BLACKLEAF

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BLACKLEAF CORPORATE ADVISORY

Shareholder Agreement *Essentials*

What a shareholder agreement should settle before a disagreement does: control, funding, deadlock, exits and succession, in plain language.

INTRODUCTION

Agree the rules *while you still agree*.

Most shareholder disputes are not about money. They are about control, expectations and exits that nobody wrote down. A shareholder agreement records the answers while relationships are good.

In South Africa, a company has a Memorandum of Incorporation (MOI) and may also have a shareholders' agreement. The MOI is a public constitutional document filed with CIPC. The shareholders' agreement is private, and can go further on commercial terms, as long as it is consistent with the MOI and the law.

Control

Who decides what, and with what majority.

Money

Funding, dividends and loan accounts.

Exit

How shareholders leave, and at what price.

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MOI and *shareholders' agreement*.

The two documents work together. Where they conflict, the MOI generally prevails against the company, so they should be aligned.

	MEMORANDUM OF INCORPORATION	SHAREHOLDERS' AGREEMENT
Nature	The company's constitution, filed with CIPC	A private contract between shareholders
Visible to	Anyone who requests it from CIPC	Only the parties
Binds	The company, directors and shareholders	The signatories, and the company if it signs
Typical content	Share classes, powers, meeting rules	Commercial deal: funding, exits, restraints
Changed by	Special resolution and filing	The agreed amendment clause

WHEN TO PUT AN AGREEMENT IN PLACE

- ✓ At incorporation, before the first disagreement
- ✓ When a new shareholder, investor or partner joins
- ✓ When a family business brings in the next generation
- ✓ When a shareholder takes a different role or leaves day-to-day work
- ✓ Before a sale, restructure or funding raise

Take legal advice. The wording of a shareholders' agreement has legal consequences. This guide shows the topics to cover. Your attorney drafts the agreement.

Control and *decision rights*.

Ownership percentage and control are not the same thing. Decide which decisions need which majority, in writing.

DECISION	TYPICAL LEVEL OF APPROVAL
Day-to-day operations	Management, within an approved budget
Annual budget and business plan	Board, or a named majority
Appointment and removal of directors	Shareholders, by agreed entitlement per holder
Borrowing above an agreed limit	Board, with a supermajority or specific consent
Capital expenditure above a limit	Board or reserved matter
Issue of new shares	Special resolution, plus pre-emption rights
Sale of the business or major assets	Special resolution or unanimity
Change of business, name or MOI	Special resolution
Related-party transactions	Disinterested approval and disclosure

RESERVED MATTERS

A short list of decisions that need the approval of a named shareholder or majority, even if they hold a minority stake. Keep the list short. A long list lets one shareholder block the business.

BOARD COMPOSITION

- ✓ Who may appoint a director, and how many
- ✓ Who chairs, and whether the chair has a casting vote
- ✓ Quorum rules, so one side cannot block meetings by not attending
- ✓ Information rights for shareholders who are not on the board

Funding *and dividends*.

Disputes over money are usually disputes over expectations. Agree how the business is funded and how profit is shared before it matters.

Future funding

Who must contribute more if the business needs it, and what happens to a shareholder who cannot or will not.

Shareholder loans

Terms, interest, ranking and repayment of loan accounts, written down and not left informal.

Dividend policy

How profit is retained and distributed, and who decides, within the legal solvency and liquidity tests.

Guarantees and security

Who gives personal guarantees for company debt, and how the burden is shared or recovered.

DILUTION WHEN SOMEONE CANNOT FUND

APPROACH	HOW IT WORKS
Pre-emption on new shares	Existing holders may take up new shares first, pro rata.
Loan from funding shareholders	Those who fund lend the shortfall, with an agreed return.
Dilution formula	Non-funders are diluted at a pre-agreed price or formula.
Cap on obligations	No shareholder is required to fund beyond an agreed limit.

Check the solvency and liquidity test. The Companies Act limits distributions to those that meet the tests. Dividends tax and other tax effects should be reviewed with your tax adviser.

Pre-emption, *tag and drag*.

These rights decide who may become a shareholder, and who may be taken along in a sale.

Pre-emption

Before shares are sold to an outsider, existing shareholders may buy them first, on the same terms.

Tag-along

If a majority sells, minority holders may join the sale on the same terms. It protects the minority.

Drag-along

If a defined majority sells, it may require the others to sell too. It protects the buyer's ability to acquire all.

TERMS TO SETTLE

POINT	QUESTION TO ANSWER
Offer process	How is the price set, how long do others have to accept, and what if no one accepts?
Drag threshold	What percentage is needed, and with what minimum price or conditions?
Permitted transfers	May shares move to family, a trust or a holding company without triggering rights?
Lock-in	Is there a period during which shares may not be sold?
Transferee conditions	Must a new holder sign the agreement, and meet any vetting?
Change of control	What if a corporate shareholder is itself sold?

Keep the logic consistent. Pre-emption, tag and drag should not contradict each other. Map a sale of the whole company, a partial sale and a transfer to a trust, and check each one.

Deadlock *and disputes*.

Deadlock arises when equal holders, or a required majority, cannot agree. A clear route out is cheaper than a stalemate.

A STAGED DEADLOCK PROCESS

01 **Escalate**
The matter goes to the shareholders or a nominated senior person for a short, fixed period.

02 **Mediate**
An independent mediator is appointed, with a time limit and shared cost.

03 **Decide or part**
Expert determination or arbitration on a defined question, or a structured exit mechanism.

EXIT MECHANISMS FOR A TRUE DEADLOCK

MECHANISM	HOW IT WORKS
Buy-sell offer	One shareholder names a price. The other may buy or sell at that price.
Sealed bids	Each side bids. The higher bidder buys the other out.
Independent valuation	An agreed valuer sets the price for a buy-out.
Sale of the company	The business is sold to a third party and the proceeds shared.

DISPUTE RESOLUTION

Specify how disputes are resolved: negotiation, mediation, then arbitration or court. Name the forum, the rules and who pays. Confidential arbitration protects relationships and reputation.

Leavers, death *and disability*.

People leave. Agree the terms of departure while no one is leaving.

EVENT	POINTS TO SETTLE
Good leaver	Retirement, death, disability or agreed exit. Usually valued at full or near-full value.
Bad leaver	Breach, misconduct or competing. Often valued at a discount to value or cost.
Death	Whether the estate must sell, and to whom, and how the price is funded.
Disability	Definition, medical process and treatment of the shareholder's shares and role.
Insolvency or divorce	Whether shares may be forced to transfer, and on what valuation basis.
Retirement	Notice period, phased exit and handover obligations.

PRICING A DEPARTURE

- ✓ Agree a valuation method in the agreement: formula, independent valuer or both
- ✓ State the valuation date, and whether minority or marketability discounts apply
- ✓ Decide how the price is paid: cash, instalments, with interest and security
- ✓ Consider cover: life and disability policies to fund buy-outs, owned and structured correctly
- ✓ Review the agreement after any major change in ownership or role

Estate planning links. A shareholder's will, any trust, and the agreement should say the same thing. Conflicts between them are a common source of dispute.

Restraints *and protection*.

The agreement should protect the business, the relationships and the value it has built.

Restraint of trade

Limits on competing, soliciting customers or staff, for a defined period, area and scope. Restraints must be reasonable to be enforceable.

Confidentiality

Duties to protect business information, during and after shareholding.

Intellectual property

Ownership of business IP sits with the company, not with an individual shareholder.

Information rights

What shareholders may see, when, and how it is delivered.

OTHER TERMS WORTH INCLUDING

- ✓ Conflicts of interest and related-party dealings, with disclosure and approval
- ✓ Key-person roles, time commitment and remuneration review
- ✓ Warranties given by shareholders on joining
- ✓ Amendment clause: who must agree to change the agreement
- ✓ Termination and what survives it
- ✓ Governing law and the forum for disputes

Restraints need advice. Whether a restraint is enforceable depends on the facts and the law at the time. Ask your attorney to review each one against your business.

Drafting *checklist*.

Take this list to your attorney. A gap here is a likely future dispute.

- [ ] MOI and agreement are aligned
- [ ] Decision matrix, with reserved matters
- [ ] Board composition and quorum
- [ ] Funding obligations and shareholder loans
- [ ] Dividend policy
- [ ] Pre-emption, tag and drag rights
- [ ] Permitted transfers to family or trusts
- [ ] Deadlock process and exit mechanism
- [ ] Good and bad leaver terms
- [ ] Death, disability and insolvency
- [ ] Valuation method and payment terms
- [ ] Restraints, confidentiality and IP

11 to 12
Thorough. Review annually.

8 to 10
Good base. Close the gaps.

4 to 7
Gaps. Update the agreement.

0 to 3
Little protection. Act now.

Next step. BlackLeaf works alongside your attorney on structure, valuation and governance. We do not draft legal documents, and your attorney remains responsible for the agreement.

ABOUT BLACKLEAF

Begin with a *private conversation*.

BlackLeaf is a family-owned group offering corporate advisory, capital solutions, mergers and acquisitions, fiduciary services and family office support. Every mandate is led by a principal.

Capital Readiness Protocol

Finds and fixes structural defects before a financier or buyer does.

Capital & finance

Debt, equity and structured funding, placed with the right financiers.

Fiduciary & statutory

Compliance, trusts and company secretarial work, kept in order.

OUR COMMITMENTS

- Absolute discretion: mutual non-disclosure before any detail is shared
- One integrated team across advisory, capital and fiduciary work
- Led by a principal from first conversation to completion

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