership), the members are not liable for the debts of the company in the ordinary course of business. The exception to this rule is where a member signs as surety for a debt, or in the case of a director, where there is reckless and fraudulent trading.

1.2. WHAT IS THE BENEFIT OF FORMING A COMPANY

There are several benefits in forming a company. Two benefits are:

- (1) [Limited liability](#): In the case of other forms of businesses, owners share in the losses of the business and are held personally liable to creditors. In the case of a company, the company is liable to its creditors. As mentioned above, owners will be liable in instances where they signed as a surety or in the case of directors, where there is fraudulent trading.
- (2) [Perpetual succession](#): if an owner dies or sells out, the company continues to exist. In the case of a partnership, if a partner dies, a partnership (subject to some exceptions), would automatically terminate.

1.3. ARE THERE OTHER FORMS OF BUSINESSES?

Yes. In South Africa you also have the option of a partnership and a public company.

1.4. IS IT DIFFICULT TO FORM A COMPANY

No. A company can either be incorporated from scratch or a shelf company can be purchased. It's inexpensive and easy to form.

1.5. ARE THERE RISKS

- (1) Yes. As with all business. Every owner needs to consider several factors, these include *inter alia*: (1). [Regulatory Compliance](#) – licenses, Tax, BEE & Labour Law; (2). [Lawsuits](#) - by the company against a customer for default, or against a supplier or against the company for default by a third party; (3). [Financial Loss](#) - default by customers; (4). [Theft of Intellectual Property](#); (5). [Unlawful disclosure of confidential information](#); (6). [Unforeseen](#)

circumstances – political uncertainty/ strikes/ war/ exchange rates/ water shortages/ land reform; and (7). Cyber risks.

- (2) HOW TO ENSURE YOUR SUCCESS – know your risks and prevent or mitigate as far as possible. How – Have your contracts in place, have favourable contract terms, back to back contracts or additional insurance policies. CH Legal provides risk mitigation and prevention solutions.

1.6. HOW TO FORM A COMPANY

(1) **The Memorandum of Incorporation & a Shareholders Agreement**

- (2) As mentioned above, a company is a juristic person. Accordingly a separate “organisation” needs to be formed. This is different to a partnership, which is formed only by contract.
- (3) The Companies Act, 2008 sets out the process for registering a company. When the new Companies Act 2008 was enacted in 2011, the old Memorandum and Articles of Association as we knew it, was done away with. The Companies Act, 2008 now provides that all companies must have a Memorandum of Incorporation (MOI).
- (4) This MOI incorporates specific sections of the Companies Act, 2008. These sections include provisions which are referred to as “alterable provisions” and “unalterable provisions”. In the case of “unalterable provisions”, a provision in a shareholders’ agreement which is in conflict with this unalterable provision will be super-ceded by the MOI and would be void. An unalterable provision would include for example a 75% resolution in the case of a decision to liquidate the company. This therefore protects minority shareholders and cannot be altered.
- (5) The “alterable provisions”, on the other hand can be altered. This would include for example, a change to the notice period requirements to call a meeting or funding of a company.
- (6) As a company needs to be registered in the Company’s office – CIPC (<http://www.cipc.co.za/>), the “MOI” is also registered. This means that the MOI is a public document and is open to the public.
- (7) When structuring a deal, although we cannot contract out of legislation, owners of businesses prefer to keep their contract dealings private, to the extent possible. Therefore, where alterable provisions can be amended, eg intellectual property, funding by shareholders, a shareholders agreement will be signed.

1.7. PROCESS TO FORM A SHELF COMPANY

- (1) Reserve & Change of name
- (2) Amendment of memorandum Register amendment in Companies Office
- (3) Shareholders Agreement
- (4) Change of registered office
- (5) Change of location of company records
- (6) Change of directors

- (7) Change of year end

1.8. NEED TO CONSIDER:

- (1) Companies Act (Shareholders Agreement & Rights & Duties of Parties)
- (2) Employment Contracts & Labour Law (<http://www.labour.gov.za/DOL/legislation/acts/labour-relations/labour-relations-act>)
- (3) Business Terms & Conditions
- (4) Supplier Contracts (ensure KPIs)
- (5) Sub-Contractor Agreements
- (6) Licenses (Compliance)
- (7) Intellectual property (Protect)
- (8) Confidential Information
- (9) Tax <https://www.gov.za/documents/income-tax-act-29-may-1962-0000>

2. CHECKLIST FOR SHAREHOLDERS AGREEMENTS

WHAT FOLLOWS BELOW ARE THE GENERAL TERMS OR CHECKLIST FOR A SHAREHOLDERS AGREEMENT

NO.	ITEM	NOTE	ANSWER
1.	DETAILS OF THE PARTIES	<ul style="list-style-type: none"> • Details of parties as shareholders <i>[Names, Identity Numbers and addresses of each shareholder]</i> • Details of directors, if the same, mark as same. • In respect of directors, I require copies of identity docs <i>[Please see Note attached to this checklist for requirements in respect of identity docs]</i> 	
2.	PURPOSE OF COMPANY/ BUSINESS	<ul style="list-style-type: none"> • A joint venture is formed as parties wish to combine their resources for mutual benefit • What is this object or business to be conducted by the company 	
3.	DETAILS OF COMPANY	<ul style="list-style-type: none"> • Will a new company be incorporated, or an existing company be used [I use a company called Company Partners to attend to my shelf company and change of details etc. They charge R1 000.00 for a shelf company with 	

		<p>change of details) – Please advise if we need to instruct them</p> <p>[See Note attached regarding requirements to instruct Company Partners and special resolution required]</p> <ul style="list-style-type: none"> • <u>What is the name of the company</u> • If using an already incorporated company, what is the <u>registration number</u> • If an existing company, I need a copy of the <u>Memorandum of Incorporation</u> (details of parties to existing company must be changed at CIPC as well) • <u>Where will the business be based</u> (registered office) • <u>What is theal year end</u> • <u>Details of bank account</u> • <u>Who has signing power</u> • As a Note of BEE, if the company's annual turnover is less than R10 million, the company is an automatic BEE contributor level 4. I prepare the affidavit for my clients for BEE. Please advise if you require a BEE affidavit. 	
4.	CONDITIONS PRECEDENT	<ul style="list-style-type: none"> • Identify if there are any conditions precedent • Relevant licences or approvals • Third party consents to participate in the joint venture 	
5.	TAX CONSIDERATIONS	<p>Consider what is the optimal joint venture structure from a tax perspective ie:</p> <ul style="list-style-type: none"> • How will payments from the joint venture to the parties be taxed (for example dividends, distributions, interest, intellectual property royalties) • Will there be any on-going supplies between the parties and the joint venture, such that VAT issues may arise • <u>Do we need to register the company for VAT</u> • In respect of income tax, if we acquire a shelf company from Company Partners, the service includes tax registration for income tax 	

6.	CONTRIBUTIONS OF THE PARTIES	<ul style="list-style-type: none"> • <u>What will each party be contributing to the business –money (investor), skills, services, assets, IP</u> • <u>How will contributed assets be valued</u> • How will adjustments be made for any shortfall or excess in relation to any contributor's proportionate funding obligation • <u>If contribution is skill or assets – what happens if party wants to exit joint venture or joint venture terminates</u> • 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 • 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 	
7.	SHAREHOLDING	<ul style="list-style-type: none"> • <u>How will ownership interests in the joint venture be held? I.e. Equally or in proportion to contribution</u> • <i>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 & C get equal shareholding</i> 	
8.	INTELLECTUAL PROPERTY	<ul style="list-style-type: none"> • <u>Are any intellectual property rights to be contributed by any of the parties to the joint venture? Should they be licensed or transferred outright</u> • Who will own any new intellectual property rights developed by the joint venture and (if any) by the joint venture parties • 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 	
9.	EMPLOYMENT MATTERS	<ul style="list-style-type: none"> • <u>Will employees be employed</u> • <u>Who is liable to the employees</u> 	
10.	FINANCING (Working Capital) <ul style="list-style-type: none"> • Offices/telephone/equipment 	<ul style="list-style-type: none"> • <u>In what proportions and how, if at all, will the parties provide initial finance to the joint venture</u> 	

	<ul style="list-style-type: none"> • Staff • Marketing 	<ul style="list-style-type: none"> • How much will be provided from third party sources (for example banks), if at all • 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 • 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 • 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 	
11.	<p>MANAGEMENT & DECISION MAKING</p> <p>In this regard:</p> <ul style="list-style-type: none"> • Day to day • Important decisions 	<ul style="list-style-type: none"> • <u>How will decisions be made, eg Hiring of employees, Business plan, Marketing, Bank accounts, Expenses (small – day to day)</u> • Will decisions be by majority or unanimity • Will the chairman have a casting vote • Will the parties' respective decision-making rights be reduced or curtailed if their respective ownership interests are reduced • What will be the structure for decision making • How frequently will meetings of the joint venture parties or its decision-making organs be held • What will be the quorum for such meetings • To what extent will powers over mundane and day-to-day decision making be delegated to an executive team • How is the executive team appointed, replaced, etc • 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 • What protections exist for minority participants 	
12.	<p>DEADLOCK (NB)</p> <p>If 50/50</p>	<ul style="list-style-type: none"> • <u>What happens if the parties disagree on decisions? Will business come to an end</u> 	

		<ul style="list-style-type: none"> • Will deadlock issues be resolved: <ol style="list-style-type: none"> (1) By discussion between senior executives of the parties - and what happens if they cannot agree (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 (3) By conferring rights of termination • What rights will any party have on a deadlock (which is not resolved by any other means): <ol style="list-style-type: none"> (1) To require the termination or dissolution or winding-up of the joint venture (2) To require other parties to purchase its interest or to buy out the interests of other parties (and if so, on what terms) 	
13.	DUTIES OF THE PARTIES	<ul style="list-style-type: none"> • <u>What legal duties do the parties have to each other and to the joint venture</u> • Are the parties prevented from competing with the joint venture: <ol style="list-style-type: none"> (1) During the joint venture (2) For a period after termination • What are the parties' expectations in respect of their role in the joint venture • The management structure should reflect these expectations 	
14.	HOW WILL PROFITS BE SHARED /DIVIDENDS	<ul style="list-style-type: none"> • If there is a loan by a party, it can be agreed that this is paid before any dividends is declared 	
15.	TRANSFER OF INTEREST	<ul style="list-style-type: none"> • If contribution is skill or assets – what happens if party wants to exit joint venture or joint venture terminates • 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 • 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 • How will joint venture interests be valued for the purposes of any transfer provisions 	

16.	TERMINATION	<ul style="list-style-type: none"> • If the joint venture terminates, how will the assets/income be distributed (if there is a loan, it can be agreed that the loan must be paid first) • Are there any circumstances in which the joint venture will automatically terminate, for example: <ol style="list-style-type: none"> (1) The loss of any regulatory approval (2) The loss of an asset (3) The insolvency of any party (4) The transfer of any party's interest (5) Deadlock <p>NOTE: 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>	
17.	EXIT MECHANISMS	<ul style="list-style-type: none"> • What exit mechanisms will be agreed • What is the effect if one party subsequently leaves the joint venture in relation to: <ol style="list-style-type: none"> (1) Assets or other rights leased by it to the joint venture; and (2) Contracts entered into by it with the joint venture 	
18.	VALUATION OF INTERESTS	<ul style="list-style-type: none"> • 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 • Who decides the valuation: Should it be left entirely to a third-party expert (for example an auditor or independent accountant) 	
19.	Other Agreements	<ul style="list-style-type: none"> • Confidentiality agreements 	

3. SCHEDULES: CIPC NOTES AND RESOLUTION

2x Documents are required for shelf company and/or to change any details at CIPC

(1) ID DOCUMENT/S or PASSPORT/S (only for non-South Africans)

We need a Certified Copy of the Company's Directors' ID or Passport. To avoid any delays, please read carefully through the Government's Requirements and follow them EXACTLY as requested:

- Clear and Color: Please make sure your ID copies are CLEAR and COLOR copies to avoid any delays. **Faces MUST be clearly visible.**
- Certified: These ID copies must be certified - Stamped by a Police Station or Commissioner of Oaths only (the Post office is not accepted). Important: **The Full Name, Surname as well as the Signature** of the Commissioner of Oaths MUST be clearly visible on all certified ID / Passport copies.
- Dated: The Police Station / Commissioner of Oaths Stamp must be **dated within the last 2 months** and the date must be **CLEAR**.
- Over 18: All Directors must be 18 years or older.
- All Directors: If there are more than one Director we require an ID for each Director.
- SMART CARD ID's: These ID's must be copied both sides on one page and then certified.
- SA Citizens: Must provide an ID Document Copy only,
- Foreigners: Must provide a Passport Copy only.
- Asylum Seeker: No Asylum Seeker Documents will be Accepted.

(2) CIPC Permission Form

Please print and sign our CIPC's Permission Form. Important: We require each Director to complete and sign his / her own form. Note the important facts of this document:

- CIPC Requirement: We require this document to represent you at CIPC for this service only.
- Complete: Then complete, print, date and sign this document and email it back to us, or upload in your online panel.

CIPC Permission Form (SPECIAL POWER OF ATTORNEY AT CIPC)

Service _____	Number:
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SPECIAL POWER OF ATTORNEY FOR REGISTRATION OF A NEW COMPANY ONLY

I or we, the undersigned and Incorporator(s) and new Directors hereby nominate, constitute and appoint **Company Partners, Ilana Steyn and Agents** with the full power of substitution, to be my / our lawful attorney and agent in my / our name, in place and instead to register a new Company on my / our behalf.

- To apply for, and obtain the registration of the new Company under the Companies Act of the Republic of South Africa 71 of 2008, as per the submitted information to PtyCompanyRegistration.co.za through their online company registration process, and to sign on my / our behalf if required.
- To incorporate the new company above (on behalf of the incorporators) and appoint myself / us as the Director(s).
- To apply for and obtain the new Company Name and Registration Certificate for a Local Private Company (COR 14.3) under the Companies Act of the Republic of South Africa 71 of 2008, and to sign on my / our behalf.
- To sign on my / our behalf and to deliver to the Registrar of Companies (CIPC) the following documents for the registration of the new Company:
- Notice of Incorporation (CoR 14.1)
- Memorandum of Incorporation (MOI) (CoR 15.1A)
- Any other documents / forms which might be required for the registration of the new Company with CIPC and the obtaining of the Registration Certificate for a Local Private Company.
- To uplift the new Company registration documents from CIPC and send it to the Owners of the new Company.
- To act as the proxy regarding with future communication between your new company and CIPC. Our email address and phone number will be used as the 'director's contact details' to enable us to register your company without any communication problems.

I / we also indemnify **Company Partners**, as well as the individual to whom I / we give limited power of attorney, against any claims, loss, damage or liability arising from delay or errors occurring in the registration process.

YOUR PREFERRED **COMPANY NAME**: " _____ "

(Please note CIPC Registrar: the above name matches the first name choice according to the attached CoR9.4 document)

	Full Name and Surname	ID Number	Signature	Date
1.				
2.				
3.				
4.				

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Please make the subject line of your email your reference code **SERVICE NUMBER**.