



Virtual Board Meeting Governance in South Africa

Under the Companies Act 71 of 2008



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Executive Summary

Many organisations are running their board meetings with some or all directors present virtually. In the early stages of the pandemic these meetings were arranged under pressure, using a patchwork of IT systems often assembled without full consideration of governance rules, electronic compliance and security risks.

This paper answers some fundamental questions that arise about the governance of virtual board meetings.

It addresses, in simple terms, how the South African Companies Act of 2008 applies to hybrid board meetings, resolutions arising from these meetings and the responsibilities of directors attending these meetings.

This paper answers some fundamental questions like:

- Are virtual board meetings legal?
- Are resolutions and votes made at virtual meetings legally binding?

In closing and in the interests of holding better board meetings, a Code of Virtual Meeting Conduct for Directors is proposed.

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Novel Governance Issues

We call the COVID 19 virus 'novel' because it presents a never-before-seen challenge to our immune systems. It has become trite to say, but the virus has affected almost every facet of human life, including the comfortable gatherings of company directors in wood-panelled boardrooms.

The virus has forced us to adjust long-standing board meeting rules and traditions dating back to the 1500's, so that we can continue to hold these meetings virtually.

Fortunately, technology has been quick to provide us with the tools we need to solve the new governance and infrastructure challenges that have resulted. We are also fortunate, thanks to the era of video conferencing, to have legal structures in The Companies Act that caters for meetings being held electronically.

The downside is that the speed at which these technology changes have been implemented has resulted in a laissez-faire patchwork of Zoom sessions, emailed agendas and WhatsApp conversations. This has allowed many companies to conduct virtual meetings that are poorly organised and run. And more worryingly, has resulted in the standardisation of board meetings that have governance and security risks.

On top of various governance and infrastructure difficulties, IT teams have had to deal with resourcing, training and upskilling the technical abilities of the board members themselves. The pressure of dealing with company directors and other 'big shots' often leads IT staff to make ill-advised short-cuts to connect them as quickly and painlessly as possible to virtual meetings. Often these 'one-time quick-fixes' become permanent features, waiting to be picked up by either bad actors or a security audit, whichever happens first.

Virtual Board Meetings: A New Necessity

The common practice of scheduling board meetings far into the future has hard-wired board meeting dates that have to be honoured. As mentioned above, this has led to the cutting of corners from both a security and a corporate governance perspective.

Hybrid meetings, consisting of a mixture of physical and virtual attendees, are convened regularly, adding new compliance challenges to an already risky situation. Many governance consultants believe that hybrid board meetings will become the new normal as the face-to-face director's meeting of the recent past becomes extinct.

The rise of hybrid meetings is not all bad news and has some interesting and advantageous knock-on effects. One of which, is the ability to schedule meetings quickly, in days rather than months. Another advantage is a new ability to convene smaller gatherings with fewer, more focussed members, who are then able to thoroughly address a single topic and are more likely to reach a practical and timely outcome. (We like the term **agile board meetings** for these kinds of sessions and will be addressing this topic in our next white paper)

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Virtual Governance and the Companies Act of 2008

Fortunately, company law has already dealt with the question of whether a meeting of the board of directors can be convened electronically. In our country as in most other cases, these amendments were driven by the video conferencing boom of a few years ago. It is fortuitous that the banal Zoom meetings we have come to live by have already been anticipated by company law in the previous decade.

In South Africa the Companies Act of 2008 (the Act) bought with it the overhauling of many areas of South African corporate law. The area of interest to us is that it provides for the creation of binding resolutions at virtual meetings of the board of directors, and ensures that directors do not escape their responsibilities merely because they acted virtually.

Virtual Compliance

There are a number of technical changes resulting from electronic innovations for board meetings that mandate governance changes. So far, we have limited our discussion to the changes made by the Companies Act, but the Electronic Communications and Transactions Act (the ECT Act) has also had an impact on virtual board meetings and corporate governance.

Areas of Governance Affected by Electronic Compliance

There are a number of areas of board meeting governance that can potentially be affected when meetings of directors are held with some (or all) virtual attendees.

Below are some of the major areas affected, with clear answers to the most common governance questions.

Are Virtual Board Meetings Legal?

Yes.

According to the Companies Act, Board meetings can be held electronically (or as a hybrid-meeting) as long as the rules of the company in its MOI (Memorandum of Incorporation) do not specifically prohibit this.

Being present at an electronic board meeting after joining with a virtual meeting tool like Zoom, Microsoft Teams, Google Hangouts or similar, is legally the same as being physically present.

Are Virtual Board Meeting Resolutions Binding?

Yes.

This means that unless a company's MOI prohibits such meetings, any resolution made by the directors at a virtual meeting will be binding on the company in the same way it would be if the meeting was physical.

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Is an Email Legal Notice of an Upcoming Board Meeting?

Yes.

Notice of an upcoming board meeting can be delivered to directors electronically via email, subject to the notice being sent within a reasonable time frame before the meeting.

What is 'reasonable' will depend on any existing time requirements in the company's MOI or documented internal procedures, as well as the nature of the meeting.

Electronic Signatures

Some confusion surrounds the requirements relating to a legal electronic signature. To make matters more complex, there are two legal types of signatures.

Normal Electronic Signatures

A normal electronic signature is a broad signing tool, such as the 'click-box' or 'click-wrap' agreements that are used on most e-commerce websites. This kind of simple signature also includes the signing of one's name - usually using a mouse in a textbox.

However, the ECT Act requires that certain documents are signed and authenticated by way of an advanced electronic signature. These signatures employ more complex systems in order to verify the identity of the person signing the documents.

Advanced Electronic Signatures

An advanced electronic signature is an electronic signature that has been accredited by the South African Accreditation Authority (SAAA), after the electronic signature has been shown to be competent in identifying the signer, being under their sole use, and being irrevocable, amongst other things. The ECT Act requires that where an electronic signature is called for, it must be an advanced electronic signature without an intention to the contrary.

This requirement does not apply to agreements that are required to be agreed on *in writing*.

Thus round-robin resolutions and resolutions of the board of directors need be signed by way of an advanced electronic signature, but can be signed through typical electronic voting mechanisms unless there is a prohibition in the company's MOI.

Voting

When an agenda item is presented for an electronic vote, it is acceptable for directors to vote via email or another electronic system, provided that such electronic voting is not specifically prohibited by the company's MOI.

Where does that leave my company?

The takeaway is that your company should either specify in its MOI or in its board meeting policies and procedures how digital signing is to take place in the event of a digital meeting.

Your company may want to take advantage of virtual board meeting platforms that have this functionality baked-in. In the absence of any rules, your company could simply require that each director sign their name or click an agreement box to indicate their consent.

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Why Compliant Board Meetings Need a Competent Chairperson

Ultimately, corporate governance is aimed at ensuring that companies work efficiently, and that the company's controllers make sound decisions. Such decisions can only be made at a meeting of the board of directors. This means that a company's ability to react to changing situations and to pass fitting resolutions is only as good as its board of directors and the decisions they come to when they meet.

A strong chairperson who provides clear guidelines, keeps the meeting on track and controls the attendees, makes for efficient meetings. One obvious upshot of virtual meetings, unlike physical ones, is that a member cannot filibuster or speak over other members, because the chairperson can provide speaking rights to one person at any given time.

Virtual meetings, like their physical counterparts, are most efficient when they operate according to a set of rules or procedures that determines the meeting's structure. Laying down the ground rules or having board directors agree to a code of conduct is an essential first step towards holding successful board meetings.

Code of Virtual Meeting Conduct

Below is a general checklist of items that could be included in a code of virtual conduct. It is intended to be used as a starting point and modified to suit the circumstances and needs of your organisation.

Code of Conduct for Directors at Virtual Meetings

1. The Meeting Director or Chairman controls the meeting and I will comply immediately with all requests or instructions that he/she makes
2. I will keep my video camera on at all times unless instructed otherwise by the Meeting Director
3. I will keep my microphone muted at all times, unless I have been asked to speak by the Meeting Director
4. I will 'raise my hand' electronically when I would like to speak and I will wait until instructed to speak before unmuting my microphone and starting to speak
5. I will clearly identify myself by name before I speak
6. I will not:
 - a. Engage in other work or tasks during the meeting, this includes but is not limited to:
 - i. Reading or answering emails
 - ii. Reading documents not related to the current meeting
 - iii. Browsing or surfing the internet for any reason other than research related to the matter under discussion
 - b. Type or use my keyboard unless specifically required for a response or to make notes directly pertaining to the matter under discussion

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References:

- 1) Institute of Directors South Africa - How to run a great virtual board meeting
[How to run a great virtual board meeting - The Institute of Directors in South Africa NPC \(iodsa.co.za\)](https://www.iodsa.co.za/how-to-run-a-great-virtual-board-meeting)
- 2) The Companies Act No. 71 of 2008
- 3) Contemporary Company Law, MF Cassim