LAW AND PROCEDURE OF CORPORATE MEETINGS IN MALAWI

Allan Hans MUHOME
THE LAW AND PROCEDURE
OF
CORPORATE MEETINGS
IN
MALAWI

Allan Hans Muhome
MBA, LLB (Hons) (Mw)
Commercial Law Specialist
January 2019

Published in Malawi by Allan Hans Publishers ©

Telephone: +265 888 304 274

e-mail: tmuhome@gmail.com

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Dedicated to

Patricia-Mary, Francisca-Naphiri, Eugene-Ekari and Gabriella-Okota
PREFACE

Meetings are held to provide an opportunity to communicate information and opinions, and to make decisions. Company Law relies heavily on meetings as a mode of decision-making. Until recently, much of the law on corporate meetings was governed by the Companies Act of 1984.

On 31 August 2016, the Companies Act 2013 came into force, repealing and replacing the Companies Act of 1984. With it, has come a large body of regulations and various Corporate Governance requirements, relating to corporate meetings.

It is against this background that we found it necessary to publish this modest contribution particularly focusing on the overreaching changes that have been brought about by the 2013 reforms on corporate meetings in Malawi.

For instance, private companies are now exempted from holding an Annual General Meeting and need not have a Company Secretary. In addition, companies can now hold virtual meetings. Creditors’ meetings are now better regulated under the Insolvency Act 2016. Service of various notices can now be achieved electronically. Rules in relation to conflict of interest have been expounded in order to afford better protection to stakeholders. Most of all, voting procedures and decision making processes in a company have now been streamlined with clearer roles assigned to the Chairperson, Directors and Shareholders.

This Book is the first of its kind on corporate meetings in Malawi. It is aimed at addressing the needs of students, investors and Corporate Law Practitioners - lawyers, accountants and auditors, alike. Those serving as
Directors as well as Company Secretaries will certainly find this book to be exceptionally useful.

The material in the Book is drawn from legislation, court cases and works of eminent authors; more importantly, from practice as much of the law on meetings is ‘unwritten.’ For neutrality, we have used the term ‘Chairperson’ rather than ‘Chairman’ as provided for in the legislation.

In order to enrich knowledge, we have taken opportunity to dwell on other Corporate Governance concepts outside meetings. Such include corporate social responsibility, ethics, Board induction, training and evaluation.

We take this opportunity to thank all that have contributed to this effort; my wife Patricia, my children Francisca-Naphiri, Eugene-Ekari and Gabriella-Okota for the extended hours spent away from home; Ms Rosaria-Klerani Muhome for typing the manuscript and Mrs Zunzo Mitole, Mrs Maureen Kachingwe, Mr Francis M’mame and Mr Pempho Likongwe for their insightful contributions. I say God bless you all!

**Allan Hans Muhome**

Mpemba, Blantyre

1st January 2019

+265 888 304 274

tmuhome@gmail.com
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Union Music Ltd v Watson [2003] 1 BCLC 454
Wagner v International Health Promotions (1994) 15 ACSR 419
Welton v Saffery [1897] AC 299
Wise v Landsell [1921] 1 Ch 420
Woonda Nominees Pvt Ltd v Chng (2000) 34 ACSR 558
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<tr>
<th>Abbreviation</th>
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<tr>
<td>AC</td>
<td>Law Reports, Appeal Cases</td>
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<td>Annual General Meeting</td>
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<td>Chief Executive Officer</td>
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<td>ChD</td>
<td>Law Reports, Chancery Division</td>
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<td>Com.</td>
<td>Commercial</td>
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<td>CSR</td>
<td>Corporate Social Responsibility</td>
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<td>Institute of Chartered Accountants in Malawi</td>
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<td>Reserve Bank of Malawi</td>
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<td>RSA</td>
<td>Republic of South Africa</td>
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<td>SADC</td>
<td>Southern African Development Community</td>
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<td>SOC</td>
<td>State Owned Company</td>
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<td>USA</td>
<td>United States of America</td>
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<td>UK</td>
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1. THE CONSTITUTION OF A COMPANY

1.1 The Constitution

Every club, society or association needs a constitution or set of rules to regulate the way the business of the association is conducted. The registered company is no different and its constitution is contained in two documents, the Memorandum of Association and the Articles of Association.\(^1\)

1.2 Memorandum of Association

The Memorandum of Association consists of rules that govern the relationship between the company and outsiders. It provides for the name of the company, Registered Office, type of company and capital, among other things.

1.3 Articles of Association

Articles of Association are rules for internal management of a company. This document will contain the basic regulations for the management of the company. It covers such matters as the issue and allotment of shares, the calls on shares, the rules relating to the transfer of shares, the procedures to be followed at General Meetings and the regulations relating to members voting, the appointment, removal and powers of Directors, the payment of dividends and the capitalisation of profits.

\(^1\) Section 33(1) of the Companies Act 2013.
1.4 Registration of the Constitution

When registering a company, the Application Form\(^1\) is filed together with the Memorandum of Association and Articles of Association. These documents remain open for public inspection. Together, they form the complete constitution which must be consistent with the provisions of the Companies Act 2013 and other written law.\(^2\)

Annex 1: Prescribed Forms

1.5 Relationship between the Memorandum and the Articles

Of the two documents, the Memorandum is the more fundamental both because of its content and because, if conflict arises between the terms of the Memorandum and the Articles, the Memorandum takes precedence.\(^3\)

1.6 The Contractual Effect of the Constitution

The constitution of a company has the legal effect of a contract firstly as between the company and each member or shareholder; secondly as between the members or shareholders themselves and not outsiders.\(^4\) This means that both the company and members have individual rights and obligations such that failure to comply with the Memorandum and Articles amounts to breach of contract entitling the injured party to sue.

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\(^1\) See Companies Regulations 2017 – Form 1 – see also Annex 1 herein.

\(^2\) Section 33(2) of the Companies Act 2013.

\(^3\) *Welton v Saffery* [1897] AC 299.

\(^4\) Section 33(3) of the Companies Act 2013.
1.7 Shareholders’ Agreement

The Companies Act 2013\(^1\) provides for an option for shareholders to execute a Shareholders’ Agreement. The Agreement operates as a binding contract and deals with the rights and duties of members of a particular company to which it applies. It may be made by all members of the company, or be limited to a portion of them.

The benefits of a Shareholders’ Agreement include its privacy as compared to the constitution which is available for public inspection.\(^2\) It is also believed that a Shareholders’ Agreement is generally cheaper and less formal to form, administer, revise or terminate thereby providing greater flexibility to shareholders.

1.8 Alteration of the Constitution

The important point to appreciate is that any member of a company enters into a contract, the terms of which may be amended by the company in a General Meeting at any time in the future by passing a special resolution.\(^3\)

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\(^1\) Section 33(5).
\(^2\) Section 12 of the Companies Act 2013.
\(^3\) Section 35 of the Companies Act 2013. See Companies Regulations 2017 – Form 6 – and see also Annex 1 herein. See also Shuttleworth v Cox Brothers & Co (Maidenhead) Ltd [1927] 2 KB 9, where the articles were validly amended requiring a lifetime Director to resign if all directors required him to do so.
1.9 Provision of Constitutional Documents to Members

The Companies Act 2013 grants a right to members of a company to request their company to provide them with electronic or hard copies of the company’s constitutional documents. Such documents may include:-

(a) An up-to-date copy of the company’s constitution;

(b) Copies of any resolutions or agreements relating to the company’s constitution that are for the time being in force;

(c) Copies of any Court order sanctioning a compromise agreement facilitating a reconstruction or take over;

(d) Copies of the certificate of incorporation; and

(e) Copies of the statement of capital and in the case of a company limited by guarantee, a copy of the guarantee statement.¹

¹ Section 36(1) of the Companies Act 2013.
2. TYPES OF COMPANIES

2.1 Private Limited Liability Company

The Companies Act 2013\(^2\) defines a private limited liability company as one that firstly consists of a minimum of one person\(^3\) and a maximum of fifty persons\(^4\) and secondly its constitution prohibits it from offering any of its securities to the public.\(^5\)

2.2 Public Limited Liability Company

The Companies Act 2013\(^6\) defines a Public Limited Liability Company as one that firstly, consists of a minimum of three members, secondly, its constitution permits offering its securities to the public\(^7\) and lastly its constitution permits the transferability of its securities.\(^8\) It is important to

\[\text{\textsuperscript{1}}\text{ For more details, see Muhome A, \textit{Company Law in Malawi}, Assemblies of God Press (2016) p.43.} \]
\[\text{\textsuperscript{2}}\text{ Section 23(1).} \]
\[\text{\textsuperscript{3}}\text{ Section 2 of the Companies Act 2013 defines a ‘one-person company’ as a private company in which the only shareholder is also the sole Director; and this does not include a company in which the only shareholder is a company.} \]
\[\text{\textsuperscript{4}}\text{ See also section 63(1) of the Companies Act 2013.} \]
\[\text{\textsuperscript{5}}\text{ See also section 64 of the Companies Act 2013.} \]
\[\text{\textsuperscript{6}}\text{ Section 24.} \]
\[\text{\textsuperscript{7}}\text{ As to the meaning of a public offer – see sections 258 and 259 of the Companies Act 2013 and for the requirements of a prospectus see s 260 of the Companies Act 2013.} \]
\[\text{\textsuperscript{8}}\text{ Securities are not defined in the Companies Act 2013 but in section 2 of the Securities Act 2010 and they include shares, debentures, stocks, bonds, notes or funds issued by a government or a body corporate; any warrant, right, option or interest, whether described as units or otherwise, in respect of any shares, debentures, stocks, bonds, notes or funds as well as any instrument, including a derivative instrument, contract, profit-sharing agreement, fractional interest, right to subscribe or any instrument commonly known as securities or which are prescribed by the Registrar to be securities for the purposes of the Securities Act. In \textit{Auction Holdings Ltd v Hara and Others} MSCA Civil Appeal Case No. 69 of 2009, the MSCA upheld the High Court judgment (Com. Cause No. 130 of 2009).} \]
note that all companies registered on the stock exchange are public limited companies. However, not all public limited liability companies are registered on the stock exchange.\(^1\)

### 2.3 Company Limited by Guarantee

The Companies Act 2013\(^2\) defines a Company Limited by Guarantee as one which is formed on the principle of having the liability of its members limited by its constitution to such amount as the members may respectively undertake to contribute to the assets of the company in the event of its being wound up. The company is formed for the sole purpose of operating as a charity or as a not for profit organisation. This company does not make any distributions.\(^3\)

### 2.4 State Owned Companies (SOC)

A SOC is a company controlled by the Government.\(^4\) The provisions in the Companies Act 2013 pertaining to public companies do apply to all SOC,\(^5\) much as the Minister may, where appropriate, exempt SOC from the provisions of the Companies Act 2013.\(^6\)

\(^\text{\textsuperscript{1}}\) Such as Auction Holdings Ltd - see *Auction Holdings Ltd v Hara and Others* MSCA Civil Appeal Case No. 69 of 2009.

\(^\text{\textsuperscript{2}}\) Section 25.

\(^\text{\textsuperscript{3}}\) Section 37 of the Companies Act 2013.

\(^\text{\textsuperscript{4}}\) Section 26(1) of the Companies Act 2013.

\(^\text{\textsuperscript{5}}\) Section 26(2) of the Companies Act 2013.

\(^\text{\textsuperscript{6}}\) Section 26(3) of the Companies Act 2013.
2.5 Holding (Parent) and Subsidiary Companies

‘Holding and subsidiary’ companies are relative terms. A company is a holding of another only if the other is a subsidiary. A holding company firstly, controls the composition of the Board of the subsidiary company. Secondly, the parent is in a position to exercise, or control the exercise of, more than one-half of the maximum number of votes that can be exercised at a shareholders’ meeting. Thirdly, the parent holds more than one-half of the issued shares of the subsidiary company’s.¹

2.6 Dormant Companies

A dormant company is not necessarily a type of company but a state into which any company may transform into. A ‘dormant company’ means that a company is ‘dormant’ during any period in which it has no significant accounting transaction.² A company may be dormant from the time of its formation;³ or by passing a special resolution to that effect.⁴ A company formed for the business of banking or insurance is prohibited from declaring itself a dormant company.⁵

¹ Section 2 of the Companies Act 2013.
² See also section 354(1)(a) of the Companies Act 2013.
³ Section 355(1)(a) of the Companies Act 2013.
⁴ Section 355(1)(b) of the Companies Act 2013.
⁵ Section 355(2) of the Companies Act 2013.
2.7 Foreign Companies

A foreign company is considered as a company incorporated outside Malawi but which has a place of business or is carrying on business in Malawi.\(^1\) Such a company may be registered as a foreign company in Malawi.\(^2\)

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\(^1\) See section 357 of the Companies Act 2013.

\(^2\) The procedure for its registration is covered in section 360 of the Companies Act 2013.
3. DEFINITION AND TYPES OF MEETINGS

3.1 Definition of a Meeting

At common law, a meeting may be defined as ‘the coming together of two or more people with a common intent or purpose with a view to transacting business.’¹ The ‘coming together’ originally implied that there had to be a physical assembly although there was no need to limit the assembly to one place, for instance, a procession could easily satisfy the definition. In all respects, the ‘common intent or purpose’ must, of course, be lawful.²

The traditional view of what constitutes a meeting has evolved over time with the advancement of technology. Physical presence is no longer an essential element to prove that there is a valid meeting. This is proven by the change of Court’s attitude in deciding what amounts to a valid meeting. The case of Byng v London Life Assurance Limited³ marked the changes in the concept of ‘meeting’. In this case, a General Meeting of London Life Assurance was held in few separate rooms connected by electronic audio-visual aid. The Court held that the same constituted a meeting.

The word ‘meeting’ has therefore been extended to mean ‘meeting of mind’.⁴ In Wagner v International Health Promotions,⁵ a Board Meeting

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² Under section 71(2) of the Penal Code, Cap 7:02 of the Laws of Malawi, it is an offence for three or more persons to meet with unlawful intent, such as to commit a crime or commit breach of peace. See also Bande L, Criminal Law in Malawi, Junta (2017) p. 364.
³ [1990] 1 Ch 170. See also the decision of the Federal Court of Australia in Re GIGA Investments Pvt Ltd (1995) 17 ACSR 472.
⁵ (1994)15 ACSR 419.
held through telephone was held to fall within the Articles that provided for ‘the Directors meeting together.’ The words ‘meet together’ connote a ‘meeting of mind made possible by modern technology and not of bodies’.1

3.2 Board and Shareholders’ Meetings

According to Salomon v Salomon,2 once a company is incorporated it becomes a separate legal entity. There are two primary decision making bodies within a company, the General Meeting of shareholders and the meeting of the Board of Directors. Rules and procedures pertaining to both meetings are discussed throughout this Book.

3.3 Annual General Meeting

An Annual General Meeting (AGM) is a shareholders’ meeting that takes place each year. In the past, it was mandatory of each company to hold an AGM.3 Nowadays private companies may resolve not to hold meetings.4 The AGM is therefore mandatory for public companies only.5

It has been argued that although AGMs are compulsory for public companies, these meetings are in practice the least successful in terms of providing an opportunity for membership to discuss company business.6 There are several reasons to this. First, the members of most listed

1 Ibid p. 421-422.
2 [1897] AC 22.
3 Section 104 of the Companies Act 1984.
4 See section 66 of the Companies Act 2013. See also Order 2 and 3(1) of the Companies (Shareholder’s Code of Conduct) Order, 2016 - Part A of the Schedule on Code of Conduct for Shareholders of a Private Company.
5 See Order 2(1) of the Companies (Shareholder’s Code of Conduct) Order, 2016 - Part B of the Schedule on Code of Conduct for Shareholders of a Public Company.
companies are very widely dispersed throughout the world and most find it impractical to attend a meeting. Even within Malawi, a shareholder will rarely travel from one city to another just to attend the AGM. Second, because of this, all questions to be voted on at meetings are decided beforehand by members who appoint proxies to vote for them. Third, up to 80 percent of the shares of a listed company, at least in the UK, will be held by financial institutions such as pension funds, insurance companies and investment companies, which rely on personal discussions with the company’s Directors (who are usually their nominees) to inform themselves of the company’s affairs. This has agitated for abandoning AGMs altogether. However, there is currently little support for this radical change. This indicates that public companies shall continue to hold AGMs for the foreseeable future.

3.4 Class Meetings

A registered company is permitted to create different classes of shares by attaching certain rights or restrictions to some of its shares. Classes of shares may include ordinary shares, preference shares, deferred shares, employee shares, redeemable shares, treasury shares and bonus shares. Members of a particular class may therefore hold meetings called class meetings and the presence of ‘strangers’ will invalidate the meeting unless members of the class have acquiesced to such presence. Rules regulating class meetings will be found in the company’s constitution.

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1 Similar trends have been observed on the MSE as well as in RSA on the Johannesburg Stock Exchange – per King III Institute of Directors in Southern Africa 2009 p. 9.
3 See section 84(3) of the Companies Act 2013.
4 For the definition of the classes of shares - see Muhome A, Company Law in Malawi, Assemblies of God Press (2016) p. 140.
5 Carruth v Imperial Chemical Industries (1937) AC 707.
Where the constitution does not provide for such rules, rules applicable to any shareholders’ meeting will apply with necessary adjustments.¹

Creditors with variant rights may also hold class meetings. This means that class meetings should be understood as meetings of a grouping of similar rights within a larger association.

### 3.5 Extraordinary Meetings

Circumstances may arise when there is some urgent business that needs to be attended to but the company has not planned to hold a shareholders’ meeting. In that case, Directors or shareholders will call for an extraordinary meeting in keeping with the company’s constitution. For public companies, any Director has statutory power to call for a General Meeting.² The Director’s power to call for a meeting is a fiduciary power which must be exercised by the Directors bona fide in what they consider is the interest of the company and not for collateral purposes³.

### 3.6 Requisitioned Meetings

Members of a public company may requisition a General Meeting from the Directors.⁴

Members that may make the requisition include:–

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(1) Where share capital is present, members representing at least ten per cent of such of the paid-up capital of the company as carries the right of voting at General Meetings; or

(2) In the case of a company not having a share capital, members who represent at least ten per cent of the total voting rights of all the members having a right to vote at General Meetings.\(^1\)

Contents of the requisition include the following:-

(a) The general nature of the business to be dealt with at the meeting i.e. agenda;\(^2\)

(b) The proposed text of the intended resolution, provided that the same is not inconsistent with any enactment or the company’s constitution. It should also not be defamatory of any person or be frivolous or vexatious.\(^3\)

The requisition may be in electronic or hard copy format and must be signed by the persons making it.\(^4\)

Once the members of a company have requisitioned for a General Meeting, the Directors are obliged to call for the meeting within twenty one days from the date of receipt of the requisition and the meeting must be held on a date not more than twenty eight days after the date of the requisition.\(^5\)

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1 *Ibid* Order 5(2).
2 According to *Ball v Metal Industries Ltd* 1957 SC 315, members other than the requisitionists have a right to have business put on the agenda, but Directors who convene the meeting may put their own business on the agenda.
notice convening the meeting. Directors must also comply with the required notice for any resolutions as may be provided in the Code or in the company’s constitution.

Note, however, that if the objects for which a meeting is requisitioned cannot be legally carried into effect in any manner, the Directors are justified in refusing to act on the requisition and the requisitionists cannot convene the meeting themselves following such a justified refusal. If one of several objects cannot be legally effected then the Directors are justified in omitting that object from the notice of the meeting to consider the other objects, but they must convene the meeting to consider the other objects.

Where Directors of a company fail or neglect to call for a General Meeting as discussed above, then the members who requisitioned for the meeting or any of them representing more than one half of the total voting rights of all of them, may themselves call for a General Meeting. Such a meeting must be on a date not more than three months after the date on which the Directors received the requisition to call for the meeting whilst complying with all requirements as if it was called by the Directors.

1 Ibid Order 6(1).
2 Ibid Order 6(2).
6 Totally and Incapacitated Veterans’ Association of NSW Ltd v Gadd (1998) 28 ACSR 549.
7 Order 7(1) of the Companies (Shareholder’s Code of Conduct) Order, 2016 - Part B of the Schedule on Code of Conduct for Shareholders of a Public Company.
8 Ibid Order 7(2) and (3).
Reasonable expenses incurred by the members who call for such a meeting are reimbursable by the company.¹

In Canada, it has been held that, pending the holding of a requisitioned meeting, there is no rule to preclude the Directors from exercising their powers in such a way as to render nugatory the stated purpose of the requisitionists, provided the Directors are not otherwise abusing their powers.² In Australia, though, it has been suggested that Directors in this situation are ‘caretaker Directors’, who must maintain the status quo pending the members’ decision.³ The Court will not order members to reconsider their requisition in the light of changed circumstances.⁴

3.7 Physical and Virtual Meetings

Previously, it was assumed, for the most part, that a company had to conduct meetings by physical presence.⁵ The business of the meeting was despatched in writing to all participants within the stipulated time-frames and a time called for the physical meeting.⁶ As a matter of fact, the Courts were unwilling to accept that a telephone conversation, lacking a visual link, could be a meeting.⁷

In contrast, the technological advances that have occurred, especially in recent years, have created a somewhat unnecessary burden to gather physically. It will be appreciated that electronic meetings offer a low cost

¹ Ibid Order 7(4).
² See Shield Development Co. Ltd v Snyder [1976] 3 WWR 44.
⁴ Rose v McGivern [1998] 2 BCLC 593.
⁵ Under the Companies Act 1984.
and borderless medium of communication. Hence, shareholders’ rights to participate may be enhanced.¹

The whole scheme under the 2013 Company Law reform encourages electronic dealings which includes virtual or electronic meetings,² unless the same are specifically restricted by the company’s own constitution. Electronic presence at a meeting can be achieved via teleconferencing, video conferencing or even via chat or messenger functions that are operated via computers or on smart phones.

In some jurisdictions, such as Australia, Directors can use video or other technology to take part in a meeting even if they are physically somewhere else as long as all directors consent to this.³ However, Directors who do this should ensure that they have all the necessary documents available to them to allow them to be properly informed to take part in the decision-making.⁴

3.8 Creditors’ Meetings

A Creditors' Meeting is a form of a statutory meeting. It is a meeting of persons who are owed certain monies by a company which is undergoing liquidation or an individual who is undergoing bankruptcy. The usual purpose of such meetings is to draw up a plan for the administrator, receiver or liquidator to distribute the assets of the insolvent entity, in accordance with the prevailing laws on priorities. The

⁴ ASIC v MacDonald (No. 11) (2009) NSWSC 287.
conduct and procedures of Creditors Meetings are governed by the Insolvency Act 2016 and Insolvency Rules 2017.¹

3.9 Meetings Sanctioned by a Court Order

The High Court may on its own motion or on the application a Director or a member who would be entitled to vote at the meeting, order for a meeting of a company to be called, held and conducted in any manner that the Court shall deem fit.²

The power of the a Court under this section are exercised where, for any reason it is impracticable to call for a meeting of a company in any manner in which meetings of that company may be called or as prescribed by the company’s constitution.³

A meeting called, held and conducted in accordance with such a Court order is, for all intents and purposes, deemed to be a shareholders’ meeting duly called, held and conducted.⁴

The power has been used to remove practical obstacles. For example, in Edinburgh Work-men’s Houses Improvement Co. Ltd ⁵ the company had 54 members who were widely scattered geographically. Its Articles required 13 members present in person to form a quorum at a General Meeting. To enable the company to effect a reduction of capital, the Court ordered extraordinary General Meetings to be summoned at which five

1 See sections 34 and 210 of the Insolvency Act 2016
2 Order 8(1) of the Companies (Shareholder’s Code of Conduct) Order, 2016 - Part B of the Schedule on Code of Conduct for Shareholders of a Public Company.
3 Ibid Order 8(2). For the meaning of ‘impracticable’ see Re El Sombrero Ltd [1958] Ch 900.
4 Order 8(3) of the Companies (Shareholder’s Code of Conduct) Order, 2016 - Part B of the Schedule on Code of Conduct for Shareholders of a Public Company.
5 1935 SC 56.
members present in person would form a quorum. In Re Beckers Pvt Ltd,\(^1\) one member died, leaving only two members to attend General Meetings for which the quorum was three. The Court ordered a meeting whereat two members would form a quorum.\(^2\)

Minority members of a company whose presence at General Meetings is essential in order to form a quorum may deliberately stay away in order to prevent the adoption of an unwelcome resolution, for example, a resolution dismissing them from directorships. The law will not allow a minority shareholder, in such circumstances, to frustrate meetings.\(^3\)

When ordering the meeting, the Court may vary the rules which would normally apply to meetings, so as to remove a practical obstacle, whether those rules are in the company’s constitution or Shareholders’ Agreement.\(^4\) The Court must not override a class right intended to protect the interests of members of that class,\(^5\) but the mere fact that if any member does not attend there will not be a quorum at a meeting, does not mean that any member has a class right – they all have the same rights.\(^6\)

When a minority in a company is frustrating the holding of meetings, they may also be seeking a relief for unfairly prejudicial conduct of the

\(^1\) (1942) 59 WN (NSW) 206.
\(^2\) See also Masangano and Others v Masangano and Agrihort Suppliers Ltd Com. Cause No. 67 of 2014 where a general meeting was ordered by the High Court for the purposes of appointing Directors.
\(^3\) See Re El Sombrero Ltd [1958] Ch 900, Re H.R. Paul and Sons Ltd (1973) 118 SJ 166 and Re Opera Photographic Ltd [1989] 1 WLR 634.
company’s affairs.\textsuperscript{1} The Court will take into consideration the existence of such proceedings when deciding whether to order the meeting or not.\textsuperscript{2}

\textbf{3.10 Statutory and Constitutional Meetings}

Statutory meetings are those required by an Act of Parliament or subsidiary legislation. Here are a few examples:-

(a) An AGM for a public company;\textsuperscript{3}
(b) Debentures holders meeting;\textsuperscript{4}
(c) A meeting before the resignation of a one-person shareholder and Director;\textsuperscript{5}
(d) Board Meeting on discovery of insolvency;\textsuperscript{6}
(e) A shareholders’ meeting before the resignation of an Auditor;\textsuperscript{7}
(f) Shareholders’ meeting approving a merger;\textsuperscript{8}
(g) Creditors’ meeting;\textsuperscript{9}
(h) Annual meeting of shareholders and creditors;\textsuperscript{10}
(i) Trust incorporation meeting;\textsuperscript{11}
(j) A meeting by the Panel on Takeovers before enforcement.\textsuperscript{12}

\footnotesize
\begin{itemize}
\item \textsuperscript{1} Section 343 of the Companies Act 2013.
\item \textsuperscript{3} See Order 2(1) of the Companies (Shareholder’s Code of Conduct) Order, 2016 - Part B of the Schedule on Code of Conduct for Shareholders of a Public Company.
\item \textsuperscript{4} See section 126(3)(b) of the Companies Act 2013.
\item \textsuperscript{5} See section 171(1) of the Companies Act 2013.
\item \textsuperscript{6} See section 222(1) of the Companies Act 2013.
\item \textsuperscript{7} See section 244(4) of the Companies Act 2013.
\item \textsuperscript{8} See section 269(1) of the Companies Act 2013.
\item \textsuperscript{9} See sections 34 and 210 of the Insolvency Act 2016.
\item \textsuperscript{10} See section 154 of the Insolvency Act 2016.
\item \textsuperscript{11} See section 2(1)(b) of the Trustee Incorporation Rules under the Trustee Incorporation Act, Cap 5:03 of the Laws of Malawi.
\item \textsuperscript{12} Rule 45 of the Companies (Panel on Takeovers and Mergers) Rules, 2016.
\end{itemize}
By constitutional meeting, is meant a meeting sanctioned by the constitution of the company. Members of a company may create their own unique meetings, by whatever name and relevant procedures, through their respective constitutions.

### 3.11 Public and Private Meetings

Private meetings are those where only members of the body have a right to attend. Anyone who is not a member of that body has no right to participate in such meetings. Examples of private meetings are company meetings, where only registered shareholders may attend. Meetings of clubs and associations are also private. On a larger scale, meetings of the National Assembly are also private since only elected members have a right to attend and participate.¹

In certain circumstances, where it is considered expedient for the conduct of proceedings at a private meeting, non-members may be invited to attend and speak. However, they do not have the right to vote nor to be counted towards the quorum and can be asked to leave the meeting at any time.

According to Mahony,² public meetings are those to which all members of the public are invited to attend by the convenors. Sometimes persons attending a public meeting may be required to purchase an admission ticket. This does not give them an unalienable right to stay at the meeting; they may be removed at any time if they do not behave themselves. No person has a statutory right by virtue of membership to attend a public meeting. Examples of public meetings include political and non-political

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¹ See Order 219 of the National Assembly Standing Orders adopted on 22nd May 2003.
meetings, sports events, public lectures and public inquiries.\textsuperscript{1} A public meeting could be held either outdoors or inside a building.

\textbf{3.12 Language of the Meeting}

Both shareholders’ and Board Meetings are traditionally conducted in the English language.\textsuperscript{2} It is not necessary for the company to provide translation, although it is good practice to do so and this is to be encouraged. Our view is that the company should be prepared to accept a question in any official language, but may answer in the language in which the meeting is being conducted.\textsuperscript{3} The constitution may prescribe the language of the meetings. If not prescribed, usually, the choice of language is indicated at the beginning of the meeting and the Chairperson asks if anyone objects. If anyone does, the question should be decided by a vote of members present.

\footnotesize
\textsuperscript{1} For Example, the Commissions of Inquiry Act, Cap 18:01 of the Laws of Malawi, provides in section 2(e), that an inquiry may or may not be held in public, with reservation nevertheless to the Commissioners to exclude any person or persons if they deem fit for the due conduct of the inquiry, the preservation of order or for any other reason. Section 11 of the Competition and Fair Trading Act, Cap 48:09 of the Laws of Malawi, provides that ‘Hearings of the Commission shall take place in public but Hearings to the Commission may, whenever the circumstances so warrant, conduct a hearing in private.’ This is similar to meetings of the Panel on Takeovers and Mergers – see Rule 58 of the Companies (Panel on Takeovers and Mergers) Rules, 2016 and meetings of the Appeals Committee under the Financial Services Act 2010 – see section 86(2).

\textsuperscript{2} For Parliamentary proceedings, the same must be conducted in English – see section 56(5) of the Republican Constitution of Malawi, 1994.

\textsuperscript{3} After all, section 26 of the Republican Constitution of Malawi, 1994, guarantees every person the right to use the language of his or her choice.
4. NOTICE OF MEETINGS

4.1 Introduction

The principle of the law of meetings is that a majority of members voting, in person or by proxy, at a meeting can take a decision which is binding on the members who did not attend, in person or by proxy. It follows that a decision of a meeting can be valid only if everyone with the right to attend it was given notice of it and the notice was given in sufficient time, and gave sufficient details of the business to be transacted at the meeting, to enable each member to decide whether to attend.

By definition, a notice is an advice given to the member of a body that it is intended to hold a meeting at a certain place, on a specified date and time, for particular purposes as reflected on the notice.1

4.2 Who May Give Notice?

A notice of a meeting issued by a person who does not have authority to issue such notices is void and even if the meeting takes place, its decisions will be void,2 though the Court will not intervene if it is clear the decisions would have been the same had the correct procedure been followed.3 The Directors have authority to summon General Meetings4 and Board Meetings.5

2 Re Haycraft Gold Reduction and Mining Co [1900] 2 Ch 230; Re State of Wyoming Syndicate [1901] 2 Ch 431.
3 Browne v La Trinidad (1887) 37 ChD 1; Southern Counties Deposit Bank Ltd v Rider (1895) 73 LT 374; Boschoek Proprietary Co. Ltd v Fuke [1906] 1 Ch 148; Bentley-Stevens v Jones [1974] 1 WLR 638.
5 See article 8(1) of the Model Articles for a Public Company.
4.3 Entitlement to Notice

Subject to the company’s constitution, the following are entitled to the notice:-

i. Every member;¹
ii. Every Director; and²
iii. Every Auditor.³

The position is not clear whether a member, such as a preference shareholder, who is only entitled to vote on certain matters is in law entitled to notice of a meeting at which none of those matters will be discussed. It may be that, at common law, a mere restriction on the right to vote disentitles a member from receiving notice.⁴ We suggest that notice be given to all shareholders, regardless.

4.4 Member’s Request Not to be Given Notice

It has been held in the past that the proceedings of a meeting of any kind will be invalid if a member did not have notice of the meeting even if the member had indicated that he or she did not want to receive notices.⁵ It is thought therefore that as a general rule a member’s request not to be sent notices must be ignored.

¹ Ibid Order 10(1)(a) and per Order 10(2) a member under this provision includes any person who is entitled to a share in consequence of the death or bankruptcy of a member, where the company has been notified of such entitlement.
² Ibid Order 10(1)(b).
³ Section 243 of the Companies Act 2013.
⁴ This seems to have been the view of Astbury J in Re Mackenzie and Co Ltd [1916] 2 Ch 450. See also Shaw v Shaw [1935] 2 KB 113, Royal Mutual Benefit Building Society v Sharman [1963] 1 WLR 581 and Re Compaction Systems Pty Ltd [1976] 2 NSWLR 477.
⁵ Re Portuguese Consolidated Copper Mines Ltd (1889) 42 ChD 160; Young v Ladies Imperial Club Ltd [1920] 2 KB 523.
4.5 Length of Notice

Formerly, AGMs required a notice of no less than **twenty one days** whereas other meetings required a notice of no less than **fourteen days**.\(^1\) The Companies Act 2013 has not prescribed any such minimum notice periods. The company’s constitution will have to regulate the same. It is indeed good practice to include the notice period in the company’s constitution when drafting the same.

That said, every listed company must within **six months** after the end of each financial year at least **twenty one clear days** before the date of the AGM, distribute to all shareholders notice of the AGM and annual financial statements.\(^2\)

Where the notice is stipulated, the method of calculation is based on number of clear days. The day on which the event takes place is excluded from the calculation of the notice period.\(^3\)

Note that it is ‘days’ not ‘working days’ such that weekends are included in the computation.\(^4\) Again, even if the notice is received after the **fourteen or twenty one days**, the notice will still be valid.\(^5\) It is incumbent upon the shareholder to provide the correct and updated address.\(^6\)

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\(^1\) Section 108(1)(a) and (b) of the Companies Act 1984.
\(^2\) Rule 7.23 of the Malawi Stock Exchange, Listing Requirements – 1\(^{st}\) May 2008.
\(^3\) See section 45(1)(a) of the General Interpretation Act, Cap 1:01 of the Laws of Malawi. See also *Re Railway Sleepers Supply Co.* (1885) 29 Ch.204 and *In Re Hector Whaling Ltd* [1936] 1 Ch. 208.
\(^4\) However, see section 45(1)(b),(c) and (d) of the General Interpretation Act, Cap 1:01 of the Laws of Malawi.
\(^5\) *Mercantile Investment and General Trust Co. v International Company of Mexico* [1893] 1 Ch.484, n.
\(^6\) See article 80 of the Model Articles of a Public Company.
4.6 Mode of Notice

The notice of a General Meeting of a company must be given either in hard copy format or in electronic format. For a public company, it is now standard practice to fly the notice in a newspaper of general circulation.

4.7 Contents of the Notice

Subject to the company’s constitution, the notice of a General Meeting must, among others, state the following:-

(a) The time and date of the meeting;

(b) The place of the meeting (Venue); and

(c) The general nature of the business to be dealt with at the meeting i.e. the agenda.

1 Order 9(1) and 31 of the Companies (Shareholder’s Code of Conduct) Order, 2016 - Part B of the Schedule on Code of Conduct for Shareholders of a Public Company.
2 For listed companies, Schedule 12.24 of the Malawi Stock Exchange, Listing Requirements – 1st May 2008 provides for publication in the newspaper of all notices to all shareholders.
3 See paragraph 5, below.
4 Order 9(2) and (3) of the Companies (Shareholder’s Code of Conduct) Order, 2016 - Part B of the Schedule on Code of Conduct for Shareholders of a Public Company. The agenda is covered in paragraph 10, below.
In relation to proxies, the notice must also contain, with reasonable prominence, a statement informing the member of:-

i) His rights to appoint proxies; and

ii) Any more extensive rights conferred by the company’s constitution to appoint more than one proxy.

Failure to comply with this provision not however affect the validity of the meeting or of anything done at the meeting. However, if a company fails to comply with this requirement, the company and every officer in default is liable to a fine.1

The law further requires that when calling for a meeting, a Proxy Appointment Form2 must be sent with the notice.3

Members who hold at least five percent of the total voting rights have a right to request for a statement of not more than one thousand words in respect of matters referred to in the agenda, at the company’s expense (with few exceptions).4 An aggrieved person can obtain an injunction restraining the company from circulating the statement.5

Note that where a special notice of a resolution is required, the notice of intention to move such a resolution must be given at least twenty one days before the meeting. Where it is not practicable to give the twenty

1 Ibid Order 24.
2 See Annex 4.
5 Ibid Order 16.
one days’ notice, the company must give a fourteen days’ notice through a newspaper of wide circulation.¹

Sometimes the notice may be accompanied by a more discursive document, called a ‘circular,’ setting out the background to items of business on the agenda. If a notice is accompanies by a circular, the two documents can and should ordinarily be treated as one document.²

When a meeting has been adjourned for several days it is customary for a fresh notice to be sent to members advising them of the reasons for the meeting having been adjourned and the date, time and place for the resumption of the meeting.

Annex 2: Sample of a Notice of an AGM

4.8 Service of Notice

Under the Companies Act 2013,³ a notice, statement, report, accounts, or other document to be sent to a shareholder or creditor who is a natural person may be:-

a) Delivered to that person;

b) Posted to that person's address or delivered to a post office box which that person is using at the time. Note that if the notice sent by postal address is returned undelivered twice within twelve

¹ Ibid Order 11.
³ Section 376 of the Companies Act 2013. For comparison, see also section 59 of the General Interpretation Act, Cap 1:01 of the Laws of Malawi.
months then the members ceases to be entitled to notice until a valid postal address is furnished.\textsuperscript{1}

c) Sent by facsimile machine to a telephone number used by that person for the transmission of documents by facsimile; or

d) By his consent, sent by email or other electronic form of communication to the address provided by that person for the transmission of documents by electronic means.

There are special rules for service of a notice, statement, report, accounts, or other document to be sent to a shareholder or creditor that is a company or a foreign company.\textsuperscript{2}

\textbf{4.9 Effect of Failure to Give Notice}

There is a long-established rule of the law of meetings that failure to give notice of a meeting to a member entitled to notice invalidates the proceedings of the meeting.\textsuperscript{3} However, a person who does not receive proper notice of a meeting, or of a particular item of business, but who attends the meeting may waive the entitlement to notice. Accordingly, if all members entitled to attend a meeting are gathered together then they may agree to treat their gathering as a meeting of which they have all waived their entitlement to notice.\textsuperscript{4}

\begin{enumerate}
\item See article 80 of the Model Articles of a Public Company.
\item See sections 374 and 376 of the Companies Act 2013. For comparison, see also section 59 of the General Interpretation Act, Cap 1:01 of the Laws of Malawi.
\item \textit{Musselwhite v C.H. Musselwhite and Son Ltd} [1962] Ch 964 and \textit{Young v Ladies Imperial Club} [1920] 2 KB 523.
\end{enumerate}
In any event, the strict common law position is now relaxed. Subject to the company’s constitution, accidental failure to send a notice or other documents to a shareholder in accordance with the Companies Act 2013 does not affect the validity of the meeting.¹ For example, in *Re West Canadian Collieries Ltd,*² a few members did not receive notice because their address plates were inadvertently not put in an addressing machine. The meeting was nevertheless held to be valid.

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¹ Section 254 of the Companies Act 2013. See also Order 12 of the Companies (Shareholder’s Code of Conduct) Order, 2016 - Part B of the Schedule on Code of Conduct for Shareholders of a Public Company.
² [1962] Ch 370.
5. VENUE

5.1 Rules on Meeting Venues

Previously it was a requirement for a General Meeting to take place in Malawi, unless all shareholders agreed to hold the meeting outside Malawi.\(^1\) The Companies Act 2013 does not restrict General Meetings to taking place in Malawi. Thus, unless and to the extent that a company’s constitution provides otherwise, the Board of Directors may determine both the venue and location of all company meetings.

5.2 Venue and Validity of the Meeting

In some cases, choice of venue, may affect the validity of a meeting. For example, if Directors of a company that has a majority of its shareholding in one city decide to hold a General Meeting in another city a thousand kilometers away, it could be argued that their actions were in bad faith. A Court can set aside the proceedings at the meeting. In *Cannon v Trask*,\(^2\) the Directors of a company were restrained from convening an AGM on a date intentionally chosen to prevent certain shareholders from exercising their voting rights. However, *Martin v Walker and Others*\(^3\) suggests that the meeting need not be held in the most convenient location for shareholders. In *Byng v London Life Assurance Limited*\(^4\) the Court set aside a decision by the Chairperson to adjourn the meeting to a smaller venue where all members would not fit in and had no reasonable time to prepare proxies.

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\(^1\) Section 110(1) and (2) of the Companies Act 1984.
\(^2\) (1875) 20 E1.669.
\(^3\) (1918) 145 L.T.Jo.377.
\(^4\) [1990] 1 Ch 170.
Our recommendation is that the location, date and time of an AGM should have regard to what is likely to be convenient to shareholders generally. There are just thirteen companies listed on the MSE with a number of shareholders having shares in almost all the counters. Listed companies should therefore try to avoid holding their AGMs on the same day as others.

As a matter of best practice, we also recommend that the venue for the AGM must be accessible by attendees with disabilities, including hearing disabilities and the blind.\footnote{Section 9(1) of the Disability Act 2012 provides that ‘no person shall be denied access or admission to any premises, or the provision of any service or amenity, on the basis of disability.’}
6. ATTENDANCE

6.1 Attendance Register

It is not a requirement of the law for a company to maintain any Attendance Register, but such a Register does facilitate any future enquiry as to who was present as a meeting. Some companies with smaller membership record the names of those present in the minutes of the meeting. This is as good as having an Attendance Register.

In determining attendance at a General Meeting, it is immaterial whether any two or more members attending it are in the same place as each other.¹

It stands to reason that before any person, including proxies² and invited persons, are permitted to attend or participate in the company meetings, that person must present satisfactory identification. For public companies, Transfer Secretaries arrange a checkpoint to the entrance of the meeting venue where they can verify membership against the Share Register, as well as proxies received. With increasing risk of terrorist attacks and other security breaches, companies may provide in their constitution (or other document) for searches at the entrance or other scanning mechanisms.³

¹ Article 29(4) of the Model Articles of a Public Company.
² See article 45(1)(b) of the Model Articles of a Private Company and 38(1)(b) of the Model Articles of a Public Company.
³ See also Bratton Seymour Service Company v Oxborough [1992] BCLC 693.
6.2 Register of Members

The Companies Act 2013 has relaxed requirements for a Register of Members.\(^1\) It provides that a private company is not under obligation to keep a Share Register but it must keep and maintain proper records of shares and debentures that it has issued and transferred.\(^2\)

Other companies, including public limited liability companies, are obliged to maintain an electronic or hard copy Share Register. The Register contains information on shares issued by the company and gives a statement on whether, under the constitution or the terms of issue of the shares, there are any restrictions or limitations on their transfer; and the place where any document that contains the restrictions or limitations may be inspected.\(^3\)

In addition to the Share Register, a public company or subsidiary or parent company of a public company is required to maintain a Register of Substantial Shareholders\(^4\) in which it enters some particulars such as the names and address of a shareholder; the number of shares of that class held by each shareholder; the date of issue of shares, repurchase or redemption of shares; or transfer of shares. These records must cover the last seven years.\(^5\) A company may engage services of an agent to

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\(^1\) Under section 32(1) of the Companies Act 1984, every company had to maintain a Register of Members.
\(^2\) Section 144 and 65 of the Companies Act 2013.
\(^3\) Section 145(1) of the Companies Act 2013.
\(^4\) Section 145(2) of the Companies Act 2013. A ‘substantial shareholders’ is defined as a shareholders who is entitled to exercise not less than five per cent of the aggregate voting power exercisable at the meeting of shareholders – section 2 of the Companies Act 2013.
\(^5\) Section 145(3) of the Companies Act 2013.
maintain the Share Register on its behalf as long as the agent is qualified to be a Company Secretary.¹

For companies having more than 50 members, an index must also be kept giving the names of the members, enabling them to be readily found in the Register, unless the Register itself is in the form of an index.²

Where a company purchases its own shares, it may cancel them from the Share Register,³ or alternatively the company may hold the shares as treasury shares.⁴ Where treasury shares are held by a company, then the same must be entered in the Treasury Share Register, which may be in electronic or in hard copy form.⁵

The Register must be capable of search either by electronic means or by physical inspection⁶ and the company must give notice to the Registrar of the place where its Share Register is kept available for physical inspection and of any change in that place.⁷ In a nutshell, the Register must be kept in Malawi, where it is in hard copy. This will usually be at the Registered Office or where an agent is appointed, the agent’s place of business.⁸

¹ Section 145(4) of the Companies Act 2013. See Transfer Secretaries under paragraph 30, below.
² Section 145(5) of the Companies Act 2013.
³ Section 146(1) of the Companies Act 2013.
⁴ ‘Treasury shares’ are shares that a company has bought back from shareholders but such shares have not been cancelled. See Division IV of the Companies Act 2013.
⁵ Section 146(2) and (3) of the Companies Act 2013.
⁶ Section 147(1) of the Companies Act 2013 and the right of members to search the Register and obtain copies, free of charge and others at a fee, is provided for in section 149 of the Companies Act 2013.
⁷ Section 147(2) of the Companies Act 2013. Rules on the place where the Register is kept are detailed in section 148 of the Companies Act 2013.
⁸ See Transfer Secretaries under paragraph 30, below.
The entry of the name of a person in the Share Register as holder of a share is *prima facie* evidence that legal title to the share is vested in that person.\(^1\) As a matter of fact, a share is only issued when the name of the shareholder has been entered on the Share Register.\(^2\) In that respect a company may treat a shareholder as the only person entitled to exercise the right to vote attaching to the share; receive notices; receive a distribution in respect of the share; and exercise the other rights and powers attaching to the share.\(^3\)

However, this does not prevent rectification of the Register. Thus, the Companies Act 2013\(^4\) provides that where the name of a person is wrongly entered in, or omitted from, the Share Register of a company, the person aggrieved, or shareholder, may apply to the Registrar of Companies for rectification of the Share Register and where unsatisfied with the decision of the Registrar, he may appeal to the High Court.\(^5\) In comparison, under the Companies Act 1984\(^6\) such rectification of the Register could only be made by the High Court at first instance.\(^7\) It is commendable that the scheme under the Companies Act 2013 has sought to devolve most of the administrative powers to the Registrar as such applications were unnecessarily clogging the Court system.

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\(^1\) Section 155(1) of the Companies Act 2013.

\(^2\) Section 97 of the Companies Act 2013. According to *National Westminster Bank plc v IRC* [1995] 1 AC 119 HL the terms ‘allotment’ and ‘issue’ are distinguishable – allotment is the stage at which the company and allottee became contractually bound to issue the shares whereas the shares could only be said to be issued at a later stage – when the allottee’s legal title has been perfected by the company effecting registration of the allottee or his nominee as the owner of the shares.

\(^3\) Section 155(2) of the Companies Act 2013.

\(^4\) Section 151.

\(^5\) Section 151 of the Companies Act 2013.

\(^6\) Section 35 of the Companies Act 1984.

\(^7\) See also *In Re MacPherson Ltd; in re Companies Act* [1994] MLR 177, *Ferreira v Fersons Ltd* MSCA Civil Appeal No. 13 of 2011 and *Re Swaledale Cleaners* [1968] 3 All ER 619.
It was held by the Court of Appeal in *Re Hoicrest Ltd*¹ that the power of the Court to rectify the Register of Members could be used to effect a transfer where there was no instrument of transfer so that the company had not had an opportunity to refuse the transfer.

The Companies Act 2013 prohibits entry of notices of any expressed, implied or constructive trust into the Share Register and such are not receivable by the Registrar.² This means that the only interest in one of its shares that a company will recognize is an absolute right of the registered shareholder to the whole share.³

### 6.3 Attendance by Non-Members

As discussed earlier,⁴ private meetings are those where presence at meetings is restricted to those who register as members. Registered members are those persons who have met required criteria for membership and are thus recorded in the Register of Members.

Criteria for membership would be, for example, payment of membership fees and subscriptions or the acquisition of shares. This gives them the right to attend. Anyone who is not a member has no such right to attend.

There are however exceptions to this rule but there are formalities that need to be complied with such as in the case of proxies.⁵ Further than this, non-members can be invited to attend in order to deal with specific

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¹ [1999] 2 BCLC 346.
² Section 152 of the Companies Act 2013.
⁴ Under *Types of Meetings* – paragraph 3, above.
⁵ Covered under paragraph 17.1, below.
issues, for instance, the company’s lawyers or Auditors might be invited to a meeting to report on litigation and audited accounts, respectively.

Other non-members, for example the External Auditors,¹ Transfer Secretaries, Directors and senior management, might attend shareholders’ meetings as a matter of routine to answer questions that might be asked at the meeting.

The authority to invite non-members lies with the convenors of the meeting, usually the Chairperson. Such guests at the meeting are present at the sufferance of the convenors and may be asked to leave at any time, without reasons.² Invitations could be withdrawn as a result of an objection by a member to their presence.

¹ Note that for External Auditors, they have a statutory right to attend shareholders’ meetings under section 243 of the Companies Act 2013.
² Of course, with exception of those with statutory right to attend.
7. CONFLICT OF INTEREST

7.1 Introduction

The Companies Act 2013 provides that a Director of a company must avoid a situation in which he has, or can have, a direct or indirect interest that conflicts, or possibly may conflict, with the interests of the company.\(^1\)

7.2 Direct Conflict of Interest

Direct conflict arises where one is being asked to participate on an issue that relates to the company but at the same time he stands to benefit from that same decision. Direct conflict of interest would arise where a Director of company A is at a Board Meeting of that company and it is being proposed to enter into a contract with company B where he is a large shareholder. It can be argued that in voting for the deal, the reason for doing so is that he stands to gain as a shareholder of company B.

7.3 Indirect Conflict of Interest

Conflict of interest may also be indirect. It could be that a person has no direct link, but that the link exists via a related party. For example, A is a Director of a Bank where it is proposed to advance a credit facility to company C. The wife of A has shares in C and is also a Director of that company. It can clearly be seen that there is a link which results in a conflict of interest i.e. A is more likely than not to be lenient in the assessment process of the credit facility to ensure that company C obtains the facility.\(^2\)

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\(^1\) Section 180(1) of the Companies Act 2013.

\(^2\) See also Companies (Corporate Governance) Regulations 2016, regulation 3 clause 14.
7.4 Rules on Disclosure

There are detailed rules on core disclosure obligations in transactions involving self-interest under the Companies Act 2013.\(^1\) In a nutshell, where a Director is interested in a transaction,\(^2\) he is obliged to declare the same to the Board of Directors\(^3\) not its Committee.\(^4\) Such transactions may be voided by the company within **six months** from the date of the declaration\(^5\) unless the company has received fair value under it.\(^6\) The avoidability of the transaction does not affect a *bona fide* purchaser for value.\(^7\)

Subject to the company’s constitution, an interested Director in a public company is disqualified from voting whereas an interested Director in a private company may vote provided he discloses his interest.\(^8\) An interested Director for both public and private company may also attend, be considered for quorum, sign and do any other thing in his capacity as a Director in relation to the transaction in which he is interested.\(^9\)

To make it convenient for Directors and Management, it is good practice to keep a ‘Conflict of Interest Register,’ which may be circulated for declarations just before the Board Meeting starts. It is also a good practice to make ‘declaration of conflict of interest’ a standing preliminary agenda

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\(^2\) The meaning of ‘interested in a transaction or arrangement’ is given in section 186(1) of the Companies Act 2013.

\(^3\) Section 187 of the Companies Act 2013.

\(^4\) Per the House of Lords in *Guinness v Saunders* [1990] 1 All ER 652.

\(^5\) Section 188(1) of the Companies Act 2013.

\(^6\) Section 188(2) of the Companies Act 2013.

\(^7\) Section 189 of the Companies Act 2013.

\(^8\) Section 191 (a) and (b) of the Companies Act 2013.

\(^9\) Section 191 (c), (d) and (e) of the Companies Act 2013.
item. Some companies also make the commendable practice of circulating a ‘Declaration of Conflict of Interest Form’ which Directors update say annually.
8. QUORUM

8.1 Definition of Quorum

Quorum is the number of persons who must, by the rules, be present at a meeting before its proceedings can have authority.¹ The requisite quorum for a meeting will be specified in the company’s constitution.

At common law, the quorum comprises the majority of members of the body and it can be seen that this is a stringent requirement. For example, if there is a large association with, say, 1000 members then they need at least 501 of them to be at a meeting in order to pass valid resolutions. Since meetings are, in the main, relatively poorly attended unless there is something really contentious on the agenda, it can be expected that the company will have a battle to muster enough of their members in order to have valid meetings.

In view of this, many, if not most, companies will specify in their constitutions what their quorum will be. The number chosen does not have to be large or representative of the body. In fact, in most cases it tends to be rather small. Thus, under the Companies Act of 1984, the default quorum for all General Meetings was two members.² Currently, the default quorum for a General Meeting of a public company is three;³

¹ See MCP v Attorney General and Another (Press Trust Case) [1996] MLR 271 a, b. This case discussed quorum for the National Assembly but drew important parallels on quorum for general meetings in a company. See also its appeal to the MSCA – Attorney General v MCP and Others [1997] 2 MLR 181.
² Section 112 of the Companies Act 1984.
³ Order 17(1) - Companies (Shareholder’s Code of Conduct) Order, 2016 - Part B of the Schedule on Code of Conduct for Shareholders of a Public Company.
however, say three persons holding proxy for the same member cannot form a quorum.\(^1\) A quorum must be formed from persons entitled to vote.\(^2\)

### 8.2 Importance of Quorum

The importance of quorum is as simple as that the meeting will not proceed. The Chairperson will have to postpone or dissolve it, as any business transacted thereat will be a nullity.\(^3\) However, this principle will not apply to a contract entered into with third parties who are not acquainted with any defect in the constitution.\(^4\) Third parties are not under obligation to ensure that rules of internal management have been followed.\(^5\)

### 8.3 Continuous Presence of Quorum

A problem which sometimes arises is where the meeting is quorate at the outset but, subsequently, a member or members leave, reducing the number present to below the minimum required for a quorum. In *Re Hartley Baird Ltd*,\(^6\) the quorum set by the company’s Articles was 10 and the meeting began with that number of members present. One member then left but, despite this, Wynn Parry J. held that, on the interpretation

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1. *Ibid* Order 17(1) (a) and (b) and Order 17(2). See also *Re Queensland Petroleum Management Ltd* [1989] QdR 549.
4. *County of Gloucester Bank v Rudry Merthyr Steam and House Coal Colliery Co. Ltd* [1895] 1 Ch. 430. See also *Smith v Henniker-Major & Co (a Firm)* [2002] All ER (D) 310 (Jul).
5. In *Davis v R Bolton & Co* [1894] 3 Ch 678, Directors made a transfer of shares without a quorum at the meeting. The transfer was nevertheless held to be valid. See also *Royal British Bank v Turquand* (1843 - 1860) All ER 435. See also Muhome A, *Company Law in Malawi*, Assemblies of God (2016) p. 115.
6. *[1955] Ch 143.*
of that company’s articles, the departure of the member did not invalidate the proceedings carried on after his departure.

Contrast that case, however, with *Re London Flats Ltd*,¹ where two persons were originally present at a meeting and one subsequently left. A decision then taken by the remaining member was held to be ineffective. Here, the question was whether or not there was actually still a meeting as defined above, not simply whether, if there were a meeting, it was quorate.

In other jurisdictions such as the RSA,² company legislation provides that the meeting must be quorate throughout its duration. This is a higher standard, which only applies in Malawi where the company adopts the Model Articles.³

Thus, where the company has Model Articles for private companies, the position is made clear by article 41, which provides that, if during the meeting the quorum ceases to be present, the Chairperson of the meeting must adjourn it.⁴ On the other hand, Model Articles for a public company provide that no business other than the appointment of the Chairperson of the meeting is to be transacted at a General Meeting if the persons attending it do not constitute a quorum.⁵ The appointment of the Chairperson is because a meeting is not automatically adjourned, the Chairperson must do it.

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¹ [1969] 1 WLR 711.
² Section 64 of RSA Companies Act of 2008.
³ In comparison, the quorum for parliamentary proceedings needs to be satisfied only at the beginning of the meeting – section 50(1) of the Republican Constitution of Malawi, 1994.
⁴ See also *Re Cambrian Peat* (1875) 31 LT 773.
⁵ Article 30.
8.4 Proxies,¹ Non-members and the Quorum

Proxies are counted as part of the quorum. However, as earlier observed, where the quorum is three and there are three persons present but holding proxy for the same member, they will not constitute a quorum.²

Non-members such as invited guests and those in attendance at the meeting or casual bystanders, can never be regarded as a part of the quorum. A quorum must be formed from persons entitled to vote.³

8.5 Voting Disability and Quorum

A quorum must be made up of members who are entitled to attend and vote. Therefore, if there is any prohibition on the member from voting then he cannot form part of a quorum. In clubs, for example, the constitution usually provides that members who are in arrears with their subscriptions may not vote on issues (although they may still be allowed to come to meetings). Similarly, shareholders who have not paid for their shares in full may be disallowed from voting by the constitution of their company.

For the Board, a Director of a company must avoid a situation in which he has, or can have, a direct or indirect interest that conflicts, or possibly

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¹ See Proxies under paragraph 17.1 below.
² Order 17(1) (a) and (b) and Order 17(2) of the Companies (Shareholder’s Code of Conduct) Order, 2016 - Part B of the Schedule on Code of Conduct for Shareholders of a Public Company.
may conflict, with the interests of the company. Where such a conflict exists, the Director must disclose the same.2

Subject to the company’s constitution, an interested Director in a public company is disqualified from voting whereas an interested Director in a private company may vote provided he discloses his interest.3 An interested Director for both public and private company is permitted to attend the meeting, be considered for quorum, sign and do any other thing in his capacity as a Director in relation to the transaction in which he is interested.4

8.6 Quorum by Chance

A meeting must be properly convened and constituted. Thus if a quorum happens to exist without any meeting having been properly convened it is illegal for a valid meeting to be held. However, if the chance assembly of the quorum happens to coincide with all of the members of the body and they all agree to condone the absence of notice, then the meeting may proceed.5 After all, the Duomatic Principle6 states that where all the shareholders of a company assent to a matter that could be brought into effect by a resolution in a General Meeting the unanimous consent of the shareholders without a formal meeting is enough.7

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1 Section 180(1) of the Companies Act 2013. Under a similar provision – section 150 of the Companies Act 1984 – the High Court found no breach of the duty to disclose conflict of interest in Patel v Rare Earth Co. (Mw) Ltd Com. Cause No. 15 of 2013.

2 See Conflict of Interest under paragraph 7, above.

3 Section 191 (a) and (b) of the Companies Act 2013.

4 Section 191 (c), (d) and (e) of the Companies Act 2013.

5 Machell v Nevinson (1809) 11 East 84, n.


7 See also the definition of a ‘unanimous resolution’ under section 2(1) of the Companies Act 2013.
A valid Board Meeting can be held informally, as long as all Directors who should be informed are informed, and agree to the informality.¹ An informal Board Meeting cannot be held against the wishes of one or more of the Directors, as was shown in Barron v Potter,² where one of the two Directors attempted to convene an informal Board Meeting on the platform of Paddington Station as the other alighted from a train and against his wishes. It was held that the additional Directors who had been purportedly elected at this ‘meeting’ by the use of a casting vote had not been properly appointed.

¹ Smith v Paringa Mines Ltd [1906] 2 Ch 193.
² [1914] 1 Ch 895.
9. APOLOGIES

9.1 Introduction

When a member finds that he is unable to attend a meeting he is at liberty to contact either the Chairperson or the Secretary (usually the latter) to ask that his apology for non-attendance be brought to the attention of those present at the meeting. It is in fact a display of bad manners not to apologize for absence from a meeting.

For Directors, the constitution may provide that Directors who do not attend a certain number of meetings, without reasonable cause, lose their seat.¹ This promotes good Corporate Governance.

For Directors of a bank, the requirement is higher. The Corporate Governance Guidelines for Banks provide in clause 5.2.11² as follows:-

Every Director shall make all efforts to attend all Board Meetings of the institution… At its AGM, each institution shall be required to review the suitability of every Director who has failed to attend at least seventy five percent of Board Meetings. Attendances shall be disclosed in the Annual Report; should the AGM reappoint a Director who was absent for at least seventy five percent of the Board Meetings, the Director shall cease to be a member of the Board if he fails to attend fifty percent of the meetings in the subsequent year(s).

¹ In comparison, a Member of Parliament who fails to attend three consecutive meetings of a Committee loses membership of that Committee – see Order 152(2) of the National Assembly Standing Orders adopted on 22nd May 2003.
² April 2010.
9.2 Recording Apologies

Since a member has taken the trouble to tender his apologies, it is considered good practice to record his name in the minutes under the appropriate heading. Where a large number of apologies are received, consideration could be given to recording these in a suitable register.

9.3 Tendering Apologies

The usual way is for the member to ask a person who is sure to attend the meeting to bring his apologies. What generally happens is that the Chairperson will ask the Secretary to read out the names of anyone who has tendered apologies (by writing or calling) and then to ask those present if there are any other apologies that must be recorded. However, in order to manage time, a Register for Apologies may be circulated as the meeting proceeds.

9.4 Apologies and Quorum

If a member is absent from a meeting, regardless of having apologized for such, he cannot be regarded as part of the quorum of the meeting.

9.5 Apology and Leave of Absence

Certain constitutions allow a member to request leave of absence. A leave of absence is an officially excused period of time off duty from work. In that case such a member will not be expected to attend a meeting. This can be done to avoid having a ‘blemish’ which might otherwise count as a disqualifying factor for appointment. For instance, if the constitution provides that a member who does not attend three consecutive meetings will lose his seat, then if such a member misses the three meetings because he requested for leave of absence, then he may not lose his seat.
Leave of absence may be comparable to sabbatical leave which is usually a period off duty for a college teacher to rest or travel and was originally availed every seven years, hence sabbatical.
10. AGENDA

10.1 Function of the Agenda

The function of the agenda is to disseminate information concerning business to be discussed at the meeting. A good agenda would consist not merely of a list of items, but would amplify the headings with a brief note to give guidance as to what precisely the meeting is intended to discuss and form decisions upon. Agendas are generally divided into items for decision, discussion, noting and/or information.

A carefully prepared agenda not only conduces to an efficient and harmonious ordering of the meeting but by its subsequent integration in the minutes, forms, as it were, the structure on which the decisions noted thereon are based.

10.2 Preparation of the Agenda

In practice, the preparation of the agenda is left with the Secretary, but generally he or she has not complete discretion of inclusion or exclusion. In difficult and doubtful matters he or she should always consult the Chairperson. At the request of a member and subject to the constitution, the Secretary should readily include any matter which can be regarded as the proper business of the meeting.¹

¹ See also Pedley v Inland Waterways Association Ltd [1977] 1 All ER 209.
10.3 Contents of the Agenda

Previously, business was classified as either ordinary or special. As a rule of thumb, ordinary business can be regarded as routine proceedings at an AGM. This will generally be as follows:-

1. To adopt the agenda;
2. To approve previous minutes;
3. To receive the Chairperson’s Report;
4. To approve financial statements for the previous year;
5. To declare a dividend;¹
6. To appoint Directors;
7. To re-elect Directors who retire by rotation;
8. To fix Directors remuneration;
9. To appoint External Auditors and fix their fees.

Anything else that gets done at an AGM or at any other General Meetings is regarded as special business. The distinction between special and ordinary business used to be defined under the Companies Act 1984,² but that is no longer the case under the Companies Act 2013. The thinking was that special business needed special notice and a shareholder who was informed of it would be more likely than not to thoroughly prepare for and attend the meeting. The new thinking is that the distinction between ordinary and special business is no longer necessary and a shareholder should treat all business of the company as equally important.

¹ This is a specific requirement for a public company under section 104(3) of the Companies Act 2013.
² Section 113(6) of the Companies Act 1984.
10.4 *Any Other Business (AOB)*

The modern practice is to exclude ‘Any Other Business’ from the agenda. This is so because attendees can use an AOB to hijack a meeting for their own purposes and change the whole feeling of the meeting, often from a highly positive, action-focused discussion to a complaint. That said some notices of a General Meeting may include the following:

To transact any other business prior notice of which should have been given to the office of the Company Secretary not less than *twenty one days* before the date of the meeting.

This ensures that no AOB is raised in the meeting itself to avoid ambushing members and unnecessarily prolonging the meeting.
11. MINUTES

11.1 Definition of Minutes

According to Mahony, minutes of a meeting are the official record of meetings that were held in the past, as well as the business that was dealt with at those meetings. Once signed by the Chairperson, the minutes are *prima facie* evidence of the proceedings. This means that although there is a presumption that all the proceedings were in order and that all appointments of directors, managers or liquidators are deemed to be valid, evidence can be brought to contradict the minutes. Thus, in *Re Fireproof Doors* a contract to indemnify directors was held binding though not recorded in the minutes.

On the other hand, if the articles provide that minutes duly signed by the chairman are conclusive evidence, they cannot be contradicted. Thus, in *Kerr v Mottram* the claimant said that a contract to sell him preference and ordinary shares had been agreed at a meeting. There was no record in the minutes and since the articles said that the minutes were conclusive evidence the court would not admit evidence as to the existence of the contract.

11.2 Requirement to Keep Minutes

Previously every company was required to keep minutes of all proceedings of General and Board Meetings and enter these into a Minute Book. In practice though, a majority of private companies neither kept any minutes nor the Minute Book.

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2 [1916] 2 Ch 142.
3 [1940] Ch 657.
Consequently, the Companies Act 2013 has now removed the blanket requirement for companies to keep minutes. There are now limited situations where the law demands that minutes be kept:

(a) Where a company passes a unanimous resolution; and\(^1\)
(b) Where a company effects an indemnity and insurance policy in favour of its Directors or employees;\(^2\)

That said, good Corporate Governance demands that minutes be kept as they become a useful tool for referencing and provide reliable evidence even in Courts.\(^3\)

The reader must also take good notice of Order 33(1)(a) and (b),\(^4\) which seems to re-introduce the keeping of both Board and General Meetings minutes for all companies. This should be treated as a mistake in the law as no subsidiary legislation can be inconsistent with the provisions of the principal Act and any such legislation is of no effect to the extent of such inconsistency.\(^5\)

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\(^1\) See definition of a unanimous resolution under section 2(1) of the Companies Act 2013.
\(^2\) Section 221(7) of the Companies Act 2013.
\(^3\) For instance, in *Chikoja v Southern Region Water Board* Matter No. IRC 146 of 2003 the Court received Board Minutes as evidence that the respondent organisation was undergoing some restructuring. In *Candlex Limited v Mark Katsonga Phiri* Civil Cause No. 680 of 2000 – MSCA Civil Appeal No. 2 of 2002 – the Supreme Court of Appeal ordered production of minutes where the same was refused by the appellant. See also the Australian decision in *ASIC v Hellicar* (2012) HCA 17. In *The State (Francis Bisika) v Malawi Communications Authority* Judicial Review Case No. 71 of 2017, there was an allegation that Board Minutes were unlawfully changed, to ensure that the claimant’s contract was not renewed following a contrary decision from the Government. According to *Re Cawley & Co* (1889) 42 Ch. D. 209 minutes should on no account be altered after they have been signed. Corrections can always be captured in subsequent minutes.
\(^4\) Of the Companies (Shareholder’s Code of Conduct) Order, 2016 - Part B of the Schedule on Code of Conduct for Shareholders of a Public Company.
\(^5\) Section 21(b) of the General Interpretation Act, Cap 1:01 of the Laws of Malawi.
11.3 Responsibility for Taking Minutes

Since the law requires that a public company must have a Company Secretary,\(^1\) he or she will be the one responsible for taking the minutes and safeguarding the same. For private companies, any Director can be assigned the responsibility of taking and safeguarding the minutes.

11.4 Period for Production of Minutes

There is no prescribed period within which the Secretary should finalise the minutes. The best practice is to finalise the minutes ‘as soon as possible.’ With the aid of modern technology, Secretaries are continuously being challenged to circulate draft minutes within hours of finishing the meeting. Regardless, a fair copy of the minutes must be available for incorporation into the Board Pack. In relation to listed companies, previous minutes must be furnished to members **thirty days** before the AGM.\(^2\)

Delay in the production of minutes does not only affect the quality and accuracy of the minutes themselves but also the implementation of action plans and overall achievement of corporate goals.

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\(^1\) Section 223 of the Companies Act 2013.

\(^2\) Rule 6.20(b) of the Malawi Stock Exchange, Listing Requirements – 1\(^{st}\) May 2008.
11.5 Form in which Minutes may be Kept

The minutes must be kept in either electronic or hard copy format.\(^1\)

Since the Companies Act 1984 envisaged hard copy format only, the old practice of keeping minutes was to record the minutes in a bound book with pre-numbered pages, either by writing the minutes directly into the book or by typing them on loose sheets which were then pasted into the Minute Book. This need not be the case anymore as we embrace the digital world!

11.6 Duration for Keeping Minutes

The minutes and other records must be kept for a minimum period of **ten years** from the date of the resolution, meeting or decision as appropriate.\(^2\)

In our view, the **ten years** are again erroneous as they go beyond the spirit of the Companies Act 2013 itself, where, for example Share Register records must be kept for a minimum of **seven years**.\(^3\) Even bank account records are only kept for a minimum of **seven years**.\(^4\) We submit that the law needs to be aligned through an amendment.\(^5\)

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4. See section 19(2) of the Banking Act 2010 and section 8 of the Financial Services (Record Keeping Requirements for Banks) Directive 2012.
5. See also article 82 for Model Articles for Public Companies which provides for the destruction of documentation in relation to shares after **six years**.
11.7 Style for Writing Minutes

There is no hard and fast rule pertaining to the style in which the minutes should be. Some prefer to record proceedings in a verbatim style i.e. word for word. However, this tends to result in multiple pages, containing the relevant business as well as things that are not really necessary. These are referred to as ‘narrative minutes’ and they should be avoided in a company. However, parliamentary records (Hansards)\(^1\) and Court records are recorded in such a format for posterity.

Another style is where the Secretary records resolutions made without any background details. These are referred to as ‘resolutive minutes’. They are scanty and may not be favourable for referencing back.

There is a third possibility, taking their lead from each of the above two styles. In this style, the minutes reflect the resolutions that were passed, but more importantly in the opinion of the Secretary, the reasons for taking such resolutions as well as the information that was available to the meeting when the issue was debated and decided is included. This, in our view, is the preferable format for a company. This is so because if at some future stage the decision taken is queried it will be possible to show what factors led the meeting to that particular conclusion. This will be particularly beneficial if, for example, the Directors are being sued for a poor decision - they can demonstrate much more easily that they were exercising good judgment.

Minutes should be written in reported speech, i.e. past tense, and in the conditional mood for future actions i.e. would and should, rather than will and shall.

\(^1\) See generally Order 14 of the National Assembly Standing Orders adopted on 22\(^{nd}\) May 2003.
In any event, minutes must be accurate, clear and unambiguous, succinct, grammatical, useful and most of all be capable of being understood by persons who never attended the meeting.

11.8 Dissenting View and the Minutes

Where a member strongly disagrees with a certain decision, he may request the Chairperson that the record should indicate his dissenting views. This may be important in future and absolve the Director of some liability.

11.9 Proposers, Seconders and Minutes

Although some companies do include the names of the proposers and seconders in the minutes, there is no necessity whatsoever to do so. Our view is that minutes must as much as possible avoid mentioning names of contributors for their own ‘safety’ and this ensures the resolutions made out of a meeting are not personalised but are truly a collective decision of the meeting as such.

11.10 Audio and Video Recording of Meetings

Audio and video recording of proceedings at both Board and General Meetings should be actively discouraged. Matters discussed in a private meeting must remain private. For the Secretary, the traditional way of taking hand-written notes still holds sway. It is common knowledge that audio and video recordings are most prone to leakage especially through the social media. More importantly, the moment members are made aware that they are being recorded they tend to censure their own contributions. This creates a tense environment leading to poor decision-making. That said, conveners for AGMs for public companies often relax
the rule by allowing media coverage for the purposes of positive publicity and enhancing corporate image.

11.11 Confirmation of Previous Minutes

It is not necessary to read previous minutes. The acceptable practice has evolved over the years where previous minutes are included in the Board Pack for the subsequent meeting. At the meeting, the Chairperson will simply propose; ‘May we take the minutes of the previous meeting as read?’ once agreed then the Chairperson goes page by page for corrections.

Corrections are usually captured by the Secretary in the subsequent minutes, such that the Chairperson proceeds to sign the previous minutes subject to such corrections. For a competent Secretary, these will usually just be a few typos and minors. Otherwise, some companies require that the Secretary presents a final set of corrected previous minutes for the Chairperson to sign off. In our view, this may only be necessary where serious errors are noted for correction.

11.12 Execution of Minutes

The Chairperson who presided over the meeting is the primary person to sign the minutes as soon as he is satisfied that they present a true and correct record of the proceedings thereat. If not urgent, the minutes may wait to be signed after corrections are made at the next meeting. Note that electronic signatures are now accepted.¹

In the event that the Chairperson is unavailable to preside over the next meeting and someone else, probably new, assumes the chair, it will be

¹ Under section 8(1) of the Electronic Transactions and Cyber Security Act 2016.
prudent to put a request to the meeting if the minutes can be regarded as correct and that he may sign them. Where all the attendees did not attend the previous meeting, the minutes will still have to be signed, probably with a note to that effect in the subsequent minutes.

11.13 Matters Arising from the Minutes

A matter arising from the minutes is something that was not finalized at a previous meeting and it has been brought before the current meeting either to finish the debate, or to establish progress thereon. Only the extent of the unfinished business may be discussed. Members should not use this opportunity to re-open discussion on matters that were in fact dealt with and finalized at the previous meeting.

It is now established practice for Management to isolate matters arising in advance and indicate the current position in the ‘Matters Arising Paper.’ This saves time. However, it has the potential of leaving out some matter arising. In any case, the Chairperson will ask members if there are any other matters arising noted, that have not been addressed by Management.

11.14 Inspection of Minutes

Minutes are not considered to be open documents available for inspection for the public at large, unless provided otherwise by the law.\(^1\) That said, a company may consider providing access to such outsiders as it may deem fit in the interest of transparency.\(^2\) The minutes should be available

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1 For instance, Order 14(5) of the National Assembly Standing Orders provides for publication of parliamentary minutes to the general public at a fee.

2 For instance, RBM publishes minutes of the Monetary Policy Committee for general consumption on [www.rbm.mw](http://www.rbm.mw)
to all Directors and formal persons such as External Auditors.\(^1\) The general members are entitled to inspect the minutes of all the General Meetings,\(^2\) but have no general right to inspect Board Minutes.\(^3\)

For listed companies, previous minutes must be furnished to members **thirty days** before the AGM.\(^4\)

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1 According to section 242 of the Companies Act 2013, the Board must ensure that an Auditor has access at all times to the accounting records and other documents of the company, which include minutes.

2 Section 36(1)(b) of the Companies Act 2013.

3 *R v Merchant Tailors Co.* (1831) 2 B & Ad 115.

12. MOTIONS

12.1 Proposer

The member who introduces a proposal at a meeting for it to be discussed is known as the proposer. There have been cases where resolutions properly proposed to a meeting were not accepted by the Chairperson, who tried to close the meeting without letting all those who wished to speak do so. In these cases it was held quite valid for the members to continue with the meeting and proceed with business.\(^1\)

Otherwise, when proposing a motion, the proposer is allowed to speak on it, mentioning what the objects of making this proposal are and why he believes that the members ought to accept it. Having done this, the Chairperson accepts the proposal and, where this is required by the constitution, calls for a seconder. The motion is now known as the ‘question before the meeting’ and is declared open for discussion.

Having put the proposal, the proposer is not permitted to participate any further in the discussion, but immediately prior to a vote being taken the Chairperson might ask the proposer if he wishes to exercise his ‘right of reply’ i.e. make concluding remarks addressing concerns emanating from the debate.

12.2 Seconder

Depending on the constitution, a motion may have to be seconded. A seconder of any motion or amendment may not speak on the motion beyond formally seconding it. When the seconder says: ‘Chairperson, I second that motion’ he is in fact associating himself fully with all the

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\(^1\) National Dwellings Society v Sykes [1894] 3 Ch 159.
remarks made by the proposer- if he disagrees on any point he should not second the motion.

It is permissible for a member to second a motion, even though he disagrees with it and intends voting against it. This may be deployed as a tactic to get the motion before the meeting so that he will get the chance of bringing debate to discredit it.

If a motion has been proposed, but not seconded when required, the meeting cannot proceed to discuss the motion, let alone take a decision on it. The absence of a seconder therefore indicates that there is a complete lack of support and the Chairperson should either dismiss the motion or request the proposer to withdraw it.

Some practice, which we disagree with is that, if the member persists with his motion in spite of not having the required seconder, the Chairperson, in the interests of the best harmony of the meeting, should himself second the motion and then immediately proceed to put the motion to the vote.

12.3 Definition of a Motion

A motion is a proposal that is put to the meeting for consideration.

12.4 A Counter Motion

A counter motion is a proposal made to the meeting which, if accepted, renders the main motion redundant and unnecessary.

For the purposes of illustration, assume that a motion has been proposed ‘That the financial report for the period ended 31 December 2020 be adopted’. Before this is put to the vote, but debate might already have commenced on it, someone proposes a new motion ‘That the financial
report for the period ended 31 December 2020 be referred back to the Auditors to investigate a possible understatement of expenses.’

It can readily be seen that if the counter motion is accepted by the meeting there is no point in resuming debate on the main motion.

12.5 A Dropped Motion

A proposal put to the meeting is referred to as a motion and will, after due process be put to a vote. If it is not carried, the motion is said to have been defeated. Alternatively, if the motion has been presented and the meeting subsequently decides not to vote on it, the motion is said to have been dropped.

12.6 Rules Applicable to Motions

A motion will be accepted by the Chairperson for discussion by the meeting if:-

a) It is within the scope of the notice convening the meeting;

b) It is within the powers of the body, i.e. it is not ultra vires the constitution;

c) It deals with a single topic, i.e. it must be capable of being accepted or rejected by a member voting yes or no. For example, a motion: ‘That the office hours be 07:00 hours to 16:00 hours from Monday to Friday and that the company moves to new premises from 1 January 2020’ is unacceptable because it deals with more than one issue;

d) It must be positive in form, e.g. ‘that the office hours will be 07:00 hours to 16:00 hours from Monday to Friday’s’ is in order but
proposing a motion ‘that the office hours will not be 07:00 hours to 16:00 hours’ is unacceptable for discussion;

e) It is capable of consisting of several parts although in this event the meeting will take decision on each part separately;

f) Motions must be free from ambiguity;

g) A motion must be put before the meeting commences to discuss the issue.

12.7 Withdrawal of a Motion

Depending on the constitution, a motion, once put to the meeting, should not be withdrawn. If it is considered inappropriate to continue with the motion the recommended course of action is that it is put to the vote immediately and without further discussion.
13. RULES OF DEBATE

13.1 Introduction

Any meeting that is not regulated by rules of conduct is bound to run into trouble sooner or later when there is a dispute as to how to proceed on a particular issue, and, more so, how to ensure that members present behave with decorum. Over time, rules of debate have evolved and these are expected to be observed.

13.2 Common Rules of Debate

a) Members are required to respect the authority of the Chairperson;
b) Members must respect participants and allow others to have their say regardless of whether or not they agree with them;
c) Persons will not speak unless invited to do so by the Chairperson;
d) Only one person at a time shall have the floor;
e) Remarks shall not be directed personally at others in attendance, but shall be directed through the Chairperson;
f) Speakers must not use offensive language;
g) Speakers must avoid repetition and wastage of time;
h) Nobody must be allowed to speak twice on the same motion;
i) The proposer of a motion must be entitled to a ‘right of reply’;
j) No debate must be permitted unless there is a properly proposed (and seconded, if required) motion before the meeting;
k) Debate must be restricted to the motion before the meeting, i.e. speakers should not anticipate subsequent items on the agenda;
l) If a resolution has been passed at a meeting it cannot be rescinded later in the same meeting.
14. **POINT OF ORDER**

14.1 *Definition of a Point of Order*

A point of order is the method of drawing the Chairperson’s attention to an alleged irregularity in the proceedings at a meeting. The objective is therefore to seek the Chairperson’s action in fixing what is wrong, and this must be dealt with immediately, i.e. the proceedings are summarily halted and the Chairperson must determine if the grounds for raising the point of order are valid, then give a ruling.

14.2 *Grounds for a Point of Order*

A point of order may be raised on any of the following grounds:

- *a)* There is no quorum present;
- *b)* The speaker is using inappropriate language;
- *c)* There is no motion before the meeting;
- *d)* There has not been a seconder to the motion when one is required;
- *e)* The motion being discussed is outside the scope of the notice of the meeting;
- *f)* The motion being discussed is *ultra vires* the constitution;
- *g)* The speaker is deviating from the subject or is anticipating subsequent agenda items;
- *h)* The constitution is not being followed;
- *i)* The motion being debated is illegal (e.g. in Court or defamatory);
- *j)* The rules of debate are not being followed.
14.3 Raising a Point of Order

When a person notices that there is an alleged irregularity in the proceedings he shall forthwith raise his hand, interrupting the debate, and state; ‘Chairperson, I wish to raise a point of order’. The person who was speaking immediately before this halts and the Chairperson must ask the person who raised the point of order on what grounds he has done so.

Having heard the grounds, the Chairperson will evaluate the validity of the point of order. If the grounds are not valid he shall inform the objector that the point of order is not accepted and the meeting shall resume from the point where it was interrupted. If however, the grounds are valid he must take remedial action which, in most cases, involves getting the proceedings corrected, perhaps with a word of reprimand to the speaker who was using foul language,\(^1\) straying from the topic or wasting time as the case may be.

In extreme cases, such as where the point of order has been raised because there was no quorum present, the meeting might have to be adjourned or dissolved altogether.

14.4 Limit on Points of Order

There is no limit to points of orders that may have to be raised. Nonetheless, the Chairperson must take care to ensure that members are not frivolous or abusing this this mechanism to prevent the meeting from reaching its purpose, as would often happen in parliamentary proceedings.

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\(^1\) For example, where a Member of Parliament, Dr Ntatu, in 2009, called fellow members ‘dogs’ and ‘stupid’, the Speaker, apart from reprimanding the member, also ordered that the inappropriate words be removed from the Hansards.
15. RESOLUTIONS

15.1 Definition and Types of Resolutions

A resolution is a formal expression of the decision taken by members in a meeting. Types of resolutions that may be passed by the General Meeting follow.

a) **Ordinary Resolution** - means a resolution passed by a simple majority of votes cast by such shareholders as are entitled to vote, voting in person or by proxy at a General Meeting.¹ Decisions that may be effected by an ordinary resolution include alteration of the number of shares in a company² and appointment of Directors, subject to the company’s constitution.³ An ordinary resolution to be proposed at a General Meeting may be amended by ordinary resolution.⁴

b) **Special Resolution** - means a resolution approved by a majority of not less than **seventy-five per cent** or, if a higher majority is required by the company constitution, that higher majority, of the votes cast of those shareholders as are entitled to vote and voting in person or by proxy.⁵ Decisions that may be effected by a special resolution include alteration of the company’s constitution;⁶ change

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¹ Section 2(1) of the Companies Act 2013. See also *Bushell v Faith* [1970] AC 1099.
² Section 90 of the Companies Act 2013.
³ Section 166(2) of the Companies Act 2013.
⁴ See conditions under article 47(1) of the Model Articles of a Private Company and article 40(1) of the Model Articles for a Public Company. See also *Re Moorgate Mercantile Holdings* [1980] 1 All ER 40.
⁵ Section 2(1) of the Companies Act 2013.
⁶ Section 35 of the Companies Act 2013.
of company name;¹ alteration of company status by re-registration;² reduction of capital³ and removal of Directors, subject to the company’s constitution.⁴ A special resolution to be proposed at a General Meeting may be amended by ordinary resolution.⁵ Amendments must be put to the vote before the resolution is voted upon. Improper refusal by the Chairperson to put in an amendment renders the main resolution void.⁶

c) **Unanimous Resolution** - Where all the shareholders of a company assent to a matter that could be brought into effect by a resolution in a General Meeting the unanimous consent of the shareholders without a formal meeting is enough. This is called the ‘*Duomatic Principle*’ from the case in which it was most famously canvassed, i.e. *Re Duomatic.*⁷ The Duomatic Principle is now embraced in the Companies Act 2013 through what has been termed a ‘unanimous resolution.’ This is a resolution which has the assent of every shareholder entitled to vote on the matter which is the subject of the resolution, and either

i. Given by voting at a meeting and minutes of the meeting duly recorded that the resolution was carried unanimously; or

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¹ Section 52(1)(c) of the Companies Act 2013.
² For example, section 56(1)(a) of the Companies Act 2013.
³ Section 100 of the Companies Act 2013.
⁴ Section 169(1) and (2) of the Companies Act 2013.
⁵ See conditions under article 47(2) of the Model Articles of a Private Company and article 40(2) of the Model Articles for a Public Company. See also *Re Moorgate Mercantile Holdings* [1980] 1 All ER 40.
⁶ *Henderson v Bank of Australasia* (1890) 45 Ch D 330.
⁷ [1969] 1 All ER 161.
ii. Where the resolution is signed by every shareholder or his agent in hard copy or electronically.\(^1\)

This introduces flexibility as decisions may be made through ‘Round Robin’.\(^2\)

The Companies Act 2013 requires that a unanimous resolution be passed in the following circumstances:-

a) Acquisition by a company of its own shares;\(^3\)

b) Disclosure document in relation to purchase of company’s own shares must be supported by a unanimous resolution;\(^4\)

c) Shareholders of a private company may by unanimous resolution prevent the reappointment of an Auditor by a shareholder who holds five percent of the shareholding;\(^5\)

d) Shareholders of a private company may resolve by unanimous resolution not to prepare Annual Report and accounts.\(^6\)

**Annex 3: Summary of Resolutions**

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\(^1\) Section 2(1) of the Companies Act 2013.

\(^2\) ‘Round Robin’ discussed below.

\(^3\) Section 109(1)(c) of the Companies Act 2013.

\(^4\) Section 111(1)(c) of the Companies Act 2013.

\(^5\) Section 244(5) of the Companies Act 2013.

\(^6\) Section 251(3) of the Companies Act 2013.
d) **Round Robin Resolution** – ‘Round Robin’ was coined as a name for Written Resolutions because the document requires the signatures of the shareholders or Directors, as the case may be, and is sent from one to the other and next, in the process of obtaining the signatures.\(^1\) Much as Round Robin provides convenience where Directors or shareholders cannot readily meet, its use must be kept to a minimum because it does not promote good Corporate Governance as it denies the shareholders or Directors the opportunity of sharing views before committing to signing the resolution. Round Robin may also be specifically prohibited where the company intends to remove a Director or an Auditor, as natural justice requires that they be heard before being removed.\(^2\)

The common practice is that a Round Robin resolution can be passed by a majority of the Directors, provided all Directors get notice of the proposed resolution, unless the constitution provides otherwise. It is also good practice to file signed resolutions, received from each Director, in the Minute Book for posterity.

\(^1\) Electronic signatures are now accepted under section 8(1) of the Electronic Transactions and Cyber Security Act 2016. That said regulation 7(2)(a) of the Companies Regulations 2017 erroneously provide that all signatures on documents submitted to the Registrar of Companies must be in original form. This, in our view, defeats the whole concept of electronic filing and should be considered erroneous for being inconsistent with the Companies Act 2013 – see section 21(b) of the General Interpretation Act Cap, 1:01 of the Laws of Malawi.

\(^2\) This was specifically provided for under section 121(2) of the Companies Act 1984.
Please note the following **ten rules** applicable to a Directors’ Written Resolution, where a public company adopts the Model Articles.¹

1. Any Director may propose a Directors’ Written Resolution;

2. The Company Secretary must propose a Directors’ Written Resolution if a Director so requests;

3. A Directors’ Written Resolution must be proposed by giving notice of the proposed resolution to the Directors.

4. The notice itself must indicate firstly the proposed resolution and secondly the time by which it is proposed that the Directors should adopt it.

5. Notice of a proposed Directors’ Written Resolution must be given in writing to each Director.

6. Any decision which a person giving notice of a proposed Directors’ Written Resolution takes regarding the process of adopting that resolution must be taken reasonably in good faith.

7. A proposed Directors’ Written Resolution must be adopted when **all** the Directors who would have been entitled to vote on the resolution at a Board Meeting have signed it, provided that those Directors would have formed a quorum at such a meeting.

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¹ See articles 17 and 18 of the Model Articles for Public Companies.
8. It is immaterial whether any Director signs the resolution before or after the time by which the notice proposed that it should be adopted.

9. Once a Directors’ Written Resolution has been adopted, it is treated as if it had been a decision taken at a Board Meeting.

10. A Company Secretary must ensure that the company keeps a record, in writing, of all Directors’ Written Resolutions for at least ten years from the date of their adoption.

Of course, all these rules may be varied in a particular company’s constitution.

15.2 Confirmation of Resolutions by the Court

There are occasions where decisions taken by the Directors or shareholders of a company do not have full legitimacy until approved by the Court. A few illustrations follow:-

(a) Following a special resolution on variation of class rights, those against the variation, holding 15 percent of the issued shares of that class, may apply to Court for confirmation;¹

(b) Once the Court makes the winding up order, the winding up is deemed to have commenced at the time of the presentation of the petition.² Thus resolutions attempting to dispose of property, transfer shares or alter shareholding, made after the

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¹ See generally section 119(2) of the Companies Act 2013.
² Section 106(2) of the Insolvency Act 2016.
commencement of the winding up are all void, unless the Court orders otherwise;¹

(c) A special resolution to remove a liquidator must be confirmed by the Court;²

(d) A resolution to appoint members of the Liquidation Committee must be confirmed by the Court;³

(e) A special resolution to transfer the business or property of the company in liquidation to another company must be confirmed by the Court.⁴

15.3 Registration of Resolutions

Some resolutions of a company are of such importance as to affect persons other than its members, for example, debtors, creditors and prospective shareholders. Accordingly, the Companies Act 2013 requires copies of certain resolutions to be registered with the Registrar of Companies. In that way members of the public can search the Registry before taking key decisions. In some cases a publication in the local newspapers may be required.⁵ Examples are as follows:-

(a) A special resolution adopting a constitution by a company, or the alteration or revocation of the constitution of a company, as the

¹ See section 111 of the Insolvency Act 2016.
² See section 144(3) and (4) of the Insolvency Act 2016.
³ See section 148(3) of the Insolvency Act 2016.
⁵ For example, resolution on change of name – section 52(2)(c) of the Companies Act 2013. See also the Malawi Stock Exchange, Listing Requirements – 1st May 2008, for example, Rule 7.68 requires that changes in the office of Chairperson and CEO’s be advertised in newspapers.
case may be, must be notified to the Registrar of Companies within **fourteen days**;¹

(b) A special resolution changing the company name;²

(c) A special resolution re-registering a company from one type to another;³

(d) A special resolution converting shares with par or nominal value into shares of no par or nominal value;⁴

(e) A special resolution reducing the capital of a company;⁵

(f) A special resolution to remove a company from the Register of Companies;⁶

(g) A special resolution required to declare a company dormant.⁷

In addition, for listed companies, all special resolutions must be furnished to the MSE.⁸

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¹ Section 35(2) of the Companies Act 2013. See also Rule 6.21(b) of the Malawi Stock Exchange, Listing Requirements – 1st May 2008.
² Section 52 of the Companies Act 2013.
³ Sections 56, 57, 59 and 143 of the Companies Act 2013.
⁴ Section 87(3) of the Companies Act 2013.
⁵ Section 100(7) of the Companies Act 2013.
⁶ Section 348(d)(1) of the Companies Act 2013.
⁷ Section 355(1)(b) and (3) of the Companies Act 2013.
⁸ Rule 6.20(c) of the Malawi Stock Exchange, Listing Requirements – 1st May 2008.
16. VOTING

16.1 Introduction

Voting is a mode of decision making by a plurality of the membership. Mostly the majority rule will be applied as requiring unanimity of all shareholders will always be difficult. Voting is such an important right for every shareholders; it provides a mechanism to adapt the original constitution to changing circumstances; elect the Board of Directors and Auditors, among many other strategic decisions.

Much as ‘The shareholders may, by special resolution, direct the Directors to take, or refrain from taking, specified action,’ shareholders do not as a matter of course have any say in the day to day management of the company. Shareholders delegate their authority to Directors who manage the company on their behalf whilst retaining the ultimate power to steer the company, including the appointment and removal of the Directors through a vote.

16.2 Methods of Voting

Mahony\textsuperscript{2} states that there are several methods of voting that can be used to determine the outcome of a motion in a meeting. Each has its own benefits and drawbacks and suitability for the occasion as well as legality. The Chairperson must therefore exercise caution in ensuring that the appropriate method is used.

(a) **Manual and electronic voting** – previously, manual voting was apparently the readily acceptable mode of voting under the Companies Act of 1984. Now Company Law provides for electronic voting.

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\textsuperscript{1} Article 4(1) of the Model Articles for a Private Company.

voting.\(^1\) Where a company sets up an electronic interface in the conduct of its meetings, any member absent who follows the proceedings by way of such electronic communication can also vote accordingly.\(^2\)

Advantages of using electronic voting include convenience and cost effectiveness for individual investors as well as the company. At the same time, electronic voting also has some drawbacks. Electronic transmission, for instance, is unreliable especially with poor internet connectivity in Malawi.

**(b) Voting by acclamation/Voice vote** - This is a common way of determining how the meeting feels, whether it supports or rejects the motion. What happens is that the Chairperson asks those in favour to say ‘Aye’ and those against to say ‘Nay’ - often simultaneously - and he judges, based on the predominant volume of voices, whether or not the meeting adopts or rejects the motion.\(^3\) Obviously, this is a method of voting that cannot deliver an accurate result and should therefore be used when accuracy is not an issue and it is apparent to the Chairperson that the meeting is heavily swayed in one particular direction. It is undoubtedly very quick.

This method of voting is not commendable for company meetings. However, in case it is used, it should not be used on contentious issues, nor where it is necessary to record the exact number of votes for and against.

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\(^2\) *Ibid* Order 9(8).

\(^3\) This method of voting is particularly prescribed for parliamentary proceedings under Order 90(1) of the National Assembly Standing Orders adopted on 22\(^{nd}\) May 2003.
If any member is unhappy with the use of this method to determine the sense of the meeting he can, but only upon the announcement of the result of the vote by the Chairperson, demand that the meeting use a more accurate method of voting.

(c) **Voting on a show of hands and on a poll**– The common law position adopted by companies is that, when a resolution is put to the vote, it must be decided on a show of hands, unless before, or on the declaration of the result of the show of hands, a poll is duly demanded. Once a poll is demanded, the result on show of hands is void. On a show of hands, every member present in person has one vote, but, on a poll, he has one vote for every share held by him. This ensures that decisions in a company are made by the majority.

The right to demand a poll can only be legally excluded in two scenarios:

(i) Election of a Chairperson; or
(ii) An adjournment of the meeting.

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1 See generally *Re Horbury Bridge Coal, Iron and Wagon Co.* (1879) 11 ChD 109 and *Arnot v United African Lands Ltd* [1901] 1 Ch 518.
2 *R v Wimbledon Local Board* (1882) 8 QBD 459.
3 Note however, that such a member need not use all his votes or cast all the votes he uses in the same way – Order 21 of the Companies (Shareholder’s Code of Conduct) Order, 2016 - Part B of the Schedule on Code of Conduct for Shareholders of a Public Company.
4 See Order 8 of the Companies (Shareholder’s Code of Conduct) Order, 2016 - Part A of the Schedule on Code of Conduct for Shareholders of a Private Company. See also article 44 of the Model Articles for Private Companies and articles 36 and 37 of the Model Articles for Public Companies.
In a public company, a poll can readily be demanded by the following:-

a) Not less than **five** members having the right to vote on the resolution; or

b) By a member or members representing not less than **ten per cent** of the total voting rights thereon; or

c) By a member or members holding shares in the company conferring a right to vote on the resolution, being shares on which an aggregate sum has been paid up equal to not less than **ten per cent** of the total sum paid up on all the shares conferring that right.¹

The Model Articles provide that in both public² and private companies,³ a poll may be demanded by:-

a) The Chairperson of the meeting;⁴
b) The Directors;
c) Two or more persons having the right to vote on the resolution;⁵ or
d) A person or persons representing not less than one tenth of the total voting rights of all the shareholders having the right to vote on the resolution.

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¹ *Ibid* Order 20(2).
² Article 36(2) of the Model Articles for Public Companies.
³ Article 44(2) of the Model Articles for Private Companies.
⁴ See *Second Consolidated Trust Ltd v Ceylon Amalgamated Tea and Rubber Estates Ltd* [1943] 2 All ER 567.
⁵ See *Siemens Brothers and Co. Ltd v Burns* [1918] 2 Ch 325.
Voting by show of hands and a poll are certainly more accurate in that they give an exact tally as opposed to making a judgment call as one finds in a vote by acclamation.

In a vote by show of hands, the Chairperson asks those in favour to raise their hands and the scrutineers\(^1\) count them. Those hands are put down and the Chairperson next requests that those against the motion raise their hands and these are then counted. The majority vote can thus be easily determined. In announcing the outcome the Chairperson is not obliged to reveal the exact numbers of votes for and against.\(^2\) That said, we think it is good practice to do so in order to promote transparency. If any member is dissatisfied with this method of voting being used he can immediately request the Chairperson to use a more sophisticated method.

There are drawbacks with voting by show of hands, especially in a large meeting, because counting can take a long time and people get tired of holding up their hands. In company meetings there are some other drawbacks, most notably that shareholders have different numbers of shares. This means that a show of hands will not determine the accurate number of votes hence demand for a poll.

(d) **Voting by division** - this is a method that may rarely be encountered nonetheless worthy mentioning. The voting is initiated by the ringing of a ‘division bell’ and, while the bell continues ringing, those who are not in the chamber at the time must make their way there before the bell stops ringing. At the same time those who are already in the chamber and do not wish to participate in the vote

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\(^1\) Scrutineers are appointed by the Chairperson and they need not be members – per article 37(2) of the Model Articles of a Public Company.

must leave the room. When the bell stops ringing the doors are closed and only those who are in the room will participate. Those who are in favour are asked to move to one side of the room, and those against to the other. The numbers are then counted and the result declared. It is clear that the accuracy of this method is beyond dispute.

In this method of voting there is no way of abstaining, because everyone in the room must be on one side or the other. Nobody can be left in the middle- if they want to abstain because they cannot decide for or against then they must use the opportunity of the ringing division bell to leave the room.

This method most probably gave rise to the expression ‘voting with your feet’ where people who are so frustrated by the issue and foresee no acceptable outcome leave in disgust.

(e) **Voting by ballot** - where several candidates have been nominated for a particular appointment, e.g. as Chairperson, and only one appointment is to be made, the manner of deciding shall be by ballot (sometimes referred to as a ‘run off’ election).

What happens is that each person who is entitled to vote is given a ballot paper containing the names of all the nominated candidates. For the purposes of this illustration let us assume that there are five candidates. Members are asked to indicate by means of a cross against the name of their chosen candidate. The ballot papers are then collected by scrutineers who sort them by candidate, excluding null and void votes. The results will then be referred to the Chairperson and those with the fewest votes are dropped off the next round of voting. If no clear winner emerges in the first round of voting, for example, suppose three got the same number of votes...
each then the ballot gets repeated, but this time only the three names will appear on the ballot paper.

Obviously, this is a very administration intensive procedure as new ballot papers might have to be prepared for each successive round of voting and it could consume a lot of time.

Note that the Courts can order some other form of voting. For instance, in Re British Union for the Abolition of Vivisection\(^1\) where shareholders could not peacefully convene, the Court ordered a ‘postal ballot’ i.e. voting through the postal service.

(f) **A unanimous vote** - contrary to popular belief a unanimous vote does not mean that everybody at the meeting must vote in the same direction. The position can be illustrated thus: Assume that there are 50 people at a meeting and a motion is put to the vote. The Chairperson asks those in favour to raise their hands and there are 10 who do so. He then asks if there are any against and nobody raises their hand. The outcome is unanimous adoption because everybody who voted, cast his or her vote in favour.\(^2\)

(g) **Deliberative vote and Casting Vote** - A distinction is made between a deliberative vote which is a vote given to a person because they are a member and a casting vote which is the second vote that the Chairperson of a meeting possesses to use whenever there is a tie in the votes. Where the Chairperson is required to exercise a casting vote, he must use it objectively.\(^3\) More

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1 CHD 4 March 1995.
3 Companies (Corporate Governance) Regulations 2016, regulation 3 clause 7.6.
importantly, the constitution of a company must provide for it.\(^1\) This is so because there is no common law right to a casting vote. Sometimes two persons form a joint venture company on the basis of exactly equal control. In such a company, it is important for no one to have a casting vote.\(^2\)

The Chairperson may use his casting vote even if he has not used his deliberative vote as a member. If he has used his deliberative vote then he is not obliged to use his casting vote in the same manner. For example, if he has voted ‘yes’ as a member and there is an equality, then the Chairperson is not obliged to use his casting vote also to vote ‘yes’. However, where the Chairperson chooses not to exercise his casting vote the motion is automatically defeated.

Mahony\(^3\) argues that despite having this right to a casting vote, the Chairperson, should refrain from using it. In the unlikely event that the Chairperson uses it, it is submitted that he should use it to vote against the resolution. It is apparent that the use of a casting vote promotes partiality and often brings discord amongst members especially where the law deems it that decisions are arrived at collectively, especially Board decisions.\(^4\)

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\(^1\) Otherwise as a general rule, the Chairperson of a general meeting of a private company does not have a casting vote according to Order 8(7) of the of the Companies (Shareholder’s Code of Conduct) Order, 2016 - Part A of the Schedule on Code of Conduct for Shareholders of a Private Company. However, see article 13(1) of the Model Articles of a Private Company and article 14(1) of the Model Articles of a Public Company. In comparison, in the National Assembly, the Speaker does not have a deliberative vote but only a casting vote whenever there is a tie – section 54(1) of the Republican Constitution of Malawi, 1994.


\(^4\) See articles 7 of both the Companies (Shareholder’s Code of Conduct) Order, 2016 - Part A of the Schedule on Code of Conduct for Shareholders of a Private Company and
16.3 Joint Holders and Voting

Subject to the constitution of a private company, in the case of joint holders of shares of a company, only a vote of a senior holder who votes, or any proxies duly authorized by him, may be counted by the company. In this respect, a senior holder of a share is determined by the order in which the names of the joint holders appear in the Register of Members.¹ Joint voters therefore have a right to instruct the company on the order in which their names are to appear in the register.²

16.4 Out-going Member and Voting

If a share has been sold out but, at the date of the meeting, the transfer has not been completed because the share has not been paid for then the unpaid vendor retains the right to vote in respect of the share. If the vendor of the share has not been paid for it but the transfer has been registered then the buyer must vote in accordance with the unpaid vendor’s instructions.³

16.5 Errors and Disputes in Votes

The law presumes that all votes cast at a meeting are valid. Any objection as to the qualification of any person voting at a General Meeting can only be entertained at the same meeting. Any objection must be referred to the Chairperson of the meeting, whose decision is final.⁴ This ensures finality

² Re T.H. Saunders and Co. Ltd [1908] 1 Ch 415.
⁴ Article 43 of the Model Articles of a Private Company and article 35 of the Model Articles for a Public Company.
as to the result of a vote at a meeting and probably avoidance of unnecessary injunctions!

16.6 Trustees in Bankruptcy and Personal Representatives

A trustee in bankruptcy or personal representative, though entitled to notice of company meetings,\(^1\) is not, unless registered as a member in respect of a share, generally entitled to exercise any right conferred by membership in relation to company meetings. A bankrupt who is still registered as a member remains entitled to attend and vote at company meetings though obliged to vote in accordance with the directions of his or her trustee in bankruptcy because the trustee has the beneficial interest in the shares.\(^2\)

16.7 Freedom to Exercise the Right to Vote

There is strong authority, particularly in the older cases,\(^3\) to the effect that the right to vote is a property right being attached or incident to a share which, itself, is a piece of intangible property or a chose in action.\(^4\) Therefore, in voting, shareholders can vote in whatever way they think fit and from whatever motive. It also follows that a member who is also a Director is not subject to the rule against conflict of interest and duty when voting as a member.\(^5\)

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1 Order 10(2) of the Companies (Shareholder’s Code of Conduct) Order, 2016 - Part B of the Schedule on Code of Conduct for Shareholders of a Public Company.
3 See Pender v Lushington (1877) 6 Ch D 70.
4 Section 82 of the Companies Act 2013 which provides that the shares or other interests of any member in a company are personal property.
5 North-West Transportation Co. Ltd v Beatty (1887) 12 App Cas 589; Re Express Engineering Works Ltd [1920] 1 Ch 466; Baird v Baird 1949 SLT 368.
That said, Courts have sometimes said that a resolution of the members of a company would be invalid if members voting for it did not vote bona fide in the interest of the company\(^1\) or if the resolution was adopted for improper purpose.\(^2\) In addition, minority shareholders can always bring an action to question a decision of the majority that is *ultra vires*, fraudulent or oppressive.\(^3\)

### 16.8 Loss of the Right to Vote

Where a shareholder sells his shares, he retains the right to vote until he is paid in full for the shares, as long as he is still on the Register of Members.\(^4\)

Depending on a particular credit agreement, a shareholder may lose the right to vote if he mortgages his shares, so that the mortgagee will be able to exercise the voting rights attaching to the shares.\(^5\) More importantly, the constitution may also restrict the right to vote.\(^6\)

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1. *Allen v Gold Reefs of West Africa Ltd* [1900] 1 Ch 656.
5. *Siemens Brothers and Co. Ltd v Burns* [1918] 2 Ch 324.
6. For example, article 41 of the Model Articles for Public Companies restricts the right to vote where any sums payable in relation to a share are outstanding. See also Order 11 of the Companies (Shareholder’s Code of Conduct) Order, 2016 - Part A of the Schedule on Code of Conduct for Shareholders of a Private Company.
16.9 Voting Agreements

Shareholders can enter into a contract which restricts the way in which they will vote or bind them to vote in a particular way.¹ This can be a stand alone agreement or a provision within the Shareholders’ Agreement.² These agreements will be enforced by means of both prohibitory and mandatory injunctions by the Courts.³

16.10 Unanimous Informal Agreement

Notwithstanding the formalities connected with shareholders’ meetings outlined above, there is a strong principle running through corporate decision making. That principle is to the effect that, where a unanimous but informal resolve or assent can be demonstrated on the part of all the members on a matter, which is within the power of the company, then the Courts will treat this as the equivalent of a formal resolution in a duly convened shareholders’ meeting.⁴

² See paragraph 1.7, above.
³ Greenwell v Porter [1902] 1 Ch 530.
⁴ Baroness Wenlock v River Dee Co (1885) 36 Ch D 675n.
17. PROXIES

17.1 Right to Appoint a Proxy

Any member of a company, natural or corporate, who is entitled to attend and vote at a meeting of shareholders is entitled to appoint another person (whether a member or not) as his proxy to attend and vote instead of him. In addition, subject to the company’s constitution, a proxy may be elected to be chairperson of a general meeting, and can demand a poll.

A proxy is appointed by notice in writing signed by the shareholder and the notice must state whether the appointment is for a particular meeting or a specified term. The articles frequently set out the form of a proxy but a written appointment in reasonable form will suffice.

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1 If the member company is in liquidation, the liquidator may also make the appointment Hillman v Crystal Bowl Amusements [1973] 1 All ER 379.
2 See Order 9 of the Companies (Shareholder’s Code of Conduct) Order, 2016 - Part A of the Schedule on Code of Conduct for Shareholders of a Private Company and Order 23 of the Companies (Shareholder’s Code of Conduct) Order, 2016 - Part B of the Schedule on Code of Conduct for Shareholders of a Public Company. See also the articles 45 and 46 of the Model Articles of Private Companies and articles 38 and 39 of the Model Articles of Public Companies. In addition, the Stock Exchange’s Listing Requirements require that, when a notice is sent out to members of a listed company convening a meeting, it has to be accompanied by a Proxy Appointment Form: section 7.51 of the Malawi Stock Exchange’s Listing Requirements, 1st May 2008.
Furthermore, minor errors which do not seriously mislead will not make a proxy invalid. Thus in *Oliver v Dalgleish*\(^1\) a proxy form gave the correct date of the meeting but said it was the annual general meeting and not an extraordinary general meeting as it in fact was. It was held that the proxy was nevertheless valid.

### 17.2 Effectiveness of a Proxy Appointment

A proxy is effective where:

a) A copy of the notice of appointment is produced before the start of the meeting in accordance with the constitution\(^2\) which is usually **48 hours** before the start of the meeting;\(^3\) and

b) Any power of attorney, or other authority under which the proxy is signed, is produced.\(^4\)

An instrument appointing a proxy must be in writing under the hand of the appointer or of his agent duly authorized in writing or, in the case of a company, under the hand of an officer or of an agent duly authorized.\(^5\)

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1. [1963] 3 All ER 330.
2. *Ibid* Order 9(4) and (7).
A Proxy Appointment Form may indicate whether the proxy should vote for or against a particular motion. Where the proxy decides to vote otherwise than indicated in the Proxy Appointment Form, the company ought not accept the change.\textsuperscript{1}

\textbf{Annex 4: Proxy Appointment Form}

\textbf{17.3 Termination of a Proxy’s Authority}

Where a proxy is appointed for a particular meeting or term, his authority terminates automatically at the conclusion of that meeting or term as provided for in the Proxy Appointment Form.\textsuperscript{2} Otherwise, the authority can be terminated anytime through the Notice of Termination.\textsuperscript{3} The authority may also be terminated impliedly, for example where the shareholder who appointed the proxy turns up for the meeting and votes personally. In that case, the proxy’s votes will be validly rejected.\textsuperscript{4} A proxy who acts knowing that his or her authority has been revoked will be in breach of duty to his or her appointer,\textsuperscript{5} and the law of agency will apply accordingly.

\textbf{Annex 5: Notice of Termination of Proxy’s Authority}

\begin{itemize}
\item \textsuperscript{1} \textit{Oliver v Dalgleish} [1963] 3 All ER 330.
\item \textsuperscript{2} Order 9(3) of the Companies (Shareholder’s Code of Conduct) Order, 2016 - Part A of the Schedule on Code of Conduct for Shareholders of a Private Company. See Annex 4.
\item \textsuperscript{3} See generally Order 29 of the Companies (Shareholder’s Code of Conduct) Order, 2016 - Part B of the Schedule on Code of Conduct for Shareholders of a Public Company. See Annex 5.
\item \textsuperscript{4} \textit{Cousins v International Brick Co Ltd} (1931) CA 2 Ch 90.
\item \textsuperscript{5} \textit{Ibid.}
\end{itemize}
18. SCRUTINEERS

18.1 Definition of a Scrutineer

A scrutineer is a person, whether a member or not, appointed by the Chairperson\(^1\) or elected by the meeting to attend to several matters in regard to voting and to see that malpractices do not occur. As such they should be people of integrity who are impartial.

In the case of company meetings, especially the larger public companies, one often finds that personnel from the Transfer Secretaries’ office are in attendance to check attendance against membership records and to act as scrutineers when it comes to voting. External Auditors, may also be appointed as scrutineers, on account of their independence.

18.2 Duties of a Scrutineer

A scrutineer will assist in several respects such as:-

a) Distributing voting slips to those entitled to vote;
b) Collecting completed voting slips after the voting;
c) Checking the voting slips against member records to determine entitlement to vote;
d) Checking voting slips against proxy lists to ensure the voting has been done in accordance with instructions;
e) Sorting out voting slips and counting the same;
f) Determining if any voting slips are to be regarded as null and void;
g) Giving the tallies of vote for, against and the number of null and void votes to the Chairperson to announce the results.

\(^1\) See article 37(2) of the Model Articles for a Public Company.
19. DEFAMATION AND MEETINGS

19.1 Definition of Defamation

It may happen that certain statements made at a meeting, oral or written, are statements that are or could be considered to be defamatory.\(^1\) Defamation occurs where a publication results in the reputation of a person being diminished or brought into ridicule. There is no need for loss of money but rather just loss of esteem.

Statements conveyed in some permanent form such as printed form or a statue are called libel and those made by spoken words are called slander. Defamation may be actionable as a civil action or as a criminal action.

19.2 Defences

Defences to a claim based on defamation include justification, fair comment and privilege. Justification entails that the alleged defamatory statement is true. For example, calling a thief a thief. This will be complete defence once established. Fair comment is analogous to the defence of privilege, but of wider application, is the defence of fair comment on a matter of public interest. It is concerned with expressions of opinion. Defence of privilege follows below.

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\(^1\) Defamation is a technical branch of law and resort must be had to any dedicated text on the law of tort.
19.3 The Defence of Privilege

Where certain conditions exist at a meeting, then the person making the alleged defamatory publication could claim that he was protected by privilege. Privilege, it must be stressed, relates to the occasion and not the statement.

There are two types of privilege- absolute and qualified. Absolute privilege exists in parliamentary proceedings\(^1\) as well as Court proceedings.\(^2\)

Qualified privilege is what can be deemed to exist in meetings of bodies such as clubs, companies, and other private associations where members only are present.

Qualified privilege exists if the person making the statement is doing so-

a) Only to discharge some social, moral or legal obligation; and

b) Does this only to those people who have a corresponding interest or right to receive it.\(^3\)

However, qualified privilege is not available where a statement is made with malice or if the statement is made to persons who do not have corresponding interest to receiving it. Consequently if, for example, the press are present at the meeting, this may cause difficulties. There is

\(^1\) See section 60(2) of the Republican Constitution of Malawi, 1994. See also section 3 of the National Assembly (Powers and Privileges) Act, Cap 2:04 of the Laws of Malawi, which provides for immunity from legal proceedings as follows:- ‘No civil or criminal proceedings may be instituted against any member for words spoken before, or written in a report to, the Assembly or to a committee, or by reason of any matter or thing so brought by him by petition, Bill, motion or otherwise.’

\(^2\) Section 61 of the Courts Act, Cap 3:02 of the Laws of Malawi.

\(^3\) See also *Migochi v Registered Trustees of CCAP* Civil Cause Number 1776 of 2001.
authority to suggest that qualified privilege will not be lost if the press (or other strangers) are present at the meeting in the normal course of business.\textsuperscript{1} However, qualified privilege will be lost if the maker of the defamatory statement expressly invited them.

If the business of the company inevitably involves discussion of an area where there is potential for defamatory statements, the company may, in an exceptional case, want to consider excluding the press and other strangers from the meeting to ensure that qualified privilege is not lost. However, it would be a serious step to decide to exclude the press and would probably generate further press interest.

If documents are to be submitted to the meeting for consideration these should be clearly marked ‘Strictly Confidential- For Members Only.’ This in itself does not remove the potential for a defamation claim; one should take further prudent steps to ensure that whatever is written in the document is not read or seen by non-members. It is in fact prudent to produce this document to the members of the meeting only when assurances are received that only members are present.

\textsuperscript{1} Slaughter and May, \textit{The Law of Difficult Meetings}, 2016 p. 18.
20. ADJOURNMENT, POSTPONEMENT AND DISSOLUTION OF MEETINGS

20.1 Definition of an Adjournment

An adjournment is a temporary cessation in the proceedings of a meeting with a view to resuming later on. A meeting may be adjourned for any length of time. It may be for a short time such as adjourning for refreshments or a health-break or to await the arrival of a person who has been asked to attend. Sometimes a meeting will be adjourned for a longer period, say a week, so as to permit members to carry out more detailed research on an issue or to arrange for a poll. It is also possible for the Chairperson to adjourn a meeting *sin die* i.e. without setting a date for its resumption.

20.2 Circumstances for Adjournment

If the persons attending a General Meeting within **half an hour** of the time at which the meeting was due to start do not constitute a quorum, or if during a meeting a quorum ceases to be present, the Chairperson of the meeting must adjourn it.¹

The Chairperson of the meeting may also adjourn a General Meeting at which a quorum is present if :-

a) The meeting consents to an adjournment, or

b) It appears to the Chairperson of the meeting that an adjournment is necessary to protect the safety of any person attending the meeting or ensure that the business of the meeting is conducted

¹ Article 41(1) of the Model Articles for a Private Company and article 33(1) of the Model Articles for a Public Company.
in an orderly manner.\(^1\) Indeed, the Chairperson has the power to adjourn the meeting for a short while to allow tempers to cool down and allow for some informal consultations.

The Chairperson of the meeting must adjourn a General Meeting if directed to do so by the meeting.\(^2\) It is fairly common practice for the meeting to agree to interest groups to requesting an adjournment so that they can consolidate the proceedings to date and agree amongst themselves on their next steps. An everyday example of this is when Trade Unions are in negotiations with Management and they wish to ‘caucus’ to consider an offer.

### 20.3 Procedure after Wrongful Adjournment

Where circumstances do not dictate that a Chairperson must use his power to adjourn or where the meeting considers that he has abused his power, those present at a meeting, provided they still form a quorum, may elect someone else to be the Chairperson for the rest of the meeting and carry on with the transaction of business.\(^3\) The previously appointed Chairperson must accept that position and vacate the chair gracefully!

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\(^1\) Article 41(2) of the Model Articles for a Private Company and article 33(2) of the Model Articles for a Public Company. See also *John v Rees* [1970] Ch 345; *Jackson v Hamlyn* [1953] Ch 577 and *Byng v London Life Association Ltd* [1990] Ch 170.

\(^2\) Article 41(3) of the Model Articles for a Private Company and article 33(3) of the Model Articles for a Public Company.

\(^3\) *National Dwellings Society v Sykes* [1894] 3 Ch 159.
20.4 Adjournment and Fresh Notice

It is not necessary to issue a fresh notice when the meeting has been adjourned to a specific time and place.\(^1\) However, where a meeting is adjourned for more than **fourteen days** after it was adjourned, then a fresh notice of at least **seven clear days** must be given.\(^2\) This also applies where the meeting has been adjourned *sine die*.\(^3\)

20.5 Postponement of Meetings

Postponement takes place before the meeting can even convene due to some unexpected emergency. A postponed meeting will be convened again with fresh notice. There are no statutory rules for postponement. However, common law states that once the meeting has been summoned it cannot be postponed or cancelled unless the company’s Articles provide power to do so.\(^4\) Where it is desired to cancel a meeting because the purpose for which it was originally called has ceased to exist, then the proper course is to open the meeting and adjourn it indefinitely without transacting any business. Of course, it would be sensible to inform the shareholders in advance that the meeting will be a mere formality.

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\(^1\) See Article 41(4)(a) and (b) of the Model Articles for a Private Company and article 33(4)(a) and (b) of the Model Articles for a Public Company.

\(^2\) Article 41(5) of the Model Articles for a Private Company and article 33(5) of the Model Articles for a Public Company.

\(^3\) *Kerr v Wilkie* (1860) 1 L.T. 501.

\(^4\) *Smith v Paringa Mines Ltd* [1906] 2 Ch 193; *Bell Resources Ltd v Turnbridge Pty Ltd* (1988) 13 ACLR 429.
20.6 Dissolution of Meetings

When the business for which a meeting has been convened has been transacted the Chairperson has the authority to dissolve i.e. terminate the meeting. There is no need for members’ consent to dissolve the meeting.

Dissolution may also happen when proceedings at a meeting have become so disorderly that it renders the transaction of the business impossible, in spite of there being unfinished business.

Annex 6: Chairperson’s Procedures in an AGM
21. ANNUAL REPORT AND ACCOUNTS

21.1 Annual Report and Accounts

The Annual Report and accounts must comprise a Directors' Report, the financial statements and the Auditor's Report.\(^1\)

The Board of every company must, within six months after the balance sheet date,\(^2\) prepare an Annual Report and accounts.\(^3\) That said, the shareholders of a private company may resolve by unanimous resolution that this requirement should not apply to their company.\(^4\)

21.2 Directors’ Report

A Directors’ Report is required for all public companies.\(^5\) It must be in writing and dated. The Director’s Report must contain the following:-

(a) The nature of the business of the company or any of its subsidiaries;

(b) The classes of business in which the company has an interest whether as a shareholder of another company or otherwise; and

(c) The names of Directors during the financial year;

(d) Particulars of entries in the Register of Interest made during the accounting period;

\(^1\) Section 251(1) of the Companies Act 2013.
\(^2\) The balance sheet date is a date as of which the information in a statement of financial position is stated. This date is usually the end of a month, quarter, or year and in Malawi mostly 31\(^{\text{st}}\) December for a majority of companies.
\(^3\) Section 251(2) of the Companies Act 2013.
\(^4\) Section 251(3) of the Companies Act 2013.
\(^5\) Section 252 of the Companies Act 2013.
(e) Remuneration and benefits received, or due to executive Directors and non in a separate statement, Non-Executive Directors and subsidiaries;¹

(f) State the total amount of donations made by the company and any subsidiary during the accounting period;

(g) State the amounts payable by the company to the External Auditor;

(h) State particulars of indemnity insurance for Directors, employees and related parties;² and

(i) Be signed on behalf of the Board by two Directors.

21.3 Right of Shareholder to Receive the Annual Report

i. The Board is obliged to send a copy of the Annual Report and accounts to every shareholder not less than fourteen days before the date fixed for holding the annual meeting of the shareholders and such delivery may be made by electronic means.³

ii. The shareholder may waive this right in writing.⁴

iii. Subject to the company’s constitution, accidental failure to send an Annual Report and accounts, notice, or other documents to a shareholder in accordance with the Companies Act 2013 does not affect the validity of proceedings at a meeting of the shareholders.⁵

¹ See also section 252(2) of the Companies Act 2013.
² Section 221(7)(c) of the Companies Act 2013.
³ Section 253(1) of the Companies Act 2013.
⁴ Section 253(2) of the Companies Act 2013.
⁵ Section 254 of the Companies Act 2013.
21.4 Filing of Annual Report

For public companies, the Annual Report must be filed with the Registrar of Companies, within twenty eight days after the date when they are required to be signed.\(^1\) This provision is unclear as to when the accounts are required to be signed. Our view is that the date of the AGM should be considered as the date on which the accounts are supposed to be signed. This entails that the twenty eight days start running after the date of the AGM, much as in practice the accounts will have been signed much earlier.

21.5 Concise Annual Report

The Companies Regulations 2017\(^2\) provide for a concise Annual Report for the purposes of the Companies Act 2013.\(^3\) It states that the concise report must:

- (a) Be in writing;
- (b) Be dated;
- (c) Be signed on behalf of the Board by two Directors; and
- (d) Describe, so far as the Board believes is material for the shareholders to have an appreciation of the state of the company's affairs and will not be harmful to the business of the company or of any of its subsidiaries, any change during the accounting period in
  - i. The nature of the business of the company or any of its subsidiaries; or
  - ii. The classes of business in which the company has an interest.

\(^1\) Section 255 of the Companies Act 2013.
\(^2\) Regulation 11 of the Companies Regulations 2017.
\(^3\) Sections 251 to 255 of the Companies Act 2013.
21.6 Annual Return

Every company must, once in every year, file with the Registrar for registration an Annual Return which may be in electronic form. The Annual Return must be completed and filed with the Registrar within twenty eight days of the date of the AGM. The Annual Return must be signed by a Director or Secretary.

The contents of the Annual Return are governed by the Regulations. Where there are no changes from previous return, the company will present a “No Change Return” certified by a Director or Secretary.

The law requires that these Returns should be made truthfully and honestly. Indeed, other legal commentators have said that the objective of an Annual Return is to provide an annual consolidation of periodic information so that a searcher does not have to go beyond the last Annual Return.

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1 Section 256(1) of the Companies Act 2013. Under section 256(6), a company may not make an Annual Return in the calendar year of its incorporation.
2 Section 256(2) of the Companies Act 2013. However, a company which keeps a Branch Register outside Malawi must comply with these requirements within eight weeks after the date of the AGM – section 256 (3) of the Companies Act 2013.
3 Section 256(4) of the Companies Act 2013.
4 See Companies Regulations 2017 – Forms 12 and 17 – see Annex 1 herein.
5 Section 256(5) of the Companies Act 2013.
6 See the Judgment of Kapanda J. in Deeps Enterprises v The Registered Trustees of the Archdiocese of Blantyre HC Civil Cause no. 96 of 2006 p. 11.
22. CHAIRPERSON

22.1 The Position of Chairperson

The Chairperson is the person chosen by the members of a body to preside over and regulate their meetings. There is no legal requirement that a Chairperson must be a member of the body over whose meetings he presides, but this is in fact very often the case. It is our view that having a non-member as Chairperson entrenches impartiality.

For the Board Chairperson of a public company,¹ the following points must be noted:-

(1) The Chairperson should preferably be non-executive;²

(2) The roles of the Chairperson and the CEO must preferably be separate, but where they are combined, it is important that the Chairperson encourages proper deliberation of all matters requiring the Board’s attention and obtains optimum input from all Directors.³

(3) The Chairperson ensures that all Board Members are as fully informed as possible on any issue on which a decision is to be made and afford each Board Member a reasonable opportunity to contribute to the Board’s deliberations.

¹ Companies (Corporate Governance) Regulations 2016, regulation 3 clause 7.
² For financial institutions, the Chairperson must always be non-executive – section 29(3) of the Financial Services Act 2010.
³ The most notable institution in Malawi that combines the roles of the CEO (the Governor) and Chairperson is the RBM under section 11 of the RBM Act, Cap 44:02 of the Laws of Malawi. This needs a review to enhance Corporate Governance at RBM.
(4) It is the responsibility of the Chairperson, following a Board Evaluation, to recommend to the owners the removal of Board members who do not contribute effectively to the Board.¹

(5) Where the Chairperson is appointed by the Board, the Directors should ensure that only a person that can add value is appointed to the position.

(6) The company should determine the length of service of the Chairperson.²

(7) Where the Chairperson is required to exercise a casting vote, he must use it objectively.

22.2 Election of the Chairperson

A member may be elected to be a Chairperson of a General Meeting by a resolution of the company passed at the meeting, subject to any provision of the company’s constitution that states who may or may not be a chairperson.³ The Board Chairperson chairs the General Meetings as well.⁴ It may be necessary for someone to act as chair temporarily for the purpose of organising the election of a Chairperson.

¹ See Board Evaluation under paragraph 26.3, below.
² There is no consistency of practice on the tenure; however, all Directors are subject to retirement by rotation – see paragraph 23.16, below. For statutory corporations’ appointments; the tenure for all Directors is usually three years – see for example, section 8(7) of the MRA Act, Cap 39.9 of the Laws of Malawi and section 6(3) of the RBM Act Cap 44:02 of the Laws of Malawi.
³ Order 18(1) of the Companies (Shareholder’s Code of Conduct) Order, 2016 - Part B of the Schedule on Code of Conduct for Shareholders of a Public Company.
⁴ Article 39(1) of the Model Articles for a Private Company and article 31 of the Model Articles of a Public Company.
Obviously, the person nominated for Chairperson must be willing and able to act.

22.3 Absence of the Chairperson at a Meeting

If at the time appointed for the meeting to commence the Chairperson is not present then-

a) Those present might decide to wait for a reasonable time (usually ten minutes) to see if the Chairperson does arrive. They are not bound to do so, but it is a courtesy.

b) Those present might decide to elect someone else to preside over the meeting.

If, having done the latter, it is to be noted that the person appointed will be Chairperson for that meeting only. Should the regular Chairperson arrive late and someone else has already been elected to chair the meeting, then that person may offer to stand down and let the regular Chairperson continue. However, there is no obligation to do this.\(^1\)

22.4 Functions of a Chairperson

At all times the Chairperson should prudently exercise impartiality, even if the wishes of the meeting are different to his own views on the matter. The Chairperson should be firm, but not to the extent that he dominates the proceedings and members who are present feel intimidated. A good Chairperson must obviously have ‘people skills’ and strong knowledge of the affairs of the body over whose meetings he presides, besides of course a thorough knowledge of the law, procedure and conduct of

\(^1\) See also the Model Articles for Private Companies - article 12(4) for Board Meetings and articles 39(2) for General Meetings.
meetings. A sense of humor in the Chairperson is often appreciated as this might relax the meetings on those occasions when proceedings become tense.

The functions of the Chairperson include the following:

a) To see that there is no defect in the manner in which the meeting was convened;

b) To see that there is a quorum present before the meeting proceeds to business;

c) To ensure that proceedings are conducted in an orderly manner. The Chairperson will have the power to preserve order at meetings. At a private meeting the Chairperson needs to seek the support of the meeting in expelling unruly persons, but in public meetings he has the sole authority to do so. Where appropriate, reasonable force may have to be used;

d) Where proceedings at a meeting have become so out of hand that continuing with the business has been rendered impossible the Chairperson alone has the authority to terminate the meeting, i.e. he does not need to secure the support of a majority of those present;

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1 National Dwellings Society v Sykes [1894] 3 Ch 159.
2 In Re British Union for the Abolition of Vivisection (1995) The Times, 3 March, the meeting had to be disbanded by the police for fear of a breach of the peace after it degenerated into a disorderly tumult.
3 John v Rees [1970] Ch. 345, National Dwellings Society v Sykes [1894] 3 Ch 159 and Byng v London Life Assurance Limited [1990] 1 Ch 170. See also article 41(2) of the Model Articles for Private Companies and article 33 of the Model Articles of a Public Company.
e) In the event of a procedural question, the Chairperson will make a ruling. He will also decide on all points of order. The onus is on the person challenging the Chairperson’s decision to show that it is wrong;¹

f) To impartially call on all who wish to speak on a motion and to see that their rights to give unfettered opinion are upheld. According to Australian Judge, Barrett J, practices, such as the Chairperson saying, after discussion of a proposal ‘I think we are all agreed on that’ are ‘dangerous unless supplemented by appropriate formality';²

The Chairperson will, having due regard to time constraints, see that everyone, especially minorities, is given a fair opportunity to express their views;

h) To see that resolutions are properly passed;

i) After the meeting, to ensure that proper minutes are written up and if he is satisfied as to their accuracy, to sign these as a correct record of proceedings;

j) Whenever in doubt, the Chairperson must seek guidance from the Company Secretary or indeed members present.

The Chairperson or indeed shareholders in a meeting may not be personally liable for statements that they make on behalf of the company.

¹ Re Indian Zoedone Co. (1884) 26 ChD 70.
This is generally so because the company is a separate legal entity, the company itself will be liable.¹

23. THE BOARD OF DIRECTORS

23.1 The Role of the Board of Directors

Companies are managed by the Board of Directors, appointed by the shareholders of different identities (individuals, funds, companies, banks and so on) to run the company on their behalf. The Board appoints executives who run the company on a daily basis. This relationship creates the agency-problem as the interests of the three parties i.e. the shareholders, the Board and Management, may be divergent. Corporate Governance rules are developed to fill that gap by making sure that variant interests are protected.

For instance, the Directors are subject to annual re-election by the shareholders. This would appear to give the shareholders ultimate power, but in most sectors, it is recognised that performance can only be judged over the medium to long-term.

Shareholders therefore have to place trust in those who act on their behalf and Directors owe the shareholders fiduciary duties. It is rare but not unknown for shareholders to lose patience with the Board and remove all Board Members at once.

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1 For a fuller discussion, see Muhome A, *Company Law in Malawi*, Assemblies of God Press (2016) - Chapters 11 and 12.
2 This is part of the AGM’s agenda - see paragraph 10.3 above.
3 See *Removal and Vacation of Directors’ Office* under paragraph 23.15 below.
The role of the Board of Directors\(^1\) was summarised by the King Report III as:

1. To define the purpose of the company;

2. To define the values by which the company will perform its daily duties;

3. To identify the stakeholders relevant to the company;

4. To develop a strategy combining the preceding factors; and

5. To ensure implementation of this strategy.

The purpose and values of a company are often set down in its constitutional documents, reflecting the objectives of its founders. However, it is sometimes appropriate for the Board to consider whether it is in the best interests of those served by the company to modify this or even change it completely hence the need for periodic strategy review.\(^2\)

### 23.2 Board Structure

In Malawi, the unitary (or one tier) Board structure, comprising Executive and Non-Executive Directors,\(^3\) rather than the dual (or two tier) Board structure\(^4\) adopted in some countries, is considered appropriate as it provides greater interaction among all Board Members when dealing

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\(^1\) See also regulation 4 of the Companies (Corporate Governance) Regulations 2016.

\(^2\) For example, Apple and Facebook had to re-define their strategies in order to become some of the richest businesses as at 2018. One may also consider the rise and fall of Nokia.

\(^3\) Also applicable in the UK, USA, Australia and RSA.

\(^4\) In such a structure, applicable in many countries in continental Europe, there is separation between those responsible for supervision from those responsible for operations. The Supervisory Board generally oversees the Operating Board.
with matters such as strategic planning, performance, standards of conduct, resource allocation and communication with stakeholders.¹

23.3 The Board Charter

The Board Charter is a policy document that clearly defines the respective roles, responsibilities and authorities of the Board of Directors (both individually and collectively) and Management in setting the direction, the management and the control of the company.

It is one of the roles of the Board to develop and periodically review a Board Charter.² Preferably, a Board Charter should be reviewed annually.

23.4 Definition and Types of Directors

Since a company is an artificial entity, it needs real people to represent it and act on its behalf. The company enables investors to put their money into a business without being responsible for managing it. Instead, management is conducted by persons called Directors.

The term ‘Director’ ‘includes a person occupying the position of Director of the company by whatever name called.’ The following are common types of Directors:-

1. **A De Jure Director** (meaning a Director from the law) is a Director who is properly appointed to the Board and registered with the Registrar of Companies.

2. **A De Facto Director** (meaning a Director in fact or in reality) is someone who has not been properly appointed and notified to

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¹ Clause 3.1 of regulation 3 - The Companies (Corporate Governance) Regulations 2016.
² Companies (Corporate Governance) Regulations 2016, regulation 3 clause 4.5.
Registrar of Companies as a Director but who nevertheless acts as a Director and holds themselves out to third parties as a Director.

3. **An Alternate Director** – a Director is allowed to appoint a fellow Director or with the approval of the Board, any other person as an Alternate Director. Such appointment must be in writing and signed by both the appointor and the appointee and lodged with the company. An Alternate Director acts when the appointor is unable to act for whatever reason.¹

4. **A Casual Director** – fills a casual vacancy that arises between AGMs because of death or resignation of a Director.

5. **A Shadow Director** is a person in accordance with whose instructions the Board may be required or is accustomed to act.² He exerts ‘real influence’ over the company’s affairs. A Shadow Director does not include a person giving advice in a professional capacity.³

6. **A Nominee Director** - occasionally circumstances will arise where a group of people with an interest in a company (for example shareholders or less frequently a creditor) wish to appoint a representative or ‘nominee’ to the Board of Directors. The right to make such appointments will sometimes be found in a company’s constitution or in a shareholders or investment agreement. Despite

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¹ Section 158 of the Companies Act 2013 defines Directors as including Alternate Directors and they are specifically provided for in the Model Articles for Public Companies in articles 25, 26 and 27 about their appointment, duties, rights and termination of their office, respectively.
² Section 158(2)(a) and (b) of the Companies Act 2013.
³ Section 158(6) of the Companies Act 2013.
being a nominee, the Director is under obligation to act independently and comply will all duties of Directors.

7. **An Executive Director** is both a Director and an employee working under a contract of service. Such a Director will be expected to perform a specified role for the company. The Articles will usually empower the Board of Directors to appoint such employees for example the *Managing Director*\(^1\) or *CEO*. Directors may delegate their duties to the managing Director.

8. **A Non-Executive Director** is an officer of the company who does not have such an employment relationship with the company and is usually only awarded a relatively small fee for rendering his services. Such a Director brings an independent judgment to bear on issues of strategy, performance, resources, including key appointments and standards of conduct.\(^2\) Corporate Governance therefore, requires that the majority of Directors be non-executive. In respect of banks, independent Non-Executive Directors are not considered independent after serving on the Board for a period of more than **ten years**.\(^3\) May be its time to leave honourably!

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\(^1\) The Companies Act 2013 has not attempted to define a ‘Managing Director,’ however, previously the Companies Act 1984 (section 2) defined a ‘Managing Director’ as a Director to whom has been delegated any of the powers of the Board of Directors to direct and administer the business and affairs of the company. This definition is still more instructive under the new regime.

\(^2\) Regulation 9 of the Companies (Corporate Governance) Regulations 2016. See also the Cadbury Report, paragraph 4.11.

\(^3\) Clause 5.2.14 of the Corporate Governance Guidelines for Banks, issued by RBM in April 2010.
23.5 Management Powers of Directors

The business and affairs of a company are managed, directed and supervised by the Board.¹ The Board must therefore have all the powers necessary for managing, and for directing and supervising the management of, the business and affairs of the company. These powers will usually be found in the company’s constitution.²

Powers of management for Directors are extensive and may include power to borrow money, issue debentures and charge company property as security for the loan; determine how negotiable instruments and receipts for money paid to the company are to be executed; appoint other Directors; pay interim dividends; appoint the managing Director; ensure that accounting records are kept and that accounts are prepared and laid before the company in a General Meeting; delegate their powers; issue shares and determine the rights and restrictions which may be attached to them and convening General Meetings.³

23.6 Limits on Management Powers of Directors

There are various limits on Director’s powers. For instance, the Companies Act 2013⁴ prohibits a company from entering into a ‘substantial transaction’⁵ unless the same is approved by a special

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¹ Section 159(1) of the Companies Act 2013.
² Section 159 (2) and (3) of the Companies Act 2013.
³ See also section 69 of the Companies Act 2013.
⁴ Section 160.
⁵ Under section 160(2) of the Companies Act 2013, ‘substantial transaction’, in relation to a company, means (a) the acquisition of more than seventy-five per cent of the value of the company's assets; (b) the disposition of assets of the company the value of which is more than seventy five per cent of the value of the company's assets or (c) a transaction that has or is likely to have the effect of the company acquiring rights or interests or
resolution. In addition, the company in General Meetings has the residuary power to exercise Director’s powers of management if they are unable or unwilling to exercise the powers.

23.7 Number of Directors

A private company must have at least one Director\(^1\) and a public company must have a minimum of three Directors.\(^2\) In all types of companies at least one Director is required to be ordinarily resident in Malawi.\(^3\) The constitution may provide for a Board seat upon meeting certain conditions such as accumulating a defined percentage of the shareholding.

23.8 Multiple Directorship

There is generally no prescribed limit for the number of Boards that one can sit on, save for banks, which is a generously maximum of seven Boards for companies incorporated under the Companies Act 2013.\(^4\) That said, for a Director to professionally discharge his duties, he must avoid being overwhelmed by multiple directorships. Research shows that multiple directorship negatively affects the performance of companies.\(^5\) Directors must therefore ensure that they devote sufficient time to their responsibilities\(^6\) and if necessary, decline multiple directorships.

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\(^1\) Section 162(1) of the Companies Act 2013.
\(^2\) Section 162(2) of the Companies Act 2013.
\(^3\) Section 162(2) of the Companies Act 2013.
\(^4\) Clause 5.2.12 of the Corporate Governance Guidelines for Banks, issued by RBM in April 2010. We find the maximum of seven to be too generous and propose a maximum of three.
\(^6\) Regulation 8.3 of the Companies (Corporate Governance) Regulations 2016.
23.9 Qualification of Directors

The Companies Act 2013\(^1\) provides for eligibility for appointment to the office of a Director. The following are ineligible:

1. A body corporate,\(^2\) unless the company concerned is a SOC.\(^3\)

2. A person below the age of eighteen (18);\(^4\)

3. In the case of a public company, a person over **seventy years** of age.\(^5\) As a matter of fact, the office of Director of a public company or of a subsidiary of a public company becomes vacant at the conclusion of the AGM commencing next after the Director attains the age of **seventy years**.\(^6\) However, a resolution may be passed to extend that Director’s tenure up to the next AGM.\(^7\) Note that the Act allows a company through its constitution to set this age below **seventy**.\(^8\)

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\(^1\) Section 164.
\(^2\) Section 164(1) of the Companies Act 2013.
\(^3\) Section 164(2) (d) of the Companies Act 2013.
\(^4\) The Companies Act 1984 section 142(1)(b) prohibited an infant, understood to be a person under the age of twenty one, from being a Director. As to the definition of a child, section 23(5) of the Constitution defines a ‘child’ as a person below the age of sixteen years (for the purposes of that section). The Child Care, Protection and Justice Act 2010 also defines a child as a person below the age of sixteen. On the other hand, the Convention on the Rights of the Child (1989) defines a ‘child’ as person below the age of eighteen. The Companies Act 2013 seems to follow the Convention. It is suggested that the law ought to have prescribed a uniform age for the definition of a child as the present situation presents unnecessary confusion. See also Odala V, *Childhood Under Malawian Law* (2012) MLJ Vol. 6, Issue 1 p. 96.
\(^5\) Section 164(2) (b) of the Companies Act 2013.
\(^6\) Section 169(4) of the Companies Act 2013.
\(^7\) Section 169(6) of the Companies Act 2013.
\(^8\) Section 169(7) of the Companies Act 2013.
4. An un-discharged bankrupt;¹

5. A person prohibited from being a Director or manager;

6. A person adjudged to be of unsound mind;²

7. A person who by virtue of the constitution of a company, does not comply with any qualifications for Directors. For example, where a Director is required by the constitution to take up shares in the company and fails to do so within the prescribed time.

The Companies Act 2013, further requires that a person may only be appointed a Director of a company after he has consented in writing to be a Director and certified that he is not disqualified from being appointed or holding office as a Director of a company.³ Directors in a financial institution have additional qualifications as they are subjected to the ‘fit and proper test’.⁴

23.10 Directors’ Service Contracts

The Companies Act 2013 does not make it mandatory for a company to enter into service contracts with Directors. That said, public companies may have such contracts with their Directors.

A Director's ‘service contract’, is defined as a contract under which a Director undertakes personally to perform services for the company, or

¹ The Director of Insolvency maintains a public register of discharged and undischarged bankrupts under section 12(1)(a) of the Insolvency Act 2016.
² See Parts V and VII of Mental Treatment Act, Cap 34:02 of the Laws of Malawi.
³ Section 165 of the Companies Act 2013. See Companies Regulations 2017 – Forms 2 and 9 – see Annex 1 herein.
for a subsidiary of the company. The services performed by the Director may be made available to the company or its subsidiary by a third party such as through a service company.¹

The Companies Act 2013² requires a copy of the contract or, if the contract is not in writing, a written memorandum of its terms, to be kept available for inspection by shareholders without charge at the company’s Registered Office. Further than this, the contract or memoranda must be retained by the company for inspection for at least one year after expiry of the contract.

23.11 Irregularly Appointed Directors

Where a person who is disqualified from being a Director, acts as a Director, he is deemed to be a Director under the Act.³ Further than that, the acts of a Director are valid even though the Director's appointment was defective; or the Director is not qualified for appointment.⁴

23.12 Appointment of Directors

The first Directors of a company are the ones named as such in the Application for Registration Form.⁵ All subsequent Directors are appointed by an ordinary resolution, unless the constitution otherwise

¹ Section 216(1)(a) and (b) of the Companies Act 2013.
² Section 217.
³ Section 164(3) of the Companies Act 2013. See also Annex 1.
⁴ Section 173 of the Companies Act 2013. See also In the Matter of East Africa Sailing and Trading Co Ltd Com. Court Petition No. 4 of 2012 - where Kachale J found that the company’s Directors and Company Secretary were irregularly appointed and that their actions perpetrated unfairly prejudicial conduct against the petitioner.
⁵ Section 166(1) of the Companies Act 2013.
provides. For public companies, each appointee must be voted in on a separate resolution i.e. you cannot lump together the proposed names and vote at once. Each director must be assessed individually.

Note that the Companies (Corporate Governance) Regulations 2016 provide various considerations that the company should bear in mind in appointing Directors. These include ensuring long-term sustainability of the company, strategy, a balanced mix of experience and skills and diversity of gender and or social and economic background.

Changes in the Directors and Secretary or their particulars such as name or residential address must be notified to the Registrar by the Board in a prescribed form, within twenty eight days.

### 23.13 Powers of the Court to Appoint Directors

The High Court has power to appoint a Director where there are no Directors of a company, or the number of Directors is less than the quorum required for a meeting of the Board; and it is not possible or practicable to appoint Directors in accordance with the company's constitution. An application, in that regard, may be made by a shareholder or creditor and the Court may appoint one or more persons as Directors on such terms and conditions as the Court thinks fit. This provision should be useful in all kinds of emergencies.

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1 Section 166(2) of the Companies Act 2013. The Court may also order that a General Meeting be convened to appoint Directors – see *Masangano and Others v Masangano and Agrihort Suppliers Ltd* Commercial Cause No. 67 of 2014.
2 Section 168 of the Companies Act 2013.
3 Regulation 10.
4 See generally section 172 of the Companies Act 2013. See Companies Regulations 2017 – Form 10 and Annex 1 herein.
5 See generally section 167 of the Companies Act 2013.
23.14 Directors’ Remuneration

A Director is not an employee\(^1\) of the company merely by reason of holding office, further, he is not entitled merely by holding office to any remuneration for the services he performs; the company’s constitution must provide for the same and all attendant rules.\(^2\)

The Companies (Corporate Governance) Regulations 2016,\(^3\) provide as follows, in relation to Directors’ remuneration:-

a) Remuneration should be appropriate to the company and should take into account the long term sustainability of the company;

b) The company should have a formal and transparent process for determining remuneration;

c) Non-Executive Directors should receive fees at levels that reflect time invested commitment, performance and responsibilities, unless agreed otherwise;

d) The company must disclose, at least on an aggregate basis, in its Annual Report, the remuneration, bonuses and other benefits received by Directors;\(^4\)

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\(^1\) This means that Labour Legislation, e.g. The Employment Act Cap 55:01 of the Laws of Malawi, do not apply to directors. Thus a dismissed director cannot successfully sue for unfair dismissal under the Employment Act (unless he was an executive director). See also *Coley v Forward Technology Industries plc* [2003] All ER (D) 175.

\(^2\) In *Guinness plc v Saunders* [1990] 2 AC 663, the company’s articles provided that the Board should fix the annual remuneration and also any extra, special remuneration in respect of services which, in the opinion of the Board, were outside the scope of the ordinary duties of a director. These articles were construed strictly, so a claim by the Director that the remuneration could be fixed by a Committee of the Board instead of the whole Board failed.

\(^3\) Regulation 11.

\(^4\) See also section 252(1)(b)(iii) of the Companies Act 2013.
e) When considering appointing Executive Directors, the Board should seek proper legal advice in relation to termination clauses to avoid the risk of paying excessive amounts on termination of service.

23.15 Removal and Vacation of Directors’ Office

A Director of a public company may be removed from office by an ordinary resolution passed at a meeting called for that purpose. This is so regardless of anything in its constitution or in any agreement between it and a Director.¹

In contrast, a Director of a private company may be removed from office by a special resolution passed at a meeting called for the purpose that includes the removal of the Director. The removal of such a Director is subject to the constitution of a company.²

This means that for the removal of a Director in a public company, a special meeting must be called for that purpose whereas for the removal of a Director in a private company, a meeting that discusses other agenda items may also include an item on the removal of a Director. The Written Resolution procedure is not available for this purpose because the Director has a right to defend himself.³

Apart from the removal of a Director above,⁴ there are a number of situations in which a Director ceases to hold office and the office falls vacant.

¹ Section 169(1) of the Companies Act 2013.
² Section 169(2) of the Companies Act 2013.
³ This was previously specifically provided for under section 121 (2) of the Companies Act 1984.
⁴ See also sections 170(1)(b) and 170(2) of the Companies Act 2013.
1. As observed above, the office of a Director of a public company or of a subsidiary of a public company becomes vacant at the conclusion of the AGM commencing next after the Director attains the age of **seventy years**, but the Director’s tenure may be extended.¹

2. A Director may resign by signing a written notice of resignation and delivering it to the address for service of the company.² The resignation is effective on the date on which it is received by the company or some other day indicated in the notice of resignation itself.³ The Companies Act 2013 prohibits sole Director from resigning unless that Director has called a meeting of shareholders to receive notice of the resignation, and to appoint one or more new Directors.⁴ This means that a notice of resignation, if given by the sole Director is not effective until the date of the meeting of shareholders.⁵ This, in our view, ensures continuity in the company otherwise disgruntled sole Directors would abandon companies haphazardly.

3. The office of a Director falls vacant once he becomes disqualified from being a Director, for example he is declared bankrupt or he becomes of unsound mind.⁶ In respect of a private company, where the only Director and shareholder is unable to manage the affairs of the company by reason of his mental

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¹ See *Qualification of Directors* – paragraph 23.9, above and sections 164(2), 169(4) and 169(6) of the Companies Act 2013.
² Section 170(1)(a) of the Companies Act 2013. See also *Candlex Limited v Mark Katsonga Phiri* Civil Cause No. 680 of 2000 and Civil Cause No. 713 of 2000.
³ Section 170(3) of the Companies Act 2013.
⁴ Section 171(1) of the Companies Act 2013.
⁵ Section 171(2) of the Companies Act 2013.
⁶ See s 164 and 347 of the Companies Act 2013.
incapacity, the appointed guardian may act as Director or appoint a person as Director.¹

4. The office of a Director also falls vacant upon his death.²

5. The office of a Director falls vacant in accordance to provisions of the constitution of a company.³ This means that the constitution may provide for additional circumstances through which the Director’s office falls vacant.

6. Under the Insolvency Act 2016,⁴ following the commencement of the liquidation of a company, Directors remain in office but cease to have powers, functions or duties, other than those required or permitted to be exercised by the Act. Again, on the appointment of a liquidator, all the powers of the Directors cease except so far as the liquidator, or, with his consent, the company in a General Meeting, may otherwise determine.⁵

7. Directors in a financial institution who cease to meet the ‘fit and proper test’⁶ and failure to attend meetings⁷ must relinquish their position. Any cessation of office must be reported to the Registrar of Financial Institutions within seven days.⁸

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¹ Section 171(10) of the Companies Act 2013.
² Section 170(1)(e) of the Companies Act 2013.
³ Section 170(1) (f) of the Companies Act 2013. See also Shuttleworth v Cox Brothers & Co (Maidenhead) Ltd [1927] 2 KB 9.
⁴ Section 158(1)(b) of the Insolvency Act 2016.
⁵ Section 144(2) of the Insolvency Act 2016.
⁷ See clause 5.2.11 of the Corporate Governance Guidelines for Banks, issued by RBM in April 2010.
⁸ Clause 5.2.15, ibid.
**23.16 Retirement by Rotation**

Retirement by rotation may be provided for in the company’s constitution. For example, for a public company at the first AGM of a company, all Directors must retire from office. In addition, at every subsequent AGM any Directors:

a) who have been appointed by the Directors since the last AGM; or

b) who were not appointed or reappointed at one of the preceding two AGMs, other than executive Directors, must retire from office and may offer themselves for reappointment by the members.

**23.17 Register of Directors**

Every company must keep a Register of Directors. The Register must contain particulars of each person who is a Director including but not limited to names; address; nationality; country of residence; occupation or profession and date of birth.

The Register must be kept available for search at the company's Registered Office; or other designated place notified to the Registrar of Companies. The Register must be open to the search of any member without charge; and of any other person on payment of such fee as may be prescribed.

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1 Article 21(1) of the Model Articles for a Public Company.
2 Article 21 (2) of the Model Articles for a Public Company. See also Rule 7.66 of the Malawi Stock Exchange, Listing Requirements – 1st May 2008.
3 Section 174(1) of the Companies Act 2013.
4 Section 174(2) and (3) of the Companies Act 2013.
5 Section 174(3) and (4) of the Companies Act 2013.
6 Section 174(5) of the Companies Act 2013.
23.18 Board Meetings

The model constitutions are liberal by allowing Directors to regulate their proceedings as they think fit. Any Director can call a meeting of the Directors and the quorum for conducting any business is two, unless the contrary is provided for. The Board must meet regularly, ideally once a quarter. However, each Board should decide how regularly it needs to meet to discharge its duties, having regard to the company’s own circumstances. Committees of the Board may have to meet more often than the Board.

Questions are decided by a majority vote and, in the case of equality of votes, the Chairperson has a casting vote. A provision in the articles for weighted voting is valid. At common law, every Director is entitled to notice of Board Meetings and to be able to attend and speak.

Meetings called at very short notice, and held at a time when it is known that certain Directors will not be able to attend, will not be held to be valid Board Meetings and, therefore, decision taken even when a quorum is present will not bind the company.

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1 Detailed rules governing Board Meetings are covered throughout this Book.
2 See article 19 of the Model Articles for a Public Company.
3 See articles 8 and 10 of the Model Articles for a Public Company.
4 Companies (Corporate Governance) Regulations 2016, regulation 3 clause 4.15. See also articles 8 and 9 of the Model Articles for a Public Company.
5 See articles 13 and 14 of the Model Articles for a Public Company.
7 Harben v Phillips (1883) 23 Ch D 14; Halifax Sugar Refining Co Ltd v Francklyn (1890) 62 LT 563.
8 Re Homer District Consolidated Gold Mines (1888) 39 Ch D 546. However, the notice itself may be a matter of days, hours, or even minutes, depending on the circumstances. It has been held that three hours’ notice to Directors who had other business to attend to was insufficient, even though their places of business and the place where the Board Meeting was to be held were all in the City of London - Re Homer District Consolidated
23.19 The Board and the General Meeting

The Directors derive their powers and functions from the constitution. Therefore, where a dispute arises between the Directors and the shareholders as to a particular course of action, the company should be primarily guided by the interpretation of the constitution.

The Model Articles of Association for Public Companies provide that subject to the Articles, the Directors are responsible for the management of the company’s business, for which purpose they may exercise all the powers of the company.¹ However, members may, by special resolution, direct the Directors to take, or refrain from taking, specified action, where none has already been taken.²

23.20 The Residual Powers of the General Meeting

Shareholders being the owners of the company, retain the following powers to themselves:-

1) Powers to Remove Directors - If the shareholders fundamentally disagree with the policies pursued by the Directors or are unhappy with their performance then, ultimately, a majority of the shareholders can remove the Directors from office.³

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¹ Gold Mines Ltd, (1888) 39 Ch D 546. On the other hand, five minutes’ notice to a Director was held sufficient where neither distance nor other engagements prevented him from attending - Browne v La Trinidad (1887) 37 Ch D 1.
² Article 3.
³ Article 4.
⁴ Section 166 of the Companies Act 2013.
2) **Ratification and Approval of Irregularities** - It has always been recognised that the General Meeting has wide powers to ratify or approve acts which are within the powers of the company but which have been carried out in an irregular way and, further, to ratify certain breaches of Directors’ duties, which are not illegal or *ultra vires*.1

3) **Miscellaneous Residual Statutory Powers** - the General Meeting has a number of statutory powers to control and scrutinise the activities of Directors. So, for example, in a public company, a Director’s contract which is to last for more than **two years** has to be disclosed to and approved by the General Meeting.2 So too does any payment to a Director by way of compensation for loss of office.3

### 24. STATUTORY DUTIES OF DIRECTORS AND REMEDIES

Statutory duties of Directors include the following:-

**24.1 Duty to act in accordance with the constitution.**4

**24.2 Duty to use powers for a proper purpose.**5

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1 See *Ashbury Railway Carriage v Riche* (1875) LR 7 HL 653.
2 Section 195 of the Companies Act 2013.
3 Section 210 of the Companies Act 2013. See also Resolutions under paragraph 15, above.
4 Section 176(a) of the Companies Act 2013.
5 Section 176 (a) and (b) of the Companies Act 2013.
24.3 Duty to promote the success of the company

The Companies Act 2013 introduces the concept of ‘enlightened shareholder value’ i.e. a requirement that Directors must have regard to a range of interests\(^1\) in discharging their duty to promote the success of their company. The Act provides that a Director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole.\(^2\)

24.4 Duty to exercise independent judgment.

24.5 Duty of care and skill

A Director of a company is obliged to exercise reasonable care, skill and diligence.\(^3\) This means the care, skill and diligence that would be exercised by a reasonably diligent person with firstly, the general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions carried out by the Director in relation to the company; and secondly the general knowledge, skill and experience that the Director has.\(^4\)

24.6 Duty to avoid and declare conflict of interest.\(^5\)

\(^1\) Such as likely consequences of their decision in the long term; interests of employees, suppliers, customers, creditors, the community and the environment; company reputation and fairness as between shareholders etc.

\(^2\) Section 177(1) of the Companies Act 2013.

\(^3\) Section 179(1) of the Companies Act 2013.

\(^4\) Section 179(2) of the Companies Act 2013.

\(^5\) See Declaration of Interest – paragraph 7 above.
24.7 **Duty not to accept benefits**

A Director is prohibited from accepting a benefit from a third party conferred by reason of his being a Director or his doing, or failure to do, anything as Director.\(^1\)

24.8 **Duty against inside dealings**

In relation to public companies, insider dealing is prohibited under the Securities Act 2010.\(^2\) It provides that no Director (and other specified persons) shall directly or indirectly, purchase or sell, or counsel or procure another person to purchase or sell, securities of an issuer concerning which he has knowledge that is not yet publically available and would, if it were publically available, materially affect the price of the security. Contravention of this section is an offence.\(^3\) In relation to private companies insider dealing is not wholly prohibited, however there are key restrictions on share dealing in a private company.\(^4\)

24.9 **Duty as to the company’s solvency (wrongful trading)**

A Director of a company who believes that the company is unable to pay its debts as they fall due is obliged to forthwith call a meeting of the Board to consider whether the Board should appoint a liquidator or an administrator.\(^5\)

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\(^1\) Section 181(1) of the Companies Act 2013 and in any event, this may also constitute a criminal offence under the Corrupt Practices Act, Cap 7:04 of the Laws of Malawi.

\(^2\) Section 49 of the Securities Act 2010.

\(^3\) Section 49(2) and 69(1) of the Securities Act 2010.

\(^4\) The restrictions are outlined in section 194(1) of the Companies Act 2013.

\(^5\) Section 222(1) of the Companies Act 2013. For the solvency test for financial institutions, such as an insurance company see generally the MSCA judgment *In the Matter of Citizen Insurance Company Limited and In the Matter of the FSA 2010 Ex parte: The Registrar of Financial Services* - MSCA Civil Appeal No. 6 of 2012.
24.10 Duty to comply with the Code of Corporate Governance

The recent financial crisis and continued failure of prominent companies around the globe and within Malawi,¹ has served to highlight the need for the proper governance of business. Given the Board’s overall responsibility and accountability for the same, the focus on the need for effective governance has never been greater. Directors, for both public and private companies, are therefore required to comply with the prescribed Code of Corporate Governance.²

To fulfill their duties, Directors are entitled to seek independent professional advice at the expense of the company. Before seeking independent professional advice, however, the member concerned must discuss and clear the matter with the Chairperson or the Company Secretary. If to approach either of them is inappropriate in the circumstances of the matter, the Director must act within the best interests of the company.³

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¹ For example, a research conducted by Suzi-Banda pointedly found out that the fall of the Finance Bank of Malawi was partly due to a poor corporate governance structure which was heavily dominated by its owner Dr Mahtani, see Suzi-Banda, J 2008, *The Failure of FBM Bank Malawi Ltd; Corporate Governance Lessons* Eastern and Southern Africa Management Institute (ESAMI), thesis. The statutory management and eventual liquidation of Citizen Insurance Company Ltd also hinges on lack of good corporate governance practices. See also *In the Matter of Citizen Insurance Company Limited and In the Matter of the FSA 2010 Ex parte: The Registrar of Financial Services – Com. Case No. 55 of 2011 and its appeal to the MSCA – Civil Appeal No. 6 of 2012.* Other once prosperous companies that have failed recently include Malawi Development Corp, Brown and Clapperton Ltd, Shire Bus Lines Ltd and Air Malawi Ltd (and Indebank Ltd and Malawi Savings Bank for failure by the shareholder to recapitalize them following Basel II).

² Section 184(1) and 70 of the Companies Act 2013.

³ Regulation 8.6 of the Companies (Corporate Governance) Regulations 2016.
24.11 Remedies for Breach of Duties of Directors

Remedies may include the following:-

i) Removal of the Director from office.¹

ii) Where the Director or officer and every person knowingly participated in the breach he is liable to compensate the company for any loss it suffers as a result of the breach.²

iii) The Director or officer is liable to account to the company for any profit made by the officer as a result of such breach.³

iv) Any contract or other transaction entered into between the Director or officer and the company in breach of those duties may be rescinded by the company.⁴

v) The company may generally obtain an injunction against the Director’s breach.⁵

vi) The Director may be ordered to pay a fine or be imprisoned upon lifting the veil of incorporation.⁶

¹ See paragraph 23.15, above.
² Section 220(3) (a) of the Companies Act 2013.
³ Section 220(3)(b) of the Companies Act 2013.
⁴ Section 220(3)(c) of the Companies Act 2013.
⁵ See generally Order 10 of the Courts (High Court) (Civil Procedure) Rules, 2017.
⁶ For example, under section 346 of the Companies Act 2013, on fraudulent trading, the Director may be liable to imprisonment for ten years and a fine determinable by the Court. See also section 24 of the Penal Code, Cap 7:01 of the Laws of Malawi, which provides, in part, that where an offence is committed by any company, every person charged with or concerned or acting in, the control or management of the affairs or
vii) The Minister, the Registrar of Companies or the Registrar of Financial Institutions may institute company investigations, which may lead into prosecution of company Directors.\(^1\)

viii) Aggrieved shareholders may take up minority action against the Directors.\(^2\)

Note that a Director’s disqualification expires after five years after the date of removal from office or at the completion of the sentence imposed for the relevant offence.\(^3\)

\(\text{activities of such company is guilty of that offence and is liable to be punished accordingly. } \text{R v Lutepo Criminal Cause No. 2 of 2014.}\)

\(^1\) Section 331 of the Companies Act 2013.

\(^2\) Section 337 of the Companies Act 2013.

\(^3\) See section 347(2) of the Companies Act.
25. BOARD COMMITTEES

25.1 Delegation of Directors’ Authority

The well-known common law maxim of the law of agency – ‘*delegatus non potest delegare*’ (a delegate cannot delegate) – applies to Directors, so that they cannot delegate their functions and powers to others without the permission of the law or the constitution. The Companies Act 2013 provides that the Board of a company may delegate to a Committee of Directors, a Director or employee or any other person, any one or more of the powers conferred on them by the constitution on such terms and conditions as they see fit.¹ Having delegated, the Board is still responsible for the exercise of the power by the delegate.²

25.2 Committees of the Board

A Committee is a group of Directors (and rarely, other adopted members) who are charged with the administration of the routine affairs of the company such as finance, audit, related party transactions, projects, human capital and remuneration.³

There are two main types of Committees: a ‘Standing Committee’ which has a long-term appointment and an ‘Ad hoc Committee’ which is appointed to deal with a specific task, and once they have completed their work the Ad hoc Committee ceases to exist.

¹ Section 161(1) of the Companies Act 2013. See also article 6(1) for both Model Articles of a Private Company and Model Articles for a Public Company.
² Section 161(2) of the Companies Act 2013.
³ There is no prescribed number and names of Committees. Each company decides depending on their unique needs.
A Committee derives its authority and powers from the Board and as such is required to report back to the Board on the achievement of their work.

Customarily, when a Committee is appointed their objectives, power and duties as well as administrative issues such as who will be the convenor, how often the Committee should meet, what their quorum is, are recorded in a document referred to as the ‘Terms of Reference.’

25.3 Benefits of Board Committees

According to Chen\(^2\) Board Committees provide three benefits, as follows:

1) Through the process of decentralization, Committees can allow for knowledge specialization, which benefits companies because the monitoring and advising tasks of Boards are complex and require firm-specific knowledge;

2) Specialization through Committees can allow for a more efficient task allocation to Directors, leading to task-division efficiency;

3) Committees can increase the accountability of the Board to the company by reducing individual free-riding and enabling outside Directors to perform their monitoring duties more effectively through greater separation from Management.

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1 See also article 6(2) for both Model Articles of a Private Company and Model Articles for a Public Company.

Despite these benefits, the major disadvantage with Board Committees is information segregation for the Directors not on a specific Committee. The solution to this is that Directors must belong to two or more Committees on the same Board.

25.4 Powers of the Committee

A Committee derives its powers from the Terms of Reference. Care must be exercised when drafting the Terms of Reference to ensure that they are neither too wide nor too restricted. The Terms of Reference should be reviewed periodically to maintain their relevance, preferably every year.

The Companies (Corporate Governance) Regulations 2016,\(^1\) provide as follows, in relation to the Board Committees:-

a) Boards may find it useful to establish Board Committees to deal with matters that can best be dealt with in a small forum. The number and nature of Committees will depend on the type and structure of the company.\(^2\) All Committees when established should be given, in writing, clear Terms of Reference.

b) Decisions of each Committee must be communicated to the Board as recommendations for its further consideration.

c) When constituting Committees, it is imperative for the Board to ensure that the Committees’ members have the appropriate balance of skills, experience, independence and knowledge of

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\(^1\) Regulation 3, clause 6.

\(^2\) For example, a bank at a minimum must have the following committees: Audit Committee, Risk Management Committee, and Credit Review Committee and the Nominations (Appointments) and Remuneration Committee - Corporate Governance Guidelines for Banks, issued by RBM in April 2010 – clause 6.1.
the company and the Committees’ Terms of Reference to discharge their duties and responsibilities effectively.

d) Committees must also be provided with sufficient and appropriate resources to undertake their duties.
26. BOARD INDUCTION, TRAINING AND EVALUATION

26.1 Board Induction

The Companies (Corporate Governance) Regulations 2016,\(^1\) provide that the Board must ensure that new members undergo a tailored induction programme, particularly if the new members have no previous Board experience.

The induction offers an opportunity to the new Director to understand the nature and operations of the business. It is trite that businesses operate within different regulatory environments and if a particular Director is to be effective, he or she must appreciate the uniqueness of the business. The Company Secretary, together with Management, is responsible for the induction which must ideally take place before the new Director can attend any meeting.

26.2 Board Training and Development

The Companies (Corporate Governance) Regulations 2016,\(^2\) provide as follows, in relation to Board training and development:

Directors need proper knowledge of the company for which they are responsible. They should acquire a broad knowledge of –

1. The business of the company so that they can provide meaningful direction to it;

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\(^1\) Regulation 3, clause 12.3.
\(^2\) Regulation 3, clause 12.
2. The statutory and regulatory requirements affecting the direction of the company and the environment in which the company operates; and

3. Their role, duties, responsibilities, and obligations as well as Board practices and procedures.

The Board, in developing training needs, is enjoined to take into account any training needs identified during the Board Evaluation exercise. Every Director is obliged to keep abreast of both practical and theoretical developments affecting the environment in which the company operates as well as to ensure that their expertise and experience remain relevant to the Board and to the company. Directors must be regularly exposed to matters relevant to legal reforms, Corporate Governance, changing corporate environment, risks, opportunities and other matters that may be of interest in the execution of their duties.¹

26.3 Board Evaluation

Board Evaluation may be classified as self-evaluation or external evaluation. Through self-evaluation, the Board is responsible for managing both the process as well as the content, usually guided by the Company Secretary, through standard questionnaires.²

External evaluation is carried out by an external third party, retained by and reporting to the Board. These have an advantage of bringing their own judgment on the quality of the Board’s performance during the evaluation, as well as including input from other stakeholders.

¹ See regulation 12.4 of the Companies (Corporate Governance) Regulations 2016.
² See Annex 7.
The reasons why companies implement Board Evaluation may vary, but the following are some motivations:

(a) Improving the performance of the Board towards corporate goals and objectives.

(b) Assessing the balance of skills, knowledge and experience on the Board.

(c) Identifying the areas of concern and areas to be focused for improvement.

(d) Identifying and creating awareness about the role of Directors individually and collectively as a Board.

(e) Building teamwork among Board Members.

(f) Effective coordination between the Board and Management.

(g) Overall growth of the company.

(h) Responding to external demands such as compliance with some legislation.

As observed, Directors owe a duty to comply with the prescribed Code of Corporate Governance. The Companies (Corporate Governance) Regulations 2016, provide, among others, for Board Evaluation.

Globally, Board Evaluation has emerged as a Corporate Governance priority and brought to the forefront many associated challenges. Key

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1 See paragraph 24.10, above and also section 184(1) and 70 of the Companies Act 2013.
2 Regulation 3, clause 5.
among the challenges is finding an effective Board Evaluation process as practice varies from country to country.¹

The Companies (Corporate Governance) Regulations 2016² generally provide as follows:-

(a) It is good practice for Boards to evaluate annually the mix of skills and experience of their members as well as the Board’s performance and processes. The level of evaluation would depend on the type of company. Large companies may also consider evaluating the Chairperson, other Directors, Board Committees and the CEO.

(b) Companies should agree in advance the type of evaluation suitable for them and how to measure and report it to the Board and other stakeholders. In practice, we have observed some companies engaging an expert consultant to attempt a scientific Board Evaluation exercise since Company Secretaries are often ill equipped for the exercise.

(c) It is the responsibility of the Chairperson, following a Board Evaluation, to recommend to the owners the removal of Board Members who do not contribute effectively to the Board.³ Sadly, Malawi being such a small economy, Chairmen have generally failed short of admonishing non-performing Directors, let alone recommending them for removal. The expectation is that this shall change with the growing Corporate Governance culture that Malawi is now embracing!

² Regulation 3, clause 5.
³ Companies (Corporate Governance) Regulations 2016, regulation 3 clause 7.4.
More importantly, any Board Evaluation should be focused on the improvement of Board performance, through the development and implementation of action plans. Board Evaluations are not simply a control mechanism over Board Members, but a tool to identify areas of governance improvement. The Board, in developing training needs, is enjoined to take into account any training needs identified during a Board Evaluation.¹

Annex 7: Sample of Board Evaluation Form

¹ See Companies (Corporate Governance) Regulations 2016, regulation 3 clause 12.2.
27. RISK MANAGEMENT AND INTERNAL CONTROLS

The Companies (Corporate Governance) Regulations 2016,¹ provide as follows, in relation to risk management and internal controls:-

(a) The Board is responsible for the governance of risk;

(b) The Board should regularly review the company’s risks, risk appetite and tolerance, and ensure that it has endeavoured to put in place measures to minimize or avert any identified risks;

(c) The Board must also regularly review the appropriateness of these measures;

(d) The Board must put in place appropriate back-up measures for its data and computer systems.

28. ETHICS

Companies must ensure that they abide by highest ethical standards.² In that regard, they may consider developing a Code of Ethics (also called an Integrity Charter) aimed at fostering an ethical culture within the company. Such a Code must be developed with the full participation of all parties expected to abide by it and receive total commitment from the Board and Management.

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¹ Regulation 15.
² Regulation 16 of the Companies (Corporate Governance) Regulations 2016.
29. CORPORATE SOCIAL RESPONSIBILITY

‘What are companies for? The primary goal is to make a profit for their shareholders, certainly. But the days when that was the whole answer are long gone.’¹

Company Law has now introduced the concept of ‘enlightened shareholder value’ i.e. a requirement that Directors must have regard to a range of interests in discharging their duty to promote the success of their company.² The interests are many³ but key on CSR are as follows:-

(a) The impact of the company's operations on the community and the environment;⁴ and

(b) The desirability of the company maintaining a reputation for high standards of business conduct.⁵

According to Hopkins,⁶ CSR is concerned with treating the stakeholders of a company ethically or in a responsible manner. ‘Ethically or responsible’ means treating stakeholders in a manner deemed acceptable

² See also Richard Williams, Enlightened Shareholder Value In UK Company Law, University of New South Wales Law Journal Volume 35(1) p 360.
³ Such as likely consequences of their decision in the long term; interests of employees, suppliers, customers, creditors, company reputation and fairness as between shareholders etc.
⁴ Section 177(1)(d) of the Companies Act 2013.
⁵ Section 177(1)(e) of the Companies Act 2013.
in civilized societies. Social includes economic responsibility. Stakeholders exist both within a company and outside. The natural environment is a stakeholder. The wider aim of social responsibility is to create higher and higher standards of living, while preserving the profitability of the company, for peoples both within and outside the company.

In relation to CSR, the law\(^1\) provides that a company as well as being an economic entity is also a citizen of Malawi and as such has a moral and social standing within Malawian society, with all the responsibilities attached to that status. As such, when making decisions, a company is obliged to consider the impact of its decisions on its stakeholders, both internal and external, the environment and society as a whole.

The requirements\(^2\) go on to state that companies must conduct their operations in a manner that meets existing needs without compromising the ability of future generations to meet their needs. It means having regard to the impact that the company’s operations have on the environment, economic and social life of the community in which it operates. This includes its supply chain, that is to say, access to the resources and raw materials it needs to carry out its operations.

Companies are also required to report on how they have both positively and negatively impacted on the environment and on the economic and social life of the community in which they operate and how they believe they can improve the positive and eradicate or lessen the negative aspects in the coming year.\(^3\)

\(^1\) Regulation 17 of the Companies (Corporate Governance) Regulations 2016.
\(^3\) Regulation 18(2) of the Companies (Corporate Governance) Regulations 2016. This is also referred to as Triple Bottom Line in accounting (social, environmental and financial).
For public companies, a Directors’ Report must state the total amount of donations made by the company and any subsidiary during the accounting period.¹

¹ Section 252(1)(c) of the Companies Act 2013.
30. TRANSFER SECRETARIES

A company may engage services of an agent to maintain the Share Register on its behalf as long as the agent is qualified to be a Company Secretary.¹

All listed companies are required to maintain a Transfer Office or Receiving Office in Lilongwe or Blantyre.²

The Securities (Operations of Transfer Secretaries) Directive, 2012 governs the role of Transfer Secretaries and defines ‘Transfer Secretaries’ as any limited company that engages in the business of providing services for registration of securities transfers in respect of securities which are listed on a licenced stock exchange.³ Transfer Secretaries are licenced and regulated by the Registrar of Financial Institutions⁴ and their traditional functions include the following:

(a) Maintenance and management of the shareholder Register;

(b) Issue of electronic and or hard copy share certificates for newly issued shares, as well as share transfers and replacements;⁵

(c) In the event of a claim in respect of share certificates, to verify such claim for validity and replace share certificates;

(d) Manage the payment of dividends;

¹ Section 145(4) of the Companies Act 2013.
⁵ At the time of publication, the MSE and RBM were in the process of implementing an Automated Trading System leading to dematerialisation - i.e. the process of converting physical shares into electronic format effective September 2018. See also article 49 of the Model Articles for a Public Company.
(e) Manage shareholder communication and shareholders’ meetings;

(f) Attend to routine enquiries from stakeholders.¹

¹ Including directors, Management, shareholders, MSE, the Registrar of Financial Institutions, Registrar of Companies, Anti-Corruption Bureau and Financial Intelligence Authority.
31. COMPANY SECRETARY

31.1 The Requirement

Previously, every company was required to have a Company Secretary.\(^1\) This is no longer the case as the Companies Act 2013 exempts private companies from having a Secretary.\(^2\) The traditional functions of the Secretary in a private company may now be performed by the company itself, a Director, or a person authorised generally or specifically in that behalf by the Directors.\(^3\)

However, it is mandatory for a public company to have a Secretary.\(^4\) Where a Secretary is appointed, the notice of such appointment must be accompanied by the consent by that person to act in that capacity.\(^5\)

Where it appears to the Registrar that a public company is in breach of this requirement, the Registrar must inform the company about the breach and require the company to comply within a specified period of time,\(^6\) failing which, a company or every officer who contravenes this provision commits an offence and is liable to a fine in accordance with the prevailing schedule of penalties.\(^7\)

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1 Section 156 of the Companies Act 1984.
2 Section 68(1) of the Companies Act 2013. Note however, that certain private companies will still be required to have a Company Secretary, under other laws/directives/guidelines, other than the Companies Act 2013; for instance, banks under the Corporate Governance Guidelines for Banks, issued by RBM in April 2010.
3 Section 68(2) and (3) of the Companies Act 2013.
4 Section 223 of the Companies Act 2013.
5 Section 228(2) of the Companies Act 2013.
6 Section 224(1) of the Companies Act 2013.
7 The schedule was yet to be gazetted at the time of publication.
31.2 The Function and Duties of the Secretary

According to Lord Denning MR in Panorama Developments (Guildford) Ltd v Fidelis Furnishing Fabrics Ltd¹ a Company Secretary is a much more important person nowadays than he was when companies were first introduced.² He is an officer of the company with extensive duties and responsibilities. This appears not only in the modern Companies Acts, but also by the role which he plays in the day-to-day business of companies. He is no longer a mere clerk. He regularly makes representations on behalf of the company and enters into contracts on its behalf which come within the day-to-day running of the company’s business. So much so that he may be regarded as held out as having authority to do such things on behalf of the company. He is certainly entitled to sign contracts concerned with the administrative side of the company’s affairs, such as employing staff, and ordering cars, and so forth. All such matters now come within the ostensible authority of a company’s Secretary. In that case, a Secretary hired cars on the company’s behalf, signing relevant car hire documentation as ‘Company Secretary’ and informing the car hire company that the cars were to be used for collecting clients from airports. Instead, he used the cars for private purposes. The company refused to pay the car hire charges, claiming that the Company Secretary had no authority to make the contract on the company’s behalf. It was held that the company was liable to pay, as the Company Secretary had acted within the scope of his apparent authority i.e. authority as seen by third parties.

¹ [1971] 2 QB 711.
² For example, in the nineteenth century case of Barnett Hoares v South London Tramways (1877) 18 QB 815, a Company Secretary was described as ‘a mere servant,’ a person who was supposed to do what he/she was told and who had no authority to represent the company and upon whom third parties should not rely.
Wide variations exist as to the exact nature of the functions and duties of the Secretary. It is appreciated, for example in the King Report on Corporate Governance,\(^1\) that the Secretary performs a ‘pivotal role’ in providing support functions, especially to the Directors. The following are some of the functions that the Company Secretary performs:—

1) Planning and organising meetings of the Board and shareholders.

2) To make all necessary arrangements prior to holding Board Meetings and General Meetings and ensure implementation of resolutions passed thereat;

3) To keep and maintain company registers and records, including filing of Annual Returns.\(^2\) It should be noted that the Secretary can be fined personally in the event of default.\(^3\)

4) To ensure that the company complies with its constitutional documents, various laws and regulations and Corporate Governance Codes;

5) To manage the company’s intellectual property and other property portfolios;

6) To handle internal and external official communication for the company more especially on legal matters.\(^4\)

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\(^1\) See King Code III (2009).
\(^2\) For example, see sections 150 and 256(4) of the Companies Act 2013.
\(^3\) See section 150(2) of the Companies Act 2013.
\(^4\) Regulation 19 of the Companies (Corporate Governance) Regulations 2016, acknowledges that society is currently demanding greater transparency, accountability and responsibility from companies. Companies must therefore make regular, timely, balanced and understandable statements about their activities, performance and future prospects. For example, outcome of key litigation may have to be published as it may
The Companies (Corporate Governance) Regulations 2016,\(^1\) provide as follows, in relation to the Company Secretary:-

(a) All companies, where required by law, must ensure that they have access to a competent Company Secretary to render company secretarial services to the company.

(b) The appointment and removal of the Company Secretary is a matter for the Board as a whole.

(c) The Company Secretary is among other duties, responsible for advising the Chairperson and the Board on the implementation of the Malawi Code II.

(d) All Directors must have access to advice and services of the Company Secretary.

(e) The Company Secretary is responsible for ensuring effective information flows between the Board and Management and between the Board and its Committees.

(f) Wherever possible, the role of the CEO and that of the Company Secretary must be separated.

Having assessed the authority of the Company Secretary, we must now turn to the limitation of such authority. To begin with, the Company Secretary cannot without authority borrow money on behalf of the

\(^1\) Regulation 3, clause 13.
company. He cannot without authority commence litigation on the company’s behalf. He cannot summon a General Meeting himself nor register a transfer without the Board’s approval nor may he without approval strike a name off the register. These are powers which are vested in the Directors.

Further than this, a Secretary owes fiduciary duties to the company which are similar to those of a Director, thus he must not make secret profits or take secret benefits from his office and if this happens he can be required to account for them to the company as a constructive trustee.

It is key to note that criminal law regards the Company Secretary as an organ of the company and a higher managerial agent whose fraudulent conduct can be imputed to the company in order to make it liable along with him for crimes inter alia, arising out of fraud and the falsification of documents and returns.

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1 Re Cleadon Trust Ltd [1939] Ch 286.
2 Daimler Co Ltd v Continental Tyre and Rubber Co Ltd [1916] 2 AC 307.
3 Re State of Wyoming Syndicate [1901] 2 Ch 431. Directors may however ratify the notice – see Hooper v Kerr, Stuart and Co. (1900) 83 L.T. 729 and an improper notice may be cured by the presence and acquiescence of all the Directors – Harben v Phillips (1883) 23 Ch. D. 17.
4 Chida Mines Ltd v Anderson (1905) 22 TLR 27.
5 Re Indo China Steam Navigation Co [1917] 2 Ch 100.
6 See Re Morvah Consols Tin Mining Co, McKay’s Case (1875) 2 Ch D 1.
7 For instance see Companies Act 2013 sections 36(2), 42(3), 51(4), 57(9), 73(3), 94(7) and (8), 103(2), 109(7), 119(6), 142(3) and (4), 147(4), 163(3), 172(3), 174(6), 217(4) and (5), 220(3) (a) and (b), 224(3), 227(5), 228(3), 262(7), 263(4), 264 (3) and section 381 which provides that a person who is convicted of an offence under the Companies Act 2013 for which no specific penalty is provided shall be liable to a fine of five million Kwacha, or to an amount equivalent to the financial gain generated by the offence or the loss suffered due to the offence as the case may be, whichever is greater. See also section 24 of the Penal Code, Cap 7:01 of the Laws of Malawi, which provides that where an offence is committed by any company, every person charged with or concerned or acting in, the control or management of the affairs or activities of such company shall be guilty
31.3 Qualifications of Secretaries

Under the Companies Act 2013,¹ the Board of Directors of a public company are under a duty to take all reasonable steps to ensure that the Secretary of the company:—

a) Is a person who appears to them to have the requisite knowledge and experience to discharge the functions of Secretary of the company;

b) Is a person who, by virtue of his holding or having held any other position or his being a member of any other body, appears to the Directors to be capable of discharging the functions of Secretary of the company; or

c) Has the following qualifications

(i) That he has held the office of Secretary of a public company for at least three of the five years immediately preceding his appointment as Secretary; or

(ii) That he is a member of any professional body of company secretaries in Malawi.²

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¹ Section 225 of the Companies Act 2013.
² Which body is currently non-existent.
31.4 Vacancy and Removal

The Companies (Corporate Governance) Regulations 2016,\(^1\) provide that the removal of the Company Secretary is a matter of the Board as a whole. This is aimed at ensuring that the Company Secretary enjoys security of tenure to perform his or her job professionally.

In the case of a public company, where the office of Secretary is vacant, anything required to be done by or to the Secretary may be done by or to an assistant or deputy Secretary if any or if none then any person authorized by the Directors.\(^2\)

31.5 Register of Secretaries

A public company must keep a Register of Secretaries.\(^3\) The Register contains particulars of the person who is, or persons who are, the Secretary or joint Secretaries of the company including but not limited to name; address and any other relevant information.\(^4\) The Register must be kept available for inspection at the company's Registered Office\(^5\) and be open for the inspection of any member of the company without charge and of any other person on payment of such fee as may be prescribed.\(^6\)

A company or every officer who defaults in complying with the above requirements is liable to a fine in accordance with the prevailing schedule

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\(^1\) Regulation 3, clause 13.
\(^2\) Section 226 of the Companies Act 2013.
\(^3\) Section 227(1) of the Companies Act 2013.
\(^4\) Section 227(2) of the Companies Act 2013.
\(^5\) Section 227(3) of the Companies Act 2013.
\(^6\) Section 227(4) of the Companies Act 2013.
of penalties.\footnote{Section 227(5) of the Companies Act 2013. The schedule was yet to be gazetted at the time of publication.} In the case of a refusal of inspection of the register, the Court may by order an immediate inspection of it.\footnote{Section 227(6) of the Companies Act 2013.}

### 31.6 Notice of Changes to the Registrar

Where a change occurs in the office of the Secretary, the company must give a notice to that effect to the Registrar of Companies within \textbf{fourteen days}.\footnote{Section 228(1) of the Companies Act 2013.} Where a Secretary is appointed, the notice of such appointment must be accompanied by the consent by that person to act in that capacity.\footnote{Section 228(2) of the Companies Act 2013.}
32. AUDITORS

32.1 Introduction

In order to ensure that a company’s accounts serve the purpose for which they were intended, that is, to give both the members and the public accurate information about the financial position of the company, the accounts must be subject to professional scrutiny. Therefore, the Companies Act 2013,\footnote{Section 231.} provides that every company must appoint an Auditor or Auditors.\footnote{Except dormant companies - per section 356 of the Companies Act 2013 and a private company with an annual turnover of twenty million Kwacha or less is exempted from having audited accounts – see regulation 13(1) of the Companies (Regulations) 2017.} The purpose of statutory audit is to provide an independent, external professional opinion that the company’s accounts reflect a true and fair view of the company’s financial returns.\footnote{An ‘audit’ is defined in section 2 of the Public Accountants and Auditors Act 2013 as ‘an independent examination of financial statements by an Auditor to enable him express an opinion on whether financial statements are prepared, in all material respects, in accordance with an identical financial reporting framework.’}

32.2 Internal Auditors

Under the Companies Act 2013, there is no requirement for a company to have Internal Auditors.\footnote{The same used to be the case under the Companies Act 1984.} That said changing stakeholder expectations and a new view of risk management are prompting companies to engage Internal Auditors. It is well understood that internal auditing\footnote{Internal auditing is understood as an independent, objective assurance and consulting activity designed to add value and improve the operations of a company. It helps companies accomplish their objectives by bringing a systematic, disciplined approach to evaluate and improve the effectiveness of risk management, control, and governance processes – www.global.theiia.org} is an integral part of the Corporate Governance culture in both the public and

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1 Section 231.
2 Except dormant companies - per section 356 of the Companies Act 2013 and a private company with an annual turnover of twenty million Kwacha or less is exempted from having audited accounts – see regulation 13(1) of the Companies (Regulations) 2017.
3 An ‘audit’ is defined in section 2 of the Public Accountants and Auditors Act 2013 as ‘an independent examination of financial statements by an Auditor to enable him express an opinion on whether financial statements are prepared, in all material respects, in accordance with an identical financial reporting framework.’
4 The same used to be the case under the Companies Act 1984.
5 Internal auditing is understood as an independent, objective assurance and consulting activity designed to add value and improve the operations of a company. It helps companies accomplish their objectives by bringing a systematic, disciplined approach to evaluate and improve the effectiveness of risk management, control, and governance processes – www.global.theiia.org
the private sectors and its importance cannot be overemphasized. In particular, for financial institutions, there is a requirement for them to appoint an Internal Auditor, unless exempted by the Registrar of Financial Institutions.¹ This requirement is quite relevant considering the risks that financial institutions take in playing their role in the economy vis a vis financial intermediation. In respect of banks, the Internal Auditor must be a member of the Institute of Internal Auditors (Malawi).²

### 32.3 Appointment of Auditors

The first Auditor of a company may be appointed by the Directors before the first AGM, and, if so appointed, holds office until the conclusion of that AGM. Where the Directors do not appoint the first Auditor, the company must appoint the first Auditor at a shareholders’ meeting.³

Financial institutions have peculiar rules.⁴ Subsequently, a company must appoint an Auditor at each AGM. The Auditor holds office from the conclusion of the meeting until the conclusion of the next AGM.⁵ An Auditor is automatically reappointed at an AGM unless the Auditor is not qualified for appointment; or the company passes a resolution at the meeting appointing another person to


² Section 9(2) of the *Financial Services (Fit and Proper Requirements for Shareholders, Directors and Senior Management Officials for Banks) Directive, 2014* and the fine for breach of this requirement is twenty five million Kwacha – See p. 20 of the RBM Schedule of Charges and Penalties for Banks effective 1st October, 2015. The Institute itself was established in 1998; it is registered as a company limited by guarantee and affiliated to the Institute of Internal Auditors Inc.

³ Section 237 of the Companies Act 2013.

⁴ See the Financial Services Act 2010 sections 55 to 60 and the *Financial Services (Annual Audits of Banks) Directive, 2012*, for example.

⁵ Section 231(1) of the Companies Act 2013.
replace him as Auditor; or the Auditor has given notice to the company that he does not wish to be reappointed.\(^1\)

The Board may fill any casual vacancy in the office of Auditor, but while the vacancy remains, the surviving or continuing Auditor, if any, may continue to act as Auditor.\(^2\) A casual vacancy is a vacancy that arises between one AGM and the next. The company must notify the Registrar of companies in writing about the appointment within **seven days**.\(^3\) Where a company does not appoint an Auditor at an AGM or a casual vacancy in the office of Auditor is not filled within **one month** of the vacancy occurring, the Registrar of companies may appoint an Auditor.\(^4\)

The fees and expenses of an Auditor of a company are fixed by the appointer, i.e. by the company at the meeting or by the Director; or the Registrar, as the case may be.\(^5\)

The Companies Act 2013\(^6\) has provided special rules for the appointment of a partnership as Auditors. A partnership may be appointed by the firm name to be the Auditor of a company where the following conditions are met:-

1. At least one member of the firm is ordinarily resident in Malawi;

2. All or some of the partners including the partner who is ordinarily resident in Malawi are qualified for appointment;\(^7\)

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1 Section 236 of the Companies Act 2013.
2 Section 231(2) of the Companies Act 2013.
3 Section 231(4) of the Companies Act 2013.
4 Section 231(3) of the Companies Act 2013.
5 Section 231(4) of the Companies Act 2013.
6 Section 233.
7 Under section 234 of the Companies Act 2013.
3. No member of the firm is indebted to the company or a related company unless the debt is in the ordinary course of business;¹

4. No member of the firm is an officer or employee of the company; or a partner, or in the employment, of a Director or employee or the company or a related company;

5. No officer of the company receives any remuneration from the firm or acts as a consultant to it on accounting or auditing matters.

The appointment of a partnership by the firm named to be the Auditor of a company is deemed to be the appointment of all the persons who are partners in the firm from time to time whether ordinarily resident or not in Malawi at the date of the appointment.² However, this does not include unqualified persons who are also partners in the firm.³ The appointment is not affected by the changes in the partnership by reason of the death, retirement, or withdrawal of a member or by reason of the admission of a new member, unless disqualified on other grounds.⁴ This scheme largely appears to be in agreement with the provisions of the Partnership Act,⁵ for example, that partners in a partnership are jointly and severally liable.⁶

Under the Companies Act 1984, it was sufficient for the report to be signed in the name of the firm by a qualified Auditor without necessarily putting down his name. The Companies Act 2013 now requires that the

¹ For example, an Auditor who obtains a loan from a bank in the course of its business is still eligible for appointment as an Auditor for that bank.
² Section 233(2) of the Companies Act 2013.
³ Section 233(3) of the Companies Act 2013.
⁴ Section 233(4) of the Companies Act 2013.
⁵ Cap 46:04 of the Laws of Malawi.
⁶ See sections 11 and 14 of the Partnership Act, Ibid.
name of the Auditor be included.\textsuperscript{1} This is aimed at making Auditors more responsible for their work and it will enhance ownership of the report and so hopefully reduce cases of professional negligence.

\textbf{32.4 Qualifications of an Auditor}

The qualifications of an Auditor are provided for under the Public Accountants and Auditors Act 2013.\textsuperscript{2} However, the Companies Act 2013\textsuperscript{3} outlines a list of disqualified persons, including:

i) A Director or employee of the company or a related company;

ii) A person who is a partner, or in the employment, of a Director or employee of the company or a related company;

iii) A liquidator or a person who is a receiver in respect of the property of the company or a related company;

iv) A body corporate;

v) A person who is not ordinarily resident in Malawi; or

vi) A person who is indebted to the company, or to a related company unless the debt is in the ordinary course of business.

In terms of the Public Accountants and Auditors Act 2013\textsuperscript{4} the following, \textit{inter alia}, are not qualified for registration as members of ICAM,\textsuperscript{5} hence they do not qualify to be Auditors:-

\begin{itemize}
\item Section 233(5) of the Companies Act 2013.
\item Section 234(1) of the Companies Act 2013. See also section 25 of the Public Accountants and Auditors Act 2013.
\item Section 234(2).
\item Sections 25 and 28.
\item The role of ICAM is provided for in the Public Accountants and Auditors 2013.
\end{itemize}

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a) An un-discharged bankrupt;¹

b) A convict of an offence which is disgraceful or dishonourable;²

c) A person who has behaved in a manner which is disgraceful or dishonourable;

d) A person of unsound mind;³

e) A person removed from a position of trust on account of misconduct;

f) A person convicted of theft, fraud, forgery or perjury;

g) A person disqualified from registration consequent upon any punishment imposed under the Public Accountants and Auditors Act 2013.

In addition, the Companies Act 2013 makes it an offence for an Auditor of a company to wilfully disqualify himself, while the appointment continues, from acting as Auditor; or where he is a member of a firm that has been appointed Auditor of a company to wilfully disqualify the firm while the appointment continues, from acting as Auditor.⁴ This ensures that companies have Auditors at all times and that Auditors will not shun from responsibility whilst the appointment subsists.

¹ Under the Insolvency Act 2016.
² The extent to which the Courts will go to hold some act or behaviour ‘dishonourable’ is yet to be seen - ‘is taking off one’s shirt at a drinking joint dishonourable enough?’
³ See Parts V and VII of Mental Treatment Act, Cap 34:02 of the Laws of Malawi.
⁴ Section 234(3) of the CA 2013.
Every application by a person to be an Auditor must be made in the prescribed form.\textsuperscript{1} Following an investigation, an Auditor may be removed from his office where he is no longer a fit and proper person under the Public Accountants and Auditors Act 2013. A declaration to that effect must be made by a notice published in the 	extit{Gazette} that such a person is no longer a qualified Auditor.

\textbf{32.5 Replacement of an Auditor}

To enhance the independence of an auditor, the law must provide for security of his tenure. Accordingly, the Companies Act 2013\textsuperscript{2} provides that a company shall not remove or appoint a new Auditor in the place of an Auditor who is qualified for reappointment, unless at least twenty eight days' written notice of a proposal to do so has been given to the Auditor and the Auditor has been given a reasonable opportunity to make representations to the shareholders on the appointment of another person either, at the option of the Auditor, in writing or by the Auditor or his representative speaking at the AGM at which it is proposed not to reappoint the Auditor or at a special meeting of shareholders called for the purpose of removing and replacing the Auditor. In respect to an Auditor of a financial institution, his removal before expiry of his term only becomes effective on approval from the Registrar of Financial Institutions.\textsuperscript{3}

An Auditor is entitled to be paid by the company reasonable fees and expenses for making the representations to the shareholders.\textsuperscript{4} On the application of the company or any aggrieved person, the Registrar of

\textsuperscript{1} Section 235(1) of the CA 2013. The Form has not yet been prescribed, therefore refer to Annex 1.
\textsuperscript{2} Section 238(1).
\textsuperscript{3} Section 60(1) of the Financial Services Act 2010.
\textsuperscript{4} Section 238(2) of the Companies Act 2013.
companies may stop the circulation of the representations where the Auditor’s representations are abusive or aimed at securing needless publicity of defamatory matter.

32.6 Resignation of an Auditor

Where an Auditor gives the Board written notice that he does not wish to be reappointed, the Board must, if requested to do so by that Auditor, distribute to all shareholders and to the Registrar of companies, at the expense of the company, a written statement of the Auditor's reasons for his wish not to be reappointed. Alternatively, the Auditor or his representative may explain the reasons for his wish not to be appointed at a shareholders' meeting.¹

An Auditor may resign prior to the AGM by giving notice to the company calling on the Board to call a special shareholder’s meeting to receive the Auditor's notice of resignation.² The notice may be accompanied by a written statement to be provided to the shareholders setting out reasons for the resignation.³ The appointment of the Auditor terminates at that meeting and the business of the meeting must include the appointment of a new Auditor to the company.⁴

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¹ Section 239(1) of the Companies Act 2013. Confer section 60(2) of the Financial Services Act 2010.
² Section 239(2) of the Companies Act 2013.
³ Section 239 (3)(4) of the Companies Act 2013.
⁴ Section 239(5) of the Companies Act 2013.
32.7 Duties and Rights of an Auditor

(1) Duty to Avoid Conflict of Interest.\(^1\)

(2) Duty to Make a Report\(^2\) - The Auditor is required to make a report to the shareholders on the financial statements which he has audited.\(^3\) The contents of the Auditor's Report must include the following:-

i. The scope and limitations of the audit;

ii. Whether the Auditor has obtained all information and explanations that the Auditor has required;

iii. Whether, in the Auditor's opinion, the financial statements and any group financial statements give a true and fair view of the matters to which they relate, and where they do not, the respects in which they fail to do so and whether the financial statements have been prepared in accordance with International Financial Reporting Standards and the Companies Act 2013.

In carrying out the audit, an Auditor is enjoined to carry out the same in accordance with International Standards on Auditing\(^4\) as well as ensure integrated reporting and auditing.\(^5\)

(3) Right to Access Information - the Board must ensure that an Auditor has access at all times to the accounting records and other documents

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\(^1\) Section 240 of the Companies Act 2013.

\(^2\) Auditors of financial institutions may be required by the Registrar of Financial Institutions to report to him - section 57 of the Financial Services Act 2010. In addition, Auditors appointed by the Registrar of Financial Institutions have supplementary duties outlined in section 59 of the Financial Services Act 2010.

\(^3\) Section 241(1) of the Companies Act 2013.

\(^4\) Section 241(3) of the Companies Act 2013.

\(^5\) Regulation 20 of Companies (Corporate Governance) Regulations 2016.
of the company. In that respect, an Auditor of a company is entitled to receive from a Director or employee such information and explanation as he thinks necessary for the performance of his duties as Auditor. Where the Board fails to comply with these requirements every Director is liable to a fine in accordance with the prevailing schedule of penalties. An Auditor who certifies accounts where he was in fact denied information or does not comply with the law, in so doing, or is restricted in some way, commits an offence and may be disciplined. An Auditor may also be sued for professional negligence.

(4) Right to Attend Shareholders’ Meeting - It is the duty of the Board to ensure that an Auditor:-

a) Is permitted to attend shareholders’ meetings;

b) Receives the notices and communications that a shareholder is entitled to receive relating to a meeting of the shareholders; and

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1 Section 242(1) of the Companies Act 2013.
2 Section 242(2) of the Companies Act 2013.
3 Section 242(3) of the Companies Act 2013. The schedule was yet to be gazetted at the time of publication.
4 Section 20 of the Public Accountants and Auditors Act 2013. The disciplinary process is covered under Part VII of the Public Accountants and Auditors Act 2013.
5 Issues of professional negligence were raised in Prudential Holdings Ltd v Illovo Sugar (Malawi) plc, Commercial Cause no. 33 of 2016, a minority action. ‘Disappointingly’ the matter was amicably settled per newspaper notice of 1st June 2018. See also the following decided cases Re Thomas Gerrard and Son Ltd [1967] 2 All ER 525 Ch 534; Re London and General Bank (No 2) [1895] 2 Ch 673; Barings plc v Coopers and Lybrand [1997] 1 BCLC 427; Caparo Industries plc v Dickman. [1990] 2 AC 605; Al Saudi Banque v Clark Pixley [1990] Ch 313 and Morgan Crucible Co plc v Hill Samuel & Co Ltd [1991] Ch 295.
c) May be heard at a meeting of the shareholders which he attends on any part of the business of the meeting which concerns him as Auditor.¹

33. FEES AND PENALTIES

For convenience, annexures have been provided for applicable fees and penalties for late delivery of documentation to the Registrar of Companies (Penalties for other non-compliance were not yet gazetted). Note that the fees and penalties are subject to change from time to time.

Annex 8: Fees Payable to the Registrar of Companies

Annex 9: Penalties Payable to the Registrar of Companies

¹Section 243 of the Companies Act 2013.
ANNEXURES

ANNEX 1: PRESCRIBED FORMS

These Forms are prescribed under the Companies Regulations 2017, Regulation 4(1). Where not provided for, the Forms should be drafted as close as possible to the prescribed Forms. For lack of space here, the Forms can be requested through tmuhome@gmail.com

<table>
<thead>
<tr>
<th>Form Number</th>
<th>Subject</th>
</tr>
</thead>
<tbody>
<tr>
<td>Form 1</td>
<td>Application for Registration of a Company</td>
</tr>
<tr>
<td>Form 2</td>
<td>Consent and Certificate of a Director or Directors of a Proposed Company</td>
</tr>
<tr>
<td>Form 3</td>
<td>Consent of a Shareholder or Shareholders of Proposed Company</td>
</tr>
<tr>
<td>Form 4</td>
<td>Application for Reservation of a Company Name</td>
</tr>
<tr>
<td>Form 5</td>
<td>Application to Change a Name of a Company</td>
</tr>
<tr>
<td>Form 6</td>
<td>Notice of Adoption, Alteration, or Revocation of Constitution</td>
</tr>
<tr>
<td>Form 7</td>
<td>Notice of Issue of Shares and of Approval for Issue of Shares</td>
</tr>
<tr>
<td>Form 8</td>
<td>Notice of Purchase or Acquisition by Company of its Own Shares</td>
</tr>
<tr>
<td>Form 9</td>
<td>Consent and Certificate of a Director</td>
</tr>
<tr>
<td>---------</td>
<td>--------------------------------------</td>
</tr>
<tr>
<td>Form 10</td>
<td>Notice of Change of Directors and Particulars of Directors</td>
</tr>
<tr>
<td>Form 11</td>
<td>Notice of Change of Registered Office or Address for Service</td>
</tr>
<tr>
<td>Form 12</td>
<td>Annual Return</td>
</tr>
<tr>
<td>Form 13</td>
<td>Request to Remove Company from the Register</td>
</tr>
<tr>
<td>Form 14</td>
<td>Notice of Change of Name of a Foreign Company</td>
</tr>
<tr>
<td>Form 15</td>
<td>Application for Registration of a Foreign Company in the Register</td>
</tr>
<tr>
<td>Form 16</td>
<td>Notice of Alteration of Constitution of a Foreign Company, Change of Directors, Change of Place of Business, or Change in Persons Authorized to Accept Service</td>
</tr>
<tr>
<td>Form 17</td>
<td>Annual Return of a Foreign Company</td>
</tr>
<tr>
<td>Form 18</td>
<td>Notice by a Foreign Company of Intention to Cease to Carry on Business in Malawi</td>
</tr>
<tr>
<td>Form 19</td>
<td>Application by a Foreign Company to Register as a Company</td>
</tr>
<tr>
<td>Form 20</td>
<td>Application for Registration as a Valuer</td>
</tr>
</tbody>
</table>
NOTICE OF THE SECOND ANNUAL GENERAL MEETING

NOTICE is hereby given that the second Annual General Meeting of the Company will be held at Sunbird Mount Soche, Njamba Room, Blantyre on Friday, 15th June 2017 at 15:30 hours to transact the following business:

1. APPROVAL OF MINUTES

To consider and if deemed appropriate to approve the Minutes of the first Annual General Meeting held on 29th June 2016.

2. FINANCIAL STATEMENTS

To consider and if deemed appropriate to approve the audited financial statements for the year ended 31st December 2017 together with the reports of the Auditors and Directors therein.

3. DIVIDEND

To consider and if deemed appropriate to declare a final dividend of K165 million (representing 63 tambala per share) for the year ended 31st December 2017 to make the total dividend paid for 2017 as K238 million (or 92 tambala per share). For the year 2016, the Company declared a total dividend of K105 million (representing 40 tambala per share).
4. DIRECTORS’ APPOINTMENTS

To confirm the appointment of the following as Directors in order to fill casual vacancies.

Mr [...] – *Insert Brief Profile*

5. DIRECTORS’ RE-ELECTION

To re-elect Mrs [...] who retires by rotation in accordance with the terms of the Company’s Articles of Association, however, being eligible, has offered herself for re-election.

6. DIRECTORS’ RETIREMENT

To accept the retirement of Mr [...] who retires in accordance with Article [...] of the Company’s Articles of Association.

7. DIRECTORS’ REMUNERATION

To consider and if deemed appropriate to approve that the remuneration of the Chairperson and Directors be adjusted with effect from 1st January, 2018 as follows:-

7.1 Fees
Chairperson from K2,504,000 to K2,879,600 per annum.
Other Non-Executive Directors from K2,082,000 to K2,394,300 per annum.

7.2 Sitting Allowances
Chairperson from K132,000 to K151,800 per meeting.
Non-Executive Directors from K106,000 to K121,900 per meeting.
8. APPOINTMENT OF EXTERNAL AUDITORS

To appoint M/s […] Certified Public Accountants, as Auditors for the ensuing year and to authorise the Directors to fix their remuneration.

9. ANY OTHER BUSINESS

To transact any other business prior notice of which should have been given to the office of the Company Secretary not less than twenty one days before the date of the meeting.

Dated: 15th May 2018

By order of the Board

SIGNED

Allan Hans Muhome
COMPANY SECRETARY

Registered Offices:
Mount Soche Hotel
28 Glyn Jones Road
P.O. Box 376
Blantyre
MALAWI
1. A member entitled to attend and vote at the meeting is entitled to appoint a proxy (or more than one proxy) to attend and vote in his/her stead. The proxy need not be a member of the Company.

2. The Proxy Appointment Form is attached.

3. Proxy Appointment Forms should be forwarded to reach the Company’s Registered Offices, whose address is provided above, or the Transfer Secretaries at National Bank of Malawi, Henderson Street, Blantyre, not later than forty eight hours before the time of holding the meeting and in default the instrument of proxy shall not be valid.
## ANNEX 3: SUMMARY OF RESOLUTIONS

<table>
<thead>
<tr>
<th>ORDINARY RESOLUTION</th>
<th>Summary of Provision</th>
</tr>
</thead>
<tbody>
<tr>
<td>Provision in the Companies Act 2013</td>
<td></td>
</tr>
<tr>
<td>90 (1)(a) &amp; (b)</td>
<td>Alteration of number of shares by dividing or subdividing and consolidation.</td>
</tr>
<tr>
<td>98(1)(b)</td>
<td>Any distribution to shareholders must be approved by shareholders (subject to the constitution).</td>
</tr>
<tr>
<td>160(3)(a)</td>
<td>Substantial transactions to be approved by shareholders.</td>
</tr>
<tr>
<td>166(2)</td>
<td>All subsequent Directors of a company shall, unless the constitution of the company otherwise provides, be appointed by ordinary resolution.</td>
</tr>
<tr>
<td>169(1)</td>
<td>A Director of a public company shall be removed by an ordinary resolution.</td>
</tr>
<tr>
<td>237(2)</td>
<td>An Auditor to be appointed by Directors and if not by the meeting of the company.</td>
</tr>
<tr>
<td>274 &amp; 290</td>
<td>In the case of a merger by formation of a new company, the constitution of the transferee must be approved by an ordinary resolution of the transferor company.</td>
</tr>
<tr>
<td>Provision in the Companies Act 2013</td>
<td>Summary of Provision</td>
</tr>
<tr>
<td>-------------------------------------</td>
<td>----------------------</td>
</tr>
<tr>
<td>35(1)</td>
<td>Existing company may by a special resolution adopt model constitution.</td>
</tr>
<tr>
<td>52(1)(c)</td>
<td>Change of name effected by a special resolution, subject to the constitution.</td>
</tr>
<tr>
<td>56(1)(a) &amp; (2)</td>
<td>Public company may be re-registered as a private company by passing a special resolution.</td>
</tr>
<tr>
<td>57(1)</td>
<td>An application may be made objecting to the special resolution for a public company to be re-registered as a private company.</td>
</tr>
<tr>
<td>59(1)(a) &amp; 2 &amp; (3)(d)(i)</td>
<td>Private company, other than a company limited by guarantee or a SOC, may be re-registered as a public company by passing a special resolution.</td>
</tr>
<tr>
<td>87(3)(b)(i) &amp; (ii)</td>
<td>A company with nominal value shares may convert the shares into shares of no nominal value by a special resolution.</td>
</tr>
<tr>
<td>100</td>
<td>Reduction of share capital by a special resolution.</td>
</tr>
<tr>
<td>143(2)(a)</td>
<td>A single member company may by a special resolution change to a private company.</td>
</tr>
<tr>
<td>Section</td>
<td>Summary</td>
</tr>
<tr>
<td>---------</td>
<td>---------</td>
</tr>
<tr>
<td>143(4)(b)(c)</td>
<td>A single member company through operation of law must pass a special resolution to change to a private company.</td>
</tr>
<tr>
<td>160(1)(a)</td>
<td>Substantial transactions to be approved by shareholders.</td>
</tr>
<tr>
<td>169(2)</td>
<td>A Director of a private company, subject to the constitution, may be removed by a special resolution.</td>
</tr>
<tr>
<td>348(d)(1)</td>
<td>Registrar may remove a company from the Register upon receipt of a special resolution.</td>
</tr>
<tr>
<td>355(1)(b) &amp; (3)</td>
<td>Special resolution required to declare a company dormant.</td>
</tr>
</tbody>
</table>

**UNANIMOUS RESOLUTION**

**Provision in the Companies Act 2013**

**Summary of Provision**

<table>
<thead>
<tr>
<th>Section</th>
<th>Summary</th>
</tr>
</thead>
<tbody>
<tr>
<td>109(1)(c)</td>
<td>Acquisition of company of its own shares.</td>
</tr>
<tr>
<td>111(1)(c)</td>
<td>Disclosure document in relation to purchase of own shares not to apply where a unanimous resolution is passed to acquire the shares.</td>
</tr>
<tr>
<td>244(5)</td>
<td>Shareholders of a private company may by unanimous resolution prevent the reappointment of an Auditor by a shareholder who holds <strong>five percent</strong> of the shareholding.</td>
</tr>
</tbody>
</table>
Shareholders of a private company may resolve by unanimous resolution not to prepare Annual Report and accounts.

ANNEX 4: PROXY APPOINTMENT FORM

[Name of Company] PLC

I/We…………………………... [ID may be attached] of P.O. Box 376 Blantyre, being a member/members of the above-named Company, hereby appoint Mr XXX [ID may be attached] of P.O. Box 222, Blantyre as my/our proxy to vote for me/us on my/our behalf at the (annual or extra-ordinary, as the case may be) General Meeting of the Company, to be held on the …….day of ………20….., and at any adjournment thereof.

This form is to be used –

<table>
<thead>
<tr>
<th>Resolution Number</th>
<th>In favour of</th>
<th>Against</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td></td>
<td></td>
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<tr>
<td>2</td>
<td></td>
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</tr>
<tr>
<td>3</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Unless otherwise instructed, the proxy will vote as he thinks fit.

Dated this ……….day of ………….20...

Signed ……………………………...
ANNEX 5: NOTICE OF TERMINATION OF PROXY’S AUTHORITY

[Name of Company] PLC

I/We..............................................[ID may be attached] of P.O. Box 376 Blantyre, being a member/members of the above-named Company, and having appoint Mr XXX [ID may be attached] of P.O. Box 222, Blantyre as my/our proxy, hereby revoke his authority with effect from the …..day of …..20….

Dated this ……..day of ………….20…

Signed .......................................
ANNEX 6: CHAIRPERSON’S PROCEDURES IN AN AGM

1. INTRODUCTION
   The Chairperson to call the meeting to Order.
   ‘I now call the meeting to order.
   Good afternoon Ladies and Gentlemen. I welcome you to the SECOND Annual General Meeting of […] plc.

   First of all, I would like to introduce to you the Board, Management and Auditors’

2. NOTICE AND MINUTES
   Chairperson ‘The notice of the meeting was circulated to members but also published in the daily papers starting from 15th May, 2018. I therefore propose that the notice convening this meeting having complied with the required twenty one days’ notice be taken as read.’

   ‘Is there a seconder to that proposal?’

   ‘I also propose that the Minutes of the FIRST Annual General Meeting be taken as read.’

   ‘Is there a seconder to the proposal?’

3. PROXIES
   Chairperson: ‘I would like to confirm that we have received […] Proxies.’

4. QUORUM
   Chairperson ‘The Quorum for this Annual General Meeting, according to Article 40 of the Company’s Articles of Association, is […] members present in person or by Proxy. I confirm therefore that based on the attendance and Proxies received, we have formed a quorum.’

   ‘I therefore declare the meeting duly constituted.’
5. **APOLOGIES**
   Chairperson: ‘I have received apologies from the following Directors who due to other commitments have not been able to attend this meeting: […]’

6. **CONDUCT OF BUSINESS**
   **Conduct of Business**
   This is how business will be conducted. I will introduce each item on the Agenda in turn and ask for a Seconder. Where necessary, commentary will be provided. Thereafter, for each Agenda Item, we will proceed to voting.

   **Voting**
   a) Voting will be by show of hands unless a poll is demanded.
   b) A poll can be demanded before the result is declared or on the declaration of the result of the show of hands.
   c) The following people can demand a poll: The Chairperson; Directors; Not less than [two] members [*e.t.c. per Constitution*].

   I wish to remind the meeting that according to Article […] of the Articles of Association, every member has one vote in respect of each ordinary share held when voting on a poll.

7. **ANNUAL FINANCIAL STATEMENTS:**
   **Chairperson**
   ‘The Annual Financial Statements for the year ended 31st December, 2017 together with the Directors’ Report and Auditors’ Report are in your hands.

   With your permission I propose that we take the accounts as read? **Is that agreed or not?**

   With your permission, I propose that the Directors’ Report be taken as read too. **Is that agreed or not?**
I will now call upon a representative from […] Auditors to present the Auditors Report. The Auditors Report is on Page […] of the AGM Pack (or Page […] of the Annual Report)

Chairperson's Report to Shareholders: My Report is in the Annual Report from Page […] to Page […], however I will only present highlights of the Report and ask that the detailed Report be taken as read.’

After presentation of the Accounts and the Chairperson's Report:
Chairperson
‘Before I propose that the accounts be adopted, I invite comments and questions on the accounts.’

NOTE: Only members, not observers, can ask questions or address the meeting. Where appropriate I will refer questions to Management.

Chairperson (after comments and questions)
‘I propose that the Financial Statements for the year ended 31st December, 2017 and the Reports of the Directors and the Auditors thereon now submitted to this meeting, be and are hereby received and adopted, and that all matters and things undertaken and discharged by the Directors on behalf of the Company be and are hereby confirmed.’

Chairperson ‘Can I have someone to second the motion?’
Chairperson: The motion will now be put to a vote.

1. Those in favour of the motion, please raise your hands.
2. Those against, please raise your hands.
3. Any abstaining?
4. (After counting) ‘I now declare that the accounts for the Financial Year ended 31st December 2017 are adopted.’

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8. **DIVIDEND**

Chairperson

‘I now move a motion that a final dividend of K165 million (or 63 tambala per share) for the year ended 31st December, 2017 be declared.

During the year, the Company declared an interim dividend of K73 million (or 28 tambala per share).

The total dividend being declared for the year is therefore K238 million (or 92 tambala per share).’

Chairperson

‘Could I have someone to second this motion?’

Chairperson

‘The motion is now open for discussion’

Chairperson:

‘The motion will now be put to a vote.’

(a) Those in favour of the motion, please raise your hands.

(b) Those against, please raise your hands.

(c) Any abstaining? **(After counting)** ‘I now declare the resolution carried’.

9. **DIRECTORSHIP**

**Confirmation**

Chairperson

I propose that Director […] who have been appointed since the last Annual General Meeting be confirmed [read profile/or taken as read].

Chairperson

Can I have a Seconder for the motion?

Chairperson:

‘The motion will now be put to a vote.’
a. Those in favour of the motion, please raise your hands.
b. Those against, please raise your hands.
c. Any abstaining? (After counting) ‘I now declare the resolution carried’.

[Similar process for retirement and re-election]

10. DIRECTORS REMUNERATION
Chairperson:
‘I propose that Directors’ remuneration be increased as follows with effect from 1st January 2018:

Chairperson – from K2,504,000 to K2,879,600
Directors – from K2,082,000 to K2,394,300’

Chairperson:
‘May I have a Seconder to the motion?’

Chairperson:
‘The motion is now open for discussion’.

Chairperson:
‘The motion will now be put to a vote.’

a. Those in favour of the motion, please raise your hands.
b. Those against, please raise your hands.
c. Any abstaining? (After counting) ‘I now declare the resolution carried’.

[Similar process for sitting allowances]

11. APPOINTMENT OF EXTERNAL AUDITORS
Chairperson: I propose

THAT Directors be permitted to appoint […] Certified Public Accountants, as Auditors for the ensuing year and be authorised to fix their remuneration.
**Chairperson**: ‘Can I have a seconder to this motion?’

The motion is now open for discussion

**Chairperson**: ‘The motion will now be put to a vote.’

a. Those in favour of the motion, please raise your hands.

b. Those against, please raise your hands.

c. Any abstaining? (After counting) ‘I now declare the resolution carried’.

12. **ANY OTHER BUSINESS**

**Chairperson**: I would like to inquire from the Secretary if we received any matters to be discussed at this meeting?

**Secretary**: [responds accordingly]

**Chairperson**: ‘There being no further business for this meeting, I thank you for your attendance and declare the meeting closed.’
ANNEX 7: SAMPLE OF BOARD EVALUATION FORM

[NOTE the sample questionnaire below is a generic Board Evaluation Form and separate questionnaires can be designed for the Chairperson, CEO, and Committees etc. it is essential that the results be run through a statistical analysis package/software for easy interpretation]

Rating Scale:
1. Outstanding,
2. Exceeds Expectation,
3. Meets Expectation,
4. Needs Improvement,
5. Poor

<table>
<thead>
<tr>
<th>BOARD COMPOSITION AND QUALITY</th>
<th>1</th>
<th>2</th>
<th>3</th>
<th>4</th>
<th>5</th>
<th>Note</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. The Board has appropriate expertise and experience to meet the best interests of the company.</td>
<td></td>
<td></td>
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</tr>
<tr>
<td>2. The Board has appropriate combination of industry knowledge and diversity (gender, experience, background).</td>
<td></td>
<td></td>
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</tr>
<tr>
<td>3. All the independent Directors are independent in true letter and spirit i.e. whether the independent Director has given declaration of independence and they exercise their own judgement, voice their concerns and act freely from any conflicts of interests.</td>
<td></td>
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</tr>
<tr>
<td>4. Board Members demonstrate highest level of integrity</td>
<td></td>
<td></td>
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<td></td>
</tr>
</tbody>
</table>
(including maintaining confidentiality and identifying, disclosing and managing conflicts of interests).

5. The Board Members spend sufficient time in understanding the vision, mission of the company and strategic and business plans, financial reporting risks and related internal controls and provides critical oversight on the same.

6. The Board understands the legal requirements and obligations under which they act as a Board; i.e. company constitution, Companies Act 2013 etc. and discharge their functions accordingly.

7. The Board has set its goals and measures its performance against them on an annual basis.

8. The Board has defined its stakeholders and has appropriate level of communication with them.

9. The Board understands the line between oversight and management.

10. The Board monitors compliances with Corporate Governance regulations and guidelines.

11. An effective succession plan of Board in place.

12. The Board has the proper number of Committees and guidelines, with well-defined Terms of
<table>
<thead>
<tr>
<th>BOARD MEETINGS AND PROCEDURES</th>
<th>1</th>
<th>2</th>
<th>3</th>
<th>4</th>
<th>5</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. The Annual Calendar of Board Meetings is communicated well in advance and reviewed from time to time.</td>
<td></td>
<td></td>
<td></td>
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<td></td>
</tr>
<tr>
<td>2. The Board Meeting agenda and related background papers are concise and provide information of appropriate quality and detail.</td>
<td></td>
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</tr>
<tr>
<td>3. The information is received by Board Members sufficiently in advance for proper consideration.</td>
<td></td>
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</tr>
<tr>
<td>4. Adequacy of attendance and participation by the Board Members at the Board Meetings.</td>
<td></td>
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</tr>
<tr>
<td>5. Frequency of Board Meetings is adequate.</td>
<td></td>
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</tr>
<tr>
<td>6. The facility for video conferencing for conducting meetings is robust.</td>
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</tr>
<tr>
<td>7. Location of Board Meeting (As a good governance practice the Board Meeting should be held at different places).</td>
<td></td>
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<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>8. The Board Meetings encourage a high quality of discussions and decision making.</td>
<td></td>
<td></td>
<td></td>
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<tr>
<td>9. Openness to ideas and ability to challenge the practices and throwing up new ideas.</td>
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<tr>
<td>10.</td>
<td>The amount of time spent on discussions on strategic and general issues is sufficient.</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>11.</td>
<td>How effectively does the Board work collectively as a team in the best interest of the company?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>12.</td>
<td>The minutes of Board Meetings are clear, accurate, consistent, complete and timely.</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>13.</td>
<td>The actions arising from Board Meetings are properly followed up and reviewed in subsequent Board Meetings.</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>14.</td>
<td>The processes are in place for ensuring that the Board is kept fully informed on all material matters between meetings (including appropriate external information e.g. emerging risks and material regulatory changes).</td>
<td></td>
<td></td>
<td></td>
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</tr>
<tr>
<td>15.</td>
<td>Adequacy of the separate meetings of independent Directors.</td>
<td></td>
<td></td>
<td></td>
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</tr>
<tr>
<td>16.</td>
<td>Appropriateness of secretarial support made available to the Board.</td>
<td></td>
<td></td>
<td></td>
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</tr>
<tr>
<td>17.</td>
<td>The Board Members understand the terms and conditions of Directors and Officers insurance.</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>18.</td>
<td>All proceedings and resolutions of the Board are recorded accurately, adequately and on a timely basis.</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>BOARD DEVELOPMENT</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
<td>5</td>
</tr>
<tr>
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</tr>
<tr>
<td>1. Appropriateness of the induction programme given to the new Board Members.</td>
<td></td>
<td></td>
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</tr>
<tr>
<td>2. Timeliness and appropriateness of ongoing development programmes to enhance skills of its members.</td>
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<tr>
<td>3. Appropriate development opportunities are encouraged and communicated well in time.</td>
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</tbody>
</table>

<table>
<thead>
<tr>
<th>BOARD STRATEGY AND RISK MANAGEMENT</th>
<th>1</th>
<th>2</th>
<th>3</th>
<th>4</th>
<th>5</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. The time spent on issues relating to the strategic direction and not day-today management responsibilities</td>
<td></td>
<td></td>
<td></td>
<td></td>
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</tr>
<tr>
<td>2. Engaging with Management in the strategic planning process, including corporate goals, objectives and overall operating and financial plans to achieve them.</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>3. The Board has developed a strategic plan and the same would meet the future requirements of the Company.</td>
<td></td>
<td></td>
<td></td>
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</tr>
<tr>
<td>4. The Board has sufficient understanding of the risk attached with the business structure and the Board uses appropriate risk management framework and whether Board</td>
<td></td>
<td></td>
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</tr>
</tbody>
</table>
reviewed and understood the risks provided in the Internal Audit Report and Management is taking sufficient steps to mitigate the risk.

<table>
<thead>
<tr>
<th>5.</th>
<th>The Board evaluates the strategic plan/policies periodically to assess the Company’s performance, considers new opportunities and responds to unanticipated external developments.</th>
</tr>
</thead>
<tbody>
<tr>
<td>6.</td>
<td>The Risk management framework is subject to review.</td>
</tr>
<tr>
<td>7.</td>
<td>Monitoring the implementation of the long term strategic goals.</td>
</tr>
<tr>
<td>8.</td>
<td>Monitoring the company’s internal controls and compliance with applicable laws and regulations.</td>
</tr>
<tr>
<td>9.</td>
<td>The adequacy of Board contingency plans for addressing and dealing with crisis situations.</td>
</tr>
<tr>
<td>10.</td>
<td>Appropriateness of effective vigil mechanism.</td>
</tr>
<tr>
<td>11.</td>
<td>The Board focuses its attention on long-term policy issues rather than short term administrative matters.</td>
</tr>
<tr>
<td>12.</td>
<td>The Board discusses thoroughly the annual budget of the Company and its implications before approving it.</td>
</tr>
<tr>
<td>13.</td>
<td>The Board periodically reviews the actual result of the Company vis-à-vis the plan/policies</td>
</tr>
</tbody>
</table>
devised earlier and suggests corrective measures, if required.

<table>
<thead>
<tr>
<th>BOARD &amp; MANAGEMENT RELATIONS</th>
<th>1</th>
<th>2</th>
<th>3</th>
<th>4</th>
<th>5</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. The Board sets the overall tone and direction of the Company.</td>
<td></td>
<td></td>
<td></td>
<td></td>
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</tr>
<tr>
<td>2. The Board has approved comprehensive policies and procedures for smooth conduct of all material activities by Company.</td>
<td></td>
<td></td>
<td></td>
<td></td>
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</tr>
<tr>
<td>3. The Board has a range of appropriate performance indicators that are used to monitor the performance of Management.</td>
<td></td>
<td></td>
<td></td>
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</tr>
<tr>
<td>4. The Board is well informed on all issues (short and long-term) being faced by the Company.</td>
<td></td>
<td></td>
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</tr>
<tr>
<td>5. The Board adequately reviews proposed departures from the long-and short-term business plans of the Company before they take place.</td>
<td></td>
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</tbody>
</table>

<table>
<thead>
<tr>
<th>SUCCESSION PLANNING</th>
<th>1</th>
<th>2</th>
<th>3</th>
<th>4</th>
<th>5</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. The Board has a succession plan for the Chairperson and the CEO/Managing Director.</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2. The Board reviews the existing succession plan and if appropriate, make necessary changes by taking into account the current conditions.</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Overall rating of Board performance</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
<td>5</td>
</tr>
<tr>
<td>-----------------------------------</td>
<td>---</td>
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</tr>
<tr>
<td>General Comment:</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Name of Director: (may be skipped for anonymity)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Signature: (may be skipped for anonymity)</td>
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<td></td>
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<td></td>
<td></td>
</tr>
<tr>
<td>Date:</td>
<td></td>
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</tr>
</tbody>
</table>
ANNEX 8: FEES PAYABLE TO THE REGISTRAR OF COMPANIES

(These fees were applicable as at 1st January 2019 and are prescribed under Companies Regulations 2017, regulation 5 and are subject to amendment from time to time)

<table>
<thead>
<tr>
<th>Item</th>
<th>Fees Payable K</th>
</tr>
</thead>
<tbody>
<tr>
<td>For an application to register a company under section 28(1) of the Act</td>
<td>50,000</td>
</tr>
<tr>
<td>For an application to reserve the name of a company under section 45(1) of the Act</td>
<td>10,000</td>
</tr>
<tr>
<td>For registration of an annual return under section 256(1) of the Act</td>
<td>10,000</td>
</tr>
<tr>
<td>For registration of documents to effect an amalgamation under the Act</td>
<td>50,000</td>
</tr>
<tr>
<td>For an application to restore a company to the Malawi register under section 353 of the Act</td>
<td>50,000</td>
</tr>
<tr>
<td>For an application to register a foreign company under section 360(1) of the Act</td>
<td>100,000</td>
</tr>
<tr>
<td>For registration of an annual return by a foreign company under the Act</td>
<td>10,000</td>
</tr>
<tr>
<td>Description</td>
<td>Fee</td>
</tr>
<tr>
<td>-----------------------------------------------------------------------------</td>
<td>------</td>
</tr>
<tr>
<td>For inspection under section 12(1) of the Act of any number of documents</td>
<td>5,000</td>
</tr>
<tr>
<td>contained in a single file that is part of the Malawi register or the</td>
<td></td>
</tr>
<tr>
<td>foreign register</td>
<td></td>
</tr>
<tr>
<td>For certification of a copy of or extract from any document</td>
<td>1,000</td>
</tr>
<tr>
<td>For photocopying a copy of, or extract from, a document that is part of the</td>
<td>500</td>
</tr>
<tr>
<td>Malawi register or the foreign register, in addition to any fee for</td>
<td></td>
</tr>
<tr>
<td>certifying the copy or extract - each A4 sheet</td>
<td></td>
</tr>
<tr>
<td>For any other electronic search</td>
<td>2000</td>
</tr>
<tr>
<td>Registration of any other document</td>
<td>10,000</td>
</tr>
<tr>
<td>For Application as Registration as a Valuer</td>
<td>500,000</td>
</tr>
</tbody>
</table>
ANNEX 8: PENALTIES PAYABLE TO THE REGISTRAR OF COMPANIES

(These penalties were applicable as at 1st January 2019 and are prescribed under Companies Regulations 2017, regulation 6(1) and are subject to amendment from time to time.

Note that under regulation 6(2) where any document is delivered to the Registrar after the time specified in the Act in respect of the document, and the Registrar is satisfied that the omission to deliver the document within the time limit was accidental or due to inadvertence, or that it is just and equitable to do so, he may remit wholly or partly the fee payable in respect of the late delivery of the document.)

<table>
<thead>
<tr>
<th>Item</th>
<th>Fees Payable K</th>
</tr>
</thead>
<tbody>
<tr>
<td>For the delivery of a document after the time specified in the Act in respect of that document (whether or not any other fee is payable and in addition to any other fee payable)—</td>
<td></td>
</tr>
<tr>
<td>(a) if delivered not later than 25 working days after the time prescribed.</td>
<td>50,000</td>
</tr>
<tr>
<td>(b) if delivered more than 25 working days after the time prescribed.</td>
<td>100,000</td>
</tr>
</tbody>
</table>
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ALLAN HANS MUHOME was born in 1980 at Queen Elizabeth Central Hospital in Blantyre, Malawi. He holds a Bachelor of Laws Honours Degree and an MBA, both from the University of Malawi. He is a legal practitioner and Commercial Law Consultant. He lectures in law courses in various schools including the University of Malawi and the Malawi Institute of Legal Education.

He is the author of Labour Law in Malawi 2012 and Company Law in Malawi 2016 and currently researching on Malawi Insolvency Law. He is married to Patricia. They are blessed with two daughters: Francisca-Naphiri and Gabriella-Okota; and a son, Eugene-Ekari.