

# Do you own your shares? You might not.

When purchasing and transferring shares in a private company, make sure you dot all the i's and cross all the t's, before later claims are made to your hard-earned success.

**CHALLENGE:** You believe you've successfully purchased shares to your business, only to find out later that what you thought you owned, is not in fact yours. We've recently had some interesting matters at Legal Legends, in particular one relating to the purchase and transfer of shares in private companies.

Private companies are those entities that are identified by the designation of (Pty) Ltd or Proprietary Limited as part of their names.

The Companies Act of 2008 (the Act) defines a share as "one of the units into which the proprietary interest in a profit company is divided."

But Fidelis Oditah, a leading legal author and professor, once very usefully explained the legal nature of shares as "a bundle of intangible property rights shareholders receive from the company in return for their contribution of cash or non-cash assets to the company," adding that "Shares are the units into which shareholders' rights of participation in the company's cash flow, management and a return of capital, are divided."

The matter I referred to

earlier related to the purchase of shares in a private company, which was later contested despite the signature of a valid sale of shares agreement.

## Validly transferring shares

So, what is legally required in order to validly transfer shares?

First, it's important to note that the Act statutorily restricts the transferability of shares in a private company, so the common provision in a shareholders' agreement that creates pre-emptive rights is captured in the Act.

The purpose of this restriction is to ensure that existing shareholders have some control over the identity of their co-shareholders and are able to prevent one or more shareholders from wresting control through purchasing the shares of other shareholders. This right of pre-emption will be covered in future articles as it warrants careful attention because of its far-reaching effects.

However, the transfer of shares generally takes place by:

- » Recording a written cession in and to the rights attached to the shares (where the

## LEGAL WRANGLING



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shareholder cedes their bundle of intangible rights to a third party).

- » The registration of a new shareholder in the share register in the company (as it suggests, basically a register of who owns which shares).
- » Issuing a new share certificate to the new shareholder that records the shares purchased and owned by the new shareholder.

The Act does not explicitly require a share certificate, nor is it a requirement for the validity of the cession. But it is generally accepted as the instrument of transfer of the movable rights attached to the shares.

## Protecting your rights

Ensuring that the rights attached to the shares and the shares themselves have been transferred to you will be demonstrated by:

- » Concluding a written sale of shares agreement that records the intention of the

seller to sell and the buyer to buy the shares in question, together with any conditions attached to the sale.

- » Taking possession of a signed share transfer form (an old CM42 form from the previous Companies Act of 1973 is still used in most instances today), together with the original share certificate pertaining to the shares.
- » A new share certificate, signed by at least two individuals, authorised by the company to do so, reflecting that you are the owner of the shares.
- » Obtaining a copy of the board resolution authorising the transfer and a copy of the updated share register that records your name as the owner of the shares.

**With these documents in hand, you can rest assured that the shares you are purchasing have been successfully transferred to you, barring some convoluted fraud, of course, but the steps outlined above will stand you in good stead to ensure you don't fall victim to this.**

This way, when your newly purchased company goes public and takes over the world, you shouldn't have any old shareholders laying claim to your hard-earned rewards or crawling out of the woodwork.

**EM**