

## COMPANIES ACT 61 OF 1973

[ASSENTED TO 19 JUNE 1973]

[DATE OF COMMENCEMENT: 1 JANUARY 1974]

(Unless otherwise indicated)

*(Afrikaans text signed by the State President)*

### **as amended by**

- Companies Amendment Act 76 of 1974
- Companies Amendment Act 111 of 1976
- Companies Amendment Act 64 of 1977
- Revenue Laws Amendment Act 114 of 1977
- Companies Amendment Act 59 of 1978
- Registration and Incorporation of Companies  
in South West Africa Proclamation 234 of 1978  
[as it is applicable in the Republic]
- Companies Amendment Act 115 of 1979
- Companies Amendment Act 84 of 1980
- Companies Amendment Act 83 of 1981
- Revenue Laws Amendment Act 99 of 1981
- Companies Amendment Act 29 of 1982
- Companies Amendment Act 70 of 1984
- Companies Amendment Act 29 of 1985
- Companies Amendment Act 31 of 1986
- Building Societies Act 82 of 1986
- Transfer of Powers and Duties of the State President Act 97 of 1986
- Companies Amendment Act 63 of 1988
- Financial Markets Control Act 55 of 1989
- Taxation Laws Amendment Act 69 of 1989
- Companies Amendment Act 78 of 1989
- Companies Amendment Act 18 of 1990
- Companies Second Amendment Act 69 of 1990
- Deposit-taking Institutions Act 94 of 1990
- Public Accountants' and Auditors' Act 80 of 1991
- Companies Amendment Act 82 of 1992
- General Law Fourth Amendment Act 132 of 1993
- Proclamation R57 of 1994
- Abolition of Restrictions on the Jurisdiction of Courts Act 88 of 1996
- Companies Amendment Act 35 of 1998
- Companies Second Amendment Act 60 of 1998
- Companies Third Amendment Act 125 of 1998
- Insider Trading Act 135 of 1998
- Companies Amendment Act 37 of 1999
- Revenue Laws Amendment Act 53 of 1999
- Companies Amendment Act 35 of 2001
- Corporate Laws Amendment Act 39 of 2002
- Judicial Matters Amendment Act 55 of 2002
- Insolvency Second Amendment Act 69 of 2002
- Judicial Matters Amendment Act 16 of 2003
- Prevention and Combating of Corrupt Activities Act 12 of 2004
- Companies Amendment Act 20 of 2004
- Securities Services Act 36 of 2004

Judicial Matters Amendment Act 22 of 2005

Corporate Laws Amendment Act 24 of 2006

**Regulations under this Act**

COMPANIES ADMINISTRATIVE REGULATIONS (GN R1948 in GG 4055 of 19 October 1973)

NOTICE IN TERMS OF SECTION 1 (GenN 2083 in GG 25297 of 4 August 2003)

NOTICE IN TERMS OF SECTION 1 AND SECTION 10 (GenN 2082 in GG 25296 of 1 August 2003)

PRACTICE NOTE 1 OF 2008: DIRECTIVES OF THE REGISTRAR OF COMPANIES AND OF CLOSE CORPORATIONS ON APPLICATIONS FOR THE RESERVATION OF NAMES OF COMPANIES, CLOSE CORPORATIONS AND DEFENSIVE NAMES published (GN 54 in GG 30687 of 25 January 2008)

RETENTION AND PRESERVATION OF COMPANY RECORDS, REGULATIONS FOR THE (GN R2592 in GG 8975 of 25 November 1983)

SECURITIES REGULATION PANEL: NOTICE IN TERMS OF SECTION 440C(4) (a) AND RULE 2.2 (GenN 209 in GG 29648 of 23 February 2007)

SECURITIES REGULATION PANEL: SECURITIES REGULATION CODE ON TAKE-OVERS AND MERGERS AND THE RULES (GN R29 in GG 12962 of 18 January 1991)

STANDING ADVISORY COMMITTEE REGULATIONS (GN R2723 in GG 6765 of 7 December 1979)

UNCERTIFICATED SECURITIES REGULATIONS (GN R1124 in GG 20479 of 23 September 1999)

WINDING-UP AND JUDICIAL MANAGEMENT OF COMPANIES, REGULATIONS FOR THE (GN R2490 of 1973 in GG 4128 of 28 December 1973)

**ACT**

**To consolidate and amend the law relating to companies; and to provide for matters incidental thereto.**

Cases

**ARRANGEMENT OF ACT**

[Arrangement of Act amended by s. 1 of Act 37 of 1999.]

*Section*

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## INTERPRETATION (s 1)

### 1 Definitions

#### Cases

(1) In this Act, unless the context otherwise indicates-

**'accounting records'**, in relation to a company, includes accounts, deeds, writings and other documents;

**'annual duty'** .....

[Definition of 'annual duty' inserted by s. 1 of Act 29 of 1982 and deleted by s. 1 of Act 31 of 1986.]

**'annual return'** .....

[Definition of 'annual return' inserted by s. 1 of Act 29 of 1982 and deleted by s. 1 of Act 31 of 1986.]

**'articles'**, in relation to a company, means the articles of association of that company for the time being in force, and includes any provision, in so far as it applies in respect of that company, set out in Table A or Table B in Schedule 1;

**'books or papers'** and **'books and papers'** include accounts, deeds, writings, electronic data reduced to paper format' and other documents,

[Definition of 'books or papers' and 'books and papers' substituted by s. 1 (a) of Act 35 of 2002.]

**'certified'** means certified in the manner prescribed by the Minister to be a true copy or a correct translation;

**'company'** means a company incorporated under Chapter IV of this Act and includes any body which immediately prior to the commencement of this Act was a company in terms of any law repealed by this Act;

**'controlled company'** .....

[Definition of 'controlled company' deleted by s. 1 (a) of Act 82 of 1992.]

**'controlling company'** .....

[Definition of 'controlling company' amended by s. 1 (a) of Act 76 of 1974 and deleted by s. 1 (a) of Act 82 of 1992.]

**'Council'** means the Financial Reporting Standards Council established by section 440P;

[Definition of 'Council' inserted by s. 1 (a) of Act 24 of 2006.]

**'Court'**, in relation to any company or other body corporate, means the Court which has jurisdiction under this Act in respect of that company or other body corporate, and, in relation to any offence under this Act, includes a magistrate's court having jurisdiction in respect of that offence;

**'debenture'** includes debenture stock, debenture bonds and any other securities of a company, whether constituting a charge on the assets of the company or not;

**'deregistration'**, in relation to a company, means the cancellation by the Registrar of the registration of the memorandum and articles of the company and, in relation to an external company, the cancellation by the Registrar of the registration of the memorandum of the external company; and

**'deregister'** has a corresponding meaning;

**'director'** includes any person occupying the position of director or alternate director of a company, by whatever name he may be designated;

**'Director of Public Prosecutions'** means a Director of Public Prosecutions appointed under section 13 (1) of the National Prosecuting Authority Act, 1998 (Act 32 of 1998), who has jurisdiction;

[Definition of 'Director of Public Prosecutions' inserted by s. 1 of Act 20 of 2004.]

**'electronic'** includes created, recorded, transmitted or stored in digital or other intangible form of electronic, optical or similar means;

[Definition of 'electronic' inserted by s. 1 (b) of Act 35 of 2001.]

**'equity share capital'** and **'equity shares'**, in relation to a company, mean its issued share capital and shares, excluding any part thereof which, neither as respects dividends nor as respects capital, carries any right to participate beyond a specified amount in a distribution;

**'existing company'** means any body which immediately prior to the commencement of this Act was a company in terms of any law repealed by this Act;

**'external company'** means a company or other association of persons, incorporated outside the Republic, the memorandum of which was lodged with the Registrar under the repealed Act, or which, since the commencement of this Act, has established a place of business in the Republic and for purposes of this definition establishing a place of business shall include the acquisition of immovable property;

[Definition of 'external company' substituted by s. 1 (a) of Act 35 of 1998.]

**'financial report'** means financial statements and any financial information in a circular, a prospectus or a provisional announcement of results upon which users may reasonably rely;

[Definition of 'financial report' inserted by s. 1 (b) of Act 24 of 2006.]

**'financial reporting standards'** means statements of Generally Accepted Accounting Practice adopted by the Accounting Practices Board prior to the establishment of the Council, and thereafter issued in terms of section 440U (2);

[Definition of 'financial reporting standards' inserted by s. 1 (b) of Act 24 of 2006.]

**'financial statements'** means annual financial statements, provisional annual financial statements and interim or preliminary reports and includes, where applicable, group and consolidated financial statements;

[Definition of 'financial statements' inserted by s. 1 (b) of Act 24 of 2006.]

**'foreign country'** means any state, country, colony or territory other than the Republic;

[Definition of 'foreign country' amended by Proclamation 234 of 1978.]

**'holding company'** means a holding company as defined in subsection (4);

[Definition of 'holding company' substituted by s. 1 (b) of Act 76 of 1974]

**'inspector'** means a person appointed by the Minister in terms of section 254, 257 or 258;

[Definition of 'inspector' inserted by s. 1 (c) of Act 24 of 2006.]

**'judicial manager'** means the final judicial manager referred to in section 432;

**'liquidator'**, in relation to a company, means the person appointed under Chapter XIV as liquidator of such company, and includes any co-liquidator and any provisional liquidator so appointed;

**'manager'**, in relation to a company, means any person who is a principal executive officer of the company for the time being, by whatever name he may be designated and whether or not he is a director;

**'Master'** means the Master of the High Court, and in relation to-

- (a) a company in respect of which application is made to a Court for a winding-up or judicial management order, the Master having jurisdiction in the area of jurisdiction of the Court where application is made;
- (b) a company being wound up by the Court or under judicial management, the Master having jurisdiction in the area of jurisdiction of the Court which issued the winding-up or judicial management order;
- (c) a company other than a company referred to in paragraph (a) or (b), the Master having jurisdiction in the area in which the registered office of that company is situated;
- (d) any other body corporate, the Master having jurisdiction in the area where the main place of business of that body corporate is situated;

[Definition of 'Master' substituted by s. 1 (1) of Act 84 of 1980 and amended by s. 5 (b) of Act 20 of 2004.]

**'memorandum'**, in relation to a company, means the memorandum of association of that company for the time being in force; and in relation to an external company, means the charter, statutes, memorandum of association and articles, or other instrument constituting or defining the constitution of the company;

**'Minister'**, in relation to any matter to be dealt with in the office of a Master in connection with the winding-up or judicial management of companies, means the Minister responsible for Justice and, in relation to any other matter, means the Minister of Trade and Industry;

[Definition of 'Minister' amended by s. 1 of Act 83 of 1981 and substituted by s. 1 (d) of Act 24 of 2006.]

**'officer'**, in relation to a company, includes any managing director, manager or secretary thereof;

[Definition of 'officer' substituted by s. 2 of Act 37 of 1999.]

**'Panel'** means the Financial Reporting Investigations Panel established by section 440W;

[Definition of 'Panel' inserted by s. 1 (e) of Act 24 of 2006.]

**'place of business'** means any place where the company transacts or holds itself out as transacting business and includes a share transfer or share registration office;

**'prescribed'** means prescribed by or under this Act;

**'prospectus'** means any prospectus, notice, circular, advertisement or other invitation, irrespective of whether it is done in non-electronic or any electronic manner, offering any shares of a company to the public;

[Definition of 'prospectus' substituted by s. 1 (c) of Act 35 of 2001.]

**'provisional judicial manager'** means a provisional judicial manager appointed by the Master under section 429;

**'Registrar'** means the Registrar of Companies appointed under section 7;

**'regulations'** means the regulations made or in force under this Act;

**'Republic' .....**

[Definition of 'Republic' deleted by Proclamation 234 of 1978.]

**'secretary'** includes any official of a company by whatever name he may be designated, including a body corporate, who or which is performing the duties normally performed by a secretary of a company;

**'share'**, in relation to a company, means a share in the share capital of that company and includes stock; and in relation to an offer of shares for subscription or sale, includes a share and a debenture of a company, whether a company within the meaning of this Act or not, and any rights or interests (by whatever name called) in a company or in or to any such share or debenture;

[Definition of 'share' substituted by s. 1 of Act 64 of 1977.]

**'signature'** includes an electronic signature and an advanced electronic signature as defined in section 1 of the Electronic Communications and Transactions Act, 2002 (Act 25 of 2002);

[Definition of 'signature' inserted by s. 1 (f) of Act 24 of 2006.]

**'special resolution'**, in relation to a company, means a resolution passed at a general meeting of that company in the manner provided for by section 199;

**'subsidiary company'** or **'subsidiary'** means a subsidiary company as defined in subsection (3);

[Definition of 'subsidiary company' or 'subsidiary' substituted for the definition of 'subsidiary company' by s. 1 (c) of Act 76 of 1974.]

**'territory' .....**

[Definition of 'territory' deleted by Proclamation 234 of 1978.]

**'the repealed Act'** means the Companies Act, 1926 (Act 46 of 1926);

**'this Act'** includes the regulations;

**'user'** in relation to a financial report, means a shareholder, prospective shareholder, creditor, regulator or any person who relies on information contained in the report;

[Definition of 'user' inserted by s. 1 (g) of Act 24 of 2006.]

**'wholly owned subsidiary'** means a wholly owned subsidiary as defined in subsection (5);

[Definition of 'wholly owned subsidiary' substituted by s. 1 (d) of Act 76 of 1974.]

**'winding-up order'** means any order of court whereby a company is wound up and includes any order of court whereby a company is placed under provisional winding-up for so long as such order is in force.

(1A) Subject to subsection (1B), the performance of the acts denoted by any of the following words or expressions, namely-

- (a) 'give notice';
- (b) 'issue, distribute, deliver or cause it to be done';
- (c) 'lodge';
- (d) 'lodge in the prescribed form';
- (e) 'lodge in the prescribed manner';
- (f) 'lodge under cover of';
- (g) 'notify in the prescribed form';
- (h) 'payment of prescribed fee';
- (i) 'publish';
- (j) 'registration'; and
- (k) 'written application',

and any word or expression derived therefrom, must be regarded as including all electronic methods of performing such acts.

[Sub-s. (1A) inserted by s. 1 (d) of Act 35 of 2001.]

(1B) (a) Subsection (1A) shall not apply to a section of this Act until the Registrar publishes a

notice in the *Gazette* making it applicable to that section.

(b) Different dates may be determined by the Registrar in respect of the application of subsection (1A) to different sections of this Act.

[Sub-s. (1B) inserted by s. 1 (d) of Act 35 of 2001.]

(2) A person shall not be deemed to be, within the meaning of any provision of this Act, a person in accordance with whose directions or instructions the directors of a company are accustomed to act by reason only that the directors of the company act on advice given by him in a professional capacity.

(3) (a) For the purposes of this Act, a company shall be deemed to be a subsidiary of another company if-

- (i) that other company is a member of it and-
  - (aa) holds a majority of the voting rights in it; or
  - (bb) has the right to appoint or remove directors holding a majority of the voting rights at meetings of the board; or
  - (cc) has the sole control of a majority of the voting rights in it, whether pursuant to an agreement with other members or otherwise; or
- (ii) it is a subsidiary of any company which is a subsidiary of that other company; or
- (iii) subsidiaries of that other company or that other company and its subsidiaries together hold the rights referred to in subparagraph (i) (aa), (bb) or (cc).

(b) In determining whether a company holds the majority of the voting rights as contemplated in paragraph (a) (i) (aa)-

- (i) voting rights which are exercisable only in certain circumstances shall be taken into account only-
  - (aa) when those circumstances have arisen, and for so long as they continue; or
  - (bb) when those circumstances are under the control of the person holding the voting rights;
- (ii) voting rights held by a person in a fiduciary capacity shall be treated as not held by him but by the beneficiary of such voting rights;
- (iii) voting rights held by a person as nominee for another person shall be treated as not held by him but by that other person, and voting rights shall be deemed to be held by a nominee for another person if they are exercisable only on the instructions or with the consent or concurrence of that other person.

(c) A body corporate or other undertaking which would have been a subsidiary of a company had the body corporate or other undertaking been a company shall be deemed to be a subsidiary of that company.

(cA) For the purposes of this subsection 'hold' or any derivative thereof refers to the registered or beneficial holder (direct or indirect) of shares conferring a right to vote;

[Para. (cA) added by s. 1 (b) of Act 35 of 1998.]

[Sub-s. (3) added by s. 1 (e) of Act 76 of 1974 and substituted by s. 1 (b) of Act 82 of 1992.]

(4) For the purposes of this Act, a company shall be deemed to be a holding company of another company if that other company is its subsidiary.

[Sub-s. (4) added by s. 1 (e) of Act 76 of 1974.]

(5) For the purposes of this Act, a subsidiary shall be deemed to be a wholly owned subsidiary of another company if it has no members except that other company and a wholly owned subsidiary of that other company and its or their nominees.

[Sub-s. (5) added by s. 1 (e) of Act 76 of 1974.]

(6) (a) A company is a widely held company: if

- (i) its articles provide for an unrestricted transfer of its shares;

- (ii) it is permitted by its articles to offer shares to the public;
- (iii) it decides by special resolution to be a widely held company; or
- (iv) it is a subsidiary of a company described in subparagraph (i), (ii) or (iii).

(b) A company with two or more types or classes of shares is a widely held company if its articles provide for the unrestricted transfer of shares in one or more of these types or classes.

(c) For the purposes of this subsection-

- (i) a transfer of shares is unrestricted if it is not subject to an effective right of pre-emption;
- (ii) an effective right of pre-emption is a right of pre-emption which operates in favour of all shareholders of the company and upon every proposed sale of shares to a person who is not a shareholder of the company.

(d) A company is a limited interest company if it is not a widely held company.

(e) An effective right of pre-emption contained in the articles of a limited interest company shall be deemed also to operate, with the necessary changes, upon-

- (i) the disposal of a beneficial interest in a share of the company; and
- (ii) an offer by the company of shares created in terms of section 75 (1) to any person who is not a shareholder of the company.

(f) For the purposes of paragraph (e) (i), 'beneficial interest' shall be as defined in subsection 140A (1), except that it shall apply in relation to a share rather than to a security.

[Sub-s. (6) added by s. 1 (h) of Act 24 of 2006.]

(7) A widely held company, which on or prior to its annual general meeting ceases to fall within the definition of a widely held company, may by a special resolution passed at that meeting become a limited interest company if the directors certify that the company will not in the following financial year seek to become a widely held company.

[Sub-s. (7) added by s. 1 (h) of Act 24 of 2006.]

## CHAPTER I

### APPLICATION OF ACT (ss 2-4)

## 2 General application of Act and preservation of rights of existing companies

### Cases

(1) .....

[Sub-s. (1) deleted by Proc 234 of 1978.]

(2) This Act shall apply to every company incorporated under this Act, every external company and, save as is otherwise provided herein, to every existing company.

(3) Any reference in this Act, express or implied, to the date of incorporation of an existing company, shall be construed as a reference to the date on which such company was originally incorporated.

(4) Nothing in this Act contained shall affect any right or privilege acquired or liability incurred by any existing company or external company, whether by agreement or otherwise, before the commencement of this Act, or affect the validity of the memorandum and articles of any existing company or the memorandum of an external company in force, or deemed to be in force, at such commencement and not in conflict with the provisions of this Act: Provided that the preceding provisions of this subsection shall not apply in relation to a provision of this Act in so far as it is amended or affected by a provision of the Registration and Incorporation of Companies in South West Africa Proclamation, 1978, of the State President.

[Sub-s. (4) amended by Proc 234 of 1978.]

(5) Those provisions of the articles of any existing company which should have been contained in a memorandum of association if the company had been formed under this Act, shall, for the purposes of this Act, be deemed to be or to be included in the memorandum of the company, and shall be subject in all respects to the provisions of this Act relating to a memorandum of association.

(6) The provisions of section 335 (5), (6) and (7) shall apply *mutatis mutandis* in relation to a company in respect of which a notice has been published in terms of section 31 (2) (a) of the said Registration and Incorporation of Companies in South West Africa Proclamation, 1978, in the *Gazette* as if that company were an external company registered in the Republic on the date mentioned in such notice and the reference in those provisions to registers and documents included a reference to copies of registers and documents sent to the Registrar of Companies, Windhoek, in terms of section 31 (1) (c) of that Proclamation.

[Sub-s. (6) added by Proc 234 of 1978.]

### **3 Restricted application of Act in case of banking and insurance companies and certain other associations**

#### Cases

(1) The provisions of this Act shall not apply-

(a) with reference to any company the formation, registration and management whereof are governed by the provisions of any law relating to friendly societies, including pension funds, within the meaning of the Pension Funds Act, 1956 (Act 24 of 1956), trade unions and employers' organizations, or co-operative societies or companies, save in so far as may be otherwise provided in any such law;

[Para. (a) substituted by s. 106 of Act 82 of 1986.]

(b) with reference to any company or external company or society which is subject to the provisions of any law relating to insurance companies or societies in so far as those provisions are inconsistent with the provisions of this Act; or

[Para. (b) substituted by s. 94 of Act 94 of 1990.]

(c) except in so far as section 21 is concerned, with reference to any association or society registered under the Societies and Associations Incorporation Ordinance, 1903 (Ordinance 56 of 1903), of the Transvaal; or

(d) with reference to any mutual building society as defined in section 1 of the Mutual Building Societies Act, 1965 (Act 24 of 1965).

[Para. (d) added by s. 106 of Act 82 of 1986.]

(2) Notwithstanding the repeal by the Companies Act, 1909 (Act 31 of 1909), of the Transvaal, of the said Societies and Associations Incorporations Ordinance, 1903, the provisions of that Ordinance shall, subject to the provisions of subsection (1) (c) of this section, continue to apply with reference to any association or society registered under the said Ordinance.

### **4 Transitional provisions as to unlimited companies and partly paid-up shares**

(1) Any existing company which is an unlimited company within the meaning of the repealed Act and which is not converted into a type of company under this Act, shall remain on the register of companies as an unlimited company and the provisions of the repealed Act shall, save as is otherwise provided in this Act, continue to apply to such company as if that Act had not been repealed.

(2) Any existing company which has issued any shares which are at the commencement of this Act not fully paid-up, shall remain subject to the provisions of the repealed Act in respect of such shares only as if this Act had not been passed.

## **CHAPTER II**

### **ADMINISTRATION OF ACT (ss 5-18)**

#### ***Office for Registration of Companies and Registrar (ss 5-11)***

### **5 Companies Registration Office and register**

(1) The Companies Registration Office established in Pretoria under section 3 of the repealed Act shall, notwithstanding its repeal, continue to exist and shall be the Companies Registration Office for the purposes of this Act.

(2) The register of companies kept by the Registrar under the repealed Act shall be deemed to

be and to form part of the register of companies to be kept in the Companies Registration Office.

## **6 Seal of the Companies Registration Office**

Cases

There shall be a seal of the Companies Registration Office and the impression of such seal shall be judicially noticed in evidence.

## **7 The Registrar of Companies, his appointment and delegation of power**

(1) The Minister shall, subject to the laws governing the public service, appoint a Registrar of Companies, who shall-

- (a) exercise the powers and perform the duties assigned to the Registrar by this Act;
- (b) subject to the directions of the Minister, be responsible for the administration of the Companies Registration Office; and
- (c) if authorized thereto by the Minister in writing and subject to such conditions as the Minister may determine, exercise any power and perform any duty assigned to the Minister by sections 15A, 258 (1), 259, 261, 263 (1) (b), 272 and 329 (6).

[Sub-s. (1) substituted by s. 2 (a) of Act 83 of 1981.]

(1A) The Minister may likewise appoint a Deputy Registrar and an Assistant Registrar, who shall, subject to the control of the Registrar, exercise any power or carry out any duty granted or assigned to the Registrar by this Act, and when the office of Registrar is vacant or when the Registrar is absent or is for any other reason unable to perform his functions the Deputy Registrar shall act temporarily in his stead.

[Sub-s. (1A) inserted by s. 2 (1) of Act 64 of 1977 and substituted by s. 1 (1) (a) of Act 70 of 1984.]

(2) The person holding office as Registrar of Companies under this Act before the amendment thereof by the Companies Amendment Act, 1981, at the commencement of section 2 of the last-mentioned Act, shall be deemed to have been appointed as the Registrar of Companies under this Act as so amended.

[Sub-s. (2) substituted by s. 2 (b) of Act 83 of 1981.]

(3) The Registrar may delegate in writing any of the powers and entrust any of the duties assigned to him by this Act, to any officer or employee in the public service.

[Sub-s. (3) substituted by s. 1 (1) (b) of Act 70 of 1984.]

## **8 Exemptions from liability**

(1) Neither the State, nor the Registrar, an inspector, or any officer or appointee of the State having duties to perform under this Act, shall be held liable for any loss sustained by or damage caused to any person as a result of any *bona fide* act or omission relating to the performance of any duty under this Act, unless gross negligence is proved.

[Sub-s. (1) substituted by s. 2 of Act 24 of 2006.]

(2) An auditor, liquidator, judicial manager or provisional judicial manager shall not be liable in respect of any opinion expressed or certificate given or report or statement made or statement, account or document certified by him or her in good faith in the ordinary course of his or her duties under this Act, unless it is proved that such opinion was expressed or such certificate was given or such report or statement was made or such statement, account or document was certified maliciously or negligently.

[Sub-s. (2) substituted by s. 46 of Act 88 of 1996.]

## **9 Inspection and copies of documents in Companies Registration Office; and by foreign governments and universities**

(1) Subject to the provisions of subsection (4), and subject to the availability of the original document, any person may, on payment of the prescribed fee (including an additional fee if any document is not uplifted personally at the Companies Registration Office)-

- (a) inspect the documents lodged under this Act with the Registrar; or

[Para. (a) substituted by s. 2 of Act 70 of 1984.]

- (b) obtain a certificate from the Registrar as to the contents or part of the contents of any document kept by him under this Act in respect of any company and which is open to inspection; or
- (c) obtain a copy of or extract from any such document.

[Sub-s. (1) amended by s. 1 (a) of Act 59 of 1978 and by s. 3 (a) of Act 24 of 2006.]

(1A) Subject to subsection (4), any person may, on payment of the prescribed fee, through any electronic medium approved by the Registrar-

- (a) inspect any document which has been lodged with the Registrar under this Act and converted into electronic format;
- (b) obtain a copy of or extract from any such converted document; or
- (c) obtain a certificate from the Registrar as to the contents or part of the contents of any documentation kept by him or her in terms of this Act in respect of any company.

[Para. (c) added by s. 3 (d) of Act 24 of 2006.]

[Sub-s. (1A) inserted by s. 9 (a) of Act 35 of 2001.]

(2) If the Registrar is satisfied-

- (a) that an inspection, certificate, copy or extract is required on behalf of a foreign government accredited to the government of the Republic; and
- (b) that no fees are payable in the foreign country concerned in respect of such inspection, certificate, copy or extract required on behalf of the government of the Republic;

no fee referred to in subsection (1) or (1A) shall be payable.

[Sub-s. (2) amended by s. 2 (b) of Act 35 of 2001.]

(3) If the Registrar is satisfied that any inspection, certificate, copy or extract is required for the purposes of research by or under the control of an institution for higher education, he may permit such inspection, or furnish such a certificate or copy or such an extract, without payment of such fees.

[Sub-s. (3) substituted by s. 2 of Act 29 of 1982.]

(4) No person may inspect a document referred to in subsection (1) or obtain a certificate as to the contents or part of the contents thereof or obtain a copy thereof or an extract therefrom, if the Registrar is satisfied that such document contains particular information or a particular fact concerning the affairs or business of a company, or of any of its subsidiaries, which information or fact the company has been prohibited under section 15A (1) from disclosing or from stating on or in any document, or which information or fact the company has been exempted under that section from any obligation so to disclose or state: Provided that the provisions of this subsection shall not apply to such portions of such document as do not contain or refer to or give any indication of the particular information or particular fact which the company has been prohibited or exempted from disclosing or stating as aforesaid.

[Sub-s. (4) added by s. 1 (b) of Act 59 of 1978.]

## **10 Manner of payment of fees to Companies Registration Office**

(1) The payment of all fees, additional fees or other moneys payable to the Registrar as laid down by this Act shall be effected-

- (a) and (b) .....

[Paras. (a) and (b) deleted by s. 1 (a) of Act 39 of 2002.]

- (c) in such manner, including any electronic form of transfer of money, as the Registrar may direct.

[Para. (c) substituted by s. 3 (a) of Act 35 of 2001 and by s. 1 (b) of Act 39 of 2002.]

[Sub-s. (1) amended by s. 2 (a) of Act 31 of 1986.]

(2) No document, form, return or notice in respect of which any fee or payment is laid down under this Act, shall be complete unless proof of payment of the prescribed fee, additional fees (if any)

or other moneys has been acknowledged as having been received by the Registrar.

[Sub-s. (2) substituted by s. 3 (b) of Act 35 of 2001.]

(3) Any fees, additional fees and any other moneys payable under this Act to the Registrar shall be debts due to the State recoverable by the Minister in any competent court.

[Sub-s. (3) substituted by s. 2 (b) of Act 31 of 1986.]

## **11 Annual report by Registrar**

The Registrar shall in every calendar year submit to the Minister a report containing such information concerning the registration of companies of each type, their authorized capitals or numbers of shares, increases in and reductions of capital, prospectuses, windings-up, judicial managements, deregistrations and dissolutions of companies, additional fees collected, prosecutions and convictions under this Act, matters dealt with by the standing advisory committee appointed under this Act and other matters as the Minister may direct; and the Minister shall table the report in the House of Assembly.

[S. 11 amended by s. 3 of Act 83 of 1981.]

### ***Court: Jurisdiction, Powers and Procedure (ss 12-14)***

## **12 Jurisdiction of Court under this Act and review of decisions of Registrar**

Cases

(1) The Court which has jurisdiction under this Act in respect of any company or other body corporate, shall be any provincial or local division of the High Court of South Africa within the area of the jurisdiction whereof the registered office of the company or other body corporate or the main place of business of the company or other body corporate is situate.

[Sub-s. (1) amended by s. 5 (b) of Act 20 of 2004.]

(2) Any person, including any company or other body corporate, aggrieved by any decision, ruling or order of the Registrar may bring the same under review by the provincial or local division of the High Court of South Africa within the area of the jurisdiction whereof such person is ordinarily resident or such company or other body corporate has its registered office or main place of business.

[Sub-s. (2) amended by s. 5 (b) of Act 20 of 2004.]

## **13 Security for costs in legal proceedings by companies and bodies corporate**

Cases

Where a company or other body corporate is plaintiff or applicant in any legal proceedings, the Court may at any stage, if it appears by credible testimony that there is reason to believe that the company or body corporate or, if it is being wound up, the liquidator thereof, will be unable to pay the costs of the defendant or respondent if successful in his defence, require sufficient security to be given for those costs and may stay all proceedings till the security is given.

## **14 Copies of Court orders to be transmitted to Registrar and Master**

Where any Court makes any order under this Act in relation to any company, the Registrar of the Court shall without delay transmit a copy of the order to the Registrar and if such order relates to the winding-up or judicial management of any company, also a copy thereof to the Master.

### ***Regulations by the Minister and Proclamations by the State President (ss 15-17)***

## **15 Regulations and policy**

Cases

(1) The Minister may make regulations -

- (a) providing for the conduct and administration of the Companies Registration Office and prescribing the practice and procedure to be observed therein;
- (b) prescribing the practice and procedure to be observed in the office of the Master in connection with the winding-up and judicial management of companies;
- (bA) providing for the reproduction of any records in the Companies Registration office or

the office of the Master by microfilm, microcard, miniature photographic process, the conversion into electronic format in such a way as to allow such records to be reconverted without changing their original contents or any other process deemed suitable by the Minister;

- (bB) providing for the use for official purposes and the admissibility in evidence in any proceedings, whether in a court of law or otherwise, of any reproduction contemplated in paragraph (bA);
- (c) providing for the keeping and preservation of any records, or any reproduction thereof contemplated in paragraph (bA), in the Companies Registration office or the office of the Master, the removal from such offices and preservation in any other place of such records or reproductions and prescribing the circumstances under which any such records or reproductions may be destroyed;
- (cA) prescribing how records required under this Act to be kept by a company may be kept, and prescribing the circumstances under which any such records may be destroyed;
- (d) prescribing the procedure to be followed with respect to any matter in connection with the winding-up and judicial management of companies;
- (e) prescribing the form and the contents of any return, notice or form provided for by this Act;
- (f) prescribing when an additional copy or copies of documents to be lodged under the Act shall require to be lodged and whether such additional copy or copies shall be in the form of a copy or copies certified in the manner prescribed or shall be in duplicate original form;
- (g) in consultation with the Minister of Finance, prescribing the matters in respect of which fees shall be payable and the tariff of such fees;
- (h) providing for a table of fees, subject to taxation by the Master, which shall be payable to a liquidator as remuneration;
- (i) prescribing a tariff of remuneration payable to any person performing on behalf of a liquidator any act relating to the winding-up of a company, and prohibiting the charging or recovery of remuneration at a higher tariff than the tariff so prescribed;
- (j) in consultation with the Minister of Finance, prescribing the remuneration and allowances of members of the standing advisory committee and its standing sub-committees and the conditions upon which such members are appointed;
- (k) as to any matter required or permitted by this Act to be prescribed by regulation; and
- (l) generally, as to any matter which he or she considers it necessary or expedient to prescribe in order that the purposes of this Act may be achieved.

(1A) (a) The Minister may determine policy for the appointment of a provisional liquidator, co-liquidator, liquidator or provisional judicial manager by the Master in order to promote consistency, fairness, transparency and the achievement of equality for persons previously disadvantaged by unfair discrimination.

(b) Any policy determined in accordance with the provisions of paragraph (a) must be tabled in Parliament before publication in the *Gazette*.

(2) Any regulations made under subsection (1) may prescribe penalties for any contravention thereof or failure to comply therewith not exceeding a fine or imprisonment for a period of six months or both a fine and such imprisonment.

[S. 15 amended by s. 1 (1) of Act 111 of 1976, by s. 2 (1) of Act 59 of 1978 and by s. 4 of Act 35 of 2001 and substituted by s. 15 of Act 16 of 2003.]

[Date of commencement of s. 15: 13 July 1973.]

## **15A Prohibition of disclosure of, and exemption from obligation to disclose, certain information**

- (1) The Minister may-
- (a) by notice in writing prohibit any company from disclosing, or from stating on or in any document of the company;
  - (b) on the written application of a company to the Registrar, exempt it, subject to such conditions or restrictions as the Minister may deem fit, from the obligation to disclose, or to state on or in any of its documents,

[Para. (b) amended by s. 4 (b) of Act 83 of 1981.]

particular information or a particular fact concerning the affairs or business of the company, or that of any of its subsidiaries, which the company would otherwise be required under this Act to disclose or to state on or in any document.

[Sub-s. (1) amended by s. 4 (a) of Act 83 of 1981.]

(2) Notwithstanding the provisions of subsection (1) any company shall, if the Registrar in a particular case in writing requires the company to do so, submit to the Registrar information which the company would otherwise have been required to submit to the Registrar in terms of the provisions of this Act.

(3) The Minister shall, when considering whether to impose a prohibition or grant an exemption under subsection (1), have regard to the right of the members of the company and of other persons to be informed of the state of affairs and the business and of the profit or loss of the company or of the company and its subsidiaries.

[Sub-s. (3) amended by s. 4 (c) of Act 83 of 1981.]

(4) Any company which contravenes a prohibition imposed under subsection (1) (a) and any director or officer of a company who contravenes such prohibition, shall be guilty of an offence.

(5) For the purposes of this section a company shall include an external company.

[S. 15A inserted by s. 3 of Act 59 of 1978.]

## **16 Regulations and proclamations to remain in force**

(1) Any regulations or rules made under section 220 of the repealed Act shall be deemed to have been made under section 15 of this Act and shall remain in force until repealed by regulation.

(2) The Third and Fourth Schedules to the repealed Act shall, notwithstanding the repeal of that Act, remain in force and shall be deemed to be regulations made under section 15 of this Act until repealed by regulation.

(3) Any proclamation issued under any law repealed by this Act and in force at the commencement of this Act shall remain in force until repealed by regulation.

## **17 Notices**

(1) The Minister may by notice in the *Gazette* from time to time amend or add to the provisions of the Schedules to this Act.

[Sub-s. (1) amended by ss. 46 and 47 of Act 97 of 1986.]

(2) Any such notice may prescribe different provisions in respect of different types of companies.

[Sub-s. (2) amended by s. 47 of Act 97 of 1986.]

(3) The provisions of any such notice amending or adding to-

- (a) Table A or B contained in Schedule 1 shall not apply in relation to any company in respect of which the provisions of the Table in question applied immediately before the date on which the notice took effect;

[Para. (a) amended by s. 47 of Act 97 of 1986.]

- (b) Schedule 4 shall not apply in respect of any financial year of any company which ended prior to the said date.

[Sub-s. (3) amended by s. 47 of Act 97 of 1986.]

## **17A Delegation**

The Minister may in writing delegate any of the powers and entrust any of the duties assigned to the Minister by Chapters IX and XIII and sections 79 (2), 272, 440U and 440FF to any officer or employee in the public service.

[S. 17A inserted by s. 4 of Act 24 of 2006.]

### *Standing Advisory Committee (s 18)*

## **18 Standing Advisory Committee**

(1) (a) The Minister shall appoint a standing advisory committee on company law consisting of a judge, a retired judge or a senior advocate of the High Court of South Africa as chairman, and such *ex officio* and other members as he may from time to time determine: Provided that the Minister shall consult the Minister of Justice before he so appoints a judge or retired judge.

[Para. (a) substituted by s. 1 of Act 63 of 1988.]

(b) A member of the standing advisory committee shall hold office for such period as the Minister may direct and shall be eligible for reappointment upon the expiration of the period of his office.

(2) The standing advisory committee shall as to witnesses and their evidence have the powers of a commission duly appointed under the Commissions Act, 1947 (Act 8 of 1947).

(3) The standing advisory committee may from time to time make recommendations to the Minister in regard to any amendments to this Act which may appear to it to be advisable and shall advise the Minister on any matter referred to it by the Minister.

(4) (a) The standing advisory committee shall constitute and maintain at all times such standing subcommittees on accounting, legal and other practices as the Minister may from time to time determine.

[Para. (a) substituted by s. 38 of Act 55 of 1989.]

(b) The standing advisory committee shall appoint as members of the standing sub-committees such of its members and such other persons and for such periods of office, as it may from time to time determine.

(5) The standing advisory committee may call to its assistance such person or persons as it may deem necessary to assist it or to investigate matters relating to company law.

(6) The Registrar shall be responsible for the administration of the standing advisory committee and the standing sub-committees.

[Date of commencement of s. 18: 13 July 1973.]

[S. 18 amended by s. 5 (b) of Act 20 of 2004.]

## **CHAPTER III**

### **TYPES AND FORMS OF COMPANIES, CONVERSIONS AND LIMITATIONS ON PARTNERSHIPS AND ASSOCIATIONS (ss 19-31)**

## **19 Types of companies**

(1) Two types of companies may be formed and incorporated under this Act, namely:

- (a) a company having a share capital; or
- (b) a company not having a share capital and having the liability of its members limited by the memorandum of association (in this Act termed 'a company limited by guarantee').

(2) A company having a share capital may be either a public company or a private company having shares of par value or shares of no par value.

(3) All companies limited by guarantee, including such existing companies, shall be deemed to be public companies for the purposes of this Act.

## **20 Meaning of 'private company' and cessation of its privileges**

Cases

(1) In this Act the expression '**private company**' means a company having a share capital and which by its articles-

- (a) restricts the right to transfer its shares; and
- (b) limits the number of its members (exclusive of persons who are in the employment of the company and of persons who having been formerly in the employment of the company were, while in such employment, and have continued after the termination of such employment to be, members of the company) to fifty; and
- (c) prohibits any offer to the public for the subscription of any shares or debentures of the company.

(2) Where two or more persons hold one or more shares of a company jointly they shall, for the purposes of this section, be treated as a single member.

(3) No private company shall alter its articles in such manner that they no longer include all of the provisions referred to in subsection (1) unless it is at the same time converted into a public company.

(4) .....

[Sub-s. (4) deleted by s. 5 of Act 24 of 2006.]

## **21 Incorporation of associations not for gain**

Cases

(1) Any association-

- (a) formed or to be formed for any lawful purpose;
- (b) having the main object of promoting religion, arts, sciences, education, charity, recreation, or any other cultural or social activity or communal or group interests;
- (c) which intends to apply its profits (if any) or other income in promoting its said main object;
- (d) which prohibits the payment of any dividend to its members; and
- (e) which complies with the requirements of this section in respect to its formation and registration,

may be incorporated as a company limited by guarantee.

(2) The memorandum of such association shall comply with the requirements of this Act and shall, in addition, contain the following provisions:

- (a) The income and property of the association whencesoever derived shall be applied solely towards the promotion of its main object, and no portion thereof shall be paid or transferred, directly or indirectly, by way of dividend, bonus, or otherwise howsoever, to the members of the association or to its holding company or subsidiary: Provided that nothing herein contained shall prevent the payment in good faith of reasonable remuneration to any officer or servant of the association or to any member thereof in return for any services actually rendered to the association.

[Para. (a) amended by s. 4 of Act 59 of 1978.]

- (b) Upon its winding-up, deregistration or dissolution the assets of the association remaining after the satisfaction of all its liabilities shall be given or transferred to some other association or institution or associations or institutions having objects similar to its main object, to be determined by the members of the association at or before the time of its dissolution or, failing such determination, by the Court.

(3) The provisions of section 49 (1) (c) of this Act shall not apply to any such association.

[Sub-s. (3) substituted by s. 3 of Act 31 of 1986.]

(4) Existing associations incorporated under section 21 of the repealed Act shall be deemed to have been formed and incorporated under this section.

### **21A Incorporation of certain branches of foreign companies and associations not for gain**

(1) Notwithstanding anything to the contrary in this Act contained, a branch, established in the Republic, of

- (a) a company or other association of persons, incorporated outside the Republic; or
- (b) an association of persons which is not incorporated and has its head office in a foreign country,

may be incorporated under section 21 if

- (i) the main object in the Republic of that branch corresponds with the main object of the company or association concerned;
- (ii) the said branch complies with the requirements of section 21; and
- (iii) the whole of the business and all the property, rights and obligations in the Republic of the company or association concerned will, on incorporation under section 21 of the said branch, be transferred in due form to, vest in and be binding upon the company so incorporated.

(2) Notwithstanding anything to the contrary contained in any law-

- (a) no transfer or stamp duty shall be payable in respect of the transfer of property contemplated in subsection (1) (iii); and
- (b) any licence, exemption, permit, certificate or authority held in terms of any law by the company or association concerned in respect of its business or property in the Republic, shall with effect from the date of incorporation of the branch concerned as a company by virtue of the provisions of subsection (1), for the purposes of any such law be deemed to be held by the company so incorporated in respect of that business or property.

(3) The provisions of this Act with regard to external companies shall not apply in the case of an external company a branch of which has been incorporated as a company by virtue of subsection (1).

[S. 21A inserted by s. 5 of Act 83 of 1981.]

***Conversion of One Type or Form of Company into Another Type or Form of Company (ss 22-29)***

**22 Conversion of a public company, having a share capital into a private company, and vice versa**

(1) With the sanction of a special resolution and upon compliance with the requirements of sections 20 and 26 and with the other requirements of this Act in respect of private companies, a public company having a share capital may convert itself into a private company having a share capital.

(2) With the sanction of a special resolution and upon compliance with the other requirements of this Act in respect of public companies, a private company having a share capital may convert itself into a public company having a share capital.

**23 Conversion of a company into an incorporated association not for gain, or into a company limited by guarantee**

With the sanction of a special resolution and upon compliance with the requirements of section 26 and the other requirements of this Act in respect of associations not for gain and companies limited by guarantee, any company may convert itself into an association not for gain under section 21 of this Act or into a company limited by guarantee: Provided that a company having a share capital may only so convert itself if its share capital is cancelled.

**24 Conversion of a company limited by guarantee into a company having a share capital**

With the sanction of a special resolution and upon compliance with the requirements of section 26 and the other requirements of this Act in respect of companies having a share capital, a company limited by guarantee (excluding an association not for gain under section 21, but including an existing company limited by guarantee having a share capital), may convert itself into a company having a share capital.

**25 Conversion of unlimited company**

(1) An unlimited company within the meaning of the repealed Act, in existence at the

commencement of this Act, may with the sanction of a special resolution and upon compliance with the requirements of section 26 and the other requirements of this Act, convert itself into any type or form of company provided for by this Act, but such conversion shall not affect the liability of its members in respect of any debts, liabilities or obligations incurred or contracts entered into by, with or on behalf of the company before the conversion.

(2) Until such conversion has taken place the provisions of the repealed Act shall continue to apply to such unlimited company as if that Act had not been repealed.

(3) If after one year from the date of commencement of this section any such unlimited company which is a private company, has not converted itself as provided for in this section, it shall be obliged thereafter to comply with the provisions of section 302 (4) as to the lodging of its annual financial statements with the Registrar, as if it were a public company having shares of par value or shares of no par value, as the case may be.

## **26 Notice of intended conversion of company**

(1) Any company intending to convert itself into another type or form of company shall not less than three weeks before the date of the meeting convened for the purpose of passing the required special resolution, give notice in the *Gazette* of such intention, specifying the particulars of the proposed conversion and the date and place of the meeting: Provided that this subsection shall not apply to any private company having a share capital intending to convert itself into a public company having a share capital.

(2) If any company intending to convert itself into another type or form of company is a public company having a share capital, it shall, in addition, send the notice referred to in subsection (1) to every creditor of the company by registered post not less than three weeks before the date of the meeting.

## **27 Contents and form of articles on conversion**

When the articles of any company are to be altered for the purpose of converting the company into another type or form of company under section 22, 24 or 25, the provisions of sections 59 (2) and 60 (1) as to the contents and form of articles shall apply *mutatis mutandis* to the articles of the said company.

## **28 Amendment of certificate of incorporation of converted company and when conversion effective**

(1) The Registrar shall, on the registration of the special resolution concerned, upon payment of the prescribed fee and upon being satisfied that the requirements of this Act have been complied with, register any conversion in the register of companies and shall issue an amended certificate of incorporation, stating the date of the first registration of the company, its former name, the name as altered and the nature of the conversion.

(2) Any such conversion shall take effect as from the date of the amended certificate of incorporation issued under subsection (1).

(3) The Registrar shall give notice in the prescribed manner of the conversion of a company into another type or form of company.

[Sub-s. (3) substituted by s. 6 of Act 24 of 2006.]

## **29 Effect of conversion and alteration of other registers**

(1) The conversion of a company into another type or form of company under this Act shall not affect the corporate existence of the company as from the date of its first registration, nor any of its rights, debts, liabilities, obligations incurred or contracts entered into by, with, or on its behalf at any time nor render defective any legal proceedings by or against the company, and any legal proceedings that could have been continued or commenced by or against it prior to the conversion, may, notwithstanding such conversion, be continued or commenced against the company as converted.

(2) If as a result of the conversion of a company into another type or form of company, any

alteration in its name pursuant to the requirements of this Act is necessary, the alteration shall not be deemed to be a change of name for the purposes of section 44 (1).

(3) Upon the production by a company of an amended certificate of incorporation or a certified copy thereof to any registrar or other officer charged with the maintenance of a register under any Act, and on compliance with the requirements of such registrar or officer as to the form of application, if any, and the payment of any prescribed fee, such registrar or other officer shall make in his register all such alterations as are necessary by reason of the conversion of the company into another type or form of company.

***Conversion of Companies and Close Corporations (ss 29A-29D)***

[Heading inserted by s. 3 (1) of Act 70 of 1984.]

**29A Meaning of 'close corporation'**

In sections 29B, 29C and 29D 'close corporation' means a corporation as defined in section 1 of the Close Corporations Act, 1984.

[S. 29A inserted by s. 3 (1) of Act 70 of 1984.]

**29B Cancellation of registration of memorandum and articles by Registrar upon conversion of company into close corporation**

When a company is converted into a close corporation in terms of the Close Corporations Act, 1984, the Registrar shall, simultaneously with the registration of the founding statement of the close corporation by the Registrar of Close Corporations in terms of the said Act, cancel the registration of the memorandum and articles of association of the company concerned.

[S. 29B inserted by s. 3 (1) of Act 70 of 1984.]

**29C Conversion of close corporation into company**

Cases

(1) A close corporation may, with the written consent of all its members, be converted into a company, provided that every member of the close corporation becomes a member of such company.

(2) A close corporation to be converted into a company as contemplated in subsection (1) may, subject to the provisions of this section, apply to be incorporated as a company under Chapter IV of this Act.

(3) If an application referred to in subsection (2) complies with the provisions of the said Chapter IV and of subsection (4)-

- (a) the Registrar shall register the memorandum and articles in accordance with the provisions of section 63; and
- (b) the Registrar shall satisfy himself that simultaneously with such registration, the registration of the founding statement of the close corporation concerned is cancelled in accordance with the provisions of the Close Corporations Act, 1984.

(4) (a) An application referred to in subsection (2) shall be accompanied by-

- (i) a statement of the paid-up share capital (if any) for an amount not greater than the excess of the fair value of the assets to be acquired by the company, over the liabilities to be assumed by the company by reason of the conversion: Provided that the company may treat any portion of such excess not reflected as paid-up share capital, as distributable reserves; and
- (ii) a statement by the close corporation's accounting officer, based on the performance of his duties under the Close Corporations Act, 1984, that he is not aware of any contravention of the said Act by the close corporation or its members or of any circumstances which may render the members of the close corporation together with the close corporation jointly and severally liable for the corporation's debts.

(b) The shares or the nominal value of the shares to be held in the company by the members individually need not necessarily be in proportion to the members' interests as stated in the founding

statement of the close corporation concerned.

(5) The Registrar shall give notice in the prescribed manner of the conversion of a close corporation into a company.

[Sub-s. (5) substituted by s. 7 of Act 24 of 2006.]

[S. 29C inserted by s. 3 (1) of Act 70 of 1984.]

## **29D Effect of conversion of close corporation into a company**

Cases

(1) (a) On the registration of a company converted from a close corporation, all the assets, liabilities, rights and obligations of the corporation shall vest in the company.

(b) Any legal proceedings instituted before the registration by or against the corporation, may be continued by or against the company, and any other thing done by or in respect of the corporation, shall be deemed to have been done by or in respect of the company.

(c) The juristic person which existed as a close corporation before the conversion shall notwithstanding the conversion continue to exist as a juristic person, but in the form of a company.

[Para. (c) added by s. 2 (1) of Act 63 of 1988.]

(2) Upon the production by a company which has been converted from a close corporation of a certificate of incorporation referred to in section 64 to any registrar or other officer charged with the maintenance of a register under any law, and on compliance with the requirements of such registrar or officer as to the form of application (if any) and the payment of any required fee, such registrar or other officer shall make in his register all such alterations as are necessary by reason of the change effected by the conversion of the close corporation into a company: Provided that no transfer or stamp duty shall be payable in respect of such alterations in a register.

[S. 29D inserted by s. 3 (1) of Act 70 of 1984.]

### ***Limitations on Partnerships and Associations for Gain (ss 30-31)***

## **30 Prohibition of associations or partnerships exceeding twenty members, and exemption**

Cases

(1) No company, association, syndicate or partnership consisting of more than twenty persons shall be permitted or formed in the Republic for the purpose of carrying on any business that has for its object the acquisition of gain by the company, association, syndicate or partnership, or by the individual members thereof, unless it is registered as a company under this Act, or is formed in pursuance of some other law or was before the thirty-first day of May, 1962, formed in pursuance of Letters Patent or Royal Charter.

(2) The provisions of subsection (1) shall not apply with reference to the formation by persons qualified to carry on any organized professions which are designated by the Minister by notice in the *Gazette*, of any association, syndicate or partnership for the purpose of carrying on such professions and/or any combinations of such professions.

## **31 Unregistered associations carrying on business for gain not to be corporate bodies**

Cases

No association of persons formed after the thirty-first day of December, 1939, for the purpose of carrying on any business that has for its object the acquisition of gain by the association or by the individual members thereof, shall be a body corporate, unless it is registered as a company under this Act or is formed in pursuance of some other law or was before the thirty-first day of May, 1962, formed in pursuance of Letters Patent or Royal Charter.

### **CHAPTER IV**

## **FORMATION, OBJECTS, CAPACITY, POWERS, NAMES, REGISTRATION AND INCORPORATION OF COMPANIES, MATTERS INCIDENTAL THERETO AND DEREGISTRATION (ss 32-73D)**

*Formation, Objects and Powers (ss 32-40)*

**32 Mode of forming company**

Any seven or more persons or, where the company to be formed is a private company, any two or more persons associated for any lawful purpose or, where the company to be formed is to be a private company with a single member, any one person for any lawful purpose, may form a company having a share capital or a company limited by guarantee and secure its incorporation by complying with the requirements of this Act in respect of the registration of the memorandum and articles.

**33 Capacity, main object and ancillary objects of company**

(1) Any company formed in pursuance of section 32 shall have the capacity determined by the main object stated in its memorandum and there shall be included in its capacity unlimited objects ancillary to the said main object except such specific ancillary objects as are expressly excluded in its memorandum.

(2) If the main business actually carried on at any time by a company referred to in subsection (1) falls within the capacity of the company by virtue only of an object ancillary to the main object stated in its memorandum, such main business shall be deemed to be the main object of that company for the purposes of the said subsection.

(3) Notwithstanding anything contained in the memorandum of any existing company, the main business which it actually carries on at the commencement of this section, shall be deemed to be its main object.

**34 Powers of company**

Subject to any limitation imposed by this Act, every company shall have plenary powers, including the common powers stated in Schedule 2 to this Act, to enable it to realize its main and ancillary objects, except such specific powers as are expressly excluded or qualified in its memorandum.

**35 Power as to pre-incorporation contracts**

Cases

Any contract made in writing by a person professing to act as agent or trustee for a company not yet incorporated shall be capable of being ratified or adopted by or otherwise made binding upon and enforceable by such company after it has been duly incorporated as if it had been duly incorporated at the time when the contract was made and such contract had been made without its authority: Provided that the memorandum of its registration contains as an object of such company the ratification or adoption of or the acquisition of rights and obligations in respect of such contract, and that such contract has been lodged with the Registrar together with the lodgment for registration of the memorandum and articles of the company.

[S. 35 amended by s. 8 of Act 24 of 2006.]

**36 Acts *ultra vires* the company not void**

No act of a company shall be void by reason only of the fact that the company was without capacity or power so to act or because the directors had no authority to perform that act on behalf of the company by reason only of the said fact and, except as between the company and its members or directors, or as between its members and its directors, neither the company nor any other person may in any legal proceedings assert or rely upon any such lack of capacity or power or authority.

**37 Loans made and security provided by a subsidiary**

(1) (a) If-

- (i) any funds of a company were employed directly or indirectly (whether through the instrumentality of its subsidiary or otherwise) in a loan to any company which is its holding company or which is a subsidiary of that holding company but not a subsidiary of itself; or
- (ii) a company directly or indirectly (whether through the instrumentality of its subsidiary

or otherwise) provided any security to another person in connection with an obligation of any company which is its holding company or which is a subsidiary of that holding company but not a subsidiary of itself,

particulars of that loan or security, as the case may be, shall be stated in the annual financial statements of the company for every year during which such loan or security was in operation.

(b) The provisions of paragraph (a) shall not apply in respect of loans made or security provided *bona fide* in the ordinary course of the business of a company actually and regularly carrying on a business a substantial part of which is the making of loans or the provision of security, as the case may be.

(2) (a) Any director or officer of a company who fails to take all reasonable steps to secure compliance with the provisions of subsection (1) shall be guilty of an offence.

(b) In any prosecution against any director or officer of a company under paragraph (a), the defence referred to in section 284 (4) (b) shall, *mutatis mutandis*, be available to him.

(3) (a) Any director or officer of a company who authorizes or permits or is a party to the making of any loan or the provision of any security contemplated in subsection (1) (a), shall be liable to the company for any damage directly arising from the making of such loan or the provision of such security on terms or conditions which, at the time of the making of such loan or the provision of such security, were not fair to the company or failed to provide reasonable protection for its business interests: Provided that a director or officer who has paid any amount as damages by virtue of the provisions of this paragraph may recover such part of that amount as the Court considers equitable, from any other director or officer who is in terms of this paragraph also liable to the company for the same damage.

(b) For the purposes of paragraph (a), '**director or officer**' of a company shall include any director or officer of a holding company of such company, and for the purposes of recovery of such damages as are contemplated in the said paragraph (a) the provisions of sections 266, 267 and 268 shall *mutatis mutandis* apply as if a director or officer or past director or officer of such holding company was a director or officer or past director or officer of such company, respectively.

(c) In enquiring, for the purposes of paragraph (a), whether or not any terms or conditions were fair to the company or failed to provide reasonable protection for its business interests, regard shall be had, without prejudice to the generality of the enquiry, to-

- (i) whether, in view of the financial position of the parties, the loan should have been made or the security should have been provided at all;
- (ii) in the case of a loan, whether security has been or should in the circumstances have been provided therefor, and whether any security provided therefor is adequate;
- (iii) the consideration for the loan or security, including any interest or other benefit received therefor;
- (iv) the term of the loan or security; and
- (v) the manner of repayment of the loan or discharge of the security.

(d) The provisions of this subsection shall not derogate from any other rule of law relating to the liability of a director or officer of a company.

(4) For the purposes of this section-

- (a) '**funds**' includes money, shares, debentures or any other property;
- (b) '**loan**' includes any credit extended by a company, if the debt concerned is not payable or being paid in accordance with the normal business practice of the company in respect of the payment to it of other debts of the same kind;
- (c) '**security**' includes a guarantee.

(5) The provisions of this section shall not apply to anything done by a company with the consent of all its members.

[S. 37 amended by s. 2 of Act 76 of 1974 and substituted by s. 3 (1) of Act 64 of 1977.]

### **38 No financial assistance to purchase shares of company or holding company**

Cases

(1) No company shall give, whether directly or indirectly, and whether by means of a loan, guarantee, the provision of security or otherwise, any financial assistance for the purpose of or in connection with a purchase or subscription made or to be made by any person of or for any shares of the company, or where the company is a subsidiary company, of its holding company.

(2) The provisions of subsection (1) shall not be construed as prohibiting-

- (a) the lending of money in the ordinary course of its business by a company whose main business is the lending of money; or
- (b) the provision by a company, in accordance with any scheme for the time being in force, of money for the subscription for or purchase of shares of the company or its holding company by trustees to be held by or for the benefit of employees of the company, including any director holding a salaried employment or office in the company; or
- (c) the making by a company of loans to persons, other than directors, *bona fide* in the employment of the company with a view to enabling those persons to purchase or subscribe for shares of the company or its holding company to be held by themselves as owners; or
- (d) the provision of financial assistance for the acquisition of shares in a company by the company or its subsidiary in accordance with the provisions of section 85 for the acquisition of such shares.

[Para. (d) added by s. 3 of Act 37 of 1999.]

(2A) Subsection (1) does not prohibit a company from giving financial assistance for the purchase of or subscription for shares of that company or its holding company, if-

- (a) the company's board is satisfied that-
  - (i) subsequent to the transaction, the consolidated assets of the company fairly valued will be more than its consolidated liabilities; and
  - (ii) subsequent to providing the assistance, and for the duration of the transaction, the company will be able to pay its debts as they become due in the ordinary course of business; and
- (b) the terms upon which the assistance is to be given is sanctioned by a special resolution of its members.

[Sub-s. (2A) inserted by s. 9 of Act 24 of 2006.]

(2B) For the purposes of paragraph (2A) (a), the directors must account for any contingent liabilities which may arise to the company, including any contingent liability which may result from giving the assistance.

[Sub-s. (2B) inserted by s. 9 of Act 24 of 2006.]

(3) (a) Any company which contravenes the provisions of this section, and every director or officer of such company, shall be guilty of an offence.

(b) For the purpose of this subsection 'director', in relation to a company, includes any person who at the time of the alleged contravention was a director of the company.

(c) It shall be a defence in any proceedings under this section against any director or officer of a company if it is proved that the accused was not a party to the contravention.

### **39 Company not to be a member of its holding company**

Cases

(1) Save as is provided in subsection (2), if shares in a company are acquired in accordance with section 89 by its subsidiary, for so long as such shares are held by the subsidiary-

- (a) no voting rights attaching to such shares may be exercised; and

- (b) the percentage of votes able to be cast at any meeting of shareholders shall be reduced by the number of shares held by the subsidiary:

Provided that this subsection shall not apply where the shares are acquired in a subsidiary of the holding company which is also a subsidiary of the acquiring company.

[Sub-s. (1) substituted by s. 4 (a) of Act 37 of 1999.]

(2) The provisions of subsection (1) shall not apply in relation to a subsidiary acting in a representative capacity or as a trustee, unless the holding company or a subsidiary thereof is beneficially interested under the trust and is not so interested only by way of security for the purposes of a transaction entered into by it in the ordinary course of a business which includes the lending of money.

(3) .....

[Sub-s. (3) amended by s. 3 of Act 76 of 1974 and deleted by s. 4 (b) of Act 37 of 1999.]

(4) .....

[Sub-s. (4) deleted by s. 4 (b) of Act 37 of 1999.]

(5) In relation to a company limited by guarantee which is a holding company, the reference in this section to shares of a company, shall be construed as including a reference to the interest of its members as such, whatever the form of that interest.

#### **40 No division into interests, rights to profits or shares in guarantee companies**

(1) In the case of a company limited by guarantee, every provision in the memorandum or articles or in any resolution of the company purporting to give any person a right to participate in the divisible profits of the company otherwise than as a member shall be void.

(2) Any provision in the memorandum or articles or in any resolution of a company limited by guarantee, purporting to divide the undertaking of the company into shares or interests shall be void.

#### *Names of Companies (ss 41-51)*

#### **41 Names of companies not to be undesirable**

Cases

No memorandum containing a name for a company to be incorporated shall be registered if in the opinion of the Registrar the name is undesirable.

#### **42 Reservation of name**

(1) Subject to the provisions of section 41, the Registrar shall, on written application on the prescribed form and on payment of the prescribed fee for each such written application form lodged, reserve a name (approved by the Registrar) or literal translation into not more than one other official language of the Republic of a name of a company or a shortened form of the name or name so translated of a company, pending the registration of a memorandum or a change of name by that company or the registration of another form of the name or translated name.

[Sub-s. (1) substituted by s. 6 of Act 83 of 1981, by s. 2 of Act 35 of 1998 and by s. 2 of Act 39 of 2002.]

(2) Such reservation shall be for a period not exceeding two months or such extended period, not exceeding in all three months, as the Registrar, upon payment of the prescribed fee, may in the special circumstances of any case allow.

#### **43 Registration of translation and shortened form of name or defensive name**

Cases

(1) The memorandum of any company to be incorporated may contain a literal translation into not more than one other official language of the Republic of the company's name and one shortened form of that name or the name so translated (hereinafter in this Chapter referred to as the translated name), and any company may, on the prescribed form and on payment of the prescribed fee, apply to the Registrar for the registration of such translated name and shortened form of its name or translated name, if in each case the translated name and shortened form of the name or translated name concerned

is not in the opinion of the Registrar undesirable.

[Sub-s. (1) substituted by s. 7 (a) of Act 83 of 1981 and by s. 3 of Act 35 of 1998.]

(2) Any person may on application on the prescribed form and on payment of the prescribed fee apply to the Registrar-

- (a) to register any name as a defensive name; or
- (b) to renew the registration of a name as a defensive name,

which is not in the opinion of the Registrar undesirable and in respect of which he has furnished proof, to the satisfaction of the Registrar, that he has a direct and material interest.

[Sub-s. (2) substituted by s. 2 of Act 84 of 1980.]

(2A) If the Registrar grants any application referred to in subsection (2) he shall register the name in question as a defensive name for a period not exceeding two years or renew the registration of the name in question as a defensive name for a period not exceeding two years, as the case may be.

[Sub-s. (2A) inserted by s. 2 of Act 84 of 1980 and substituted by s. 3 of Act 63 of 1988.]

(3) The Registrar shall register such translated name or shortened form of the name or translated name of the company concerned or such defensive name and, where registration is effected pursuant to an application under subsection (1) or (2), the Registrar shall give notice thereof in the prescribed manner.

[Sub-s. (3) substituted by s. 7 (b) of Act 83 of 1981 and by s. 10 of Act 24 of 2006.]

#### **44 Change of name and effect thereof**

##### Cases

(1) (a) Any company may by special resolution change its name to a name which is not, in the opinion of the Registrar, undesirable.

(b) Where a company changes its name, it shall at the same time, if the translated name or shortened form of the name or translated name of the company has been registered under section 43 (3), and such translated name or shortened form is no longer applicable to the name of the company as changed, apply on the prescribed form and on payment of the prescribed fee-

- (i) to change such translated name or shortened form of the name or translated name to a new translated name or shortened form of the name or translated name approved by the Registrar; or
- (ii) to deregister such former translated name or shortened form of the name or translated name of the company.

[Para. (b) substituted by s. 8 (a) of Act 83 of 1981.]

(2) Where the name, translated name or shortened form of the name or translated name of a company is changed, the Registrar shall enter the new name, translated name or shortened form of the name or translated name in the register in place of the former name, translated name or shortened form of the name or translated name, issue a certificate of incorporation altered to meet the circumstances of the case or a certificate that the new name, translated name or shortened form of the name or translated name, has been entered in the register in place of the former name, translated name or shortened form of the name or translated name and give notice of the change of name, translated name or shortened form of the name or translated name in the prescribed manner.

[Sub-s. (2) substituted by s. 8 (b) of Act 83 of 1981 and by s. 11 of Act 24 of 2006.]

(3) A change of name of a company, shall not affect any rights, debts, liabilities or obligations of the company, nor render defective any legal proceedings by or against the company, and any legal proceedings that could have been continued or commenced by or against it prior to such change of name, may, notwithstanding such change of name, be continued or commence by or against the company under its new name.

(4) Upon the production by a company of an amended certificate of incorporation or a certificate of the change of the name of such company or a certified copy thereof to any registrar or

other officer charged with the maintenance of a register under any Act, and on compliance with the requirements of such registrar or officer as to the form of application, if any, and the payment of any prescribed fee, such registrar or other officer shall make in his register all such alterations as are necessary by reason of the change of the name of the company.

(5) .....

[Sub-s. (5) deleted by s. 3 of Act 111 of 1976.]

## 45 Order to change name

Cases

(1) If within a period of one year after the registration of any memorandum, translated name or shortened form of a name or translated name of a company or after the registration or the renewal of the registration of a name referred to in section 43 (2) or after the date of an amended certificate of incorporation or a certificate of change of name, translated name or shortened form of a name or translated name referred to in section 44 (2), it appears that the name contained in the memorandum or the translated name or shortened form of such name or translated name or the name referred to in section 43 (2) or the changed name or translated name or the shortened form of that changed name or translated name referred to in the last-mentioned certificate is in the opinion of the Registrar undesirable, he shall within such period order the company concerned or the person referred to in section 43 (2) to change the name, translated name or shortened form of the name or translated name concerned.

(2) If within a period of one year after the registration of any memorandum, translated name or shortened form of a name or translated name of a company or a name referred to in section 43 (2) or after the date of an amended certificate of incorporation or a certificate of change of name, translated name or shortened form of a name or translated name referred to in section 44 (2), any person lodges an objection in writing with the Registrar against the name contained in the memorandum or the translated name or shortened form of such name or translated name or the name referred to in section 43 (2) or the changed name or translated name or the shortened form of that changed name or translated name referred to in the last-mentioned certificate, on the grounds that such name, translated name or shortened form of a name or translated name is calculated to cause damage to the objector or is undesirable, the Registrar may, if he is satisfied that the objection is sound, order the company concerned or the person referred to in section 43 (2) to change the said name, translated name or shortened form of a name or translated name.

[Sub-s. (2) substituted by s. 1 (a) of Act 18 of 1990.]

(2A) Within a period of two years after the registration of any memorandum, translated name or shortened form of a name or translated name of a company or a name referred to in section 43(2) or after the date of an amended certificate of incorporation or a certificate of change of name, translated name or shortened form of a name or translated name referred to in section 44(2), a person who has not lodged any relevant objection in terms of subsection (2) may apply to the Court for an order directing the company concerned or the person referred to in section 43(2) to change the said name, translated name or shortened form on the grounds that the said name, translated name or shortened form is undesirable or is calculated to cause damage to the applicant, and the Court may on such application make such order as it deems fit.

[Sub-s. (2A) inserted by s. 1 (b) of Act 18 of 1990.]

(3) If, at any time, the Registrar is of the opinion that the name of a company, or the translated name or shortened form of a name or translated name of a company, gives so misleading an indication of the nature of its activities as to be calculated to deceive the public, he may order the company concerned to change its name or translated name or the shortened form of its name or translated name, as the case may be.

[S. 45 amended by s. 3 of Act 84 of 1980 and substituted by s. 9 of Act 83 of 1981.]

#### **46 Provisions as to order to change name**

(1) An order under section 45 for the change of a name or translated name of a company or a shortened form of a name or translated name of a company or a name referred to in section 43 (2) shall be issued by the Registrar in writing and sent by registered post to the company at its registered office or postal address, or to the person referred to in section 43 (2) at his or her last-known address, and shall require such company or such person to comply with the order within two months from the date of its issue.

[Sub-s. (1) substituted by s. 10 of Act 83 of 1981 and by s. 5 of Act 35 of 2001.]

(2) The Registrar may, on good cause shown, extend the said period of two months for any further period not exceeding two months.

(3) If such company or such person, as the case may be, fails to comply with any order issued by the Registrar under subsection (1) within the period or extended period referred to in the said subsection or subsection (2), or if such company or such person has applied to Court for relief under section 48 and the Court has upheld the Registrar's order and such company or such person fails to comply with that order within two months from the date of the final decision by the Court, such company or such person shall be guilty of an offence.

#### **47 Registrar may call for affidavits and shall give reasons for decisions as to names**

(1) The Registrar may for the purposes of any decision as to any name, translated name or shortened form of a name or translated name referred to in section 41, 42, 43, 44 or 45 call for such evidence on affidavit or otherwise, as he may deem fit.

[Sub-s. (1) substituted by s. 11 of Act 83 of 1981.]

(2) The Registrar shall, upon the request in writing of any person aggrieved by any decision or order of the Registrar under any section referred to in subsection (1) and on payment of the prescribed fee, furnish written reasons for any such decision or order.

#### **48 Recourse to Court in matters as to names**

Cases

Any company or person aggrieved by any decision or order of the Registrar under section 41, 42, 43, 44 or 45 may, within one month after the date of such decision or order, apply to the Court for relief, and the Court shall have power to consider the merits of any such matter, to receive further evidence and to make any order it deems fit.

[S. 48 substituted by s. 2 of Act 18 of 1990.]

#### **49 Formal requirements as to names of companies**

(1) Subject to the provisions of this section-

- (a) the name of a public company having a share capital shall include, as its last word, the word 'Limited';
- (b) the name of a private company having a share capital shall include as its last two words, the words '(Proprietary) Limited';
- (c) the name of a company limited by guarantee shall include-
  - (i) the word 'Limited' as its last word; and
  - (ii) the statement '(Limited by Guarantee)' subjoined to the said name.

(2) There shall be included in the name of any external company, the memorandum of which has been registered under this Act, the statement 'Incorporated in ... (stating the name of the foreign country concerned)' subjoined to the said name: Provided that if the external company is a body corporate which by the laws of the foreign country concerned is required to subjoin the abbreviation CC of [sic] BK, in capital letters, to the name under which it is registered, the statement 'Incorporated in ..... (stating the name of the foreign country concerned) - external company under section 322' shall be subjoined to the said name.

[Sub-s. (2) amended by Proclamation R57 of 31 March 1994.]

(3) The name of an association not for gain incorporated under this Act shall not include the word and statement referred to in subsection (1) (c) but the statement 'Association incorporated under section 21' shall be included in and be subjoined to the said name: Provided that an association not for gain incorporated under this Act before the commencement of the Companies Amendment Act, 1980, may instead of the said statement include in and subjoin to its name the statement 'Incorporated association not for gain'.

[Sub-s. (3) substituted by s. 4 of Act 84 of 1980.]

(4) The name of a private company having a share capital and the memorandum of which contains the provision referred to in section 53 (b), shall not include the words referred to in subsection (1) (b), but shall include the word 'Incorporated', as its last word, in the said name.

(5) If a company is being wound up by the Court or voluntarily or is under judicial management, the statement 'In Liquidation' 'In Voluntary Liquidation', or 'Under Judicial Management', as the case may be, shall be included in and be subjoined to the name of the company concerned and if the winding-up order or judicial management order is discharged, or the voluntary winding-up ceases, the said statement shall be omitted from the name of such company.

(6) The addition to or omission from the name of any company of the words or statements prescribed by this section as a result of-

- (a) the conversion of a company into another type or form of company; or
- (b) the insertion in or deletion from the memorandum of a private company of the provision referred to in section 53 (b); or
- (c) the discharge of a winding-up order or judicial management order or the cessation of voluntary winding-up,

shall not be deemed to be a change of name for the purposes of section 44 (1): Provided that subsections (2), (3) and (4) of that section shall apply in the case of such addition or omission as if it were a change of name.

(7) If a company is being wound up by the Court or voluntarily, or is placed under judicial management, the Registrar shall, on receipt of a copy of the relevant order of Court or on registration of a special resolution for the voluntary winding-up of the company in terms of section 349, alter the register to include in and subjoin to the name of the company concerned the statement 'In Liquidation', 'In Voluntary Liquidation' or 'Under Judicial Management', as the case may be, and if the winding-up order or judicial management order is discharged, or the winding-up ceases, the Registrar shall likewise on receipt of a copy of the relevant order of Court, alter the register to omit the said statement from the name of the company concerned.

[Sub-s. (7) substituted by s. 4 (a) of Act 70 of 1984.]

(8) If any company fails to comply with any provision of subsection (1), (2), (3), (4), (5) or (6) or in any way uses a name in contravention of any such provision, it shall be guilty of an offence.

(9) .....

[Sub-s. (9) deleted by s. 4 (b) of Act 70 of 1984.]

## **50 Use and publication of name by company**

Cases

(1) Every company-

- (a) shall display its name on the outside of its registered office and every office or place in which its business is carried on, in a conspicuous position and in characters easily legible;
- (b) shall have its name engraved in legible characters on its seal (if any);
- (c) shall have its name and registration number mentioned in legible characters in all notices and other official publications of the company, including notices or other official publications in electronic format, and in all bills of exchange, promissory notes,

endorsements, cheques, and orders for money or goods purporting to be signed by or on behalf of the company and in all letters, delivery notes, invoices, receipts, and letters of credit of the company:

[Para. (c) substituted by s. 1 of Act 29 of 1985 and by s. 6 of Act 35 of 2001.]

Provided that for the purposes of this subsection-

- (i) the abbreviations 'Ltd.' or 'Bpk.', 'Pty.' or 'Edms.', 'Inc.' or 'Ing.', 'Co.' or 'Mpy.', and '&' may be used for the words 'Limited' or 'Beperk', 'Proprietary' or 'Eiendoms', 'Incorporated' or 'Ingelyf', 'Company' or 'Maatskappy' and 'and' or 'en', respectively, in a company's name; and
- (ii) no company shall use the shortened form of its name or translated name unless it is used in conjunction with its name or translated name.

[Para. (ii) substituted by s. 12 (a) of Act 83 of 1981.]

(2) If a translated name of a company has been registered, the use of that translated name, and if the name of a company consists of or contains words in one of the official languages of the Republic, the use of a name consisting of or containing a literal translation of such words into not more than one other official language, shall be deemed to be sufficient compliance with the requirements of this section.

[Sub-s. (2) substituted by s. 12 (b) of Act 83 of 1981 and by s. 4 of Act 35 of 1998.]

(3) If any director or officer of a company or any person on its behalf-

- (a) uses or authorizes the use of any seal purporting to be a seal of the company whereon its name is not so engraved as aforesaid; or
- (b) issues or authorizes the issue of any notice or other official publication of the company, or signs or authorizes to be signed on behalf of the company any bill of exchange, promissory note, endorsement, cheque or order for money or goods, wherein its name is not mentioned in manner aforesaid; or
- (c) issues or authorizes the issue of any letter, delivery note, invoice, receipt or letter of credit of the company wherein its name is not mentioned in manner aforesaid,

he shall be guilty of an offence and shall further be liable to the holder of the bill of exchange, promissory note, cheque or order for money or goods for the amount thereof unless it is duly paid by the company.

(4) If any company fails to comply with the requirements of subsection (1), it shall be guilty of an offence.

## **51 Improper use of word 'Limited' or 'Incorporated' an offence**

Cases

Any person or persons trading or carrying on business under a name or title of which the word 'Limited' or 'Incorporated' is the last word, shall, unless duly incorporated under this Act or any other law, be guilty of an offence.

### ***Memorandum of Association (ss 52-54)***

## **52 Requirements for memorandum of association**

(1) The memorandum of a company shall state the purpose, referred to in section 32, for which it is to be formed and incorporated, describing the main business which the company is to carry on or, in the case of an association not for gain, the main object it is to promote, and in addition thereto-

- (a) the name of the company;
- (b) the main object of the company, referred to in section 33 (1), stating the general nature of the main business which it is contemplated the company will be entitled to carry on or the main object which an association not for gain will be entitled to promote;
- (c) (i) the specific ancillary objects, referred to in section 33 (1), if any, which are excluded from the unlimited ancillary objects of the company; and

- (ii) the specific powers or part of any powers of the company, referred to in section 34, if any, which are excluded from the plenary powers or the powers set out in Schedule 2.
- (2) If the company is to have a share capital, the memorandum shall state-
- (a) (i) the amount of the share capital with which it is proposed to be registered and the division thereof into shares of a fixed amount; or
  - (ii) the number of shares if the company is to have shares of no par value;
  - (b) the number of shares which each subscriber undertakes to take up, stated in words opposite his name: Provided that no subscriber may take less than one share.
- (3) If the company is to be a company limited by guarantee, the memorandum shall state-
- (a) that the liability of the members is limited to the amount referred to in subparagraph (b); and
  - (b) that each member undertakes to contribute to the assets of the company in the event of its being wound up while he is a member or within one year afterwards, for payment of the debts and liabilities of the company contracted before he ceases to be a member, and of the costs, charges and expenses of the winding-up, and for adjustment of the rights of the contributories among themselves, such amount as may be required, not exceeding a specified amount but not less than one rand.

### **53 Memorandum may contain special conditions and may provide for unlimited liability of directors**

#### Cases

The memorandum of a company may, in addition to the requirements of section 52-

- (a) contain any special conditions which shall apply to the company, and the requirements, if any, additional to those prescribed in this Act for the alteration of such conditions;
- (b) in the case of a private company, provide that the directors and past directors shall be liable jointly and severally, together with the company, for such debts and liabilities of the company as are or were contracted during their periods of office, in which case the said directors and past directors shall be so liable.

### **54 Form and signing of memorandum**

- (1) The memorandum shall be and be completed in the form prescribed.
- (2) The memorandum of a public company shall be signed by not less than seven subscribers and of a private company by one or more subscribers, stating their full names, occupations and residential, business and postal addresses, and each subscriber shall sign the memorandum in the presence of at least one witness who shall attest the signature and state his residential, business and postal address.

#### *Alteration of Memorandum (ss 55-58)*

### **55 Alteration of memorandum to objects and powers**

- (1) Subject to the provisions of section 53 (a), a company may by special resolution make additions to or alter the provisions of its memorandum with respect to the objects and powers of the company.

[Sub-s. (1) substituted by s. 4 of Act 111 of 1976.]

- (2) An existing company may by special resolution alter its memorandum with respect to the objects and powers of the company so as to bring it into conformity with the provisions of this Act.

### **56 Alteration of memorandum as to special conditions and other provisions**

- (1) Subject to the provisions of subsection (3) and unless prohibited by the condition itself, a special condition contained in the memorandum may be altered by special resolution or in the manner prescribed in any such special condition.
- (2) Any private company may at any time by special resolution and with the written consent of

each person being then a director of the company, incorporate in its memorandum the provision referred to in section 53 (b).

(3) A private company may by special resolution alter or remove the provision referred to in section 53 (b) and contained in its memorandum provided the alteration or removal is confirmed by the Court if it is satisfied that such alteration or removal would be just and equitable.

(4) Any other provision of the memorandum of a company may be altered by special resolution.

(5) Nothing in this section shall authorize any alteration of a memorandum constituting a variation or abrogation of the special rights of any class of members, save and except that such rights may be altered or abrogated in the manner prescribed in the memorandum for such variation or abrogation.

### **57 Substitution of memorandum in other language**

A company may, by special resolution, substitute for its existing memorandum in any of the official languages of the Republic, a translation thereof in another official language: Provided that the memorandum in the original language shall be decisive in the construction of the memorandum so substituted therefor.

[S. 57 substituted by s. 5 of Act 35 of 1998.]

### **58 Lodgment of altered memorandum**

(1) The Registrar may in writing request any company which has lodged with him a special resolution altering its memorandum, to lodge with him, within fourteen days after the date of the request, a copy of the memorandum as so altered.

(2) Any company which fails to comply with any request under subsection (1), shall be guilty of an offence.

### *Articles of Association (ss 59-62)*

### **59 Companies to have articles of association**

(1) There shall be registered with the memorandum of a company, articles of association, prescribing articles for the company.

(2) The articles of a company having a share capital-

(a) if a public company, may consist of the articles contained in Table A of Schedule 1; and

(b) if a private company, may consist of the articles contained in Table B of Schedule 1,

subject to such additions, omissions and modifications as are stated in the articles, and the articles contained in the said Schedule shall, so far as applicable and not excluded or modified, apply to that company: Provided that after the commencement of this Act any condition contained in the articles of a company for compulsory loans to be made by members of the company to the company shall be of no force or effect.

### **60 Contents and form of articles of association**

(1) The articles shall be and be completed in the form prescribed.

(2) The articles shall be signed by each subscriber of the memorandum stating his full name, occupation and residential, business and postal address, in the presence of at least one witness who shall attest the signature and state his residential, business and postal address.

### **61 Consolidation of articles**

A company may at any time after the registration of its articles, submit to the Registrar a document in the prescribed form, containing a consolidated and full statement of all the articles applying to the company, on payment of the prescribed fee, the Registrar must issue, in respect of that document, a certificate to the effect that the articles stated therein constitute the articles of the company as at the date of the certificate.

[S. 61 substituted by s. 12 of Act 24 of 2006.]

### **62 Alteration of articles**

(1) Subject to the provisions of this Act and to the conditions contained in its memorandum, a company may by special resolution alter or add to its articles; and any alteration or addition so made shall be as valid as if originally contained therein, and be subject in like manner to alteration by special resolution.

(2) The provisions of section 58 relating to the lodgment of an altered memorandum shall apply *mutatis mutandis* to the lodgment of altered articles.

### *Registration and Incorporation (ss 63-67)*

## **63 Registration of memorandum and articles**

Cases

(1) If a memorandum and articles complying with the requirements of this Act are lodged with the Registrar in the manner prescribed, he or she shall upon payment of the prescribed fee, register such memorandum and articles.

[Sub-s. (1) substituted by s. 3 of Act 18 of 1990 by s. 7 (a) of Act 35 of 2001 and by s. 13 (a) of Act 24 of 2006.]

(2) In addition to the prescribed fee referred to in subsection (1) an additional fee shall be payable calculated at the rate of-

- (a) in the case of a company having a nominal share capital with shares having a par value, a prescribed amount for each thousand rand or part thereof;
- (b) in the case of a company having shares of no par value, a prescribed amount for each thousand shares or part thereof;
- (c) in the case of a company having both shares of par value and shares of no par value, the aggregate of the amounts calculated on the basis laid down in paragraphs (a) and (b) of this subsection.

[Sub-s. (2) substituted by s. 4 of Act 76 of 1974, amended by s. 3 (1) of Act 29 of 1982, substituted by s. 4 of Act 31 of 1986, amended by s. 2 of Act 78 of 1989 and substituted by s. 3 of Act 39 of 2002.]

(3) .....

[Sub-s. (3) deleted by s. 13 (b) of Act 24 of 2006.]

(4) Upon the registration of the memorandum and articles of a company the Registrar shall allocate a registration number to the company concerned: Provided that the Registrar may change such registration number in order to rectify duplications of such numbers or to achieve any other objective which it is necessary or expedient to achieve for the proper maintenance of the register of companies.

[Sub-s. (4) added by s. 2 of Act 29 of 1985 and amended by s. 7 (b) of Act 35 of 2001.]

## **64 Certificate of incorporation and its value as evidence**

Cases

(1) Upon the registration of the memorandum and articles of a company the Registrar must issue a certificate to the effect that the company is incorporated.

[Sub-s. (1) substituted by s. 14 of Act 24 of 2006.]

(2) A certificate of incorporation given by the Registrar in respect of any company shall upon its mere production, in the absence of proof of fraud, be conclusive evidence that all the requirements of this Act in respect of registration and of matters precedent and incidental thereto, have been complied with, and that the company is a company duly incorporated under this Act.

## **65 Effect of incorporation on company and members**

(1) From the date of incorporation stated in the certificate of incorporation, the subscribers of the memorandum together with such other persons as may from time to time become members of the company, shall be a body corporate with the name stated in the memorandum, capable of exercising all the functions of an incorporated company, and having perpetual succession, but with such liability (if any) on the part of the members to contribute to the assets of the company in the event of its being wound up as provided by this Act.

(2) The memorandum and articles shall bind the company and the members thereof to the same extent as if they respectively had been signed by each member, to observe all the provisions of the memorandum and of the articles, subject to the provisions of this Act.

#### **66 Members may become liable where membership reduced below minimum**

If any public company other than a wholly owned subsidiary carries on business for more than six months while it has less than seven members, every person who is a member of the company during the time that it so carries on business after those six months and is cognizant of the fact that it is so carrying on business, shall be liable for the payment of the whole of the debts of the company contracted during that time and may be sued for the same without any other member being joined in the action.

#### **67 Members' rights to copies of memorandum and articles**

(1) A company shall send to every member at his request and on payment of an amount of fifty cents or such lesser amount as the company may determine, a copy of its memorandum and of its articles, or shall, if so requested, afford to a member or his duly authorized agent adequate facilities for making a copy of such memorandum and articles.

(2) Any company which fails to comply with any request under subsection (1), shall be guilty of an offence.

#### *Incidental Matters (ss 68-72)*

#### **68 Issued copies of memorandum or articles to embody alterations**

(1) Every copy of the memorandum or articles of a company issued after the date on which any alteration has been made thereto, shall include the alteration.

(2) A company which at any time after the date of any such alteration issues a copy of its memorandum or articles which does not include the alteration, shall be guilty of an offence.

#### **69 Contracts by companies**

##### Cases

(1) Contracts on behalf of a company may be made as follows:-

- (a) Any contract which if made between individual persons would by law be required to be in writing signed by the parties to be charged therewith may be made on behalf of the company in writing signed by any person acting under its authority, expressed or implied, and may in the same manner be varied or discharged;
- (b) any contract which if made between individual persons would by law be valid though made orally only and not reduced to writing, may be made orally on behalf of the company by any person acting under its authority, expressed or implied, and may in the same manner be varied or discharged.

(2) All contracts made in accordance with this section shall be effectual in law and shall bind the company and its successors and all other parties thereto.

#### **70 Promissory notes and bills of exchange**

A bill of exchange or promissory note shall be deemed to have been made, accepted or endorsed on behalf of a company if made, accepted or endorsed in the name of or by or on behalf or on account of, the company by any person acting under its authority.

#### **71 Service of documents upon companies**

Any notice, order or other document which by this Act may be or is required to be served upon any company, including any external company, may be served by delivering it at or sending it by registered post to the registered office or postal address of the company.

#### **72 Arbitration between companies and others**

(1) A company may agree to refer and may refer to arbitration any existing or future difference between itself and any other company or person.

(2) Companies which are parties to the arbitration may delegate to the arbitrator power to settle

or determine any matter capable of being lawfully settled or determined by the companies themselves or by their directors or other managing body.

### *Deregistration (s 73)*

## **73 Cancellation of registration of memorandum and articles**

### Cases

(1) If a company has failed, for a period of more than six months, to lodge an annual return in compliance with section 173 or if the Registrar has reasonable cause to believe that a company is not carrying on business or is not in operation, the Registrar shall, in accordance with subsection (7), send to the company by registered post a letter enquiring whether it is carrying on business or is in operation.

[Sub-s. (1) substituted by s. 5 (a) of Act 59 of 1978, by s. 4 (1) of Act 29 of 1982 and by s. 5 of Act 31 of 1986, amended by s. 28 of Act 35 of 2001 and substituted by s. 4 of Act 39 of 2002.]

(2) .....

[Sub-s. (2) deleted by s. 5 (b) of Act 59 of 1978.]

(3) If the Registrar does not within one month after sending the letter receive any answer thereto or receives an answer to the effect that the company is not carrying on business or is not in operation, he or she may publish in the prescribed manner and send to the company by registered post a notice that at the expiration of two months from the date of that notice the company mentioned therein will, unless good cause is shown to the contrary, be deregistered.

[Sub-s. (3) substituted by s. 5 (c) of Act 59 of 1978, amended by s. 28 of Act 35 of 2001 and substituted by s. 15 (a) of Act 24 of 2006.]

(4) .....

[Sub-s. (4) deleted by s. 5 (d) of Act 59 of 1978.]

(5) At the expiration of the period mentioned in any notice referred to in subsection (3) or upon receipt from any company of a written statement signed by every director thereof to the effect that the company has ceased to carry on business and has no assets or liabilities, the Registrar may, unless good cause to the contrary has been shown by the company, deregister the company concerned, and shall give notice of the deregistration and the date thereof in the prescribed manner: Provided that the liability (if any) of every director, officer and member of the company shall continue and may be enforced as if the company had not been deregistered.

[Sub-s. (5) substituted by s. 5 (e) of Act 59 of 1978 and by s. 15 (a) of Act 24 of 2006.]

(5A) (a) When any company has been deregistered the books and papers of the company may be disposed of in such way as the Registrar may direct.

(b) After five years from the deregistration of a company, no responsibility shall rest on any person to whom the custody of the books and papers has been committed, by reason of the same not being forthcoming to a person claiming to be interested therein.

[Sub-s. (5A) inserted by s. 4 of Act 18 of 1990.]

(6) (a) The Court may, on application by any interested person or the Registrar, if it is satisfied that a company was at the time of its deregistration carrying on business or was in operation, or otherwise that it is just that the registration of the company be restored, make an order that the said registration be restored accordingly, and thereupon the company shall be deemed to have continued in existence as if it had not been deregistered.

(b) Any such order may contain such directions and make such provision as to the Court seems just for placing the company and all other persons in the position, as nearly as may be, as if the company had not been deregistered.

[Sub-s. (6) substituted by s. 5 (f) of Act 59 of 1978.]

(6A) Notwithstanding subsection (6), the Registrar may, if a company has been deregistered due to its failure to lodge an annual return in terms of section 173, on application by the company

concerned and on payment of the prescribed fee, restore the registration of the company, and thereupon the company shall be deemed to have continued in existence as if it had not been deregistered: Provided that the Registrar may only so restore the registration of the company after it has lodged the outstanding annual return and paid the outstanding prescribed fee in respect thereof.

[Sub-s. (6A) inserted by s. 15 (b) of Act 24 of 2006.]

(7) A letter or notice under this section shall be addressed to the company at its registered office, its postal address and to the care of the directors or officers and the auditor of the company or may, if there is no director, officer or auditor of the company whose name and address is known to the Registrar, be sent to each of the persons who signed the memorandum of the company, at the address mentioned in the memorandum.

***Companies which cease to be registered in the Republic (ss 73A-73D)***

[Heading inserted by s. 1 of Act 115 of 1979.]

**73A to 73D inclusive .....**

[Ss. 73A to 73D inclusive inserted by s. 1 of Act 115 of 1979 and repealed by s. 8 of Act 35 of 2001.]

**CHAPTER V**

**SHARE CAPITAL, ACQUISITION BY COMPANIES OF OWN SHARES, SHARES, ALLOTMENT AND ISSUE OF SHARES, MEMBERS AND REGISTER OF MEMBERS, DEBENTURES, TRANSFERS, AND RESTRICTIONS ON OFFERING SHARES FOR SALE**

**(ss 74-141)**

[Heading amended by s. 5 of Act 37 of 1999.]

***Share Capital (ss 74-82)***

**74 Share capital may be divided into par value shares or may be constituted by shares of no par value**

The share capital of a company may be divided into shares having a par value or may be constituted by shares having no par value: Provided that all the ordinary shares or all the preference shares shall consist of either the one or the other.

**75 Company may alter share capital and shares**

(1) Subject to the provisions of sections 56 and 102 a company having a share capital, if so authorized by its articles, may by special resolution-

- (a) increase its share capital by new shares of such amount, or increase the number of its shares having no par value, as it thinks expedient;
- (b) increase its share capital constituted by shares of no par value by transferring reserves or profits to the stated capital, with or without a distribution of shares;
- (c) consolidate and divide all or any part of its share capital into shares of larger amount than its existing shares or consolidate and reduce the number of the issued no par value shares;
- (d) increase the number of its issued no par value shares without an increase of its stated capital;
- (e) subdivide its shares, or any of them, into shares of smaller amount than is fixed by the memorandum;
- (f) convert all of its ordinary or preference share capital consisting of shares having a par value into stated capital constituted by shares of no par value, subject to the provisions of this Act: Provided that an existing company may not so convert any share capital which is not fully paid up;
- (g) convert its stated capital constituted either by ordinary or preference shares of no par value into share capital consisting of shares having a par value, subject to the provisions of this Act;
- (h) cancel shares which at the time of the passing of the resolution in that behalf, have not

been taken or agreed to be taken by any person and diminish the amount of its authorized share capital by the amount of the shares so cancelled or may cancel shares of no par value which have not so been taken or agreed to be taken;

- (i) convert any of its shares, whether issued or not, into shares of another class.

[Para. (i) added by s. 5 (1) (b) of Act 111 of 1976.]

[Sub-s. (1) amended by s. 5 (1) (a) of Act 111 of 1976.]

(2) A cancellation of shares under subsection (1) (h) shall not be deemed to be a reduction of capital within the meaning of this Act.

(3) Where under subsection (1) a company-

- (a) increases its share capital by shares of a fixed amount, it shall pay to the Registrar an amount of five rand for each one thousand rand, or part thereof, by which the share capital is increased;

[Para. (a) substituted by s. 6 (a) of Act 31 of 1986.]

- (b) increases the number of its shares of no par value, it shall-

- (i) lodge with the Registrar, in the prescribed manner, a certificate given by the auditor of the company showing the value of each issued share arrived at by dividing the number of issued shares into the stated capital; and
- (ii) pay to the Registrar an amount of five rand for each thousand rand or part thereof calculated by multiplying the number by which the number of the shares has been increased by the value of each share as certified under subparagraph (i).

[Sub-para. (ii) substituted by s. 6 (b) of Act 31 of 1986.]

(4) If, in the case of a company which has converted its share capital under subsection (1) (f) and at any time thereafter passed a special resolution to convert its stated capital as contemplated in subsection (1) (g), shares which at the time of the passing of that special resolution have not been taken or agreed to be taken by any person-

- (a) are converted as so contemplated, subsection (3) (a) shall apply *mutatis mutandis* in respect of any amount by which the share capital of the company is increased, which amount shall be the amount by which the nominal share capital after the conversion under subsection (1) (g) exceeds the nominal share capital before the conversion under subsection (1) (f);
- (b) are not converted as so contemplated, those shares shall be cancelled *mutatis mutandis* in accordance with subsection (1) (h).

[Sub-s. (4) added by s. 2 of Act 82 of 1992.]

## **76 Premiums received on issue of shares to be share capital, and limitation on application thereof**

### Cases

(1) Where a company which is not a banking institution in terms of the Banks Act, 1990 (Act 94 of 1990), issues shares at a premium, whether for cash or otherwise, a sum equal to the aggregate amount or value of the premiums on those shares shall be transferred to an account to be called the 'share premium account', and the provisions of this Act relating to the share capital of a company shall, except as provided in this section, apply as if the share premium account were paid-up share capital of the company.

[Sub-s. (1) substituted by s. 9 of Act 35 of 2001.]

(2) Where assets are acquired by the issue of shares of a company and no consideration is recorded, the assets so acquired shall be valued and if the value of the assets is more than the par value of such shares, the difference between the par value of the shares and the value of the assets so acquired shall be transferred to the share premium account.

(3) The share premium account may, notwithstanding anything contained in subsection (1), be

applied by the company-

- (a) in paying up unissued shares of the company to be issued to members of the company as fully paid capitalization shares;
- (b) in writing off-
  - (i) the preliminary expenses of the company; or
  - (ii) the expenses of, or the commission paid or discount allowed on, the creation or issue of any shares of the company; or
- (c) in providing for the premium payable on redemption of any redeemable preference shares of the company: Provided that-
  - (i) such premium shall not be so provided unless it is payable according to the terms of issue of the shares concerned and such terms have been embodied in the articles of the company as from a date prior to the date on which such shares were allotted and issued or on such later date as may be allowed by the Court on application to it;
  - (ii) in the case of ordinary shares which are converted into redeemable preference shares redeemable at a premium, only that portion of the amount standing to the credit of the share premium account which arose on the original issue of such shares may be applied in providing for the premium payable on redemption;
  - (iii) the provisions of paragraphs (i) and (ii) of this proviso shall not apply in respect of redeemable preference shares issued before the commencement of the Companies Amendment Act, 1992; or
- (d) for the payment of the premium over the par value in the case of an acquisition of shares in accordance with section 85.

[Para. (d) added by s. 6 of Act 37 of 1999.]

[Sub-s. (3) substituted by s. 3 of Act 82 of 1992.]

(4) This section shall as from six months after the date of its commencement apply to any company in respect of any balance of share premiums as at the said commencement date which arose from the issue of shares at a premium before the first day of January, 1953.

(5) This section shall also apply to any company in respect of any balance of share premiums which arose from the issue of shares on or after 1 January 1953.

[Sub-s. (5) added by s. 5 of Act 76 of 1974.]

#### **77 Proceeds of issue of shares of no par value to be stated capital**

(1) The whole of the proceeds of an issue of shares having no par value shall be paid-up share capital of a company and shall be transferred to an account to be called the 'stated capital account'.

(2) If shares having no par value are issued by a company for a consideration other than cash, a sum equal to the value of the consideration as determined by the directors shall be transferred to the stated capital account.

(3) The stated capital account may, notwithstanding anything contained in subsection (1) or (2), be applied by a company in writing off-

- (a) the preliminary expenses of the company; or
- (b) the expenses of, or the commission paid on, the creation or issue of any such shares.

#### **78 Effect of conversion of par value share capital into no par value share capital and vice versa**

(1) Where a company converts all its ordinary or preference shares having a par value, or both such ordinary and such preference shares, into shares without par value, there shall be transferred to the stated capital account of the company-

- (a) the whole of the ordinary or preference share capital, as the case may be; and
- (b) the whole of the share premium account or that part thereof contributed to it by the shares so converted.

(2) Where a company converts all its ordinary or preference shares of no par value or both such ordinary and such preference shares into shares having a par value, there shall be transferred to the share capital account of the company the whole of the stated capital account or that part thereof contributed to it by the shares so converted.

(3) Fractions, fractional surpluses or amounts arising in respect of the nominal share capital or the stated capital may be rounded off but material reductions shall be placed to non-distributable reserves.

#### **79 Payment of interest out of capital in certain cases**

(1) Where any shares of a company are issued for the purpose of raising money to defray the expenses of the construction of works or buildings or for the provision of plant, which cannot be made profitable for a lengthy period, the company may pay interest on the share capital for the period and subject to the conditions and restrictions in this section mentioned, and may charge the same to capital as part of the cost of construction of the works or buildings or the provision of plant.

(2) (a) No such payment shall be made under subsection (1) unless it is authorized by the articles or by special resolution of the company, and the approval of the Minister has first been had and obtained.

(b) The Minister may, before approving any such payment, at the expense of the company, appoint a person to enquire into and report to him on the circumstances of the case, and may before making the appointment require the company to give sufficient security for the payment of the costs of the enquiry.

(c) Any such payment shall be made only for such period as may be determined by the Minister and such period shall in no case extend beyond the close of the half-year next after the half-year during which the works or buildings have been actually completed or the plant provided.

(d) The rate of interest shall in no case exceed six per cent per annum or such lower rate as may for the time being be determined by the Minister.

(e) The payment of the interest shall not operate as a reduction of the amount paid up on the shares in respect of which it is paid.

(3) For the purposes of subsection (2) (c) the expression 'half-year' in relation to a company, means the period of six months commencing on the first or ending on the last day of the financial year of that company.

#### **80 Restriction of power to pay commission and discounts; return to Registrar**

(1) A company may pay commission to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, for any shares of the company, or of his procuring or agreeing to procure subscriptions, whether absolute or conditional, for any shares of the company if-

(a) the payment of the commission is authorized by the articles; and

(b) the commission paid or agreed to be paid does not exceed ten per cent of the price at which shares are issued or any lesser rate fixed by the articles; and

(c) the amount or rate per cent of the commission paid or agreed to be paid is-

(i) in the case of shares offered to the public, disclosed in the prospectus; or

(ii) in the case of shares not offered to the public, disclosed in a statement in the prescribed form and where any circular or notice, not being a prospectus, inviting subscription for shares is issued, also disclosed in that circular or notice; and

(d) the number of shares for which persons have agreed, for a commission, to subscribe absolutely, is disclosed in the manner aforesaid.

(2) The statement referred to in subsection (1) (c) (ii) shall be lodged with the Registrar for registration before the payment of the commission to which the statement relates.

(3) Save as aforesaid and subject to the provisions of section 81, no company shall apply any of

its shares or capital money either directly or indirectly in payment of any commission, discount or allowance to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, for any shares of the company, or of his procuring or agreeing to procure subscriptions, whether absolute or conditional, for any shares of the company, whether the shares or money be so applied by being added to the purchase price of any property acquired by the company or to the contract price of any work to be executed for the company or the money be paid out of the nominal purchase price or contract price, or otherwise.

(4) Nothing in this section shall affect the power of any company to pay such brokerage as it has heretofore been lawful for a company to pay.

(5) A vendor to, promoter of, or other person who receives payment in money or shares from, a company, shall have and shall be deemed always to have had power to apply any part of the money or shares so received in payment of any commission, the payment of which, if made directly by the company, would have been lawful under this section.

(6) If default is made in complying with the requirements of subsection (2) relating to the lodging of the statement referred to therein with the Registrar, the company, and every director and officer of the company who knowingly is a party to the default, shall be guilty of an offence.

### **81 Issue of shares of par value at a discount**

(1) A company may issue at a discount shares of the company of a class already issued if the following conditions have been complied with:

- (a) Such issue must be authorized by special resolution of the company specifying the maximum rate of discount at which the shares are to be issued; and
- (b) not less than one year must at the date of issue have elapsed since the date on which the company became entitled to commence business or the date of the first issue of the class of shares; and
- (c) such issue must be sanctioned by the Court; and
- (d) the shares to be issued at a discount must be issued within one month after the date on which the issue is sanctioned by the Court or within such extended time as the Court may allow.

(2) The Court may on application for an order sanctioning any such issue, having regard to all the circumstances of the case, make an order on such terms and conditions as it thinks fit.

(3) Every prospectus relating to the issue of shares by the company after the issue of the shares at a discount under this section shall contain particulars of the discount allowed on the issue of those shares or of so much of that discount as has not been written off at the date of the issue of the prospectus.

(4) If default is made in complying with the requirements of subsection (3), the company, and every director and officer of the company who knowingly is a party to the default, shall be guilty of an offence.

### **82 Issue price of shares of no par value requiring special resolution**

(1) No company shall issue shares having no par value of a class already issued at a price lower than an amount arrived at by dividing that part of the stated capital contributed by already issued shares of that class, by the number of issued shares of that class, unless the issue price of such shares is authorized by a special resolution of the company.

(2) The notice convening the meeting for the purpose of passing the special resolution referred to in subsection (1) shall be accompanied by a report by the directors setting out the reasons for the proposed lower issue price.

(3) A special resolution under subsection (1) shall not be capable of being registered in the Companies Registration Office unless the copy thereof lodged with the Registrar is accompanied by a copy of the report by the directors referred to in subsection (2).

(4) This section shall not apply where the issue of shares is in pursuance of an offer for subscription to all existing members in proportion to their shareholdings, whether with or without the right to renounce in favour of other persons.

***Aquisition by Companies of own Shares (ss 83-90)***

[Heading substituted by s. 7 of Act 37 of 1999.]

**83** .....

Cases

[S. 83 repealed by s. 8 of Act 37 of 1999.]

**84** .....

Cases

[S. 84 repealed by s. 8 of Act 37 of 1999.]

**85 Companies may under certain circumstances acquire shares issued by it**

Cases

(1) Subject to the provisions of this section and any other applicable law, a company may by special resolution of the company, if authorized thereto by its articles, approve the acquisition of shares issued by the company.

(2) The approval by special resolution may be a general approval or a specific approval for a particular acquisition.

(3) If the approval is a general approval, it shall be valid only until the next annual general meeting of the company, but it may be varied or revoked by special resolution by any general meeting of the company at any time prior to such annual general meeting.

(4) A company shall not make any payment in whatever form to acquire any share issued by the company if there are reasonable grounds for believing that-

- (a) the company is, or would after the payment be, unable to pay its debts as they become due in the ordinary course of business; or
- (b) the consolidated assets of the company fairly valued would after the payment be less than the consolidated liabilities of the company.

(5) In the case of the acquisition of par value shares issued by the company, the issued capital shall be decreased by an amount equal to the par value of the shares so acquired.

(6) In the case of the acquisition of no par value shares issued by the company, the stated capital of the class of shares so acquired shall be decreased by an amount derived by multiplying the number of shares of that class so acquired with the amount arrived at by dividing the stated capital contributed by issued shares of that class by the number of issued shares of that class.

(7) If par value shares are acquired at a premium over the par value, the premium may be paid out of reserves, including statutory non-distributable reserves.

(8) Shares issued by a company and acquired under this section shall be cancelled as issued shares and restored to the status of authorized shares forthwith.

(9) Shares in the capital of a company may not be acquired under this section if, as a result of such acquisition, there would no longer be any shares in issue other than convertible or redeemable shares.

[S. 85 amended by s. 5 of Act 70 of 1984 and substituted by s. 9 of Act 37 of 1999.]

**86 Liability of directors and shareholders under certain circumstances**

Cases

(1) The directors of a company who, contrary to the provisions of section 85 (4), allow the company to acquire any share issued by it, are jointly and severally liable to restore to the company any amount so paid and not otherwise recovered by the company, subject to any relief granted by the Court under section 248.

(2) A director who is liable under subsection (1) may apply to the Court for an order compelling a shareholder or former shareholder to pay to the company any money that was paid to such shareholder contrary to section 85 (4).

(3) Where the acquisition by the company of shares issued by it is in contravention of the provisions of section 85 (4), any creditor who was a creditor at the time of the acquisition, or who is a creditor by reason of a cause of debt which arose before such acquisition, or any shareholder, may apply to the Court for an order, and the Court may, if it finds it equitable to do so-

- (a) order a shareholder or former shareholder to pay to the company any money or return any consideration that was paid or given by the company to acquire the shares;
- (b) order the company to issue an equivalent number of shares to the shareholder or former shareholder;
- (c) make such other order as it thinks fit.

(4) An action to enforce a liability imposed by this section must be instituted within three years after the date of completion of the acquisition.

(5) Nothing contained in this section shall limit or diminish any liability which any person may incur under this Act or any other law, or the common law.

(6) For the purposes of this section and section 89 'director of a company' includes any director of a holding company of such company.

[S. 86 amended by s. 5 (1) of Act 84 of 1980 and substituted by s. 10 of Act 37 of 1999.]

## **87 Procedure of acquisition of certain shares by company**

### Cases

(1) Save as is provided in subsection (2), a company that proposes to acquire shares issued by it shall-

- (a) deliver or mail a copy of the written offering circular in the prescribed form, to each registered shareholder on record as at the date of the offer in such manner as may be provided in the articles of the company for the sending of any notice of a meeting of shareholders, stating the number and the class or kind of its issued shares which the company proposes to acquire, and specifying the terms and reasons for the offer;
- (b) lodge a copy of the offering circular with the Registrar within 15 days of the date that it is delivered or mailed to the shareholders of the company.

(2) The provisions of subsection (1) shall not apply-

- (a) if, and to the extent that, the shares are acquired by special resolution passed in terms of section 85 (1) and the approval by such special resolution is a specific approval contemplated in section 85 (2);

[Para. (a) substituted by s. 10 of Act 35 of 2001.]

- (b) in the case of a company whose shares are listed on a stock exchange within the Republic, to the acquisition by that company of shares in terms of transactions effected on such stock exchange in accordance with the rules and listing requirements of that exchange.

(3) The provisions of sections 160, 161, 162 and 163 shall apply *mutatis mutandis* to all documents issued in terms of subsection (1).

(4) Where in response to any offer to acquire shares, the shareholders propose to dispose of a greater number of shares than the company offered to acquire, the company shall acquire from all of the shareholders who offered to sell, *pro rata* as nearly as possible disregarding fractions: Provided that this subsection shall not apply to the acquisition of shares in terms of transactions effected on a stock exchange within the Republic.

(5) A company that acquires shares issued by it shall notify the Registrar within 30 days of the date of the acquisition in the prescribed form of the date, number and class of shares that it has

acquired.

(6) A stock exchange within the Republic may, in addition to any requirements contained in this Act, determine further requirements with which a company whose shares are listed on such exchange shall comply prior to such company acquiring its own shares.

[S. 87 substituted by s. 11 of Act 37 of 1999.]

## **88 Enforceability of contracts for acquisition by company of certain shares**

Cases

(1) A contract with a company providing for the acquisition of shares issued by it is enforceable against the company, except if the company cannot execute the contract without being in breach of section 85 (4).

(2) In an action brought on a contract referred to in subsection (1), the company has the burden of proving that execution thereof is or will be in breach of section 85 (4).

(3) Until the company has fully performed its obligations in terms of a contract referred to in subsection (1), shareholders who dispose of their shares retain the status of claimants entitled to be paid as soon as the company is lawfully able to do so or, on liquidation, to be ranked subordinate to creditors and shareholders whose claims are in priority to the claims of the class of shares which they disposed of to the company, but in priority to the claims of the other shareholders.

[S. 88 substituted by s. 12 of Act 37 of 1999.]

## **89 Subsidiaries may acquire certain shares in holding company**

Cases

Subsidiary companies may *mutatis mutandis* in accordance with sections 85, 86, 87 and 88, acquire shares in their holding company to a maximum of 10 per cent in the aggregate of the number of issued shares of the holding company: Provided that this section shall not apply to the acquisition of shares by a holding company in a subsidiary of itself.

## **90 Payments to shareholders**

Cases

(1) A company may make payments to its shareholders subject to the provisions of this section and if authorized thereto by its articles.

(2) A company shall not make any payment in whatever form to its shareholders if there are reasonable grounds for believing that-

- (a) the company is, or would after the payment be, unable to pay its debts as they become due in the ordinary course of business; or
- (b) the consolidated assets of the company fairly valued would after the payment be less than the consolidated liabilities of the company.

(3) For the purposes of this section 'payment' includes any direct or indirect payment or transfer of money or other property to a shareholder of the company by virtue of the shareholder's shareholding in the company, but excludes an acquisition of shares in terms of section 85, a redemption of redeemable preference shares in terms of section 98, any acquisition of shares in terms of an order of Court and the issue of capitalisation shares in the company.

(4) A shareholder shall be liable to the company for any payment received contrary to the provisions of subsection (2).

[S. 90 substituted by s. 14 of Act 37 of 1999.]

### ***Shares (ss 91-91A)***

## **91 Nature of shares**

Cases

The shares or other interest which any member has in a company shall be movable property, transferable in the manner provided by this Act and the articles of the company.

## 91A Uncertificated securities

(1) **'central securities depository'** means a central securities depository as defined in section 1 of the Securities Services Act, 2004;

[Definition of 'central securities depository' substituted by s. 117 of Act 36 of 2004.]

**'certificated securities'** means certificated securities as defined in section 29 of the Securities Services Act, 2004;

[Definition of 'certificated securities' inserted by s. 117 of Act 36 of 2004.]

**'participant'** means a participant as defined in section 1 of the Securities Services Act, 2004;

[Definition of 'participant' substituted by s. 117 of Act 36 of 2004.]

**'subregister'** means the record of uncertificated securities administered and maintained by a participant, which forms part of the relevant company's register of members as referred to in this Act;

**'uncertificated securities'** means uncertificated securities as defined in section 29 of the Securities Services Act, 2004, which are entered in the relevant company's register of members as uncertificated securities in terms of subsection (3) (a).

[Definition of 'uncertificated securities' substituted by s. 117 of Act 36 of 2004.]

(2) (a) This section shall apply to uncertificated securities, notwithstanding any provision to the contrary contained in this Act or in any other law, the common law, an agreement or any articles.

(b) Where any provision of this Act is not expressly or impliedly amended by this section, this Act shall apply in respect of uncertificated securities in the same manner as it applies to certificated securities.

[Para. (b) substituted by s. 117 of Act 36 of 2004.]

(3) (a) A company shall enter in its register of members, in respect of every class of securities, the total number of securities held in uncertificated form.

(b) A subregister which shall form part of the relevant company's register of members shall, notwithstanding subsection (4) (d), contain the details referred to in sections 105 and 133: Provided that no name of any person for whom a participant holds uncertificated securities as nominee shall form part of the subregister;

(c) A participant shall be responsible for entering the information referred to in sections 105 and 133 in a subregister and for ensuring the correctness of all transfers of uncertificated securities effected by the participant.

(d) A participant shall, at the request of a company and against payment of such fee as may be prescribed by the Minister from time to time, furnish that company with such details of uncertificated securities in the company as are reflected in the subregister maintained by the participant.

(e) (i) A person who wishes to inspect a subregister may do so only through the relevant company in terms of section 113.

(ii) A company shall, within seven days of the date of a request for inspection, be required to produce a subregister which reflects at least the details referred to in paragraph (c) at the close of business on the day on which the request for inspection was made.

(f) (i) Every person for whom a participant holds uncertificated securities shall receive a regular statement from such participant setting out the number and identity of the uncertificated securities held on such person's behalf.

(ii) The cost and frequency of each statement shall be determined by regulation but shall not be borne by the person for whom the uncertificated securities are held.

(4) (a) Transfer of ownership in an uncertificated security shall be effected upon the debiting and crediting, respectively, of both the account in the subregister from which the transfer is effected and the account in the subregister to which transfer is to be made, in accordance with the rules of a central securities depository.

(b) A transferee shall, upon the entry of his, her or its name in a subregister, become a member

of and be recognised as a member by the company in respect of the uncertificated securities registered in his, her or its name.

(c) Transfer of ownership and membership in accordance with paragraphs (a) and (b) shall occur notwithstanding any fraud or illegality which may affect the uncertificated securities in respect of which the transfer was effected or which may have resulted in the transfer being effected: Provided that a transferee who was a party to or had notice of the fraud or illegality may not rely on this paragraph.

(cA) A court may not order the name of a member of a company contemplated in this subsection to be removed from a subregister, unless such person was a party to or had notice of a fraud or illegality as contemplated in paragraph (c).

[Para. (cA) inserted by s. 2 of Act 20 of 2004.]

(d) Section 133 shall not apply to the transfer of ownership of uncertificated securities and also not to the acquisition of membership of a company as a result of such transfer.

(e) A company shall be liable to a participant for such fee as may be prescribed by the Minister from time to time in respect of the transfer of ownership of uncertificated securities in the company.

(5) (a) Only a participant may effect the transfer of uncertificated securities in a subregister maintained by it.

(b) A participant shall transfer uncertificated securities in a subregister administered and maintained by it, only on receipt of an instruction to transfer sent and properly authenticated in terms of the rules of a central securities depository or by order of court.

(c) Nothing in this section shall prejudice any power of a participant to effect transfer to a person to whom the right to any uncertificated securities of a company has been transmitted by operation of law or agreement.

(6) Section 114 shall not apply to a subregister.

(7) (a) Subject to paragraph (b), a company shall not issue certificates evidencing, or purporting to evidence, title to uncertificated securities of the company, and sections 96 and 140 shall not apply to uncertificated securities.

(b) Any person who wishes to withdraw his, her or its uncertificated securities held by a participant and to obtain a certificate in respect of all or part of those securities, shall notify the participant thereof, in which case-

- (i) the participant shall within seven days notify the relevant company to provide such a certificate and shall remove the details of the uncertificated securities so withdrawn from the subregister maintained by the participant;
- (ii) the company shall, immediately on receipt of such a notice from a participant, enter the relevant person's name and details in respect of his, her or its holding in the company's register of members and indicate on such register that the securities so withdrawn are no longer held in uncertificated form;
- (iii) the company shall within 14 days of receipt of the notice referred to in subparagraph (ii) prepare and deliver to the relevant person a certificate in respect of the securities so withdrawn, and notify the central securities depository that the securities are no longer held in uncertificated form; and
- (iv) transfer of ownership or acquisition of membership in respect of the securities so withdrawn shall not be capable of being effected through a central securities depository while they remain in certificated form.

(8) A person who takes any unlawful action in consequence of which any of the following events occur in a register or subregister, namely-

- (a) the name of any person remains in, is entered in, or is removed or omitted;
- (b) the number of uncertificated securities is increased, reduced, or remains unaltered; or

(c) the description of any uncertificated security is changed, shall be liable to any person who has suffered any direct loss or damage arising out of such action.

(9) (a) A person who gives an instruction to transfer uncertificated securities shall warrant the legality and correctness of any such instruction.

(b) The person referred to in paragraph (a), shall indemnify the company and the participant effecting the transfer against any claim and against any direct loss or damage suffered by them arising out of such a transfer by virtue of an instruction referred to in paragraph (a).

(c) A participant who transfers uncertificated securities other than pursuant to an instruction to transfer that was sent and properly authenticated in terms of the rules of a central securities depository, shall indemnify the company against any claim made upon it and against any direct loss or damage suffered by it arising out of such transfer and such participant shall, in addition, indemnify any person who suffers any direct loss or damage arising out of such transfer, against such loss or damage.

(10) (a) Subject to subparagraph (b), when any new offer of securities is made by a company, the offeree may elect whether all or any part of the securities offered to him, her or it must be issued in certificated or uncertificated form.

(b) A company shall only issue or allot uncertificated securities to a person who is already a client of a participant or for whom a participant has agreed to act.

(11) The Minister may make regulations regarding matters which are supplementary and ancillary to the provisions of this section and which are not inconsistent with another provision of this Act.

(12) Any person-

(a) other than a participant, who effects the transfer of uncertificated securities in contravention of subsection (5) (a);

(b) who takes any unlawful action contemplated in subsection (8); or

(c) who, without proper authority, accesses any computer system or record maintained by a participant or a central securities depository,

shall be guilty of an offence and liable on conviction to a fine not exceeding R500 000 or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment.

[S. 91A inserted by s. 1 of Act 60 of 1998.]

### ***Allotment and Issue of Shares (ss 92-102)***

## **92 Shares not to be allotted or issued unless fully paid-up**

### **Cases**

(1) No company shall allot or issue any shares unless the full issue price of or other consideration for such shares has been paid to and received by the company.

(2) Notwithstanding the provisions of subsection (1), a company may allot or agree to allot shares not fully paid-up for the purpose of their being offered for sale to the public as fully paid-up shares: Provided that-

(a) if such offer is not made within one month from the date of such allotment or agreement, such allotment or agreement shall be void; or

(b) if such offer to the public is made but not accepted in full within two months from the date of such allotment or agreement to allot, the allotment of, or the agreement to allot, such shares in respect of which the full issue price is not paid within the said period, shall be void.

## **93 Register and return as to allotments**

(1) Every company having a share capital shall keep at its registered office or at the office where it is made up, a register of allotments of shares.

(2) Every company shall forthwith after the allotment of any shares enter in the register of allotments the names and addresses of the allottees, the number of shares allotted to each of them, the

amount paid for such shares and in the case of shares allotted as fully paid-up otherwise than for cash, full particulars of the consideration in respect of which the allotment was made and of the transaction or contract concerned.

(3) Whenever a company makes any allotment of its shares, the company shall within one month thereafter lodge with the Registrar-

- (a) a return in the form prescribed stating full particulars of the nominal and previously issued share capital or stated capital and the number and description of the shares comprised in the allotment;
- (b) in the case of shares allotted otherwise than for cash, a copy of the contract in writing constituting the title of the allottee to the allotment, together with any contract of sale, or for service or other consideration in respect of which that allotment was made (or if such contract is not in writing, a memorandum containing full particulars of such contract), and a return in the prescribed form stating the number and description of the shares so allotted, the name and address of such allottee and the consideration for which they have been allotted.

(4) If any allotment of shares becomes void as a result of any provision of this Act, the company shall within one month after the date on which such allotment becomes void, lodge a notice in the prescribed form to that effect with the Registrar.

(5) If default is made in complying with any of the requirements of this section, the company, and every director or officer of the company who knowingly is a party to the default, shall be guilty of an offence.

(6) The provisions of section 113 shall *mutatis mutandis* apply to the inspection of and the furnishing of copies of or extracts from such register of allotments.

#### **94 Certificate of shares or stock**

Cases

(1) A certificate signed-

- (a) by two directors of a company; or
- (b) by one director and one officer duly authorized thereto by the directors; or
- (c) in the case of a company having only one director and no officer, by that director,

and specifying any shares or stock of that company held by any member, shall be *prima facie* evidence of the title of the member to such shares or stock.

[Sub-s. (1) substituted by s. 6 of Act 70 of 1984.]

(2) Any such signatures may be affixed to or placed on the certificate by autographic, mechanical or electronic means.

[Sub-s. (2) substituted by s. 11 of Act 35 of 2001.]

#### **95 Numbering of shares and share certificates**

(1) (a) The shares of a company having a share capital shall, except in the case of shares or any particular class of shares which rank equally for all purposes, be distinguished by appropriate numbers.

(b) No provision in the articles of a company registered before the thirtieth day of June, 1950, requiring shares of that company to be numbered, shall apply in respect of shares which in terms of paragraph (a) of this subsection are not required to have distinguishing numbers.

(2) Where shares are not distinguished by appropriate numbers, the certificates of such shares shall be so distinguished, and upon the registration of transfer of any such shares the certificate relating thereto shall, in addition to the distinguishing number, bear on its face such an endorsement, in the form of a reference number or otherwise, as will enable the immediately preceding holder of the shares to be identified.

#### **96 Limitation of time for issue of share certificates**

(1) Every company shall within two months or within such extended time, not exceeding one

month, as the Registrar on good grounds shown and on payment of the prescribed fee, may grant, after the allotment of any of its shares, debentures or debenture stock, complete and have ready for delivery the certificates of all shares, the debentures or the certificates of all debenture stock allotted.

(2) If default is made in complying with the requirements of subsection (1), any person entitled to the certificates of shares, the debentures or the certificates of debenture stock in question may by notice in writing call upon the company to make good the default, and if the company fails to comply with the notice within ten days after service thereof, the Court may on the application of such person make an order directing the company to make good the default within such time as may be specified in the order, and if it thinks fit direct that any costs of or incidental to the application shall be borne by the company or by any director or officer of the company responsible for the default.

(3) If default is made in complying with the requirements of subsection (1), the company, and every director or officer thereof who knowingly is a party to the default, shall be guilty of an offence.

### **97 Validation of irregular creation, allotment or issue of shares**

#### Cases

(1) Where a company has purported to create, allot or issue shares and the creation, allotment or issue of such shares was invalid by virtue of any provision of this Act or any other law or of the memorandum or articles of the company or otherwise, or the terms of the creation, allotment or issue were inconsistent with or not authorized by any such provision, the Court may upon application made by the company or by any interested person and upon being satisfied that in all the circumstances it is just and equitable to do so, make an order validating the creation, allotment or issue of such shares or confirming the terms of the creation, allotment or issue thereof, subject to such conditions as the Court may impose.

(2) The Court shall, when making an order under subsection (1), direct that a copy thereof be lodged with the Registrar.

(3) Upon the registration of the copy of the said order by the Registrar and after the payment of all prescribed fees, the said shares shall be deemed to have been validly created, allotted or issued upon the terms of the creation, allotment or issue thereof and subject to the conditions imposed by the Court.

### **98 Redeemable preference shares**

#### Cases

(1) Subject to the provisions of this section, a company having a share capital, if so authorized by its articles, may issue preference shares which are, or at the option of the company are liable, to be redeemed: Provided that-

- (a) no such shares shall be redeemed except out of profits of the company which would otherwise be available for dividends or out of the proceeds of a fresh issue of shares made for the purposes of the redemption;
- (b) where any such shares are redeemed otherwise than out of the proceeds of a fresh issue, there shall, out of profits which would otherwise have been available for dividends, be transferred to a reserve fund, to be called the 'capital redemption reserve fund', a sum equal to the nominal amount of the shares redeemed, or if shares of no par value, to the book value of the shares redeemed, and the provisions of this Act relating to the share capital of a company shall, except as provided in this section, apply as if the capital redemption reserve fund were share capital of the company;  
[Para. (b) substituted by s. 12 of Act 35 of 2001.]
- (c) no such shares shall be redeemed unless and until the premium, if any, payable on redemption, has been provided for out of the profits of the company or out of the company's share premium account;
- (d) the redemption of such shares shall be effected on such terms and in such manner as shall be provided by the articles of the company.

(2) Where in pursuance of this section a company has redeemed or is about to redeem any preference shares, it shall have power to issue shares (including, if the company so decides by special resolution, shares other than redeemable preference shares) up to the nominal amount of the shares redeemed or to be redeemed or in the case of preference shares of no par value, up to the book value of the shares redeemed or to be redeemed, as if those shares had never been issued, and the share capital of the company or the number of shares of no par value shall not for the purposes of section 75 (3) be deemed to be increased by the issue of shares in pursuance of this subsection.

[Sub-s. (2) substituted by s. 15 of Act 69 of 1989 and amended by s. 6 of Act 35 of 1998 and by s. 80 (1) of Act 53 of 1999.]

(3) The redemption of redeemable preference shares shall not be deemed to constitute a reduction of a company's authorized share capital.

(4) The capital redemption reserve fund may, notwithstanding anything in this section contained, be applied by the company in paying up unissued shares of the company to be issued to members of the company as fully paid-up capitalization shares or for the payment of the premium over the par value in the case of an acquisition of shares in terms of section 85.

[Sub-s. (4) substituted by s. 15 of Act 37 of 1999.]

(5) (a) If a company has redeemed any redeemable preference shares, it shall within one month thereafter give notice thereof in the prescribed form to the Registrar specifying the shares so redeemed.

(b) If default is made in complying with the provisions of paragraph (a), the company shall be guilty of an offence.

(6) For the purposes of subsections (1) and (2) 'book value' in respect of preference shares of no par value, means that part of the stated capital contributed by the preference shares redeemed or to be redeemed.

(7) This section shall also apply in respect of any balance of any capital redemption reserve fund created by a company prior to 1 January 1974.

[Sub-s. (7) added by s. 4 of Act 64 of 1977.]

## **99 Conversion of shares into certain preference shares**

If a company has converted any of its shares into preference shares which are, or at the option of the company are liable, to be redeemed, the provisions of section 98 shall apply to such preference shares.

[S. 99 substituted by s. 6 of Act 111 of 1976.]

## **100 Conversion of shares into stock**

(1) A company having a share capital, if so authorized by its articles, may by special resolution convert all or any of its paid-up shares into stock and reconvert such stock into any number of paid-up shares.

(2) Where a company has converted any of its shares into stock, the provisions of this Act which in terms apply exclusively in respect of shares, shall cease to apply to so much of the share capital as has been so converted.

## **101 Share warrants to bearer**

(1) A public company having a share capital, if so authorized by its articles, may, with respect to any paid-up shares, or to stock, issue a warrant (in this Act termed a share warrant) stating that the bearer of the warrant is entitled to the shares or stock therein specified, and may provide, by coupons or otherwise, for the payment of the future dividends on the shares or stock included in the warrant.

(2) A share warrant shall entitle the bearer thereof to the shares or stock therein specified, and such shares or stock may be transferred by the delivery of the share warrant.

## **102 Variation of rights in respect of shares**

(1) If in the case of a company the share capital of which is divided into different classes of shares, provision is made by the memorandum or articles for authorizing the variation of the rights

attached to any class of shares of the company, subject to the consent of any specified proportion of the holders of the issued shares of that class or the sanction of a resolution passed at a separate meeting of the holders of those shares, and if in pursuance of the said provision the rights attached to any such class of shares are at any time varied, the holder of a share of that class, being a person who did not consent to or vote in favour of the resolution for the variation, may apply to the Court for an order under section 252.

(2) The expression 'variation' in this section includes abrogation and the expression 'varied' shall be construed accordingly.

(3) The company shall within one month from the date of the consent or resolution referred to in subsection (1) lodge with the Registrar in the prescribed form the particulars of such consent or resolution, and if default is made in complying with this provision, the company, and every director and officer thereof who knowingly is a party to the default, shall be guilty of an offence.

### ***Members and Register of Members (ss 103-115)***

## **103 Who are members of a company**

### Cases

(1) The subscribers of the memorandum of a company shall be deemed to have agreed to become members of a company upon its incorporation, and shall forthwith be entered as members in its register of members.

(2) Every other person who agrees to become a member of a company and whose name is entered in its register of members, shall be a member of the company.

(3) A company shall, subject to the provisions of its articles, enter in the register as a member, *nomine officii*, of the company, the name of any person who submits proof of his appointment as the executor, administrator, trustee, curator or guardian in respect of the estate of a deceased member of the company or of a member whose estate has been sequestrated or of a member who is otherwise under disability or as the liquidator of any body corporate in the course of being wound up which is a member of the company, and any person whose name has been so entered in the register shall for the purposes of this Act be deemed to be a member of the company.

(4) Subject to the provisions of section 213 (1) (b), the bearer of a share warrant may, if the articles of the company so provide, be deemed to be a member of the company within the meaning of this Act, either for all purposes or for such purposes as may be specified in the articles.

## **104 Trusts in respect of shares**

A company shall not be bound to see to the execution of any trust, whether express, implied or constructive, in respect of any share.

## **105 Register of members**

(1) Every company shall keep in one of the official languages of the Republic a register of its members, and shall forthwith enter therein-

- (a) the names and addresses of the members and, in the case of a company having a share capital, a statement of the shares issued to each member, distinguishing each share by its number, if any, and by its class or kind, and of the amount paid or agreed to be considered as paid on the shares of each member; and
- (b) in respect of each member-
  - (i) the date on which his name was entered in the register as a member; and
  - (ii) the date on which he ceased to be a member.

(2) Where a company has converted any of its shares into stock, the register shall show the amount of stock held by each member instead of the number of shares and the particulars relating to shares specified in subsection (1).

(3) Where a company has issued share warrants-

- (a) it shall, on the issue of a share warrant, strike out of its register of members the name of

the member then entered therein as holding the shares or stock specified in the warrant as if he had ceased to be a member and shall enter in the register-

- (i) the fact of the issue of the warrant;
  - (ii) a statement of the shares or stock included in the warrant, distinguishing each share by its number so long as the share has a number; and
  - (iii) the date of the issue of the warrant.
- (b) Until the warrant is surrendered, the said particulars shall be deemed to be the particulars required by this Act to be entered in the register of members, and on the surrender of the warrant, the date of the surrender shall be entered as if it were the date on which a person ceased to be a member.
- (c) The bearer of a share warrant shall, subject to the articles of the company, be entitled, on surrendering it for cancellation, to have his name entered as a member in the register of members, and the company shall be liable for any loss incurred by any person by reason of the company entering in its register the name of a bearer of a share warrant in respect of the shares or stock therein specified without the share warrant being surrendered and cancelled.

(4) The register of members may be kept either by making entries in bound books or by recording the particulars required in any other manner, including the electronic recording of such particulars, and, in the case of a person who has ceased to be a member, also by microfilm or microcard or by miniature photographic or electronic process or by any other process which accurately reproduces and forms a durable or sustainable medium for recording and reproducing such particulars: Provided that where the register is not kept by making entries in bound books, adequate precautions shall be taken for guarding against falsification and facilitating its discovery.

[Sub-s. (4) amended by s. 13 of Act 35 of 2001.]

#### **106 Index to register of members**

(1) Every company having more than fifty members shall, unless the register of members is in such form as to constitute in itself an index, keep an index of the names of the members of the company, and shall, within fourteen days after the date on which any alteration is made in the register of members, make any necessary alteration in the index.

(2) The index, which may be in the form of a card index or in any electronic format which accurately reproduces the required information, shall be deemed to be a part of the register of members, and shall in respect of each member, contain a sufficient indication to enable the account of that member in the register to be readily found.

[Sub-s. (2) substituted by s. 14 of Act 35 of 2001.]

#### **107 Branch registers in foreign countries**

(1) A company having a share capital may, if so authorized by its articles, cause to be kept in any foreign country a register of members resident in any foreign country (in this Act called a branch register).

(2) The company shall give to the Registrar notice on the prescribed form of the situation of the office where any branch register is kept, and of any change in that situation, and of the discontinuance of the office in the event of its being discontinued.

#### **108 Provisions as to branch register**

(1) A branch register shall be deemed to be part of the company's register of members (in this Act called the principal register).

(2) A branch register shall be kept in the same manner in which the principal register is by this Act required to be kept except that the notice referred to in section 114, shall, for a reasonable period of time before the closing of the branch register, also be inserted in some newspaper circulating in the district wherein the branch register is kept.

(3) The company shall transmit to its registered office a copy of every entry in its branch register as soon as may be after the entry is made and shall cause to be kept at its registered office, duly entered up from time to time, a duplicate of its branch register, and the duplicate shall for the purposes of this Act be deemed to be part of the principal register.

(4) The company may discontinue to keep any branch register, and shall thereupon transfer all entries in that register to some other branch register kept by the company or to the principal register.

(5) Subject to the provisions of this Act and of any law relating to stamp duty or estate duty, any company may by its articles make such provisions as it may think fit respecting the keeping of branch registers.

### **109 Register of members to be evidence**

The register of members of a company shall be *prima facie* evidence of any matters directed or authorized to be entered therein by this Act.

### **110 Where register of members to be kept**

#### Cases

(1) Subject to the provisions of this section, the register of members of a company shall be kept at its registered office.

(2) A company's register of members may be kept at any office of the company in the Republic where the work of making it up is done, instead of at the company's registered office, and where a company arranges with some other person (in this section referred to as 'the agent') for the making up of its register of members to be undertaken on behalf of the company by the agent, the register may be kept at the office of the agent in the Republic at which the work is done instead of at an office of the company.

(3) Any index of the names of the members of a company required to be kept in terms of section 106 shall at all times be kept at the same place where the register of members is kept, and where the company keeps a branch register under section 107 the duplicate of the branch register required by subsection (3) of section 108 to be kept at the company's registered office shall, notwithstanding anything in the said subsection contained, at all times be kept at the same place where the company's principal register is kept.

(4) Any company the register of members of which is not kept at its registered office shall notify the Registrar in the prescribed form of the place where such register is kept and of any change in that place.

(5) The provisions of this section relating to the register of members of a company and the provisions of this Act relating to the inspection or production of any such register or to the furnishing of copies of any such register or any part thereof, shall apply to any agent by whom any such register is kept on behalf of a company in the same manner as they apply to the company.

### **111 Disposal of closed accounts in register**

The parts of the register of members of a company pertaining to persons who have ceased to be members, in whatever manner kept under section 105, may be disposed of after the expiration of a period of fifteen years after such persons have ceased to be members.

### **112 Offences in respect of register of members**

Any company which or an agent referred to in section 110 who fails to comply with any provision of section 105, 106, 107, 108 or 110, shall be guilty of an offence.

### **113 Inspection of register of members**

(1) The register of members of a company shall, except when closed under the provisions of this Act, during business hours (subject to such reasonable restrictions as the company in general meeting may impose, so that not less than two hours in each day be allowed for inspection) be open to inspection by any member or his duly authorized agent free of charge and by any other person upon payment for each inspection of an amount of R10 or such lesser amount as the company may

determine.

[Sub-s. (1) amended by s. 15 of Act 35 of 2001.]

(2) Any person may apply to a company for a copy of or extract from the register of members and the company shall either furnish such copy or extract on payment by the applicant of an amount of R10 or such lesser amount as the company may determine for every page of the required copy or extract, or afford such person adequate facilities for making such copy or extract.

[Sub-s. (2) substituted by s. 6 of Act 59 of 1978 and amended by s. 15 of Act 35 of 2001.]

(3) If access to the register of members for the purpose of making any such inspection or any such copy or extract or facilities for making any such copy or extract be refused or not granted or furnished within fourteen days after a written request to that effect has been delivered to the company, the company, and every director or officer of the company who knowingly is a party to the refusal or default, shall be guilty of an offence.

(4) In the case of any such refusal or default the Court may, on application, by order compel an immediate inspection of the register and index or direct that the copy or extract required shall be sent to the applicant requiring it and may direct that any costs of or incidental to the application shall be borne by the company or by any director or officer of the company responsible for the refusal or default.

(5) The provisions of this section shall *mutatis mutandis* apply also in respect of any register of transfers kept by a company.

#### **114 Power to close register of members**

A public company may, after giving notice of its intention to do so in the *Gazette* and in a newspaper circulating in the district in which its registered office is situate, close its register of members, or any part thereof relating to holders of any class of shares, for a period or periods not exceeding in the aggregate sixty days in any year.

#### **115 Rectification of register of members**

Cases

(1) If

- (a) the name of any person is, without sufficient cause, entered in or omitted from the register of members of a company; or
- (b) default is made or unnecessary delay takes place in entering in the register the fact of any person having ceased to be a member,

the person concerned or the company or any member of the company, may apply to the Court for rectification of the register.

(2) The application may be made in accordance with the rules of Court or in such other manner as the Court may direct, and the Court may either refuse it or may order rectification of the register and payment by the company, or by any director or officer of the company, of any damages sustained by any person concerned.

(3) On any application under this section the Court may decide any question relating to the title of any person who is a party to the application to have his name entered in or omitted from the register, whether the question arises between members or alleged members or between members or alleged members on the one hand and the company on the other hand, and generally may decide any question necessary or expedient to be decided for the rectification of the register.

#### ***Debentures (ss 116-131)***

#### **116 Creation and issue of debentures**

A company, if so authorized by its memorandum or by its articles, may create and issue secured or unsecured debentures.

#### **117 Security for debentures**

Cases

(1) The binding of movable property as security for any debenture or debentures may be effected by-

- (a) a deed of pledge and the delivery of the movable property concerned to one or more debenture-holders or to a trustee for debenture-holders; or
- (b) a notarial bond, collateral notarial bond or notarial surety bond executed in favour of one or more debenture-holders or of a trustee for debenture-holders; or
- (c) the pledging of incorporeal rights by means of cession of such rights, whether present or future, in due and proper form.

(2) The binding of a ship may be effected by a deed of mortgage in the form prescribed by the Merchant Shipping Act, 1951 (Act 57 of 1951), recorded in the register by the proper officer at the ship's port of registry.

(3) The binding as aforesaid of immovable property may be effected by a mortgage bond, collateral mortgage bond or surety bond executed in favour of one or more debenture-holders or of a trustee for debenture-holders.

(4) A wholly owned subsidiary shall be deemed to have and always to have had the power to mortgage any of its property as collateral security for the issue of debentures by its holding company.

### **118 Bonds to be registered in deeds registry; copies of documents to be annexed to bonds and deeds of pledge**

#### Cases

(1) Any mortgage bond or notarial bond in pursuance of the provisions of section 117 and subsequent transactions relating thereto, shall, subject to the laws governing the registration of mortgage bonds and notarial bonds, be registered in a deeds registry.

(2) If any such bond is in favour of one or more debenture-holders, a certified copy of the debenture concerned shall be annexed to the said bond.

(3) If any such bond is in favour of a trustee for debenture-holders, certified copies of the debenture concerned and of the trust deed by which the trustee is appointed and in which his rights and duties are defined, shall be annexed to the said bond.

(4) Certified copies of the debenture concerned and of any such trust deed, if any, shall be annexed to any deed of pledge where the debentures are secured by a pledge of movable property.

### **119 Debenture itself may be registered**

If any debenture is executed before a notary public, it may, subject to the provisions of section 118 (1), be registered in a deeds registry in like manner as if it were a notarial bond.

### **120 Issue of debentures at different dates and ranking of preference**

In any bond or deed of pledge executed in favour of a trustee for debenture-holders generally, provision may be made that the debentures thereby secured or to be secured may be issued from time to time and at different dates, as the company may determine, but all such debentures, whenever issued, shall rank in preference concurrently with one another as from the date on which the pledge was constituted or the bond was registered.

### **121 Rights of debenture-holders**

(1) Every holder of a debenture secured by a pledge or a bond executed in favour of a trustee for debenture-holders generally shall, unless it is otherwise provided by the deed of pledge, bond or trust deed and copy of the debenture annexed thereto, be entitled to enforce his rights under such debenture as soon as it has been issued to him in the same manner as if he were himself the pledgee or the holder of such bond.

(2) No notice of the cession of any such debenture shall be necessary in order to confer upon any cessionary thereof the rights of the cedent.

### **122 Director or officer not to be trustee for debenture-holders**

No director or officer of a company shall be capable of being a trustee for the holders of

debentures of that company.

### **123 Liability of trustee for debenture -holders**

(1) Subject to the provisions of this section, any provision contained in a trust deed for securing an issue of debentures, or in any contract with the holders of debentures secured by a trust deed, shall be void in so far

as it would have the effect of exempting a trustee thereof from or indemnifying him against liability for breach of trust where he fails to show the degree of care and diligence required of him as trustee, having regard to the provisions of the trust deed conferring on him any powers, authorities or discretions.

(2) The provisions of subsection (1) shall not have the effect of-

- (a) invalidating any release otherwise validly given in respect of anything done or omitted to be done by a trustee before the giving of the release or any provision enabling such a release to be given-
  - (i) with the consent of a majority of not less than three-fourths in value of the debenture-holders present and voting in person or by proxy at a meeting summoned for the purpose; and
  - (ii) with respect to specific acts or omissions or on the trustee dying or ceasing to act; or
- (b) invalidating any provision in force on the first day of January, 1953, so long as any person then entitled to the benefit of that provision or who is afterwards given the benefit thereof under subsection (3) remains a trustee under the relevant deed; or
- (c) depriving any person of any exemption or right to be indemnified in respect of anything done or omitted to be done by him while any provision referred to in paragraph (b) was in force.

(3) So long as any trustee under a trust deed remains entitled to the benefit of a provision saved by subsection (2) (b) or (c) the benefit of that provision may be given either-

- (a) to all trustees under the deed, present and future; or
- (b) to any named trustee or proposed trustee thereunder,

by a resolution passed by a majority of not less than three-fourths in value of the debenture-holders present in person or by proxy at a meeting summoned for the purpose in accordance with the provisions of the deed or, if the deed makes no provision for summoning meetings, at a meeting summoned for the purpose in any manner approved by the Court.

### **124 Power to re-issue redeemed debentures in certain cases**

(1) Where a company has redeemed any debentures previously issued, not being debentures convertible into shares of the company, it shall, unless its articles or the conditions of issue of such debentures expressly otherwise provide or the debentures have been redeemed in pursuance of any obligation on the part of the company to redeem them (not being an obligation enforceable only by the person to whom the redeemed debentures were issued or his successors in title) have and be deemed at all times to have had power to keep the debentures alive for the purpose of re-issue, and, where a company has purported to exercise such a power, it shall have and be deemed at all times to have had power to re-issue the debentures either by re-issuing the same debentures or by issuing other debentures in their place, and upon such a re-issue the person entitled to the debentures shall have and shall be deemed at all times to have had the same rights and priorities as if the debentures had not previously been issued.

(2) Where with the object of keeping debentures alive for the purpose of re-issue, they have been transferred to a nominee of the company, a transfer from that nominee shall be deemed to be a re-issue for the purposes of this section.

(3) Where a company had deposited any of its debentures to secure advances from time to time

on current account or otherwise, the debentures shall not be deemed to have been redeemed by reason only of the account of the company having ceased to be in debit whilst the debentures remained so deposited.

(4) Nothing in this section shall prejudice any power reserved to a company by its debentures or the securities therefor, to issue debentures in the place of any debentures paid off or otherwise satisfied or extinguished.

### **125 Debenture to be described as secured or unsecured**

No debenture, debenture certificate or prospectus relating to debentures shall be issued by a company unless the term 'debenture' or such other term denoting a debenture used therein is qualified by the word 'secured' or 'unsecured', as the case may be.

### **126 Form of debentures or debenture certificates**

Cases

(1) No debenture or debenture certificate shall be issued by a company unless the conditions of the debenture concerned are stated on the debenture or on the debenture certificate.

(2) Any debenture or debenture certificate shall be signed by one director of the company and an officer of the company duly authorized thereto by the directors and shall, in the case where the debenture concerned is not a bearer debenture and in the case of a debenture certificate, specify the debentures, other than bearer debentures, of that company held by the person named therein.

[Sub-s. (2) substituted by s. 13 (a) of Act 83 of 1981.]

(3) Any signature referred to in subsection (2) may be affixed to or placed on a debenture or debenture certificate by autographic, mechanical or electronic means.

[Sub-s. (3) substituted by s. 16 of Act 35 of 2001.]

(4) Any debenture or debenture certificate issued in terms of this section shall be *prima facie* evidence of the title thereto of the person named therein or, in the case of a bearer debenture, of the bearer thereof.

[Sub-s. (4) substituted by s. 13 (b) of Act 83 of 1981.]

### **127 Register of pledges, cessions and bonds**

Subject to the provisions of section 129, every company shall keep at its registered office a register of pledges, cessions, notarial bonds, mortgage bonds and notarial debentures and enter therein all pledges, cessions, notarial bonds, mortgage bonds and notarial debentures affecting property of the company, giving in each case a short description of the property pledged, ceded or bound, the amount of the pledge, cession or bond and the names and addresses of the persons in whose favour any pledge, cession, bond or debenture was executed or to whom any pledge has been delivered.

[S. 127 substituted by s. 5 of Act 18 of 1990.]

### **128 Register of debenture-holders**

Subject to the provisions of section 129, every company shall keep at its registered office a register of debenture-holders showing the number of debentures issued and outstanding and whether or not they are payable to bearer and specifying the names and addresses of the holders, other than bearers, thereof.

[S. 128 substituted by s. 14 of Act 83 of 1981.]

### **129 Registers may be kept where made up**

The provisions of section 110 (2) and (4) relating to the register of members shall apply *mutatis mutandis* to the registers required to be kept under sections 127 and 128.

### **130 Inspection of registers and copies and extracts**

(1) The provisions of section 113 relating to the inspection of the register of members shall apply *mutatis mutandis* to the registers to be kept under sections 127 and 128 and the provisions of section 113 (3) shall apply *mutatis mutandis* to the furnishing of a copy of a trust deed referred to in subsection (2) of this section.

(2) A copy of any trust deed for securing any issue of debentures shall be transmitted to every holder of any such debentures at his request on payment, in the case of a printed trust deed, of an amount of twenty-five cents or such lesser amounts as may be determined by the company, or where the trust deed has not been printed, on payment of an amount of twenty-five cents or such lesser amount as may be determined by the company for every page of the required copy.

[Sub-s. (2) substituted by s. 7 of Act 59 of 1978.]

### **131 Default in keeping of registers**

Any company which or any agent referred to in section 110 (2), as applied by section 129, who fails to comply with any provision of section 127, 128 or 129, shall be guilty of an offence.

#### ***Forgery of Certificates as to Shares, Debentures and other Securities (s 132)***

### **132 Forgery, impersonation and unlawful engravings**

Any person shall be guilty of an offence if he-

- (a) with intent to defraud, forges, alters, offers, utters or disposes of, knowing it to be forged or altered, any certificate as to shares, debentures or other securities within the meaning of that term as defined in section 134 (c), any broker's transfer form, certified broker's form, share warrant or coupon issued in pursuance of this Act (or any document purporting to be such share warrant or coupon); or
- (b) by means of any such forged or altered certificate, form, share warrant, coupon or document, which he knows to be forged or altered, obtains or receives or endeavours to obtain or to receive any interest in any company or obtains or receives or endeavours to obtain or to receive any benefit, dividend or money payable in respect thereof; or
- (c) by impersonating any owner of any interest in any company, including any share warrant or coupon issued in pursuance of this Act, obtains or endeavours to obtain any such interest or share warrant or coupon or receives or endeavours to receive any benefit or money due to any such owner, as if he were the true and lawful owner; or
- (d) without lawful authority or excuse (the proof whereof shall lie upon him)-
  - (i) introduces or inserts into or engraves or makes upon any plate, wood, stone or other material, including any electronic material or process, any certificate as to any interest in a company or any share warrant or coupon or document purporting to be such interest, share warrant or coupon issued or made by any particular company in pursuance of this Act or to be a blank certificate, share warrant or coupon so issued or made or to be a part of such a certificate, share warrant or coupon; or
 

[Sub-para. (i) substituted by s. 17 of Act 35 of 2001.]
  - (ii) uses any such plate, wood, stone or other material for the making or printing of any such certificate, share warrant or coupon or document or of any such blank certificate, share warrant or coupon or any part thereof; or
  - (iii) knowingly has in his custody or possession any such plate, wood, stone or other material.

#### ***Transfer of Shares and Debentures (ss 133-140A)***

### **133 Registration of transfer of shares or interests**

Cases

(1) Any transfer of shares of or interest in a company shall be registered by the company by entering in its register of members the name and address of the transferee, the description of the shares, or interest transferred and the date of the registration of such transfer and, if it is a transfer of partly paid-up shares of or interest in an existing company, the amount outstanding on each share or interest, shall be entered in the said register.

(2) Notwithstanding anything in the articles of a company, it shall not be lawful for the

company to register a transfer of shares of or interest in the company unless a proper instrument of transfer has been delivered to the company: Provided that nothing in this section shall prejudice any power of the company to register as a member any person to whom the right to any share of the company has been transmitted by operation of law.

(3) On the application of the transfer of any share of or interest in a company, the company shall enter in its register of members the matter prescribed by subsection (1) in the same manner and subject to the same conditions as if the application for the entry were made by the transferee.

(4) The registration of any transfer of shares of or interest in a company shall be subject to the law relating to stamp duty and estate duty.

### **134 Definitions for purpose of transfer of listed shares or interests**

For the purposes of sections 135, 136, 137, 138 and 140, unless the context otherwise indicates-

(a) 'broker's transfer form' means the form prescribed and any substantially similar form which is recognized by the law of the country in which the relevant transfer is registered;

(b) 'company' includes any issuer of a security;

(c) 'security' means any listed security as defined in section 1 of the Stock Exchanges Control Act, 1947 (Act 7 of 1947);

[Para. (c) substituted by s. 6 (a) of Act 76 of 1974.]

(d) 'securities transfer form' means the form prescribed and any substantially similar form which is recognized by the law of the country in which the relevant transfer is registered;

(e) .....

[Para. (e) deleted by s. 6 (b) of Act 76 of 1974.]

### **135 Manner in which securities may be transferred**

(1) Notwithstanding the provisions of any law to the contrary or of the memorandum or articles of any company or of any contract relating to the transfer of any security-

(a) a security may be transferred by means of a securities transfer form; or

(b) a security may be transferred by means of a securities transfer form and a broker's transfer form: Provided that-

(i) such broker's transfer form shall be prepared-

(aa) by a stock-broker as defined in section 1 of the Stock Exchanges Control Act, 1947 (Act 7 of 1947);

(bb) by a banking institution registered otherwise than provisionally under the Banks Act, 1965 (Act 23 of 1965), and authorized thereto in writing by the Registrar, at a branch thereof designated by the Registrar;

(cc) by a stock exchange in the Republic; or

(dd) by a company authorized thereto in writing by the Registrar and carrying on the business of a clearing-house for securities on such stock exchange, and shall bear the signature of the stock-broker concerned or of a person in the service of the banking institution, stock exchange or company concerned or an authorized facsimile of that signature;

[Sub-para. (i) substituted by s. 5 of Act 29 of 1982 and by s. 3 of Act 29 of 1985.]

(ii) such securities transfer form need not be completed with reference to the particulars relating to the transferee and the consideration passing;

(iii) a separate broker's transfer form may be used in respect of each person to whom transfer is passed.

[Para. (b) substituted by s. 7 of Act 76 of 1974.]

(2) The execution of a securities transfer form or a broker's transfer form need not be attested.

- (3) Nothing in this section contained shall be construed as-
- (a) preventing the transfer of a security by means of any form in use immediately prior to the commencement of this section or any form prescribed at any time under this Act;
  - (b) entitling the issuer of any security to refuse the registration of any person as the holder of that security on the ground that the transfer purports to be effected by means of a securities transfer form or a broker's transfer form;
  - (c) affecting the provisions of any law or of any memorandum or articles of any company or other body corporate or of any contract which deals with the manner in which any document shall be signed or sealed by or on behalf of any company or other body corporate; or
  - (d) affecting the liability for the payment of any duty payable in respect of the registration of the transfer of any security.

### **136 Certification by company that security has been lodged for transfer**

(1) (a) If a company under the signature of any person duly authorized to certify transfers of securities on behalf of the company, or of any officer or servant of a body corporate so authorized, endorses on any instrument of transfer referred to in section 135 and executed by or on behalf of the transferor, that the certificate relating to the security in question has been lodged with the company, the company shall, for the purposes of this section, be deemed to have certified that instrument.

(b) A certification shall for purposes of this section be deemed to be signed if it purports to be authenticated by the signature or initials of any person whether by autographic, electronic or mechanical means, unless it is shown that the signature or initial is not that of a person authorized to certify transfer of securities on behalf of the company.

[Para. (b) substituted by s. 18 of Act 35 of 2001.]

(2) (a) The certification by a company in terms of subsection (1) shall be taken as a representation by the company to any person acting on the faith of the certification that there have been lodged with the company the necessary documents relating to the securities mentioned in the instrument of transfer and that it appears from the said documents that the title to the said securities is held by the transferor named in the said instrument of transfer.

(b) The representation referred to in paragraph (a) shall not be taken as a representation that the transferor named in the instrument of transfer in question has in fact any title to the security in question.

(c) Where any person acts on the faith of an incorrect certification negligently made by a company, such person shall be in the same position with reference to the company as if the certification had been fraudulently made.

(3) Subject to the provisions of subsection (2), the delivery to any person of any instrument of transfer certified in terms of subsection (1) shall confer on that person the same rights as that person would have acquired before the commencement of this section upon the delivery to him of a certificate for the securities in question and an instrument of transfer signed by the transferor in blank.

(4) The certificates of any securities in respect of which a company has certified any instrument of transfer as provided in this section, shall upon certification be cancelled by the company.

### **137 Duty of company with reference to person under contractual disability**

When a company records in its registers the transfer of any security, it shall not be under any duty to satisfy itself that such transfer is within the contractual power of the transferor or transferee or that any legal requisite which obtains with reference to the ability of the transferor or transferee to transfer or to take transfer has been complied with or that any person signing any document relevant to the transfer on behalf of any person or company has been duly authorized to sign that document: Provided that the provisions of this section shall not absolve any company from liability arising from any fraudulent act to which it is knowingly a party.

### 138 Warranty and indemnity by persons lodging documents of transfer

(1) Subject to the provisions of subsection (2), any person who, for the purposes of the transfer of any security of any company, as principal or agent, lodges with that company any document relating to that transfer, shall be deemed thereby to warrant that such document, excluding a certificate of ownership or any other document evidencing title to such security, is genuine and that he or she, or when he or she is acting as agent, his or her principal jointly and severally with him or her, indemnifies the said company against any claim made upon it and against any loss or damage suffered by it arising out of a transfer registered by the company of the security referred to in such document.

(2) The indemnification contemplated in subsection (1) shall not apply where it is proved by the person who lodged the documents concerned that he or she acted in good faith and that the company acted negligently in registering the transfer of the securities referred to in those documents: Provided that if the Court holds that the loss or damage contemplated in subsection (1) is caused partly by the negligence of such company and partly by the negligence of such person the damage recoverable in respect thereof shall be reduced by the Court to such extent as the Court may deem just and equitable having regard to the degree in which the company or such other person, as the case may be, was negligent in relation to the damage.

[S. 138 substituted by s. 7 of Act 35 of 1998.]

### 139 Notice of refusal to register transfer

(1) If a company refuses to register a transfer of any shares or debentures, it shall, within thirty days after the date on which the instrument of transfer was lodged with it, send to the transferor and the transferee notice of the refusal.

(2) Any company which fails to comply with the requirements of this section, shall be guilty of an offence.

### 140 Limitation of time for issue of certificates on transfer

(1) Unless it is entitled for any reason to refuse to register a transfer and does not register it, every company shall, within six weeks after the date on which an instrument of transfer of any shares, debentures, debenture stock or securities is lodged with it, complete and have ready for delivery the certificates in respect of the shares, debentures, debenture stock or securities of which the transfer is to be registered.

(2) If default is made in complying with the requirements of subsection (1), the provisions of section 96 (2) and (3) shall apply *mutatis mutandis*.

### 140A Disclosures of beneficial interest in securities

(1) In this section, unless the context otherwise indicates-

**'beneficial interest'**, in relation to a security, means-

- (a) the right or entitlement to receive any dividend or interest payable in respect of that security; or
- (b) the right to exercise or cause to be exercised, in the ordinary course, any or all of the voting, conversion, redemption or other rights attaching to such security,

but does not include any interest held by a person in a unit trust or collective investment scheme in terms of the Unit Trusts Control Act, 1981 (Act 54 of 1981);

**'exchange'** means a stock exchange in the Republic licensed in terms of the Stock Exchanges Control Act, 1985 (Act 1 of 1985), or a financial market in the Republic licensed in terms of the Financial Markets Control Act, 1989 (Act 55 of 1989);

**'security'** means-

- (a) any listed security as defined in section 1 of the Stock Exchanges Control Act, 1985; and
- (b) any financial instrument which confers the right to convert such instrument into a listed security referred to in paragraph (a).

- (2) A person is deemed to have a beneficial interest in a security if-
- (a) the spouse of the person married in community of property or the minor children of that person have a beneficial interest in such security;
  - (b) that person acts in terms of an agreement with another person holding a beneficial interest and the agreement is in respect of the co-operation between them for the acquisition, disposal or any other matter relating to a beneficial interest in such security;
  - (c) it is the holding company of a company that has a beneficial interest in such security;
  - (d) a body corporate or trust has a beneficial interest in such security and-
    - (i) the body corporate or its directors or the trustees are accustomed to act in accordance with the directions or instructions of that person; or
    - (ii) that person is entitled to exercise or control the exercise of the majority of the voting rights at general meetings of the body corporate or trust; or
  - (e) the security is held *nomine officii* by another person on that person's behalf.

(3) Where securities of an issuer are registered in the name of a person, and that person ('the registered shareholder') is not the holder of the beneficial interest in all of the securities held by the registered shareholder, the registered shareholder shall, at the end of every three month period after 30 June 1999, disclose to the issuer the identity of each person on whose behalf the registered shareholder holds securities and the number and class of securities issued by that issuer held on behalf of each such person.

(4) The information required in terms of subsection (3) shall be furnished in writing within seven days of the end of the three month period referred to in that subsection.

(5) (a) An issuer may by notice in writing require a person who is a registered shareholder of, or whom the issuer knows or has reasonable cause to believe to have a beneficial interest in, securities issued by that issuer, to confirm or deny whether or not such person holds a beneficial interest in such securities, and if the security is held for another person, the person to whom the request is made shall disclose to the issuer the identity of the person on whose behalf that security is held.

(b) The registered shareholder may levy such fee for the furnishing of information requested as may be prescribed by the Minister from time to time.

(6) A notice under subsection (5) may, in addition, require the addressee to give particulars of the extent of the beneficial interest held during the three years preceding the date of the notice.

(7) The information required in terms of subsections (5) and (6) shall be furnished within a reasonable time specified in the notice, but not later than 14 days from the date of receipt of the notice.

(8) (a) All issuers of securities shall establish and maintain a register of the disclosures made in terms of this section and shall publish in their annual financial statements a list of the persons who hold beneficial interests equal to or in excess of five per cent of the total number of securities of that class issued by the issuer together with the extent of those beneficial interests.

(b) Such register shall be open to inspection *mutatis mutandis* as if it were a register contemplated in section 113.

(9) A person who fails to comply with any provision of this section or to make a disclosure as required by this section or who makes a false disclosure, shall be guilty of an offence.

[S. 140A inserted by s. 16 of Act 37 of 1999.]

### *Restriction on Offering Shares for Sale (s 141)*

## **141 No offer of shares for sale to public without statement**

### Cases

(1) No person shall either orally or in writing (including any newspaper advertisement or any advertisement in electronic format) make an offer of shares for sale to the public or issue, distribute or publish any such material which in its form and context is calculated to be understood as an offer as aforesaid unless it is accompanied by a written statement containing the particulars required by this

section to be included therein.

[Sub-s. (1) substituted by s. 19 of Act 35 of 2001.]

(2) The provisions of subsection (1) shall not apply-

- (a) if the shares to which the offer or material relates are shares which are listed by, or in respect of which permission to deal therein has been granted by, any stock exchange in the Republic recognized by the Minister by notice in the *Gazette* for the purposes of this section, and the person making the offer or publishing the material so states in writing, specifying the stock exchange; or
- (b) if the offer is made or the material is published only to persons-
  - (i) whose ordinary business or part of whose ordinary business it is to deal in shares, whether as principals or agents; or
  - (ii) who are at the time of the offer the holders of shares of the same company; or
- (c) in the case of an offer in his capacity as such, by an executor or administrator of a deceased estate or a trustee of an insolvent estate or a liquidator or trustee referred to in the Agricultural Credit Act, 1966 (Act 28 of 1966); or
- (d) if the offer is made or the material is published for the purpose of a sale in execution or by public auction or by public tender; or
- (e) if the said offer is accompanied by a prospectus registered under Chapter VI of this Act.

(3) The said written statement shall be dated and signed by the person or persons making the offer or issuing, distributing or publishing the said material, and if such person is a company, by every director thereof.

(4) The written statement aforesaid shall not contain any matter other than the particulars required by this section to be included therein, and shall not be in characters less large or less legible than any characters used in the offer (if in writing) or in any document accompanying such statement.

(5) The said written statement shall contain particulars with respect to the following matters:

- (a) Whether the person making the offer is acting as principal or agent and, if as agent, the name of his principal and an address in the Republic where that principal can be served with process, and the nature and extent of the remuneration received or receivable by the agent for his services;
- (b) the date on which and the country in which the company was incorporated and the address of its registered office in the Republic or, if there is no such address, the address of its principal office abroad;
- (c) the share capital of the company and the number of shares which have been issued, the classes into which it is divided and the rights of each class of shareholders in respect of capital, dividends and voting and the number and amount of shares issued for cash and the number and amount thereof issued for a consideration other than cash, and the dates on which and the prices at which or the consideration for which such shares were issued;
- (d) the dividends, if any, paid by the company on each class of shares during each of the five financial years immediately preceding the offer, and if no dividend has been paid in respect of shares of any particular class during any of those years, a statement to that effect;
- (e) the total amount of any debentures issued by the company and outstanding at the date of the statement, together with the rate of interest payable thereon;
- (f) the names and addresses of the directors of the company;
- (g) whether or not the shares are listed or permission to deal therein has been granted by any stock exchange other than that referred to in subsection (2) (a), and, if so, which, and, if not, a statement that they are not so listed or that no such permission has been

- granted;
- (h) if the offer relates to units, particulars of the names and addresses of the persons in whom the shares represented by the units are vested, the date and the parties to any document defining the terms on which those shares are held, and an address in the Republic where that document or a copy thereof can be inspected;
  - (i) the dates on which and the prices at which the shares offered were originally issued by the company, and were acquired by the person making the offer or by his principal, giving the reasons for any difference between such prices and the prices at which the shares are being offered;
  - (j) if the shares were issued as partly paid-up shares under the repealed Act, to what extent they are paid-up;
  - (k) the date of registration of the written statement by the Registrar.

In this subsection the expression 'company' means the company by which the shares to which the statement relates were issued.

(6) There shall be annexed to the said statement a copy of the last annual financial statements of the company and subsequent interim report and provisional annual financial statements, if any.

(7) Where the offer referred to in subsection (1) is in respect of shares of a public company, a copy of the written statement shall be lodged with the Registrar for registration before it is issued, distributed or published, and no such statement shall be issued, distributed or published more than three months after the date of such registration.

(8) If any person acts in contravention of any provision of this section, he shall be guilty of an offence, and if such person is a body corporate, every director and officer of that body corporate shall be guilty of the like offence unless he proves that the act constituting the offence took place without his knowledge or consent.

(9) If any person is convicted of having made an offer in contravention of any of the provisions of this section, the Court by which he is convicted, may order that any contract made as a result of the offer shall be void, and where it makes any such order, may give such consequential directions as it thinks proper for the repayment of any money or the retransfer of any shares.

(10) In this section, unless the context otherwise indicates, the expression 'offer' includes an invitation to make an offer to purchase, the expression 'shares' means the shares of a company, whether a company within the meaning of this Act or not, and includes debentures and units, and the expression 'unit' means any right or interest (by whatever name called) in a share, and for the purposes of this section a person shall not, in relation to a company, be regarded as not being a member of the public by reason only that he is a holder of shares of the company or a purchaser of goods from the company.

## CHAPTER VI

### OFFERING OF SHARES AND PROSPECTUS (ss 142-169)

#### *Interpretation (s 142)*

#### 142 Definitions

(1) In this Chapter, unless the context otherwise indicates-  
'company' includes an external company;

[Definition of 'company' inserted by s. 7 (a) of Act 111 of 1976.]

'expert' means a geologist, engineer, architect, quantity surveyor, valuer, accountant, auditor, or any person holding himself out to be such and any other person who professes to have extensive knowledge or experience or to exercise special skill which gives or implies authority to a statement made by him;

'issued generally' .....

[Definition of 'issued generally' deleted by s. 5 (a) of Act 64 of 1977.]

'letter of allocation' means any document conferring a right to subscribe for shares in terms of

a rights offer;

[Definition of 'letter of allocation' inserted by s. 7 (b) of Act 111 of 1976.]

**'offer'**, in relation to shares, means an offer made in any way, including by provisional allotment or allocation, for the subscription for or sale of any shares, and includes an invitation to subscribe for or purchase any shares;

[Definition of 'offer' substituted by s. 5 (b) of Act 64 of 1977.]

**'offer to the public'** and any reference to offering shares to the public mean any offer to the public and include an offer of shares to any section of the public, whether selected as members or debenture-holders of the company concerned or as clients of the person issuing the prospectus concerned or in any other manner;

**'promoter'**, in relation to civil and criminal liability in respect of an untrue statement in a prospectus, means a person who was a party to the preparation of the prospectus or of the portion thereof containing the untrue statement but does not include any person by reason of his acting in a professional capacity for persons engaged in procuring the formation of the company or preparing the said prospectus;

**'rights offer'** means an offer for subscription, with a right to renounce in favour of other persons, to those members or debenture-holders of a company who are not excluded from such offer under subsection (2), for any shares (as defined in relation to an offer of shares for subscription or sale in section 1 (1) of that company or any other company, where a stock exchange within the Republic or a stock exchange recognized by the Minister for the purposes of this definition by notice in the *Gazette*, has granted or has agreed to grant a listing for the shares which are the subject of the offer;

[Definition of 'rights offer' inserted by s. 7 (c) of Act 111 of 1976 and substituted by s. 5 (c) of Act 64 of 1977 and by s. 4 (a) of Act 29 of 1985.]

**'untrue statement'**, in relation to a prospectus or portion thereof, includes-

- (a) a statement which is misleading in the form and context in which it is included therein and a statement shall be deemed to be included in a prospectus if it is contained in any report or memorandum which appears on the face of the prospectus or which is by reference incorporated therein or is attached to or accompanies the prospectus on registration; and
- (b) an omission from a prospectus of any matter, whether such matter is required to be included therein by this Act or not, where such omission is calculated to mislead, and such prospectus shall be deemed in respect of such omission to be a prospectus in which an untrue statement is included.

(2) (a) Notwithstanding anything contained in the articles of a company, the company may, with the written approval of the Registrar and subject to such conditions as he may determine, exclude any category of members or debenture-holders of the company not resident within the Republic from any rights offer.

(b) An application for a written approval referred to in paragraph (a) shall be accompanied by the prescribed fee.

[Sub-s. (2) added by s. 4 (b) of Act 29 of 1985.]

### **Offers to the Public (ss 143-147)**

#### **143 Restrictions as to offers to the public**

(1) No person shall offer any shares to the public otherwise than in accordance with the provisions of this Act.

(2) No person shall offer to the public any shares of any company or body corporate which is not a company or external company within the meaning of this Act or which has not been exempted from the provisions of this subsection by the Registrar by notice in the *Gazette*.

[Sub-s. (2) substituted by s. 6 of Act 64 of 1977.]

(3) Any person who contravenes the provisions of subsection (2), and, if such person is a company, any director or officer of such company who knowingly is a party to the contravention, shall be guilty of an offence.

#### **144 Offers not being offers to the public**

An offer of shares in relation to an offer for subscription for or sale of any shares, shall not be construed as an offer to the public-

- (a) if the offer is made to-
  - (i) a bank registered or provisionally registered in terms of the Banks Act, 1990 (Act 94 of 1990); or
  - (ii) a mutual bank registered or provisionally registered in terms of the Mutual Banks Act, 1993 (Act 124 of 1993); or
  - (iii) a long-term insurer as defined in the Long-term Insurance Act, 1998 (Act 52 of 1998), or a short-term insurer as defined in the Short-term Insurance Act, 1998 (Act 53 of 1998),  
which is acting as principal, and also to a wholly owned subsidiary of such bank, mutual bank or insurer when it acts as agent in the capacity of authorized portfolio manager for a pension fund registered in terms of the Pension Funds Act, 1956 (Act 24 of 1956), or as manager for a collective investment scheme registered in terms of the Collective Investment Schemes Control Act, 2002 (Act 45 of 2002);  
[Para. (a) substituted by s. 16 of Act 24 of 2006.]
- (b) if the offer for subscription is of such a nature that the total acquisition cost of the shares for a single addressee acting as principal is at least R100 000 or such higher amount as the Minister may, by notice in the *Gazette*, determine in order to counter the effect of inflation;
- (c) if it is a single once-off offer for subscription and the offer is accepted by a maximum of fifty persons acting as principals: Provided that-
  - (i) the aggregate subscription price (including any premium) of the shares so issued does not exceed R100 000 or such higher amount as the Minister may, by notice in the *Gazette*, determine in order to counter the effect of inflation;
  - (ii) the issue of the shares shall be finalised within six months from the date the offer was first made;
  - (iii) the offer shall be in writing;
  - (iv) particulars of the offer shall be lodged in the prescribed manner with the Registrar for registration prior to the offer being made; and
  - (v) the offer shall not be accompanied by or made by means of an advertisement and no selling expenses shall be incurred in connection with the offer;
- (d) if it is a non-renounceable offer for the subscription of shares and the offer is made only to existing shareholders or debenture holders of that company;
- (e) if it is a rights offer;
- (f) if the offer is made to any director or officer of the company, or any close relative of such director or officer: Provided that the original offer shall for purposes of this Chapter be an offer to the public if the offer is renounceable in favour of a person who is not a director or officer of the company or close relative of such director or officer; or
- (g) if it is an employee share scheme as contemplated in section 144A.

[Para. (g) added by s. 1 of Act 125 of 1998]

[S. 144 amended by s. 8 of Act 111 of 1976 and substituted by s. 8 of Act 35 of 1998.]

#### **144A Employee share scheme**

- (1) In this section, unless the context indicates otherwise-

- (a) **'employee share scheme'** means a scheme established by a company for the purpose of offering participation therein to employees of the company or of its subsidiary, either-
    - (i) by means of the sale of shares in the company; or
    - (ii) by the grant of options on shares in the company, solely to *bona fide* employees of the company or of its subsidiary, whether by means of a trust or otherwise;
  - (b) **'compliance officer'** means a compliance officer appointed by a company in respect of its employee share scheme in accordance with subsection (2); and
  - (c) **'specified shares'** means shares, including options on shares, which are offered to employees of the company in terms of an employee share scheme.
- (2) Every company which establishes an employee share scheme shall-
- (a) appoint a compliance officer who shall be accountable to the directors of the company;
  - (b) state in its annual financial statements the number of specified shares which it has allotted during that financial year in terms of its employee share scheme.
- (3) A compliance officer who is appointed in respect of any employee share scheme shall-
- (a) be responsible for the administration of that scheme;
  - (b) furnish or cause to be furnished in writing to any employee who receives an offer of specified shares in terms of that employee scheme-
    - (i) full particulars of the nature of the transaction, including the risks arising therefrom;
    - (ii) information relating to the company, including its latest annual financial statements, the general nature of its business and its profit history over the last three years; and
    - (iii) full particulars of any material changes which take place in respect of any information furnished in terms of subparagraph (i) or (ii);
  - (c) ensure that copies of the documents containing the information referred to in paragraph (b) (i) and (ii) are lodged with the Registrar within 30 days after the employee share scheme has been established;
  - (d) lodge a certificate with the Registrar within 60 days after the end of each financial year to the effect that he or she has complied with the obligations in terms of this section during such year and attach thereto any documents containing particulars contemplated in paragraph (b) (iii), issued during such year.

[S. 144A inserted by s. 2 of Act 125 of 1998.]

## **145 No offer for subscription to public without prospectus**

### Cases

(1) No person shall make any offer to the public for the subscription for shares unless it is accompanied by a prospectus complying with the requirements of this Act and registered in the Companies Registration Office, and no person shall issue such a prospectus which has not been so registered.

(2) Any person who contravenes any provision of subsection (1) and, if such person is a company, any director or officer of such company who knowingly is a party to the contravention, shall be guilty of an offence.

## **145A Approval by stock exchange a requirement for letters of allocation**

(1) No person shall issue, distribute or deliver or cause to be issued, distributed or delivered a letter of allocation unless it is accompanied by such documents as are required and have been approved by the stock exchange concerned.

(2) Any person who contravenes any provision of subsection (1) and, if such person is a company, any director or officer of such company who knowingly is a party to the contravention, shall

be guilty of an offence.

[S. 145A inserted by s. 9 of Act 111 of 1976.]

#### **146 No offer for sale to the public without prospectus**

(1) No person shall make any offer to the public for the sale of any shares-

- (a) which have been, or have been agreed to be, allotted by the company concerned with a view to all or any of them being offered to the public; or
- (b) in respect of which it has been made known in any way at or about the time of, and in connection with, such offer, that the company concerned has applied or intends to apply for their listing by a stock exchange in the Republic or elsewhere,

unless it is accompanied by a prospectus complying with the requirements of this Act and registered in the Companies Registration Office, and no person shall issue such a prospectus which has not been so registered.

(2) For the purposes of subsection (1) (a) it shall, unless the contrary is proved, be evidence that an allotment of, or an agreement to allot, shares was made with a view to the shares being offered for sale to the public if it is shown that an offer for sale to the public in respect of such shares or any of them was made within eighteen months after the allotment or the agreement to allot.

[Sub-s. (2) substituted by s. 6 of Act 18 of 1990.]

(3) Any person who contravenes any provision of subsection (1) and, if such a person is a company, any director or officer of such company who knowingly is a party to the contravention, shall be guilty of an offence.

#### **146A Rights offers**

(1) A company desiring to issue a letter of allocation shall lodge with the Registrar for registration a copy thereof together with the prescribed fee and a copy of every document referred to in section 145A and every such copy shall be certified, by not less than two directors of the company, as a true copy of the original approved by the stock exchange concerned.

(2) Every copy mentioned in subsection (1) shall be accompanied by a copy of any contract referred to therein and, if such contract is not in an official language, by a translation thereof into one of the official languages.

(3) As soon as the Registrar has registered the documents referred to in subsection (1), he shall give notice of the registration to the company concerned or the person who lodged them with him on behalf of such company.

(4) Every letter of allocation which is issued shall-

- (a) state on the face of it that a copy thereof together with copies of all other documents referred to in subsections (1) and (2) have been registered as required by this section; and
- (b) be accompanied by a copy of every document lodged therewith in terms of subsection (1): Provided that the provisions of this paragraph shall not apply to any letter of allocation issued in connection with a renunciation of part of the rights to subscribe in terms of the rights offer.

(5) The provisions of sections 151, 153 (1), and (4), 154 (1), (4) and (5), 158, 160, 161, 162 and 163 shall apply *mutatis mutandis* to a rights offer and all documents issued in connection therewith.

[Sub-s. (5) substituted by s. 8 (b) of Act 64 of 1977.]

(6) Any person who contravenes any provision of this section, and if such person is a company, any director and officer of such company who knowingly is a party to such contravention, shall be guilty of an offence.

[S. 146A inserted by s. 10 of Act 111 of 1976.]

#### **147 Application form for shares to be attached to prospectus**

(1) No person shall issue, distribute or deliver or cause to be issued, distributed or delivered,

any form of application in respect of shares of a company, unless the form-

- (a) is attached to a prospectus a copy of which has been registered in the Companies Registration Office; and
- (b) bears on the face of it the date of registration of the prospectus;
- (c) .....

[Para. (c) deleted by s. 9 (b) of Act 64 of 1977.]

Provided that this subsection shall not apply if it is shown that the form of application was issued either-

- (i) in connection with a *bona fide* invitation to enter into an underwriting agreement with respect to the shares; or
  - (ii) in relation to shares which were not offered to the public.
- (2) If any person-
- (a) contravenes subsection (1) (a); or
  - (b) contravenes subsection (1) (b),

he shall be guilty of an offence.

[Sub-s. (2) substituted by s. 9 (c) of Act 64 of 1977.]

### **Prospectus (ss 148-163)**

#### **148 Matters to be stated in prospectus**

(1) A prospectus must adhere to the specifications of Schedule 3 and contain all information that an investor may reasonably require to assess-

- (a) a company in which a right or interest is to be acquired, its assets and liabilities, financial position, profits and losses, cash flow and prospects; and
- (b) the shares and the rights attached to them.

(2) As long as an offer remains open, any person responsible for information in the prospectus must, when that person becomes aware of it-

- (a) correct any error;
- (b) report on any new matter; and
- (c) report on any change of a matter included in the prospectus,

if these are relevant or material in terms of Schedule 3.

(3) A correction or report in terms of subsection (2) must be registered as a supplement to the prospectus, simultaneously published to known recipients of the prospectus and included in future distributions of the prospectus.

(4) Subject to section 148A, any person who knowingly is a party to the issue of a prospectus in contravention of this section shall be guilty of an offence.

[S. 148 amended by s. 11 of Act 111 of 1976 and by s. 10 of Act 64 of 1977 and substituted by s. 17 of Act 24 of 2006.]

#### **148A Permission to omit information**

(1) The Registrar may, on application, allow information required under section 148 to be omitted from the prospectus, if the Registrar is satisfied that-

- (a) publication of the information would be unnecessarily burdensome for the applicant, seriously detrimental to a company mentioned in section 148 (1) (a) or against the public interest; and
- (b) users will not be unduly prejudiced by the omission.

(2) An application under subsection (1) shall be in writing and accompanied by the prescribed fee.

[S. 148A inserted by s. 18 of Act 24 of 2006.]

#### **149 Statement on face of issued prospectus**

(1) Every prospectus issued shall state on the face of it that a copy thereof has been registered

as required by this Act and shall specify or refer to statements included therein specifying any documents required by sections 151 and 152 to be endorsed on or attached to or to accompany a prospectus when lodged for registration.

(2) Any person who knowingly is a party to the issue of a prospectus in contravention of subsection (1), shall be guilty of an offence.

#### **150 Consent of person named as director**

No person shall be named as a director or proposed director of a company in any prospectus relating to shares of that company unless, at any time prior to the registration of such prospectus-

- (a) his written consent, in the prescribed form, to act as such director has been lodged with the company; and
- (b) the return referred to in section 216 (2) reflecting the relevant particulars in regard to such person, has been lodged with the Registrar.

[S. 150 substituted by s. 8 (1) of Act 59 of 1978.]

#### **151 Consent by experts and others**

(1) No prospectus which includes any statement or reference to any statement purporting to be made by an expert, shall be registered by the Registrar unless-

- (a) the expert has given, and has not before the lodging of a copy of the prospectus for registration in the Companies Registration Office, withdrawn his written consent to the issue thereof with the statement or reference included in the form and context in which it is included;
- (b) a statement that the expert has given and has not so withdrawn his consent appears in the prospectus; and
- (c) such written consent is endorsed on or attached to the copy of the prospectus lodged for registration in the Companies Registration Office.

(2) The Registrar shall not register any prospectus which names any person as the auditor, attorney, banker or broker of a company unless it is accompanied by the consent in writing of the person so named to act in the capacity stated and to his name being stated in the prospectus.

#### **152 Contracts and translations thereof to be attached to prospectus**

(1) No prospectus shall be registered unless there is attached to it a copy of any material contract required by Schedule 3 to be stated in a prospectus or, in the case of such a contract not reduced to writing, a memorandum giving full particulars thereof.

[Sub-s. (1) substituted by s. 11 of Act 64 of 1977.]

- (2) There shall be attached to any such contract as is mentioned in subsection (1)-
  - (a) if it is in a foreign language, a certified translation thereof into one of the official languages of the Republic; or
  - (b) if it is partly in a foreign language, a copy thereof embodying such a certified translation of so much thereof as is in a foreign language.

#### **153 Where the issue is underwritten**

(1) No prospectus containing a statement to the effect that the whole or any portion of the issue of the shares offered to the public, has been or is being underwritten shall be registered until there is lodged with the Registrar a copy of the underwriting contract and a sworn declaration by the person named as underwriter, or, if such person is a company, by each of two directors of such company, or if such company has only one director, by that director, that to the best of the deponent's knowledge and belief the underwriter is and will be in a position to carry out his obligations even if no shares are being applied for.

(2) If an offer of shares is made in respect of which no prospectus is required by this Act, the copy of the contract and sworn declaration referred to in subsection (1) shall be lodged with the Registrar not later than the date of the proposed offer of shares.

(3) If default is made in complying with the provisions of subsection (2), the company, and any person (including a body corporate) and every director or officer of the said company (or body corporate) who knowingly is a party to the contravention, shall be guilty of an offence.

(4) In the event of any underwriter being unable, when duly called upon, to carry out his obligations under the underwriting contract, any person who has in connection with that contract made a sworn declaration as required by subsection (1) shall, unless he proves that when he made the declaration he believed and had reasonable grounds for believing that the underwriter was or would be able to carry out such obligations, be guilty of an offence.

#### **154 Signing, date and date of issue, of prospectus**

(1) A prospectus in respect of an offer for the subscription of shares of a company shall be signed by every person named therein as a director of the company or by his agent authorized by him in writing to sign on his behalf.

(2) A prospectus in respect of any other offer of shares shall be signed by every person making such offer or by his agent authorized by him in writing to sign on his behalf or if the person making the offer is a company or firm, by two directors of such company, or if such company has only one director, by that director, or by not less than one-half of the partners in such firm or by an agent authorized by any such director or partner in writing to sign on his behalf.

(3) Where a prospectus has been signed by or on behalf of directors of a company or partners in a firm as provided in subsection (2), every director of such company or partner in such firm shall be deemed to have authorized the issue of such prospectus notwithstanding that he has not signed it, unless he proves that it was issued without his knowledge, authority or consent.

(4) Every signature to a prospectus shall be dated and the latest of such dates shall be deemed to be the date of the prospectus.

(5) The date of registration of any prospectus in the Companies Registration Office shall, unless the contrary is proved, be taken as the date of the issue of the prospectus.

#### **155 Registration of prospectus**

(1) No prospectus shall be registered by the Registrar unless the requirements of this Chapter have been complied with and it is lodged with the Registrar for registration, together with such documents as are prescribed in this Chapter, within fourteen days of the date of such prospectus.

(2) As soon as the Registrar has registered the prospectus he shall send notice of the registration to the person lodging the same or to the company.

#### **156 Time limit for issue of prospectus**

(1) No prospectus shall be issued more than three months after the date of the registration thereof, and if a prospectus is so issued, it shall be deemed to be a prospectus which has not been registered.

(2) Any person who knowingly is a party to the issue of a prospectus in contravention of subsection (1), shall be guilty of an offence.

#### **157 Advertisement as to prospectus**

(1) Every newspaper or other advertisement in any format, including electronic format, offering or calling attention to an offer or intended offer of shares of a company to the public shall be deemed to be a prospectus issued by the person responsible for publishing or disseminating the advertisement (and all enactments and rules of law as to the contents of prospectuses and as to the liability in respect of statements in and omissions from prospectuses or otherwise relating to prospectuses shall apply and have effect accordingly), unless it contains no more information than the following:

- (a) the number and description of the shares concerned;
- (b) the name and date of registration of the company;
- (c) the general nature of the main business or proposed main business actually carried on or to be carried on by the company;

- (d) the names and addresses of the directors;
- (e) the places at and times during which copies of the prospectuses may be obtained;
- (f) where all the shares which are the subject of an offer are intended to be offered only to the members of a company or debenture holders, as the case may be, with or without the right to renounce in favour of other persons-
  - (i) the issue price of such shares;
  - (ii) the ratio in which such shares will be offered to the members or debenture holders entitled to accept the offer; and
  - (iii) the last day on which members or debenture holders must register as such in order to be entitled to receive the offer;

[Para. (f) added by s. 8 of Act 76 of 1974 and substituted by s. 12 (a) of Act 111 of 1976.]

- (g) the last day for subscribing.

[Para. (g) added by s. 12 (b) of Act 111 of 1976.]

[Sub-s. (1) amended by s. 20 of Act 35 of 2001.]

(2) No statement that, or to the effect that, the said advertisement is not a prospectus shall prevent the operation of this section.

### **158 Waiver of requirements of this Chapter void**

Any condition requiring any applicant for shares to waive compliance with any requirements of this Chapter or purporting to affect him with notice of any contract, document or matter not specifically referred to in the prospectus, shall be void.

### **159 Variation of contract mentioned in prospectus**

No company shall within one year after the date of registration of a prospectus vary or agree to the variation of the terms of a contract referred to in such prospectus unless the variation in specific terms is authorized or ratified by a general meeting of members of the company of which notice has been given on a date not earlier than six months after the date of registration of the prospectus.

### **160 Liability for untrue statements in prospectus**

(1) Where shares are offered to the public for subscription in pursuance of a prospectus, every person-

- (a) who is, at the time of the issue of the prospectus, a director of the company;
- (b) who becomes a director at any time between the issue of the prospectus and the holding of the first general meeting of the company at which directors are elected or appointed;
- (c) who with his authority is named in the prospectus as a director or as having agreed to become a director either immediately or after an interval of time;
- (d) who is a promoter of the company; or
- (e) who has authorized the issue of the prospectus,

shall be liable to pay compensation to all persons who have acquired any shares on the faith of the prospectus for the loss or damage they may have sustained by reason of any untrue statement therein, or in any report or memorandum appearing on the face thereof or issued therewith, or by reference incorporated therein.

(2) Where shares are offered to the public for sale in pursuance of a prospectus, every person-

- (a) who has made the said offer;
- (b) who under section 154 (3) is deemed to have authorized the issue of such prospectus; or
- (c) who is in relation to the company the shares of which are so offered, a person referred to in subsection (1) (a), (b), (c), (d) or (e),

shall be liable to pay compensation to all persons who have acquired any shares on the faith of the prospectus for the loss or damage they may have sustained by reason of any untrue statement therein, or in any report or memorandum appearing on the face thereof or issued therewith, or by reference incorporated therein.

(3) The liability provided for in subsection (1) or (2) shall not attach to any person if it is proved-

- (a) with respect to every such untrue statement not purporting to be made on the authority of an expert or of a public official document or statement, that he had reasonable ground to believe, and did up to the time of the allotment of the shares or the acceptance of the offer, as the case may be, believe that the statement was true; and
- (b) with respect to every such untrue statement purporting to be a statement by or contained in what purports to be a copy of or extract from the report or valuation of an expert, that it fairly represented the statement or was a correct and fair copy of or extract from the report or valuation and that the defendant had reasonable ground to believe and did up to the time of the issue of the prospectus believe that the person making the statement was competent to make it, and that the said person had given the consent required by this Act to the issue of the prospectus or the making of the offer and had not withdrawn that consent before lodgment of a copy of the prospectus for registration or, to the defendant's knowledge, before allotment thereunder or before the acceptance of the offer; and
- (c) with respect to every such untrue statement purporting to be a statement made by an official person or contained in what purports to be a copy of or extract from a public official statement, that it was a correct and fair representation of the statement or copy of or extract from the document;

or if it is proved-

- (i) that having consented to become a director of the company, he withdrew his consent before the issue of the prospectus and that it was issued without his authority or consent; or
- (ii) that the prospectus was issued without his knowledge or consent and that on becoming aware of its issue, he forthwith gave reasonable public notice that it was issued without his knowledge or consent; or
- (iii) that after the issue of the prospectus and before allotment or acceptance thereunder he, on becoming aware of any untrue statement therein, withdrew his consent thereto and gave reasonable public notice of the withdrawal and of the reason therefor.

(4) Where the prospectus contains the name of a person as a director of the company, or as having agreed to become a director thereof, and he has not consented to become a director, or has withdrawn his consent before the issue of the prospectus and has not authorized or consented to the issue thereof, the directors of the company (except any without whose knowledge or consent the prospectus was issued) and any other person who issued it or authorized the issue thereof, shall be liable to indemnify the person named as aforesaid, against all damages, costs and expenses for which he may be liable by reason of his name having been so stated in the prospectus or in defending himself against any action or legal proceedings brought against him in respect thereof.

(5) Every person who by reason of his being a director or having been named as a director, or having agreed to become a director, or of his having authorized the issue of the prospectus or of his having become a director between the issue of the prospectus and the holding of the first general meeting of the company at which directors are elected or appointed, has satisfied any liability to make payment under this section, may recover a contribution, as in cases of contract, from any other person, who, if sued separately, would have been liable to make the same payment, unless the person who has satisfied such liability was, and that other person was not, guilty of fraudulent misrepresentation.

### **161 Liability of experts and others**

(1) Where the consent of any person is required under section 151 and he has given that consent-

- (a) he shall not, by reason of his having given it, be liable as a person who has authorized the issue of the prospectus either-
  - (i) under section 160 (1) or (2) to compensate persons subscribing or purchasing on the faith of the prospectus, except in respect of any untrue statement purporting to be made by him as an expert; or
  - (ii) under section 160 (4) to indemnify any person against liability under the said section 160 (1) or (2); but
- (b) he shall, in respect of any untrue statement purporting to be made by him as an expert, be liable under the said section 160 (1) or (2), unless one of the following things (which shall in his case be in lieu of the grounds of defence available to others by virtue of section 160 (3), is proved, namely-
  - (i) that having given his consent as aforesaid he withdrew it in writing before lodgment of a copy of the prospectus for registration; or
  - (ii) that after lodgment of a copy of the prospectus for registration and before allotment thereunder to, or before acceptance thereunder by, the person complaining, he, on becoming aware of the untrue statement, withdrew his consent in writing and gave reasonable public notice of the withdrawal and of the reason therefor; or
  - (iii) that he was competent to make the statement and that he had reasonable ground to believe and did up to the time of the allotment of the shares or the acceptance of the offer, as the case may be, believe that the statement was true.

(2) Where under section 151 the consent of any person is required to the issue of a prospectus, and he either has not given that consent or has withdrawn it before the issue of the prospectus, he shall be entitled to indemnity under section 160 as if he had without his consent been named in the prospectus as a director of the company.

### **162 Offences in respect of untrue statements in prospectus**

(1) Where a prospectus contains a statement which is untrue, every person referred to in section 160 (1) or (2) shall, subject to the provisions of subsections (3) and (4) of this section, be guilty of an offence.

(2) Where there is published with or as part of a prospectus a report of any expert or an extract from such report and such report or extract contains a statement which is untrue, the expert shall, provided he has given his consent to the inclusion of such statement in the prospectus in the form and context in which it appears, and subject to the provisions of subsections (3) and (4), be guilty of an offence.

(3) In any prosecution under this section it shall be a defence if it is proved either that the untrue statement was immaterial or-

- (a) with respect to every such untrue statement not purporting to be made on the authority of an expert or of a public official document or statement, that the person charged had, after reasonable investigation, reasonable ground to believe and did up to the time of the allotment of the shares or acceptance of the offer (as the case may be) believe that the statement was true, and that there was no omission to state any material fact necessary to make the statement as set out not misleading; and
- (b) with respect to every untrue statement purporting to be a statement by or contained in what purports to be a copy of or extract from a report or valuation of an expert, that the person charged had reasonable ground to believe and did believe that the person making the report or valuation was competent to make it; and
- (c) with respect to every such untrue statement purporting to be a statement made by an official person or contained in what purports to be a copy of or extract from a public

official document, that it was a correct and fair representation of the statement or copy of or extract from the document.

- (4) In any prosecution under this section of any person it shall be a defence if it is proved-
- (a) that having consented to become a director of the company he withdrew his consent before the issue of the prospectus, and that it was issued without his authority or consent; or
  - (b) that the prospectus was issued without his knowledge or consent, and that on becoming aware of its issue he forthwith gave reasonable public notice that it was issued without his knowledge or consent; or
  - (c) that after the issue of the prospectus and before allotment or acceptance thereunder, he, on becoming aware of any untrue statement therein, withdrew his consent thereto and gave reasonable public notice of the withdrawal, and of the reason therefor.

### **163 No diminution of liability under any other law or the common law**

Nothing in this Chapter contained shall limit or diminish any liability which any person may incur under this Act apart from this Chapter, or under any other law, or under the common law.

#### *Allotment and Acceptance after Offer to the Public (ss 164-169)*

### **164 Time limit as to allotment or acceptance**

(1) No company shall allot any shares offered to the public for subscription and no offeror shall accept any offer to purchase any shares offered for sale to the public unless the application concerned is received by the company or the offeror, as the case may be, before the expiration of a period of four months after the date of registration of the prospectus.

(2) Any director or officer of a company or any offeror or, if the offeror is a company, any director or officer of that company who knowingly contravenes or permits the contravention of subsection (1) with respect to allotment or acceptance of an offer, shall be guilty of an offence.

### **165 No allotment unless minimum subscription received**

(1) No shares shall be allotted on any application made in pursuance of a prospectus for subscription unless the amount stated in that prospectus as the minimum amount which in the opinion of the directors of the company concerned must be raised by the issue of share capital in order to provide for the matters specified in paragraph 21 of Schedule 3 to this Act has been subscribed and the amount so stated has been paid to and received by the company.

(2) For the purposes of subsection (1)-

- (a) an amount stated in any cheque received by the company shall not be deemed to have been paid to and received by it until the amount of the cheque has been unconditionally credited to its account with its bankers; and
- (b) any amount paid to and received by the company shall be reduced by the amount of any money, bill, promissory note or cheque which it has at any time delivered to the payer otherwise than in discharge of a debt *bona fide* due to him by the company.

(3) The amount so stated in the prospectus shall be reckoned exclusively of any amount payable otherwise than in cash and is in this Act referred to as 'the minimum subscription'.

(4) The amount paid on application shall be set apart by the directors as a separate fund in a separate account with a banking institution registered under the Banks Act, 1965 (Act 23 of 1965), and shall not be available for the purposes of the company or for the satisfaction of its debts until the minimum subscription has been made up.

(5) (a) If the requirements prescribed in subsection (1) have not been complied with on the expiration of sixty days after the issue of the prospectus, all moneys received from applicants for shares shall forthwith be repaid to them without interest, and, if any such money is not so repaid within a period of eighty days after the issue of the prospectus, the directors and officers of the company shall be jointly and severally liable to repay that money with interest at the rate of six per cent per annum

reckoned from the expiration of the said period of eighty days.

(b) It shall be a defence to any claim under paragraph (a), or any charge under subsection (6), to prove that the default which is the subject of the claim or charge, was not due to any misconduct or negligence on the part of the defendant or the accused.

(6) Any director or officer of the company who knowingly contravenes or permits the contravention of any provision of this section, shall, in addition to any other liability incurred under subsection (5) (a), be guilty of an offence.

### **166 No allotment or acceptance if application form not attached to prospectus**

(1) No company shall allot any shares offered to the public for subscription and no offeror shall accept any offer to purchase any shares offered for sale to the public unless the subscription or offer has been made on an application form which has been attached to or accompanied by a prospectus as required by section 147 or unless it is shown that the applicant, at the time of his application, was in fact in possession of a copy of the prospectus or was aware of its contents.

(2) Any director or officer of a company or any offeror (or if the offeror is a company, any director or officer of that company) who knowingly contravenes or permits the contravention of subsection (1), shall be guilty of an offence.

### **167 Voidable allotment where section 164, 165 or 166 contravened**

(1) (a) An allotment made by a company to an applicant, or the acceptance of an offer made by an applicant, in contravention of any provision of section 164, 165 or 166 shall be voidable at the instance of the applicant concerned within thirty days after the date of allotment or acceptance, and not later.

(b) The provisions of paragraph (a) shall apply notwithstanding that the company concerned may be in the course of being wound up.

(2) (a) When an allotment or an acceptance is declared void under subsection (1), every director and every officer of the company concerned or the offeror, and if the offeror is a company, every director and every officer thereof, shall be liable to compensate the company concerned and the applicant for any loss, damages or costs which such company or the applicant may have sustained or incurred thereby.

(b) No proceedings to recover any such loss, damages or costs shall be commenced after the expiration of two years from the date of the relevant allotment or acceptance.

### **168 Minimum interval before allotment or acceptance**

Cases

(1) (a) No allotment of shares or acceptance of an offer in respect of shares of a company shall be made in pursuance of a prospectus, and no proceedings shall be taken on applications made in pursuance of a prospectus, until the beginning of the third day after that on which the prospectus is first issued or such later time (if any) as may be specified in the prospectus.

[Para. (a) substituted by s. 12 (a) of Act 64 of 1977.]

(b) The beginning of the said third day or the said later time is in this Chapter referred to as 'the time of the opening of the subscription lists or offer'.

(2) For the purposes of subsection (1), the reference therein to the day on which the prospectus is first issued shall be construed as a reference to the day on which it is first issued as a newspaper advertisement, or, if it is not issued as a newspaper advertisement before the third day after that on which it is first issued in any other manner, as a reference to the day on which it is first issued in such other manner.

[Sub-s. (2) substituted by s. 12 (b) of Act 64 of 1977.]

(3) The validity of an allotment or acceptance shall not be affected by any contravention of the provisions of subsection (1), but, in the event of any such contravention, the company concerned, and every director and every officer of the company and the offeror, and, if the offeror is a company, every

director and every officer thereof who knowingly is a party to the contravention, shall be guilty of an offence.

(4) An application for shares of a company which is made in pursuance of a prospectus shall not be revocable before the expiration of the third day after the time of the opening of the subscription lists or offer or the giving before the expiration of the said third day, of a public notice under section 160 having the effect of excluding or limiting the liability under that section of the person giving such notice.

[Sub-s. (4) substituted by s. 12 (c) of Act 64 of 1977.]

(5) In reckoning any number of days for the purposes of this section, Saturdays, Sundays and public holidays shall not be taken into account.

### **169 Conditional allotment if prospectus states shares to be listed by stock exchange**

(1) No prospectus containing a statement to the effect that application has been or will be made for permission for the shares offered thereby to be dealt in on a stock exchange shall be issued unless such an application has been made in accordance with the requirements of the stock exchange concerned on or before the date of issue of such prospectus and it names the particular stock exchange to which such application has been made.

(2) Any allotment of shares in pursuance of a prospectus referred to in subsection (1) shall be subject to the condition that the application for permission for the said shares to be dealt in on the stock exchange concerned, is granted or that an appeal against a refusal of such application, is upheld.

(3) (a) Any money received in respect of applications for shares in pursuance of a prospectus referred to in subsection (1) shall be set apart by the directors of the company as a separate fund in a separate account with a banking institution registered under the Banks Act, 1965 (Act 23 of 1965), and shall not be available for the purposes of the company or for the satisfaction of its debts so long as the company may in terms of subsection (4) become liable for the repayment thereof.

(b) If any issue of shares in pursuance of such a prospectus is oversubscribed, the directors of the company shall forthwith repay the amounts oversubscribed to the applicants.

(4) (a) Where the application for permission to deal in the shares on a stock exchange has been refused and no appeal has been noted or when an appeal against the refusal of an application has been dismissed or an appeal against the granting of an application has been upheld, the company shall forthwith repay all moneys received in respect of applications made in pursuance of the prospectus together with any interest earned thereon, if any; and

(b) if any such money is not repaid within fourteen days after the company becomes liable to repay it, the directors and officers of the company, together with the company, shall be jointly and severally liable to repay that money with interest at the rate of six per cent per annum from the expiration of the fourteenth day.

(5) (a) If any provision of subsection (1), (3) or (4) is contravened or not complied with, the company, and every director or officer thereof who knowingly is a party to such contravention or non-compliance, shall be guilty of an offence.

(b) It shall be a defence to any claim under subsection (4) (b) or any charge under paragraph (a) of this subsection to prove that the default which is the subject of the claim or the contravention or non-compliance was not due to misconduct or negligence on the part of the defendant or the accused.

(6) The provisions of this section shall-

(a) in relation to any shares agreed to be taken by a person underwriting an offer of the shares by a prospectus, have effect as if he had applied therefor in pursuance of the prospectus;

(b) in the case of a prospectus offering shares for sale, be construed, except in so far as the context otherwise indicates-

(i) as if any reference therein to the allotment of shares were a reference to the

- acceptance of the offer in respect thereof;
- (ii) subject to the provisions of subparagraph (iii), as if any reference therein to a company by which a prospectus has been issued, or a director or officer thereof, were a reference to the person by whom the shares have been offered; and
  - (iii) where the person by whom the shares have been offered is a company, as if the reference therein to a director or officer of a company by which a prospectus has been issued, were a reference to a director or officer of the company by which the shares have been offered for sale.

(7) In reckoning any number of days for the purposes of this section, Saturdays, Sundays and public holidays shall not be taken into account.

**CHAPTER VII**  
**ADMINISTRATION OF COMPANIES (ss 170-207)**  
*General (ss 170-178)*

**170 Postal address and registered office of company**

Cases

(1) Every company including every external company shall have in the Republic-

- (a) a postal address to which all communications and notices may be addressed; and
- (b) a registered office to which all communications and notices may be addressed and at which all process may be served.

(2) (a) Upon incorporation of a company, notice of the situation of the registered office and of the postal address shall be given to the Registrar.

(b) At least twenty-one days' notice of any intended change in the situation of the registered office or of the postal address shall be given to the Registrar: Provided that if less than twenty-one days' notice of an intended change in the situation of the registered office or postal address is given, the Registrar may determine the date on which the change will take effect.

[Para. (b) amended by s. 7 (a) of Act 70 of 1984.]

(c) Particulars of which notice was given to the Registrar in terms of paragraph (a) or (b), shall be recorded by the Registrar, and he shall notify the company of the date on which the particulars of any change referred to in paragraph (b) have been recorded by him.

(d) A change in the situation of the registered office or of the postal address of a company shall for the purposes of this Act not take effect unless the Registrar has recorded the particulars thereof.

[Para. (d) substituted by s. 7 (b) of Act 70 of 1984.]

[Sub-s. (2) substituted by s. 6 (1) (a) of Act 84 of 1980.]

(3) Any notice referred to in subsection (2) shall be in the prescribed form.

[Sub-s. (3) substituted by s. 6 (1) (b) of Act 84 of 1980.]

(4) A company which fails to comply with any requirement of this section, shall be guilty of an offence.

**171 Names of directors to be stated on trade catalogues, trade circulars and business letters of company**

(1) A company shall not issue or send, irrespective of whether it is in electronic or any other format, to any person in the Republic any trade catalogue, trade circular or business letter bearing the company's name unless there is stated thereon or therein in a form capable of retrieving therefrom in respect of every director-

- (a) his present forenames, or the initials thereof, and present surname;
- (b) any former forenames and surnames not being those referred to in section 215 (3);
- (c) his nationality, if not South African.

[Sub-s. (1) amended by s. 21 of Act 35 of 2001.]

(2) Any company which fails to comply with any provision of subsection (1), shall be guilty of

an offence.

## 172 Certificate to commence business

### Cases

(1) No company having a share capital shall commence business or exercise any borrowing powers unless and until the Registrar has under the provisions of this section issued under his hand and seal a certificate entitling the company to commence business.

(2) In the case of a public company which has issued a prospectus for the subscription for shares before a certificate to commence business has been issued, such certificate to commence business shall be issued upon the application of the company in the prescribed manner accompanied by an affidavit by a director or secretary of the company to the effect-

- (a) that every director has paid to the company for each of the shares (if any) taken or contracted to be taken by him, and for which he is liable to pay in cash, the full subscription price;
- (b) that shares paid for in cash have been allotted to a total amount of not less than the minimum subscription stated in the prospectus; and
- (c) that no money is or may become repayable to applicants for any shares which have been offered to the public by reason of the refusal of an application for permission for the shares to be dealt in on a stock exchange or the dismissal of an appeal against such refusal,

and accompanied by the return prescribed by section 216 (2).

[Sub-s. (2) amended by s. 6 (1) (a) of Act 29 of 1982.]

(3) In the case of every company having a share capital, a certificate to commence business shall be issued upon the application of the company in the prescribed manner accompanied by-

- (a) a statement of the opinion of each director to the effect that the capital of the company is adequate for the purposes of the company and its business or, if he is of the opinion that it is inadequate, the reasons therefor and the manner in which and the sources from which the company is to be financed and the extent thereof;
- (b) the return prescribed by section 216 (2);
- (c) .....

[Para. (c) deleted by s. 6 (1) (b) of Act 29 of 1982.]

- (d) .....

[Para. (d) deleted by s. 9 (1) of Act 59 of 1978.]

- (e) the consent to act as auditor, if not already lodged.

(4) Any such certificate issued by the Registrar shall be conclusive evidence that the company is entitled to commence business.

(5) (a) Any contract made by a company before the date on which it is entitled to commence business shall be provisional only and shall become binding on the company on that date and not earlier.

(b) Until a certificate entitling a company to commence business is issued, the directors and the subscribers of the memorandum of the company shall be jointly and severally liable for all the debts and liabilities arising from any business conducted by the company in contravention of subsection (1).

(6) Nothing in this section shall prevent the simultaneous offer for subscription or allotment of any shares and debentures of the company or the receipt of any money payable on application for debentures.

(7) If a company contravenes subsection (1), every person who is responsible for or knowingly is a party to the contravention shall, in addition to any other liability incurred, be guilty of an offence.

(8) This section shall not apply to an existing company which was entitled, under the repealed Act, to commence business or exercise borrowing powers.

[Sub-s. (8) added by s. 9 of Act 76 of 1974.]

### 173 Annual return

(1) (a) In order to assist the Registrar to determine whether the information required to be disclosed in terms of this Act by a company has been disclosed and is still valid, every company shall not later than the end of the month following upon the month within which the anniversary of the date of its incorporation occurs, on payment of the prescribed fee, lodge with the Registrar a return in the prescribed form.

(b) If the date of the company's incorporation cannot be established from the documents in the Companies Registration Office, the date of such anniversary shall for purposes of this section be deemed to be 30 June.

(2) A copy of the annual return contemplated in subsection (1) shall be kept at the registered office of the company, and the provisions of section 113 relating to the inspection of the register of members of the company and the furnishing of copies thereof shall apply *mutatis mutandis* to the annual return by a company.

(3) For purposes of this section 'company' includes an external company.

[S. 173 amended by s. 13 (1) of Act 111 of 1976, by s. 13 (1) of Act 64 of 1977, by s. 21 (1) of Act 114 of 1977 and by s. 7 (1) of Act 29 of 1982, repealed by s. 7 of Act 31 of 1986 and inserted by s. 5 of Act 39 of 2002.]

(4) The information required to be disclosed in terms of this Act, as contained in the latest annual return of a company will, in the absence of any subsequent compliance with any relevant disclosure requirement of this Act, be regarded as the latest disclosed information in respect of the company concerned.

[Sub-s. (4) added by s. 19 of Act 24 of 2006.]

### 174 .....

Cases

[S. 174 amended by s. 10 of Act 76 of 1974, by s. 22 (1) of Act 114 of 1977, by s. 10 of Act 59 of 1978 and by s. 10 of Act 99 of 1981, substituted by s. 8 (1) of Act 29 of 1982 and repealed by s. 8 of Act 31 of 1986.]

### 175 .....

[S. 175 amended by s. 14 (1) of Act 111 of 1976, by s. 23 (1) of Act 114 of 1977, by s. 11 of Act 59 of 1978 and by s. 11 of Act 99 of 1981 and repealed by s. 9 (1) of Act 29 of 1982.]

### 176 Enforcement of duty of company to make returns to Registrar

(1) If a company, having made default in complying with any provision of this Act which requires it to lodge with, deliver or send to the Registrar any return, annual financial statements or other document, or to give notice to him of any matter, fails to make good the default within fourteen days after the Registrar, on his own initiative or on application by any member or creditor of the company, has sent to the company a reminder by registered post to its registered office requiring it to do so, the Registrar may direct the company or any officer thereof, by written notice served on the company or officer or sent to the company or officer by registered post to the registered office of the company, to make good the default within thirty days of the date upon which the notice was served or sent.

[Sub-s. (1) substituted by s. 8 (a) of Act 70 of 1984 and amended by s. 28 of Act 35 of 2001.]

(2) If the company or the officer thereof on whom a notice referred to in subsection (1) was served or to whom it was sent, within the said period of 30 days fails to-

(a) make good the default; or

(b) satisfy the Registrar that, on good cause shown, a penalty ought not to be imposed, the Registrar may, by further written notice served on the company or officer concerned or sent to the company or officer by registered post to the registered office of the company, impose upon that

company or officer a penalty not exceeding two hundred rand.

[Sub-s. (2) substituted by s. 8 (b) of Act 70 of 1984.]

(2A) When the Registrar has served a notice under subsection (2) on a company or an officer thereof or has sent such notice to it or him, he may, not less than twenty-one days after the date upon which that notice was served or sent, forward a certified copy thereof to the clerk of the magistrate's court in whose area of jurisdiction the registered office of the company is situated, who shall record it, and thereupon such notice shall have the effect of a civil judgment of that magistrate's court against the company or officer concerned.

[Sub-s. (2A) inserted by s. 8 (c) of Act 70 of 1984.]

(2B) On application by the company on which or the officer thereof on whom a notice referred to in subsection (1) was served or to whom it was sent, the magistrate's court in question may, notwithstanding the provisions of section 12, and before the clerk of that court has recorded the notice in terms of subsection (2A), reduce the amount of the penalty, or set aside the imposition of the penalty, and the court may, where the clerk has already recorded the notice, exempt the company or officer wholly, or to the extent determined by the court, from the effect of the notice.

[Sub-s. (2B) inserted by s. 8 (c) of Act 70 of 1984.]

(2C) If a penalty imposed by the Registrar under this section is reduced or set aside in terms of subsection (2B), or the company or officer is so wholly or in part exempted from the effect of the notice, by the magistrate's court in question, no costs shall be awarded against the Registrar unless it be proved that he acted in bad faith or without reasonable care or diligence.

[Sub-s. (2C) inserted by s. 8 (c) of Act 70 of 1984.]

(3) Nothing in this section shall be taken to prejudice the operation of any provision of this Act, imposing penalties on a company or its officers in respect of any such default as aforesaid.

### **177 Extension of time**

When in terms of this Act anything is to be performed within a specified period of time, the Registrar may in any case, on application to him before or after the expiry of that period, and on payment of the prescribed fee, or generally, and on his own motion, extend the said period as he may deem fit subject to the provisions of this Act, and where any period has been so extended, any reference in section 178 to such period shall be construed as a reference to such period as so extended.

[S. 177 substituted by s. 14 (1) of Act 64 of 1977.]

### **178 Additional fees in respect of late lodgement of returns and other documents**

(1) A company or an external company which has failed to lodge a return or other document required by section 93 (3), 173, 200 (1), 216 (2) or 276 within the period specified by the relevant provision, may thereafter, without derogating from any provision of this Act, lodge such return or other document subject to the payment to the Registrar of the prescribed additional fee in respect of each such failure.

[Sub-s. (1) substituted by s. 3 of Act 78 of 1989 and by s. 6 of Act 39 of 2002.]

(2) .....

[Sub-s. (2) deleted by s. 47 of Act 88 of 1996.]

[S. 178 amended by s. 15 of Act 64 of 1977 and by s. 7 (1) of Act 84 of 1980 and substituted by s. 10 (1) of Act 29 of 1982 and by s. 9 of Act 31 of 1986.]

### **Meetings of the Company (ss 179-192)**

### **179 Annual general meeting**

Cases

(1) (a) Every company, at such times as are in this subsection prescribed, shall hold general meetings to be known and described in the notices calling such meetings as annual general meetings of that company.

(b) Such meetings shall be held-

- (i) in the case of the first such meeting, within a period of eighteen months after the date of the incorporation of the company concerned; and
- (ii) thereafter within not more than nine months after the end of every ensuing financial year of that company; and  
  - [Sub-para. (ii) substituted by s. 11 of Act 29 of 1982.]
- (iii) within not more than fifteen months after the date of the last preceding such meeting of that company.

(2) The annual general meeting of a company shall deal with and dispose of the matters prescribed by this Act and may deal with and dispose of such further matters as are provided for in the articles of the company and, subject to the provisions of this Act, any matters capable of being dealt with by any general meeting of the company.

(3) The Registrar may, on application to him before, or, for the purposes of subsection (6), also after, the expiration of the period within which an annual general meeting of a company must be held and on good cause shown, and on payment of the prescribed fee, extend the period within which an annual general meeting of the company concerned must be held by a period not exceeding three months, but, notwithstanding any such extension, the date for the holding of the first annual general meeting following the meeting in respect of which the extension is granted, shall be determined as if such meeting had been held on the last day on which it should have been held if the extension had not been granted.

[Sub-s. (3) substituted by s. 16 (a) of Act 64 of 1977 and by s. 9 of Act 70 of 1984.]

(4) (a) If for any reason an annual general meeting of a company is not or cannot be held as provided in this section or any matter required by this Act to be dealt with and disposed of at such meeting is not dealt with thereat, the Registrar may, on application by the company or any member or its or his legal representative and on payment of the prescribed fee, call or direct the calling of a general meeting of the company which shall be deemed to be an annual general meeting, and may give such ancillary or consequential directions as he may think expedient, including directions modifying or supplementing, in relation to the calling, holding and conduct of the meeting, the operation of the company's articles, and directions providing for one member or the legal representative of a member or any specified number of members present in person or by proxy, to be deemed to constitute a meeting, and any meeting called, held and conducted in accordance with any such direction shall for all purposes be deemed to be an annual general meeting of the company duly called, held and conducted.

(b) For the purpose of determining the date for the holding of the next succeeding annual general meeting of a company, after a meeting held in pursuance of paragraph (a) of this subsection, the provisions of subsection (3) shall *mutatis mutandis* apply.

(5) Any company which fails to comply with any provision of subsection (1) or with any direction given by the Registrar under subsection (4), and every director or officer of the company who knowingly is a party to the failure, shall be guilty of an offence.

(6) A company which has failed to hold its annual general meeting within the time or extended time prescribed by subsection (1) or (3), or as directed by the Registrar under subsection (4), shall further be liable to pay to the Registrar additional fees of fifty rand for every day during which the default continues but not exceeding a maximum of one thousand rand.

[Sub-s. (6) substituted by s. 48 of Act 88 of 1996 and by s. 9 of Act 35 of 1998.]

(7) A company need not hold any particular annual general meeting if all members entitled to attend that meeting agree thereto in writing, and in such event a resolution in writing dealing with and disposing of-

- (a) the matters required by this Act to be dealt with and disposed of at an annual general meeting of a company; and
- (b) such other matters, if any, as may, in terms of subsection (2), be dealt with at such a

meeting,  
and signed by all members entitled to vote at that meeting, before the expiration of the period within which that meeting is to be held, shall be deemed to be a resolution passed at an annual general meeting of the company held in terms of this section on the date on which the last signature to such resolution is affixed.

[Sub-s. (7) added by s. 16 (b) of Act 64 of 1977.]

### **180 General meetings**

(1) General meetings of a company may, subject to the provisions of its articles, be held from time to time.

(2) Any such meeting may, save in so far as is otherwise provided in the articles of a company and without derogation from any other provisions of this Act, be called by two or more members holding not less than one-tenth of its issued share capital or, in the case of a company not having a share capital, by not less than five per cent in number of the members of the company.

### **181 Calling of general meetings on requisition by members**

Cases

(1) The directors of a company shall, notwithstanding anything in its articles, on the requisition of-

- (a) one hundred members of the company or of members holding at the date of the lodging of the requisition not less than one-twentieth of such of the capital of the company as at the date of the lodgment carries the right of voting at general meetings of the company; or
- (b) in the case of a company not having a share capital, one hundred members of the company or of members representing not less than one-twentieth of the total voting rights of all the members having at the said date a right to vote at general meetings of the company,

within fourteen days of the lodging of the requisition issue a notice to members convening a general meeting of the company for a date not less than twenty-one and not more than thirty-five days from the date of the notice.

(2) The requisition shall state the objects of the meeting and shall be signed by the requisitionists and lodged at the registered office of the company, and may consist of several documents in like form, each signed by one or more requisitionists.

(3) If the directors do not within fourteen days from the date of the lodging of the requisition issue a notice as required by subsection (1), the requisitionists or any of them numbering more than fifty or representing more than one-half of the total voting rights of all of them, may themselves on twenty-one days' notice convene a meeting, stating the objects thereof, but no meeting so convened shall be held after the expiration of three months from the said date.

(4) Any meeting convened under this section by the requisitionists shall be convened in the same manner, as nearly as possible, as that in which meetings are to be convened by the directors of the company concerned.

(5) Any reasonable expense incurred by the requisitionists by reason of the failure of the directors duly to convene a meeting shall be repaid to the requisitionists by the company, and any sum so repaid shall be retained by the company out of any sums due or to become due from the company by way of fees or other remuneration in respect of their services to such of the directors as were knowingly party to the default.

(6) Any director or officer of a company who knowingly is a party to a failure to convene a meeting as required by subsection (1), shall be guilty of an offence.

### **182 Convening of general meetings by Registrar**

Where all the directors of a company have become incapacitated or have ceased to be directors,

the Registrar may, unless the articles of a company make other provision in that behalf, on the application of any member of the company or his legal representative, and on payment of the prescribed fee, call or direct the calling of a general meeting of the company and may give such ancillary or consequential directions as he may think expedient, including directions modifying or supplementing, in relation to the calling, holding and conduct of the meeting, the operation of the company's articles, and directions providing for one member or the legal representative of a member or any specified number of members present in person or by proxy to be deemed to constitute a meeting, and any meeting called, held and conducted in accordance with any such direction, shall for all purposes be deemed to be a general meeting of the company duly called, held and conducted.

### **183 General meetings on order of Court**

If for any reason it is impracticable to call an annual general meeting or other general meeting of a company in any manner in which meetings of that company may be called, or to conduct any such meeting in the manner prescribed by the articles of a company or this Act, or if for any other reason the Court thinks fit to do so, it may, either of its own motion or on the application of the Registrar or any director of the company or of any member of the company or his legal representative, order a meeting of the company to be called, held and conducted in such manner as it may direct and may in making any such order give such ancillary or consequential directions as it thinks expedient, including directions providing for one member or the legal representative of a member or any specified number of members present in person or by proxy to be deemed to constitute a meeting, and any meeting called, held and conducted in accordance with any such order, shall for all purposes be deemed to be an annual general meeting or a general meeting, as the case may be, of the company duly called, held and conducted.

### **184 Meetings of company with one member**

In the case of a company having only one member, such member present in person or by proxy shall be deemed to constitute a meeting.

### **185 Duty of company to circulate notice of resolutions and statements by members**

(1) Subject to the provisions of this section, a company shall, on the requisition in writing of such number of members as is referred to in subsection (2), and (unless the company otherwise determines) at the expense of the requisitionists-

- (a) give to members of the company entitled to receive notice of the next annual general meeting, notice of any resolution which may properly be moved and is intended to be moved at that meeting; and
  - (b) circulate to members entitled to have notice of any general meeting sent to them, any statement of not more than one thousand words with respect to the matter referred to in any proposed resolution or the business to be dealt with at that meeting.
- (2) The number of members necessary for a requisition under subsection (1) shall be-
- (a) any number of members representing not less than one-twentieth of the total voting rights of all the members having at the date of the requisition a right to vote at the meeting to which the requisition relates; or
  - (b) not less than one hundred members.

(3) (a) Notice of any such resolution shall be given and any such statement shall be circulated to members of the company entitled to have notice of the meeting sent to them, by serving a copy of the resolution or statement on each such member in any manner permitted for the service of notice of the meeting, and notice of any such resolution shall be given to any other member of the company by giving notice of the general effect of the resolution in any manner permitted for giving him notice of meetings of the company.

(b) A copy of any such resolution or statement shall be served and notice of any such resolution shall be given in the same manner and, so far as practicable, at the same time as the notice of the

meeting in question, or if it is not practicable to do so, as soon as practicable thereafter.

(4) A company shall not be bound under this section to give notice of any resolution or to circulate any statement unless-

- (a) there is lodged at the registered office of the company a copy of the requisition signed by the requisitionists or two or more copies thereof which between them contain the signatures of all the requisitionists-
  - (i) in the case of a requisition requiring notice of a resolution, not less than six weeks before the meeting; and
  - (ii) in the case of any other requisition, not less than two weeks before the meeting; and
- (b) there is lodged or tendered with the requisition a sum reasonably sufficient to meet the company's expenses in giving effect thereto:

Provided that if, after a copy of a requisition requiring notice of a resolution has been lodged at the registered office of the company, an annual general meeting is called for a date six weeks or less after the copy has been lodged, the copy, though not lodged within the time required by this subsection, shall be deemed to have been properly lodged.

(5) (a) The Court may absolve any company from the obligation to circulate any resolution or statement in terms of this section if, on the application either of the company or of any other interested person, the Court is satisfied that the rights thereby conferred are being abused to secure needless publicity for defamatory matter.

(b) An order under this subsection may include an order for the payment by the requisitionists of the costs or any portion of the costs incurred in connection with the relevant application, whether or not they are parties to the application.

(c) The decision of the Court on any such application shall be final.

(6) Notwithstanding anything contained in the articles of a company, the business which may be dealt with at an annual general meeting thereof, shall include any resolution of which notice has been given in accordance with this section, and for the purpose of this subsection notice shall be deemed to have been so given notwithstanding the accidental omission to give such notice to one or more members.

(7) In the event of any failure to comply with any provision of subsection (1), every director or officer of the company who authorizes or knowingly permits or is party to the failure, shall be guilty of an offence.

### **186 Notice of meetings and resolutions**

(1) (a) Unless the articles of a company provide for a longer period of notice, the annual general meeting or a general meeting called for the purpose of passing a special resolution may be called by not less than twenty-one clear days' notice in writing and any other general meeting may be called by not less than fourteen clear days' notice in writing.

(b) Any provision in the articles of a company providing for a shorter period of notice, not being of an adjourned meeting, shall be void.

(2) Notwithstanding the provisions of subsection (1), a meeting of a company shall be deemed to have been duly called-

- (a) in the case of a meeting which is called on a shorter period of notice than is prescribed in that subsection or provided for in the company's articles, if it is so agreed, before or at the meeting, by a majority in number of the members having a right to attend and vote at the meeting who hold not less than ninety-five per cent of the total voting rights of all the members of the company; or
- (b) in the case of a meeting in respect of which notice as contemplated in subsection (1) (a) has not been given, if it is so agreed in writing, before or at the meeting, by all the

members of the company.

[Sub-s. (2) substituted by s. 4 of Act 82 of 1992.]

(3) No resolution of which special notice is required to be given in terms of any provision of this Act shall have effect unless notice of the intention to move it has been given to the company not less than twenty-eight days before the meeting at which it is moved, and the company shall give its members notice of any such resolution at the same time, and in the same manner as it gives notice of such meeting, or, if that is not practicable, either by advertisement in a newspaper having an appropriate circulation or in any other manner allowed by the articles of the company, not less than twenty-one days before the meeting: Provided that if a meeting of the company is called for a date twenty-eight days or less after notice of the intention to move such a resolution has been given to the company, the notice, though not given within the time required by this subsection, shall be deemed to have been properly given for the purposes thereof.

(4) Any company which fails to give notice to its members as required by subsection (3), shall be guilty of an offence.

### **187 Manner of giving notice**

Unless the articles of a company otherwise provide, notice of a meeting of a company shall be served on every member of the company in the manner in which notices are required to be served in terms of Table A or Table B of Schedule 1, whichever is applicable to the company.

### **188 Representation of company or other body corporate at meetings of companies and meetings of creditors**

(1) A company or other body corporate may, by resolution of its directors or other governing body, authorize any person to act as its representative at any meeting of any company of which it is a member or at any meeting of any class of members of that company.

(2) The provisions of subsection (1) shall *mutatis mutandis* apply with reference to meetings of debenture-holders and creditors of a company.

(3) A person authorized as aforesaid shall be entitled to exercise on behalf of the company or other body corporate which he represents, the same powers as that company or body corporate could have exercised if it were an individual shareholder, debenture-holder or creditor of the company in relation to which such person has been authorized to act.

### **189 Representation of members at meetings by proxies**

(1) Any member of a company entitled to attend and vote at a meeting of the company, or where the articles of a company limited by guarantee so provide, any member of such company, shall be entitled to appoint another person (whether a member or not) as his proxy to attend, speak, and vote in his stead at any meeting of the company: Provided that, unless the articles otherwise provide, a proxy shall not be entitled to vote except on a poll and a member of a private company shall not be entitled to appoint more than one proxy.

[Sub-s. (1) substituted by s. 15 (a) of Act 111 of 1976.]

(2) (a) In every notice calling a meeting of a company having a share capital and on the face of every proxy form issued at the company's expense there shall appear with reasonable prominence a statement that a member entitled to attend and vote at the meeting is entitled to appoint a proxy or, where it is allowed, one or more proxies, to attend and speak and vote thereat in his stead, and that a proxy need not also be a member of the company.

[Para. (a) substituted by s. 15 (b) of Act 111 of 1976.]

(b) In the event of any failure to comply with the requirements of this subsection in respect of any meeting, every director and every officer of the company who authorizes, knowingly permits or is party to the failure, shall be guilty of an offence.

(3) (a) Any provision contained in a company's articles shall be void in so far as it would have the effect of requiring the instrument appointing a proxy, or any other document necessary to show the

validity of or otherwise relating to the appointment of a proxy, to be received by the company at its registered office or by any other person more than forty-eight hours before a meeting in order that the appointment may be effective thereat.

(b) In determining any period for the purposes of this subsection Saturdays, Sundays and public holidays shall not be taken into account.

(4) (a) If for the purposes of any meeting of a company invitations to appoint as proxy a person, or one of a number of persons, specified in the invitations are issued at the company's expense to some only of the members entitled to notice of the meeting and to be represented thereat by proxy, every director or officer of the company who authorizes or knowingly permits or is a party to such issue, shall be guilty of an offence.

(b) The provisions of paragraph (a) shall not apply in respect of the issue to a member of a company at his request in writing of a form of appointment naming a proxy or of a list of persons willing to act as proxy, if the form or list is available on request in writing to every member entitled to be represented at the meeting in question by proxy.

(5) If for the purposes of any meeting of a company invitations to appoint as proxy a person, or one of a number of persons, specified in the invitations or the instruments appointing a proxy, are issued at the company's expense, any such invitation or instrument appointing a proxy shall-

(a) contain adequate blank space immediately preceding the name or names of the person or persons specified therein to enable a member to write in the name and, if so desired, an alternative name of a proxy of his own choice;

(b) provide for the member to indicate whether his proxy is to vote in favour of or against any resolution or resolutions to be put at the meeting or is to abstain from voting.

(6) (a) The person present at a meeting of the company, whose name appears first in the list of names which have not been deleted in any instrument appointing a proxy shall be the validly appointed proxy of the member concerned.

(b) If a member does not indicate on the instrument appointing a proxy that his proxy is to vote in favour of or against any resolution or resolutions or to abstain from voting, the proxy shall be entitled to vote as he thinks fit.

(7) In the event of a failure to comply with any requirement of subsection (5), every director or officer of the company who authorizes, knowingly permits or is party to the failure, shall be guilty of an offence.

(8) The provisions of this section shall apply in relation to meetings of any class of members of a company as they apply in relation to general meetings of the company.

### **190 Quorum for meetings**

Unless the articles of a company provide for a greater number of members entitled to vote to constitute a quorum at meetings of a company, the quorum for such meetings shall be-

(a) in the case of a public company, three members entitled to vote, personally present, or if a member is a body corporate, represented;

(b) in the case of a private company, not being a private company having one member, two members entitled to vote, present in person or by proxy or, if a member is a body corporate, represented; and

[Para. (b) substituted by s. 11 of Act 76 of 1974.]

(c) in the case of a wholly-owned subsidiary company, the representative of the holding company.

### **191 Chairman of meetings**

Unless the articles of a company otherwise provide, any meeting of the company may elect any member to be the chairman of the meeting.

### **192 Compulsory adjournment of meetings**

Cases

(1) If at any meeting of a company any member of the company who is present or represented and entitled to vote at the meeting demands an adjournment of the meeting upon any ground stated by him, the chairman shall put the demand to the vote of the meeting, and if a majority of the members present or represented and entitled to vote at the meeting or members present or represented and entitled to vote representing either personally or by proxy more than half of the share capital of the company represented at the meeting, vote in favour of an adjournment, the chairman shall adjourn the meeting to a day not earlier than seven days and not later than twenty-one days after the date of the meeting.

(2) When a meeting has been adjourned as aforesaid the company shall, upon a date not later than three days after the adjournment, publish in a newspaper circulating in the province where the registered office of the company is situated a notice stating-

- (a) the time, date and place to which the meeting has been adjourned;
- (b) the matter before the meeting at the time when it was adjourned; and
- (c) the ground for the adjournment:

Provided that a private company may, instead of publishing the said notice in a newspaper, send it by registered post, or by electronic post if so authorized by its articles, to the members not later than three days after the adjournment.

[Sub-s. (2) amended by s. 22 of Act 35 of 2001.]

(3) Any person acting as chairman of a meeting of a company who fails to comply with any requirement of subsection (1) and any company which fails to comply with any requirement of subsection (2) and any director or officer of such a company who knowingly is a party to the failure, shall be guilty of an offence.

### *Voting Rights and Voting (ss 193-198)*

#### **193 Voting rights of shareholders**

(1) Subject to the provisions of sections 194 and 195 and to the exceptions stated in section 196, every member of a company having a share capital shall have a right to vote at meetings of that company in respect of each share held by him.

(2) Every member of a company limited by guarantee shall, unless the articles otherwise provide, have the right to vote at meetings of that company and shall have one vote.

#### **194 Voting rights of preference shareholders**

(1) Notwithstanding the provisions of section 193 (1), the articles of a company may provide that preference shares shall not confer the right to vote at meetings of the company except-

- (a) during any period determined as provided in subsection (2) during which any dividend or any part of any dividend on such shares or any redemption payment thereon remains in arrear and unpaid; or
- (b) in regard to any resolution proposed which directly affects any of the rights attached to such shares or the interests of the holders thereof, including a resolution for the winding-up of the company or for the reduction of its capital.

[Sub-s. (1) substituted by s. 16 of Act 111 of 1976.]

(2) The period referred to in subsection (1) (a) shall be a period commencing on a day specified in the articles of the company concerned, not being more than six months after the due date of the dividend or redemption payment in question, or, where no due date is specified, after the end of the financial year of the company in respect of which such dividend accrued or such redemption payment became due.

[Sub-s. (2) substituted by s. 16 of Act 111 of 1976.]

#### **195 Determination of voting rights**

(1) A member of a public company having a share capital shall-

- (a) if the share capital is divided into shares of par value, be entitled to that proportion of

the total votes in the company which the aggregate amount of the nominal value of the shares held by him bears to the aggregate amount of the nominal value of all the shares issued by the company;

- (b) if the share capital is divided into shares of no par value, be entitled to one vote in respect of each share he holds.

(2) The voting rights of a member of a private company shall, subject to the provisions of section 193 (1), be determined by the articles of the company.

(3) When any shares of a company are converted into stock, or have been so converted after the first day of January, 1953, all the provisions of this section shall apply *mutatis mutandis* as if such stock consisted-

- (a) in the case of shares of par value, of as many units of equivalent number and value as the number and nominal value of the shares so converted; or
- (b) in the case of shares of no par value, of as many units as the number of shares so converted.

(4) Notwithstanding the provisions of this section, the articles of a company may provide-

- (a) for the chairman of any meeting to have a casting vote; and
- (b) for the votes to which any member is entitled above a stated number to increase, not in direct proportion to the number of shares held, but in some lower proportion specified in such articles and may in such event further provide that no member shall be entitled to a number of votes exceeding the number so specified or that the number of votes to which any member is entitled be limited to a specified number.

#### **196 Exceptions as regards voting rights in existing companies**

(1) The provisions of section 193 (1) shall not apply in respect of shares of a company which at the date of the commencement of this Act had already been issued without voting rights, or in respect of issued shares (other than preference shares) in respect of which at that date there existed different voting rights or in respect of shares subsequently issued in respect of which there existed at that date a contractual right or obligation to issue any such shares.

(2) If any such company issues new shares, all the provisions of this Act as to voting rights shall, save as provided in subsection (1), apply in respect of such new shares, and, for the purpose of determining the voting rights attached to such new shares as provided in section 195 all its shares shall be deemed to have been issued with voting rights in accordance with the provisions of this Act.

#### **197 Exercise of voting rights**

(1) Any person present and entitled to vote, on a show of hands, as a member or as a proxy or as a representative of a body corporate at any meeting of the company shall on a show of hands have only one vote, irrespective of the number of shares he holds or represents.

[Sub-s. (1) substituted by s. 17 of Act 111 of 1976.]

(2) On a poll at any meeting of a company, any member (including a body corporate) or his proxy shall be entitled to exercise all his voting rights as determined in accordance with the provisions of this Act, but shall not be obliged to use all his votes or cast all the votes he uses in the same way.

#### **198 Right to demand a poll**

(1) Any provision contained in a company's articles shall be void in so far as it would have the effect-

- (a) of excluding the right to demand a poll at a general meeting on any question other than the election of the chairman of the meeting or the adjournment of the meeting; or
- (b) of rendering ineffective a demand for a poll made-
  - (i) by not less than five members having the right to vote at such a meeting; or
  - (ii) by a member or members representing not less than one-tenth of the total voting rights of all the members having the right to vote at the meeting; or

- (iii) by a member or members entitled to vote at the meeting and holding in the aggregate not less than one-tenth of the issued share capital of the company.

(2) The instrument appointing a proxy to vote at a meeting of a company shall be deemed also to confer authority to demand or join in demanding a poll, and for the purposes of subsection (1), a demand by a person as proxy for a member shall be the same as a demand by the member.

*Special Resolutions (ss 199-203)*

**199 Requirements for special resolutions**

Cases

(1) A resolution by a company shall be a special resolution if at a general meeting of which not less than twenty-one clear days' notice has been given specifying the intention to propose the resolution as a special resolution, the terms and effect of the resolution and the reasons for it and at which-

- (a) members holding in the aggregate not less than one-fourth of the total votes of all the members entitled to vote thereat, are present in person or by proxy; or
- (b) in the case of a company limited by guarantee, not less than one-fourth of the members entitled to vote thereat are present in person or by proxy,

the resolution has been passed, on a show of hands, by not less than three-fourths of the number of members of the company entitled to vote on a show of hands at the meeting who are present in person or by proxy or, where a poll has been demanded, by not less than three-fourths of the total votes to which the members present in person or by proxy are entitled.

[Sub-s. (1) substituted by s. 18 of Act 111 of 1976.]

(2) (a) If less than one-fourth of the total votes of all the members entitled to attend the meeting and to vote thereat or, in the case of a company limited by guarantee, less than one-fourth of the members of such company, are present or represented at a meeting called for the purpose of passing a special resolution, the meeting shall stand adjourned to a day not earlier than seven days and not later than twenty-one days after the date of the meeting and the provisions of section 192 (2) shall apply in respect of such adjournment.

(b) At the adjourned meeting the members who are present in person or by proxy and are entitled to vote may deal with the business for which the original meeting was convened and a resolution passed by not less than three-fourths of such members shall be deemed to be a special resolution even if less than one-fourth of the total votes are represented at such adjourned meeting.

(3) With the consent of a majority in number of the members of a company having the right to attend and vote at such meeting and holding in the aggregate not less than ninety-five per cent of the total votes of all such members, a resolution may be proposed and passed as a special resolution at a meeting of which less than twenty-one clear days' notice has been given. A copy of such consent, on the prescribed form, shall be lodged with the Registrar together with the copy of the special resolution.

(3A) Notwithstanding the provisions of subsection (1), a resolution may, with the written consent, on the prescribed form, of all the members of the company, be proposed and passed as a special resolution at a meeting of which notice as contemplated in subsection (1) has not been given. A copy of such consent, on the prescribed form, shall be lodged with the Registrar together with a copy of the special resolution.

[Sub-s. (3A) inserted by s. 4 of Act 63 of 1988.]

(4) At any meeting at which a special resolution is submitted to be passed, a declaration by the chairman that the resolution is carried shall, unless a poll is demanded, be conclusive evidence of that fact without proof of the number or proportion of the votes recorded in favour of or against the resolution.

(5) When a poll is demanded regard shall be had, in computing the majority on the poll, to the number of votes cast for and against the resolution.

(6) For the purposes of this section notice of a meeting shall, subject to the provisions of this Act, be deemed to have been duly given and the meeting shall be deemed to be duly held when the notice is given and the meeting is held in the manner provided by the articles of the company concerned.

## **200 Registration of special resolutions**

Cases

(1) Within one month from the passing of a special resolution a copy of such resolution together with either a copy of the notice convening the meeting concerned or a copy of the consent contemplated in section 199 (3A), as the case may be, shall be lodged with the Registrar, who shall, subject to the provisions of subsection (2), and upon payment of the prescribed fee, register such resolution.

[Sub-s. (1) substituted by s. 5 (a) of Act 63 of 1988.]

(2) The Registrar may refuse to register any special resolution so lodged with him, except upon an order of the Court, if such resolution appears to him to be contrary to the provisions of this Act or of the memorandum or articles of the company concerned.

(3) A copy of every special resolution for the time being in force shall be embodied in or annexed to every copy of the articles issued after the registration of the resolution.

(4) A copy of every special resolution shall be transmitted by the company concerned to any member thereof at his request, and on payment of an amount of twenty-five cents or such lesser amount as the company may determine.

(5) Any company which fails to comply with any requirement of subsection (3) or (4) and every director or officer thereof who knowingly permits or is a party to the failure, shall be guilty of an offence.

(6) If a company makes default in lodging with the Registrar a copy of any special resolution, and the notice or the consent, as required by subsection (1), the company, and every director or officer who knowingly permits or is a party to the default, shall be guilty of an offence.

[Sub-s. (6) substituted by s. 5 (b) of Act 63 of 1988.]

## **201 Special resolutions for altering memorandum or articles and matters in pursuance thereof may be passed at same meeting**

Where this Act permits any company to do anything by special resolution subject to the condition that its memorandum or articles authorizes it and its memorandum or articles do not provide for such authority, but do not prohibit it, the company concerned may convene a single meeting for the purpose of-

- (a) passing a special resolution for the creation of the said authority in the memorandum or articles; and
- (b) passing the intended special resolution.

## **202 Special resolution to lapse unless registered**

Any special resolution of which a copy is not lodged with the Registrar and registered by him within six months from the date of the passing of that resolution shall, unless the Court otherwise directs, lapse and be void.

## **203 Dates on which resolutions take effect**

(1) A special resolution shall not take effect until it has been registered by the Registrar under section 200.

(2) Any other resolution passed by a meeting of a company or of the holders of any class of shares of a company shall have effect as from the date on which it is passed.

*Minutes, Minute Books and Reports of Meetings (ss 204-207)*

## **204 Keeping of minutes of meetings of companies**

(1) (a) Every company shall cause minutes of the proceedings at any meeting of the company

to be entered, in one of the official languages of the Republic, in one or more minute books kept for the purpose, within one month after the date on which the meeting was held.

(b) Any such minute book shall be kept at the registered office of the company or at the office where such minute book is made up.

(2) For the purpose of this section loose leaves of paper shall not be deemed to constitute a minute book unless they are bound together permanently, without means provided for the withdrawal or insertion of leaves and the pages are consecutively numbered.

(3) The minutes of any meeting purporting to be signed by the chairman of that meeting or by the chairman of the next succeeding meeting shall be evidence of the proceedings.

(4) Any company which fails to comply with any requirement of subsection (1) or (2), and every director or officer thereof who knowingly permits or is a party to the failure, shall be guilty of an offence.

### **205 Validity of proceedings**

Where minutes have been made of the proceedings at any general meeting of a company, in accordance with the provisions of section 204, the meeting shall be deemed to have been duly held and convened and all proceedings had thereat to have been duly had and all appointments of directors, managers, liquidators, auditors and officers shall be deemed to be valid, until the contrary is proved.

### **206 Right of members to inspect minute books**

(1) Any minute book of a company kept under section 204 shall be open to inspection during business hours by any member of the company, without charge, at the registered office of the company or the office where it is made up, subject to such restrictions as may be provided for in the articles or imposed by the company in general meeting, but so that not less than two hours in each day shall be allowed for inspection.

(2) Any member of a company shall be entitled to be furnished, within seven days after he has made a written request therefor to the company, with a copy of the minutes of the proceedings at any general meeting of the company, certified by the secretary or a director of the company as correct, at a charge not exceeding an amount of twenty-five cents for every page of the copy required.

[Sub-s. (2) substituted by s. 12 of Act 59 of 1978.]

(3) If any inspection required under this section is refused or if any copy required under this section is not furnished within the proper time-

- (a) the Court may on application order that the minutes in question be made available for inspection or that the copy required be furnished immediately or within such period as the Court may direct and may order the costs of the application to be paid by any director or officer of the company who is responsible for the default; and
- (b) the company, and every director or officer thereof who knowingly is a party to the default, shall be guilty of an offence.

### **207 Publication of reports of meetings**

(1) No report purporting to be a report of the proceedings at any meeting of a company shall be circulated or advertised at the expense of the company unless it contains a fair summary of all material questions and comments, relevant to any matter before the meeting, which have been asked or made by members taking part in the proceedings: Provided that there shall not be required in any such report the inclusion of any matter which can reasonably be regarded as defamatory of any person or as detrimental to the interests of the company.

(2) Any director or officer of a company who authorizes or knowingly permits or is a party to the circulation or advertising of a report contrary to the provisions of subsection (1), shall be guilty of an offence, and if in any prosecution under this subsection the defence is raised that matter omitted from a report was immaterial or could reasonably be regarded as defamatory of some person or as detrimental to the interests of the company, the burden of proving this shall be on the person raising

the defence.

**CHAPTER VIII**  
**DIRECTORS (ss 208-251)**  
*Number and Appointment (ss 208-214)*

**208 Number of directors**

Cases

(1) Every public company shall have at least two directors and every private company shall have at least one director.

(2) Until directors are appointed, every subscriber to the memorandum of a company shall be deemed for all purposes to be a director of the company.

**209 Determination of number of directors and appointment of first directors**

Subject to the provisions of the articles of any company, the number of directors of the company may be determined and the first directors may be appointed in writing by a majority of the subscribers to its memorandum.

**210 Appointment of directors to be voted on individually**

(1) At a general meeting of a company a motion for the appointment of two or more persons as directors of the company by a single resolution shall not be moved, unless a resolution that it shall be so moved has first been agreed to by the meeting without any vote being given against it.

(2) Subject to the provisions of section 214, a resolution moved in contravention of this section shall be void, whether or not its being so moved was objected to at the time, but if a resolution so moved is passed, no provision for the automatic reappointment of a retiring director in default of another appointment shall apply.

(3) For the purposes of this section, a motion for approving a person's appointment or for nominating a person for appointment shall be treated as a motion for his appointment.

(4) This section shall not apply to a resolution altering the company's articles.

**211 Consent to act as director or officer**

(1) Any person who, before the issue of a certificate to commence business, is appointed as a director or officer of a company having a share capital, shall-

- (a) before such certificate is issued, sign and lodge with the company his written consent to act as such a director or such an officer, on a duly completed prescribed form containing the particulars prescribed by the Minister by regulation; and
- (b) in the case of a director, either in the memorandum of the company subscribe for a number of shares not less than the number, if any, required to be held by a director thereof as qualification shares, or sign and lodge with the Registrar a contract in the prescribed form in writing to subscribe for or otherwise acquire such shares.

(2) For the purposes of this section 'qualification shares' means the qualification shares required to be held on appointment to the office of director or within a period determined by reference to the time of appointment.

(3) Any person who is appointed as a director or officer of a company at any time after it has become entitled to commence business, shall within twenty-eight days after the date of such appointment or within such further period as the Registrar, on good cause shown and on payment of the prescribed fee, may allow, lodge with the company his written consent to such appointment on the prescribed form referred to in subsection (1) (a), duly completed and signed by him: Provided that the provisions of this subsection shall not apply to the reappointment of a retiring director.

(4) Failure to comply with the provisions of subsection (1) or (3) shall not affect the validity of an appointment.

(5) This section shall not apply in respect of any person deemed to be a director under section 208 (2).

(6) Any person appointed as a director or officer of a company in the circumstances referred to in subsection (1) or (3), who fails to comply with the applicable provisions of those subsections, shall be guilty of an offence.

(7) Any company which publishes, whether in non-electronic or electronic format, and every director or officer of the company who knowingly is a party to the publication of, the name of any person as a director of the company when such person is not a director or has not validly been appointed as director of the company, shall be guilty of an offence.

[Sub-s. (7) substituted by s. 23 of Act 35 of 2001.]

[S. 211 amended by s. 17 of Act 64 of 1977 and substituted by s. 13 (1) of Act 59 of 1978.]

## **212 Filling of vacancy where director disqualified or removed**

Cases

(1) If the articles of a company provide for the filling of casual vacancies in respect of directors, any such vacancy created by the disqualification of any person from being a director of the company or by the removal of a director under this Act, may, subject to the provisions of such articles, and if in the case of any such removal, the vacancy is not filled at the meeting at which he is removed, be filled as a casual vacancy.

(2) A person appointed as a director under subsection (1) in the place of a director removed or disqualified under this Act shall be treated, for the purpose of determining the time at which he or any other director is to retire, as if he had become director on the day on which the person in whose place he is appointed was last appointed a director.

## **213 Qualification shares of directors**

(1) (a) Without prejudice to the restrictions imposed by section 211, any director of a company who is by its articles required to hold a specified number of qualification shares, and who does not hold such qualification shares shall vacate his office if he does not obtain such qualification shares within two months, or such shorter period as may be provided in the articles of the company, from the date of his appointment, and shall not be capable of being reappointed until he has obtained such qualification shares.

(b) For the purposes of any provision in the articles of a company requiring a director to hold a specified number of shares as qualification shares, the bearer of a share warrant shall not be deemed to be the holder of the shares specified in the warrant.

(2) Any person who accepts an appointment or acts as a director of a company contrary to any provision of subsection (1), shall be guilty of an offence.

## **214 Defect in appointment of director and validity of acts**

Cases

The acts of a director of a company shall be valid notwithstanding any defect that may afterwards be discovered in his appointment or qualification.

### ***Register of Directors and Officers (ss 215-217)***

## **215 Register of directors and officers**

(1) Every company shall keep in one of the official languages of the Republic a register of directors and officers of the company and secretaries thereof which are bodies corporate and cause to be entered therein-

- (a) in respect of every director or officer-
  - (i) his full forenames and surname and any former forenames and surname, his identity number or, if he has no such number, his date of birth, his nationality if not South African, his occupation, his residential, business and postal addresses and the date of his appointment; and
  - (ii) the name and registration number of every other company of which such director is a director;

[Sub-para. (ii) substituted by s. 5 of Act 82 of 1992.]

[Para. (a) substituted by s. 14 (1) (a) of Act 59 of 1978.]

- (b) in respect of every officer or secretary which is a body corporate, its name, its registration number, the address of its registered office and the date of its appointment; and
- (c) any changes occurring from time to time in the particulars referred to in paragraphs (a) and (b) and the dates and nature of such changes.

[Para. (c) substituted by s. 14 (1) (c) of Act 59 of 1978.]

[Sub-s. (1) substituted by s. 7 of Act 18 of 1990.]

(2) There shall in addition be entered in the said register the name and date of appointment of the auditor of the company and, where subsection 274 (3) applies, also of the individual contemplated in that subsection, and, in each case, the date and particulars of any change of such name and date of appointment.

[Sub-s. (2) substituted by s. 20 of Act 24 of 2006.]

- (3) For the purposes of subsection (1) (a) '**former forenames and surname**' does not include-
- (a) in the case of a person adopted as a child, any forename and surname borne by him before his adoption; or
  - (b) any forename or surname previously borne by any person which was changed or disused before he attained the age of eighteen years or has been changed or disused for a period of not less than ten years; or
  - (c) in the case of a married or divorced woman or a widow, any forename or surname borne by her before her marriage.

(4) The provisions of section 110 as to the place where the register of members of a company shall be kept and notice thereof to the Registrar and of section 113 as to the inspection of and copies of or extracts from that register, shall apply *mutatis mutandis* to the register to be kept under this section.

(5) Any company which fails to comply with any provisions of subsection (1), (2) or (4), shall be guilty of an offence.

## **216 Duties of directors and others and of company in respect of register**

(1) Any person in respect of whom the particulars referred to in section 215 are in terms of that section to be entered in the register mentioned in that section, shall furnish such particulars in writing to the company concerned-

- (a) in the case of a person appointed as a director or officer of the company, within twenty-eight days after the date of his appointment; and
- (b) in the case of a change in such particulars, but excluding any change contemplated in section 215 (2) and a change by way of the vacation of his office by the person concerned, within fourteen days after the date of the occurrence of the change,

[Para. (b) substituted by s. 15 (a) of Act 83 of 1981.]

and such particulars or any change therein shall upon receipt thereof, and if any director or officer has vacated his office, a statement that such vacation of office has occurred shall forthwith, be entered in such register by the company.

[Sub-s. (1) amended by s. 15 (a) of Act 83 of 1981.]

(2) A company shall within fourteen days after receipt of any particulars referred to in section 215 (1) (a) (i) and (b) or of notice of any change in the particulars referred to in the said section 215 (1) (a) (i) or (b) or after any director or officer or a secretary which is a body corporate has vacated his office, lodge a return with the Registrar in the prescribed form reflecting the contents of such register after such particulars or such change therein or a statement that such vacation of office has occurred, have been entered in the register: Provided that any entry of such a vacation of office previously advised to the Registrar, shall not be reflected in such return.

[Sub-s. (2) amended by s. 15 (b) of Act 83 of 1981 and substituted by s. 8 of Act 18 of 1990.]

(3) In respect of any of the matters referred to in section 211 (1) the return referred to in subsection (2) shall contain a statement, signed by a director, a secretary who is a body corporate or an officer of the company, that-

- (a) the consent, referred to in section 211, of the director or officer in respect of whom particulars are reflected in such return, has been obtained on a duly completed and signed prescribed form; and
- (b) any person appointed as director or officer of the company, is not disqualified under section 218 or 219.

[Sub-s. (3) amended by s. 10 of Act 70 of 1984 and substituted by s. 23 of Act 132 of 1993.]

(4) Any written consent referred to in section 211 shall be retained by the company and the Registrar may from time to time by notice in writing require a company to transmit to him within fourteen days after the date of the receipt of such notice, a certified copy of the consent of any director or officer of the company to act as such.

(5) Any person who or company or external company which fails to comply with any provision of this section shall be guilty of an offence.

[S. 216 amended by s. 18 of Act 64 of 1977 and substituted by s. 15 (1) of Act 59 of 1978.]

**217** .....

[S. 217 repealed by s. 16 (1) of Act 59 of 1978.]

*Disqualifications of Directors (ss 218-220)*

**218 Disqualifications of directors and others**

Cases

(1) Any of the following persons shall be disqualified from being appointed or acting as a director of a company or, except for a body corporate, from being concerned or taking part, directly or indirectly, in the management of a company:

- (a) A body corporate;
  - (b) a minor or any other person under legal disability;
- [Para. (b) substituted by s. 17 (1) of Act 59 of 1978 and by s. 24 of Act 132 of 1993.]

- (c) any person who is the subject of any order under this Act or the repealed Act disqualifying him from being a director;
- (d) save under authority of the Court-
  - (i) an unrehabilitated insolvent;
  - (ii) any person removed from an office of trust on account of misconduct;
  - (iii) any person who has at any time been convicted (whether in the Republic or elsewhere) of theft, fraud, forgery or uttering a forged document, perjury, an offence under the Prevention of Corruption Act, 1958 (Act 6 of 1958), the Corruption Act, 1992 (Act 94 of 1992), Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004, or any offence involving dishonesty or in connection with the promotion, formation or management of a company, and has been sentenced therefor to imprisonment without the option of a fine or to a fine exceeding one hundred rand;

[Sub-para. (iii) substituted by s. 36 (1) of Act 12 of 2004.]

- (iv) any person who has, in terms of an Act of Parliament, been removed from office for not being a fit and proper person to serve as a director or in the management or in any other position of trust of the body in question due to theft, fraud, forgery, uttering a forged document, corruption, whether in terms of the common law or not, or any other act involving dishonesty.

[Sub-para. (iv) added by s. 3 (c) of Act 20 of 2004.]

[Sub-s. (1) amended by s. 3 (b) of Act 20 of 2004.]

(1A) (a) (i) The Registrar of the Court shall, upon-

(aa) the issue of a sequestration order;

(bb) the issue of an order for the removal of a person from an office of trust on account of misconduct; or

(cc) a conviction for an offence referred to in subsection (1) (d) (iii),

send a copy of the relevant order or particulars of the conviction, as the case may be, to the Registrar.

(ii) The Registrar shall notify each company which has as a director the person to whom the order or conviction relates, of the order or conviction.

(iii) A company notified in terms of subparagraph (ii) shall, within a period of 60 days from notification, inform its shareholders in writing of such notification.

(b) The Registrar shall establish and maintain a register of the orders and convictions contemplated in paragraph (a) and such register shall be open to inspection *mutatis mutandis* as if it were a register contemplated in section 113.

(c) (i) If a person's name has been entered on the register contemplated in paragraph (b) because that person was declared insolvent, the Registrar shall remove that person's name from the register as soon as he or she is rehabilitated.

(ii) The Registrar shall remove a person's name from the register where a court has granted authority as contemplated in subsection (1) (d).

[Sub-s. (1A) inserted by s. 3 (d) of Act 20 of 2004.]

(2) Any person disqualified from being appointed or acting as a director of a company and who purports to act as a director or directly or indirectly takes part in or is concerned in the management of any company, or any director or officer of the company in question who knew or who could reasonably be expected to know of the disqualification-

(a) shall be guilty of an offence;

(b) shall be liable, jointly and severally, for all debts incurred by the company for the period during which such person knew or could reasonably be expected to know of the disqualification.

[Sub-s. (2) substituted by s. 3 (e) of Act 20 of 2004.]

(3) Nothing in this section shall be construed as preventing a company from providing in its articles for any further disqualifications for the appointment of or the retention of office by any person as a director of such company.

[S. 218 amended by s. 3 (a) of Act 20 of 2004.]

## **219 Disqualification of directors, officers and others by the Court**

(1) The Court may make an order directing that, for such period as may be specified in the order, a person, director or officer shall not without the leave of the Court be a director of or in any way, whether directly or indirectly, be concerned or take part in the management of any company when-

(a) such person, director or officer, has been convicted of an offence in connection with the promotion, formation or management of a company; or

(b) the Court has made an order for the winding-up of a company and the Master has made a report under this Act stating that in his opinion a fraud has been committed-

(i) by such person in connection with the promotion or formation of the company; or

(ii) by any director or officer of the company in relation to the company since its formation; or

(c) in the course of the winding-up or judicial management of a company it appears that any such person-

- (i) has been guilty of an offence referred to in section 424, whether or not he has been convicted of that offence; or
  - (ii) has otherwise been guilty while an officer of the company of any fraud in relation to the company or of any breach of his duty to the company; or
- (d) a declaration has been made in respect of any person under section 424 (1).

(2) (a) An order under subsection (1) may be made-

- (i) by the Court having jurisdiction to wind up the company affected by the act or omission in respect of which the order is sought, on application by the Master, or, in the case of a company being wound up or under judicial management, by the Director of Public Prosecutions in terms of section 401, or by the liquidator or the judicial manager or by any person who is a creditor or is or has been a member of such company; or

[Sub-para. (i) amended by s. 5 (a) of Act 20 of 2004.]

- (ii) in the case of an order in the circumstances set out in paragraph (a) of that subsection, also summarily by the Court convicting the person concerned,

and any leave required under that subsection may be granted by the Court having jurisdiction to wind up the company in relation to which such leave is sought.

(b) The applicant for any such order shall give not less than ten days' notice of his intention to apply for the order, to the person against whom the order is sought and such person may attend the hearing of the application and give evidence and call witnesses to give evidence on his behalf.

(3) Where an order under subsection (1) has been made, the person to whom the order relates shall give not less than ten days' notice to the Master, the Director of Public Prosecutions, the liquidator or the person who was the judicial manager of the company concerned, of any application he intends making for leave of the Court referred to in subsection (1), who shall draw the attention of the Court to any matter which may appear to them to be relevant, may give evidence and call witnesses.

[Sub-s. (3) amended by s. 5 (a) of Act 20 of 2004.]

(4) (a) For the purposes of subsection (1) (b) (ii) the reference therein to an officer of a company shall be construed as including a reference to any person in accordance with whose directions or instructions the directors of the company have been accustomed to act.

(b) An order may be made under the said subsection (1) (b) (ii) whether or not criminal proceedings have been instituted in respect of any matter on which the order is based.

(4A) (a) The Registrar of the Court which made an order under subsection (1) shall, within seven days after the making of the order, transmit a copy of the order to the Registrar, who must notify each company which has as a director the person to whom the order relates, of the order.

(b) A company notified in terms of paragraph (a) shall, within a period of 60 days from notification, inform its shareholders in writing of such notification.

(c) The Registrar shall establish and maintain a register of the orders made under paragraph (a) and the names of the persons to whom the orders relate, and such register shall be open to inspection *mutatis mutandis* as if it were a register contemplated in section 113.

(d) The Registrar shall remove a person's name from the register-

- (i) if an appeal against an order contemplated in subsection (1) is successful; or
- (ii) where a court has granted leave as contemplated in subsection (1).

[Sub-s. (4A) inserted by s. 4 (a) of Act 20 of 2004.]

(5) Any person who contravenes any order made under subsection (1) or any director or officer of the company in question who knew or who could reasonably be expected to know of the contravention-

- (a) shall be guilty of an offence;
- (b) shall be liable, jointly and severally, for all debts incurred by the company for the period during which such person knew or could reasonably be expected to know of the

contravention.

[Sub-s. (5) substituted by s. 4 (b) of Act 20 of 2004.]

## **220 Removal of directors and procedures in regard thereto**

Cases

(1) (a) A company may, notwithstanding anything in its memorandum or articles or in any agreement between it and any director, by resolution remove a director before the expiration of his period of office.

(b) The provisions of paragraph (a) shall not be construed as authorizing the removal of a director of a private company who was holding office for life on the thirteenth day of June, 1949.

(2) Special notice shall be lodged with the company of any proposed resolution to remove a director under this section or to appoint any person in the stead of a director so removed at the meeting at which he is removed, and, on receipt of notice of such a proposed resolution, the company shall forthwith deliver a copy thereof to the director concerned who shall, whether or not he is a member of the company, be entitled to be heard on the proposed resolution at the meeting.

(3) Where notice is given of a proposed resolution to remove a director under this section, and the director concerned makes representations with respect thereto not exceeding a reasonable length in writing to the company and requests their notification to members of the company, the company shall, unless the representations are received by it too late for it to do so-

(a) in any notice of the resolution given to members of the company, state that such representations have been made; and

(b) send a copy of the representations to every member of the company to whom notice of the meeting is sent, whether such notice is sent before or after receipt of the representations by the company.

(4) If a copy of such representations is not sent as aforesaid because it was received too late or because of the company's default, the director concerned may (without prejudice to his right to be heard orally) require that the representations be read at the meeting.

(5) No copy of such representations shall be sent out and the representations need not be read out at any meeting if, on the application of the company or of any other person who claims to be aggrieved, the Court is satisfied that the rights conferred by this section are being abused to secure needless publicity for defamatory matter.

(6) The Court may order the company's or the said other person's costs on an application under subsection (5) to be paid in whole or in part by the director concerned, notwithstanding that he is not a party to the application.

(7) Nothing in this section shall be construed as depriving a person removed thereunder of compensation or damages which may be payable to him in respect of the termination of his appointment as director or of any appointment terminating with that of director or as derogating from any power to remove a director which may exist apart from this section.

### ***Restrictions on Directors, their Powers and Certain Acts (ss 221-228)***

## **221 Restriction of power of directors to issue share capital**

(1) Notwithstanding anything contained in its memorandum or articles, the directors of a company shall not have the power to allot or issue shares of the company without the prior approval of the company in general meeting.

(2) Any such approval may be in the form of a general authority to the directors, whether conditional or unconditional, to allot or issue any shares in their discretion, or in the form of a specific authority in respect of any particular allotment or issue of shares.

(3) If any such approval is given in the form of a general authority to the directors, it shall be valid only until the next annual general meeting of the company but it may be varied or revoked by any general meeting of the company prior to such annual general meeting.

(4) Any director of a company who knowingly takes part in the allotment or issue of any shares in contravention of subsection (1), shall be liable to compensate the company for any loss, damages or costs which the company may have sustained or incurred thereby, but no proceedings to recover any such loss, damages or costs shall be commenced after the expiration of two years from the date of the allotment or issue.

### **222 Restriction on issue of shares and debentures to directors**

(1) No provision in any memorandum or articles or in any resolution of a company authorizing the directors to allot or issue any shares or debentures convertible into shares of the company at the discretion of the directors, shall authorize the allotment or issue of any such shares or debentures to any director of the company or his nominee, or to any body corporate which is or the directors of which are accustomed to act in accordance with the directions or instructions of such director or nominee, or at a general meeting of which such director or his nominee is entitled to exercise or control the exercise of one-fifth or more of the voting power, or to any subsidiary of such body corporate unless-

- (a) the particular allotment or issue has prior to the allotment or issue been specifically approved by the company in general meeting; or
- (b) such shares or debentures are allotted or issued under a contract underwriting such shares or debentures; or
- (c) such shares or debentures are allotted or issued in proportion to existing holdings, on the same terms and conditions as have been offered to all the members or debenture-holders of the company or to all the holders of the shares or such debentures of the class or classes being allotted or issued; or
- (d) such shares or debentures are allotted or issued on the same terms and conditions as have been offered to members of the public.

[Sub-s. (1) amended by s. 19 of Act 64 of 1977.]

(2) (a) Any director of a company who contravenes or permits the contravention of this section, shall be guilty of an offence and shall be further liable to compensate the company for any loss, damages or costs which the company may have sustained or incurred thereby.

(b) No proceedings to recover any such loss, damages or costs shall be commenced after the expiration of two years from the date of the allotment or issue.

### **223 Share option plans where director interested**

After the commencement of this Act no option or right given directly or indirectly to any director or future director of a company in terms of any scheme or plan, to subscribe for any shares of that company or to take up any debentures convertible into shares of that company on any basis other than that laid down in section 222 (1) (c), shall be valid unless authorized in terms of a special resolution of that company: Provided that-

- (a) the term 'future director' shall not include a person who becomes a director of the company after the lapse of six months from the date upon which such option or right is acquired by such person; and
- (b) no such option or right shall be invalid in terms of this section if such director or future director of the company holds salaried employment or office in the company and is given such option or right in his capacity as an employee.

### **224 .....**

[S. 224 amended by s. 20 of Act 64 of 1977 and repealed by s. 6 of Act 78 of 1989.]

### **225 Prohibition of tax free payments to directors**

(1) No company shall pay to any of its directors (whether in his capacity as a director or otherwise) any remuneration free of any taxation in respect of his income, or otherwise calculated by reference to or varying with the amount of such taxation, or with the rate of taxation on incomes,

except under a contract which was in force on the thirteenth day of June, 1949, and which provides expressly, and not merely by reference to the articles of the company, for payment of remuneration as aforesaid.

(2) Any provision contained in the articles of a company, or in any contract other than such a contract as aforesaid, or in any resolution of a company or of its directors, providing for the payment to a director by way of remuneration of any amount to be determined in a manner prohibited by subsection (1), shall be construed as if it provided for the payment of that amount without reference to such manner of determination thereof.

## **226 Prohibition of loans to, or security in connection with transactions by, directors and managers**

### Cases

(1) No company shall directly or indirectly make a loan to-

- (a) any director or manager of-
  - (i) the company; or
  - (ii) its holding company; or
  - (iii) any other company which is a subsidiary of its holding company; or
- (b) any other company or other body corporate controlled by one or more directors or managers of the company or of its holding company or of any company which is a subsidiary of its holding company;

or provide any security to any person in connection with an obligation of such director, manager, company or other body corporate.

(1A) For the purpose of subsection (1)-

- (a) **'loan'** includes-
  - (i) a loan of money, shares, debentures or any other property; and
  - (ii) any credit extended by a company, where the debt concerned is not payable or being paid in accordance with normal business practice in respect of the payment of debts of the same kind; and
- (b) one or more directors or managers of a company contemplated in subsection (1) (b) shall be deemed to control another company or body corporate only if-
  - (i) such director or manager or his nominee is a member or such directors or managers or their nominees are members of such other company or body corporate and the composition of its board of directors is controlled by such director, manager or nominee or such directors, managers or nominees, and such composition shall be deemed to be so controlled if such director or manager or his nominee or such directors or managers or their nominees may, by the exercise of some power and without the consent or concurrence of any other person, appoint or remove the majority of the directors concerned, and such director, manager or nominee or such directors, managers or nominees shall be deemed to have power to appoint a director where a person cannot be appointed as a director without his or their consent or concurrence; or
  - (ii) more than one-half of the equity share capital of that other company or body corporate or, if that other body corporate is a corporation as defined in section 1 of the Close Corporations Act, 1984 (Act 69 of 1984), more than 50 per cent of the interest in such corporation is held by such director, manager or nominee or such directors, managers, or nominees; and
    - [Sub-para. (ii) substituted by s. 5 of Act 29 of 1985.]
    - [Para. (b) amended by s. 21 (1) (a) of Act 64 of 1977.]
- (c) **'security'** includes a guarantee.

(1B) The provisions of subsection (1) and of paragraph (b) of subsection (1A) shall not be construed as prohibiting a company from making a loan to, or providing security to any person in connection with an obligation of, its holding company or subsidiary or a subsidiary of such holding company;

[Sub-s. (1B) inserted by s. 21 (1) (b) of Act 64 of 1977.]

(2) The provisions of subsection (1) shall not apply-

(a) in respect of-

- (i) the making of a loan by a company to its own director or manager;
- (ii) the provision of security by a company in connection with an obligation of its own director or manager;
- (iii) the making of a loan by a company to any other company or other body corporate controlled by one or more of the directors or managers of the first-mentioned company; or

[Sub-para. (iii) inserted by s. 21 (1) (c) of Act 64 of 1977.]

- (iv) the provision of security by a company in connection with an obligation of any other company or other body corporate controlled by one or more of the directors or managers of the first-mentioned company,

[Sub-para. (iv) inserted by s. 21 (1) (c) of Act 64 of 1977.]

with the prior consent of all the members of the company or in terms of a special resolution relating to a specific transaction: Provided that in respect of any such loan made or security provided at any time before the date of commencement of the Companies Amendment Act, 1992, such consent shall be deemed to have been given if the transaction concerned has subsequently, whether before or after that date, been ratified by all the members of the company; or

[Para. (a) amended by s. 6 of Act 82 of 1992.]

- (b) subject to the provisions of subsection (3), in respect of anything done to provide any director or manager with funds to meet expenditure incurred or to be incurred by him for the purposes of the company concerned or for the purpose of enabling him properly to perform his duties as director or manager of that company; or
- (c) in respect of anything done *bona fide* in the ordinary course of the business of a company actually and regularly carrying on the business of the making of loans or the provision of security; or
- (d) to the provision of money or making of loans by a company for the purposes contemplated in section 38 (2) (b) and (c); or
- (e) to the making of a loan or the provision of security with the approval of the company in general meeting for housing for its director or manager; or
- (f) in respect of-
  - (i) the making of a loan by a company to a director or manager of its subsidiary; or
  - (ii) the provision of security by a company to another person in connection with an obligation of a director or manager of its subsidiary; provided such director or manager is not also a director or manager of such company itself.

[Para. (f) amended by s. 21 (1) (d) of Act 64 of 1977.]

(3) No loan shall be made or security provided by virtue of the provisions of subsection (2) (b), except-

- (a) with the prior approval of the company given at a general meeting at which the amount of the loan or the extent of the security and the purposes thereof are disclosed; or
- (b) on condition that, if the approval of the company is not given as aforesaid at or before

the next annual general meeting of the company, the loan shall be repaid or the liability under the security shall be discharged, within six months from the conclusion of that annual general meeting.

(4) Any director or officer of a company who authorizes, permits or is a party to the making of any loan or the provision of any security contrary to the provisions of this section, shall-

- (a) be liable to indemnify the company and any other person who had no actual knowledge of the contravention, against any loss directly resulting from the invalidity of such loan or security; and
- (b) be guilty of an offence.

(5) For the purposes of subsection (4) 'director or officer of a company' includes, where the company is a subsidiary, any director or officer of its holding company.

[S. 226 substituted by s. 19 of Act 111 of 1976.]

## **227 Payments to directors for loss of office or in connection with arrangements and take-over schemes**

(1) No company shall make any payment or grant any benefit or advantage to any director or past director of the company or of its subsidiary company or holding company or of any subsidiary of its holding company-

- (a) by way of compensation for loss of office or as consideration for or in connection with his retirement from office;
- (b) by way of compensation, consideration or for any other reason, for loss or retention of office or otherwise, in connection with any scheme referred to in section 313; or
- (c) by way of such compensation, consideration or other reason in connection with any scheme or transaction which constitutes an affected transaction as contemplated in Chapter XVA (hereinafter in this section referred to as a take-over offer or take-over scheme),

[Para. (c) substituted by s. 17 of Act 37 of 1999.]

unless full particulars with respect to the proposed payment (including the amount thereof), benefit or advantage have been disclosed to the members of the company and the making of the payment or the grant of the benefit or advantage has been approved by special resolution of the company.

[Sub-s. (1) amended by s. 7 of Act 82 of 1992.]

(2) Any payment made or benefit or advantage granted contrary to the provisions of subsection (1) shall-

- (a) in the case of paragraphs (a) and (b) of that subsection, be deemed to have been received by the director or past director concerned in trust for the company; and
- (b) in the case of paragraph (c) of that subsection, be deemed to have been received by the director or past director concerned in trust for any persons who have sold their shares as a result of the take-over offer concerned.

(3) If in connection with any take-over scheme the price to be paid to a director or past director for any shares of the company held by him is in excess of the price offered to other holders of such shares in terms of the take-over scheme or any benefit or advantage is granted to such director or past director, the excess or the money value of the benefit or advantage, as the case may be, shall for the purposes of this section, be deemed to have been a payment made contrary to the provisions of subsection (1) (c).

(4) A director's expenses of distributing any sum among persons entitled thereto by virtue of subsection (2) (b) shall be borne by him and shall not be retained out of that sum.

(5) Where in proceedings for the recovery of any payment, benefit or advantage deemed to have been received in trust, it is shown that-

- (a) the payment was made or the benefit or advantage was granted in pursuance of any

arrangement entered into as part of an agreement in respect of any scheme or take-over scheme, or within one year before or two years after that agreement or the take-over offer; and

- (b) the company, or the transferee company under any scheme or the offeror in respect of any take-over scheme was privy to that arrangement,

the payment, benefit or advantage shall be deemed, except in so far as the contrary is shown, to be one to which this section applies.

(6) The provisions of this section shall not apply with reference to any *bona fide* payment made or benefit or advantage granted by way of damages for breach of contract or by way of a pension, including any superannuation allowance, gratuity or similar payment in respect of past services.

(7) Nothing in this section shall be taken to prejudice the operation of any rule of law requiring disclosure to be made with respect to any such payments, benefits or advantages as are mentioned in this section or with respect to any other payments, benefits or advantages made or granted or to be made or granted to the directors or past directors of a company.

## **228 Disposal of undertaking or greater part of assets of company**

Cases

(1) Notwithstanding anything contained in its memorandum or articles, the directors of a company shall not have the power, save by a special resolution of its members, to dispose of-

- (a) the whole or the greater part of the undertaking of the company; or  
(b) the whole or the greater part of the assets of the company.

(2) If in relation to the consolidated financial statements of a holding company, a disposal by any of its subsidiaries would constitute a disposal by the holding company in terms of subsection (1) (a) or (b), such disposal requires a special resolution of the shareholders of the holding company.

(3) A special resolution of a company shall not be effective in approving a disposal described in subsection (1) or (2) unless it authorizes or ratifies in terms the [sic] specific transaction.

(4) An undertaking or assets of a company, and the part to be disposed of, shall be calculated for purposes of subsections (1) and (2) according to the fair value of the undertaking or assets as described in financial reporting standards.

(5) Subsections (1) to (4) shall not apply to a disposal between a wholly owned subsidiary and its holding company, or between two wholly owned subsidiaries of the same holding company.

[S. 228 amended by s. 10 of Act 35 of 1998 and substituted by s. 21 of Act 24 of 2006.]

### ***Interests of and Dealings by Directors and Others in Shares of Company (ss 229-233)***

**229** .....

[S. 229 amended by s. 22 of Act 64 of 1977 and repealed by s. 6 of Act 78 of 1989.]

**230 to 233 inclusive** .....

[Ss. 230 to 233 inclusive repealed by s. 6 of Act 78 of 1989.]

### ***Interests of Directors and Officers in Contracts (ss 234-241)***

## **234 Duty of director or officer to disclose interest in contracts**

Cases

(1) A director of a company who is in any way, whether directly or indirectly, materially interested in a contract or proposed contract referred to in subsection (2), which has been or is to be entered into by the company or who so becomes interested in any such contract after it has been entered into, shall declare his interest and full particulars thereof as provided in this Act.

(2) The provisions of subsection (1) shall apply to any contract or proposed contract which is of significance in relation to a company's business and which is entered into or to be entered into-

- (a) in pursuance of a resolution taken or to be taken at a meeting of directors of a company;  
or  
(b) by a director or officer of the company who either alone or together with others has

been authorized by the directors of the company to enter into such contract or any contract of a similar nature.

(3) (a) For the purposes of subsection (1) a general notice in writing given to the directors of a company by a director thereof to the effect that he is a member of a specified company or firm and is to be regarded as interested in any contract which may after the date of the notice and before the date of its expiry be made with that company or firm, shall be deemed to be a sufficient declaration of interest in relation to any contract or proposed contract so made or to be made, if-

- (i) the nature and extent of the interest of the said director in such company or firm is indicated in the said notice; and
- (ii) at the time the question of confirming or entering into the contract in question is first considered or at the time such director becomes interested in a contract after it has been entered into, the extent of his interest in such company or firm is not greater than is stated in the notice.

(b) A general notice under paragraph (a) may from time to time be amended and shall not be effective beyond the end of the financial year of the company but may from time to time be renewed.

(3A) For the purposes of subsection (3) 'firm' means a corporation as defined in section 1 of the Close Corporations Act, 1984 (Act 69 of 1984), or any other body corporate, association, syndicate, partnership or trust that has as its object the acquisition of gain.

[Sub-s. (3A) inserted by s. 11 of Act 35 of 1998.]

(4) Any director or officer of a company who fails to comply with any provision of this section, shall be guilty of an offence.

(5) Nothing in this section shall be taken to prejudice the operation of any rule of law restricting directors of a company from having any interest in contracts with the company.

### **235 Manner of and time for declaration of interest**

(1) No declaration of interest by a director under section 234 shall be of any effect unless it is made at or before the meeting of directors at which the question of confirming or entering into the contract is first taken into consideration and, if in writing, is read out to the meeting or each director present states in writing that he has read such declaration.

(2) If for any reason it is not possible for a director to make any such declaration at or before a particular meeting of directors, he may make it at the first meeting of directors held thereafter at which it is possible for him to do so and shall in that event state the reason why it was not possible to make it at such particular meeting.

### **236 Written resolution where director interested**

Subject to the provisions of section 36 and notwithstanding any provision in the articles of a company permitting the taking of a resolution by way of a written resolution signed by directors, no such resolution which concerns contracts or proposed contracts referred to in section 234 shall be valid unless the provisions of that section and section 235 are complied with.

### **237 Disclosure by interested director or officer acting for company**

(1) A director or officer referred to in section 234 (2) (b) who is in any way, whether directly or indirectly, materially interested in any proposed contract to be entered into by him on behalf of the company, shall, before entering into such contract, declare his interest and the full particulars thereof at a meeting of directors as prescribed by section 235, and shall not enter into such contract unless and until a resolution has been passed by the directors approving thereof.

(2) Any such officer who becomes materially interested in any contract entered into by him on behalf of the company after it was entered into, shall forthwith declare his interest and the full particulars thereof by a written notice given to the directors.

(3) A notice referred to in subsection (2) may be delivered to the secretary of the company, if the company has a secretary, and the secretary shall forthwith transmit it to the directors for whom it is

intended.

(4) Nothing in this section shall be taken to prejudice the operation of any rule of law restricting an officer of a company from having an interest in contracts with the company.

(5) Any director or officer of a company who fails to comply with any provision of this section, shall be guilty of an offence.

### **238 When particulars of interest to be stated in notice of meeting**

(1) If a director of a company is in any way, whether directly or indirectly, materially interested in a contract or proposed contract which is placed before the company at any meeting thereof for confirmation or authorization, the notice convening any such meeting shall state the full particulars of the interest in such contract of the director concerned.

(2) A company which fails to comply with the provisions of subsection (1) and any director who is a party to such failure, shall be guilty of an offence.

### **239 Minuting of declarations of interest**

Cases

(1) Every declaration of interest made under section 234, 235 or 237 (1) shall be recorded in the minutes of the meeting of directors at which the declaration is made, and any declaration of interest by an officer under section 237 (2) shall be recorded in the minutes of the first meeting of directors held after the date of that declaration.

(2) Where any such declaration is made in writing, the company shall, unless copies of the minutes are circulated to the directors, cause the minute recording the declaration to be read out at the first meeting of directors held after the meeting in the minutes of which the declaration was recorded.

(3) Any company which fails to comply with any provision of this section, shall be guilty of an offence.

### **240 Register of interests in contracts of directors and officers and inspection thereof**

(1) Every company shall keep at its registered office or at the office where it is made up a register of interests in contracts in one of the official languages of the Republic, and shall enter therein the particulars of any declarations of interest made under section 234, 235 or 237, including any amendments under section 234 (3) (b).

(2) The provisions of section 110 as to the place where the register of members of a company shall be kept and of section 113 as to the inspection of and copies of or extracts from that register, shall apply *mutatis mutandis* to the register to be kept under this section.

### **241 Duty of auditor as to register of interests in contracts**

The auditor of any company shall satisfy himself that the register of interests in contracts has been kept as required by section 240 and that every declaration of interest recorded therein has been minuted as required by section 239.

#### ***Proceedings at Meetings of Directors (ss 242-246)***

### **242 Keeping of minutes of directors' and managers' meetings**

Cases

(1) The directors of a company shall cause minutes in one of the official languages of the Republic of all proceedings of meetings of directors or managers to be entered in one or more books to be kept for that purpose at the registered office of the company or at the office where such minutes are made up.

(2) Any resolution of directors or managers of a company in the form of a written resolution signed by the directors or managers shall be deemed to be a minute of a meeting and shall be entered in the book or books provided for in subsection (1) and be noted by the next following meeting of directors or managers.

(3) For the purposes of this section loose leaves of paper shall not be deemed to constitute a minute book unless they are bound together permanently without means provided for the withdrawal or

insertion of leaves, and the pages or leaves are consecutively numbered.

(4) The minutes of any meeting of the directors or managers of a company purporting to be signed by the chairman of that meeting or by the chairman of the next succeeding meeting shall be evidence of the proceedings at that meeting.

(5) If default is made in complying with any requirement of subsection (1), (2) or (3), the company, and any director, manager or officer of the company who knowingly is a party to the default, shall be guilty of an offence.

#### **243 Validity of proceedings at meetings of directors or managers**

Where minutes have been kept in accordance with the provisions of section 242 of the proceedings at any meeting of directors or managers of a company, the meeting shall be deemed to have been duly held and convened and all proceedings had thereat to have been duly had, and all appointments of directors, managers, officers or auditors of the company shall be deemed to be valid, until the contrary is proved.

#### **244 When resolution at adjourned directors' or managers' meeting effective**

Any resolution passed at an adjourned meeting of directors or managers of a company shall for all purposes be treated as having been passed on the date on which it was in fact passed.

#### **245 Directors' and managers' meetings: attendance register**

(1) Every director of a company present at any meeting of directors, and every manager thereof present at any meeting of managers, shall at the meeting sign his name under the date of the meeting in a book complying with the provisions of section 242 (3) to be kept for that purpose.

(2) Such book shall be kept at the registered office of the company or at the office where it is made up and shall during business hours be open to inspection by any member of the company without charge.

(3) Any company, director or manager who fails to comply with any provision of this section, shall be guilty of an offence.

#### **246 Duty of auditor as to minute books and attendance register**

The auditor of a company shall satisfy himself that a minute book or books and an attendance register are kept by the company in the form prescribed by sections 242 and 245.

#### ***Indemnity and Relief of and Offences by Directors and Others (ss 247-251)***

#### **247 Exemption from or indemnity against liability of directors, officers or auditors of a company**

(1) Subject to the provisions of subsection (2), any provision, whether contained in the articles of a company or in any contract with a company, and whether expressed or implied, which purports to exempt any director or officer or the auditor of the company from any liability which by law would otherwise attach to him in respect of any negligence, default, breach of duty or breach of trust of which he may be guilty in relation to the company or to indemnify him against any such liability, shall be void: Provided that this subsection shall not be applicable to insurance taken out and kept by the company as indemnification against any liability of any director or officer towards the company in respect of any negligence, default, breach of duty or breach of trust.

[Sub-s. (1) amended by s. 12 of Act 35 of 1998.]

(2) The provisions of subsection (1) shall not be construed as prohibiting a company from indemnifying any director, officer or auditor in respect of any liability incurred by him in defending any proceedings, whether civil or criminal, in which judgment is given in his favour or in which he is acquitted or in respect of any such proceedings which are abandoned or in connection with any application under section 248 in which relief is granted to him by the Court.

#### **248 Relief of directors and others by Court in certain cases**

Cases

(1) If in any proceedings for negligence, default, breach of duty or breach of trust against any

director, officer or auditor of a company it appears to the Court that the person concerned is or may be liable in respect of the negligence, default, breach of duty or breach of trust, but that he has acted honestly and reasonably, and that, having regard to all the circumstances of the case, including those connected with his appointment, he ought fairly to be excused for the negligence, default, breach of duty or breach of trust, the Court may relieve him, either wholly or partly, from his liability on such terms as the Court may think fit.

(2) Any such director, officer or auditor who has reason to apprehend that any claim will be made against him in respect of any negligence, default, breach of duty or breach of trust, may apply to the Court for relief, and the Court shall on any such application have the same powers to grant relief as are by subsection (1) conferred upon it with reference to proceedings referred to in that subsection.

#### **249 False statements and evidence**

(1) Any person who in any statement, return, report, certificate, financial statement or other document required by or for the purposes of any provision of this Act, whether in non-electronic or electronic format, makes a statement which is false in any material particular, knowing it to be false, shall be guilty of an offence.

[Sub-s. (1) substituted by s. 24 of Act 35 of 2001.]

(2) Any person who on examination on oath or affirmation in terms of this Act or in any affidavit or deposition in or about any matter arising under this Act wilfully gives false evidence, shall be guilty of an offence and liable on conviction to the penalties prescribed by law for perjury.

#### **250 Falsification of books and records**

(1) Any director or officer of a company or any other person who conceals, destroys, mutilates, falsifies or makes any false entry in or, with the intent to defraud or deceive, makes any erasure in any book (including any minute book), register, document, financial record or financial statement of any company, irrespective of whether it is or has been kept in electronic format, shall, subject to the provisions of subsection (2), be guilty of an offence.

[Sub-s. (1) substituted by s. 25 of Act 35 of 2001.]

(2) It shall be a defence to any charge under subsection (1) of concealing, mutilating, falsifying or making a false entry or erasure in any book, register, document, financial record or financial statement to prove that the accused had no intention either to defraud or to conceal any offence or any conduct which he believed might constitute an offence or render any person liable to any penalty or civil obligation.

#### **251 False statement by directors and others**

(1) Every director or officer of a company or accountant employed by or auditor of a company or any other person employed generally or engaged for any special work or service by the company who makes, circulates or publishes or concurs in making, circulating or publishing any certificate, written statement, report or financial statement in relation to any property or affairs of the company which is false in any material particular, shall, subject to the provisions of subsection (2), be guilty of an offence.

(2) In any prosecution under subsection (1) it shall be a defence to prove that the person charged had, after reasonable investigation, reasonable grounds to believe and did believe that the certificate, written statement, report or financial statement was true, and that there was no omission to state any material fact necessary to make the statement as drafted not misleading.

### **CHAPTER IX**

#### **REMEDIES OF MEMBERS (ss 252-268)**

##### ***Relief from Oppression (s 252)***

#### **252 Member's remedy in case of oppressive or unfairly prejudicial conduct**

Cases

(1) Any member of a company who complains that any particular act or omission of a company

is unfairly prejudicial, unjust or inequitable, or that the affairs of the company are being conducted in a manner unfairly prejudicial, unjust or inequitable to him or to some part of the members of the company, may, subject to the provisions of subsection (2), make an application to the Court for an order under this section.

(2) Where the act complained of relates to-

- (a) any alteration of the memorandum of the company under section 55 or 56;
- (b) any reduction of the capital of the company under section 83;
- (c) any variation of rights in respect of shares of a company under section 102; and
- (d) a conversion of a private company into a public company or of a public company into a private company under section 22,

an application to the Court under subsection (1) shall be made within six weeks after the date of the passing of the relevant special resolution required in connection with the particular act concerned.

(3) If on any such application it appears to the Court that the particular act or omission is unfairly prejudicial, unjust or inequitable, or that the company's affairs are being conducted as aforesaid and if the Court considers it just and equitable, the Court may, with a view to bringing to an end the matters complained of, make such order as it thinks fit, whether for regulating the future conduct of the company's affairs or for the purchase of the shares of any members of the company by other members thereof or by the company and, in the case of a purchase by the company, for the reduction accordingly of the company's capital, or otherwise.

(4) Where an order under this section makes any alteration or addition to the memorandum or articles of a company-

- (a) the alteration or addition shall, subject to the provisions of paragraph (b), have effect as if it had been duly made by special resolution of the company; and
- (b) the company shall, notwithstanding anything contained in this Act, have no power, save as otherwise provided in the order, to make any alteration in or addition to its memorandum or articles which is inconsistent with the order, except with the leave of the Court.

(5) (a) A copy of any order made under this section which alters or adds to or grants leave to alter or add to the memorandum or articles of a company shall, within one month after the making thereof, be lodged by the company in the form prescribed with the Registrar for registration.

(b) Any company which fails to comply with the provisions of paragraph (a), shall be guilty of an offence.

#### *Inquiry into Membership and Ownership of Shares and Control of Company (ss 253-256)*

#### **253 Power of Registrar to call for information concerning shares and members**

(1) The Registrar may from time to time by notice in writing require a company or external company to transmit to him within fourteen days after the date of such notice particulars of the transfer of any share or shares and a list of persons for the time being members of the company and of all persons who ceased to be members as from a particular date.

(2) Any company or external company which fails to comply with any requirement of the Registrar under subsection (1) and every director or officer of such company who knowingly is a party to the failure, shall be guilty of an offence.

#### **254 Appointment and powers of inspectors to investigate financial interest in and control of company**

(1) The Minister may-

- (a) when it appears to him that there is good reason to do so, appoint one or more inspectors to investigate and report to him on the membership of any company and otherwise with respect to such company for the purpose of determining the true persons who are or have been financially interested in the success or failure (real or apparent) of

- the company or able to control or materially to influence the policy of the company;
- (b) on an application complying with the requirements prescribed in section 257 in respect of an application under that section, for an investigation with respect to particular shares or debentures of a company, appoint an inspector to carry out such investigation.

(2) Any appointment of such an inspector shall define the scope of the investigation to be carried out by him, whether in respect of the matters to be investigated or the period in respect of which the investigation is to be undertaken or otherwise, and may provide for an investigation to be confined to particular shares or debentures.

(3) No application under subsection (1) (b) shall be refused unless the Minister is satisfied that the application is vexatious, nor shall there be excluded from the scope of the investigation by an inspector appointed in pursuance of such an application any matter which the applicant seeks to have included therein, except in so far as in the opinion of the Minister it would be unreasonable for that matter to be investigated.

(4) The powers of an inspector shall, subject to the terms of his appointment, extend to the investigation of any circumstances suggesting the existence of an arrangement or understanding which, though not legally binding, is or was observed or likely to be observed in practice and which is relevant to any matter to be investigated.

(5) The provisions of sections 259, 260 and 261 shall *mutatis mutandis* apply with reference to any investigation under this section: Provided that the Minister shall not be bound to furnish the company concerned or any other person with a copy of any report (or part thereof) by an inspector appointed under this section if there are substantial grounds in the public interest for not divulging the contents of the report or of parts thereof.

### **255 Power to require information as to persons interested in shares or debentures**

(1) When the Minister deems it necessary to investigate any interest in shares or debentures of a company, he may by written notice require-

- (a) any director or officer of the company; or
- (b) any person whom he has reason to believe-
- (i) to have or to have had any interest in those shares or debentures; or
  - (ii) to be acting or to have acted in relation to those shares or debentures as the trustee or agent or nominee of someone having any interest therein,

to furnish the Minister in writing, within twenty-one days after the date of the said notice, with any information which he has or can reasonably be expected to obtain as to any present or past interest in those shares or debentures and the name and address of the interested person concerned and of any person who is acting or has acted on his behalf in relation to those shares or debentures.

[Sub-s. (1) substituted by s. 2 (a) of Act 115 of 1979.]

(2) For the purposes of this section, a person shall be deemed to have an interest in a share or debenture of a company if he has any right as against any member of or any holder of a debenture of the company in respect of dividends, interest or capital received from the company by such member or holder, or if he has any right to acquire or dispose of the share or debenture or any interest therein or to vote in respect thereof or is able materially to influence the exercise of such voting right, or if his consent is necessary for the exercise of any of the rights of a member or any other person having an interest therein, or if a member or any other person having an interest therein can be required or is accustomed to exercise his rights in accordance with his instructions, or if he is a beneficiary, of whatever nature, in relation to such share or debenture.

[Sub-s. (2) substituted by s. 2 (b) of Act 115 of 1979.]

(3) Any person who fails to give any information required of him under this section and which he is able to give or can reasonably obtain, or who in giving any such information knowingly or recklessly makes any statement which is false in any material particular, shall be guilty of an offence.

## 256 Power to impose restrictions on shares or debentures

(1) (a) Where in connection with an investigation under section 254 or 255 it appears to the Minister that there is difficulty in finding out the relevant facts about any shares of a company (whether issued or to be issued), and that the difficulty is due wholly or mainly to the unwillingness of the persons concerned or any of them to assist in the investigation, the Minister may by notice published in the *Gazette* and served by post upon the company at its registered office declare that the shares shall as from the date of publication of the notice in the *Gazette* be subject to the restrictions imposed by this section.

(b) The Minister may in like manner withdraw or amend such notice.

(2) As long as any such notice is in force-

(a) any transfer of the shares to which it relates or, in the case of unissued shares, any transfer of the right to be issued therewith or any issue thereof, shall be void;

(b) no voting rights shall be exercisable in respect of such shares;

(c) no further shares shall be issued in pursuance of any right attached to such shares or in pursuance of any offer made to the holder thereof; and

(d) except in a winding-up, no payment shall be made of any sums due from the company in respect of such shares, whether in respect of capital or otherwise.

(3) Where the Minister has by any such notice declared that shares shall be subject to the said restrictions, or refuses to withdraw or amend any such notice, any person aggrieved thereby may apply to the Court, and the Court may, if it sees fit, direct that the shares shall cease to be subject to the said restrictions or to any one or more of them.

(4) Any notice of the Minister or order of the Court directing that shares shall cease to be subject to any of the restrictions referred to in subsection (2), which is expressed to be made with a view to permitting a transfer of those shares, may continue the restrictions referred to in paragraphs (c) and (d) of that subsection, either in whole or in part, in so far as they relate to any right acquired or offer made before the transfer.

(5) Any person who-

(a) exercises or purports to exercise any right to dispose of any shares which to his knowledge are subject to the restrictions mentioned in subsection (2) or of any right to be issued with any such shares; or

(b) votes in respect of any such shares, whether as holder or proxy, or appoints a proxy to vote in respect thereof; or

(c) being the holder of any such shares, fails to give notice of their being subject to the said restrictions to any person whom he does not know to be aware of that fact, but does know to be entitled, apart from the said restrictions, to vote in respect of those shares, whether as holder or proxy,

shall be guilty of an offence.

(6) Where shares of any company are issued in contravention of the said restrictions, the company, and every director or officer who knowingly takes part in the contravention, shall be guilty of an offence.

(7) This section shall apply in relation to debentures as it applies in relation to shares.

### *Investigation into Affairs of Company (ss 257-262)*

## 257 Inspection of company's affairs on application of members

(1) The Minister may appoint one or more inspectors to investigate the affairs of a company and to report thereon in such manner as he may direct-

(a) in the case of a company having a share capital, on the application of not less than one hundred members or of members holding not less than one-twentieth of the shares issued; and

(b) in the case of a company not having a share capital, on the application of not less than one-tenth of the number of persons on the register of members.

(2) The application shall be supported by such evidence as the Minister may require showing that the applicants have good reason for desiring an investigation, and the Minister may, before appointing an inspector on any such application, require the applicants to give security to his satisfaction in an amount not exceeding two hundred rand towards the cost of the investigation.

(3) Before appointing an inspector under subsection (1), the Minister shall, unless he is of the opinion that to do so would defeat the objects of this section, furnish in writing to the company concerned a statement setting out the substance of the complaint made and afford it a reasonable opportunity of replying thereto.

### **258 Investigation of company's affairs in other cases**

#### Cases

(1) When a company by special resolution resolves or the Court by order declares that the affairs of a company ought to be investigated, the Minister shall appoint one or more inspectors to investigate the affairs of such company and to report thereon, in such manner as he may direct.

(2) The Minister may appoint one or more inspectors to investigate the affairs of a company and to report thereon in such manner as he may direct, if it appears to him that there are circumstances suggesting-

- (a) that the business of the company is being conducted with intent to defraud its creditors or the creditors of any other person or otherwise for a fraudulent or an unlawful purpose or in a manner oppressive or unfairly prejudicial or unjust or inequitable to any part of its members or that it was formed for any fraudulent or unlawful purpose; or
- (b) that persons concerned with its formation or the management of its affairs have in connection therewith been guilty of any fraud, delict or other misconduct towards it or towards its members; or
- (c) that its members have not been given all the information with respect to its affairs they might reasonably expect.

(3) The provisions of section 257 (3) shall apply *mutatis mutandis* in respect of an investigation under this section.

### **259 Power of inspector to conduct investigation into affairs of related companies**

(1) An inspector appointed to investigate the affairs of a company may, if he considers it necessary for the purpose, with the approval of the Minister, also investigate the affairs of any other company or other body corporate which is or has at any relevant time been the first-mentioned company's subsidiary or holding company or a subsidiary of its holding company and shall in that event report on the affairs of such other company or other body corporate so far as the results of his investigation the reof are in his opinion relevant to the investigation of the affairs of the first-mentioned company.

(2) For the purposes of subsection (1) the inspector may, with the approval of the Minister, also investigate the affairs of any individual, trust, partnership, close corporation or body corporate in which the directors or members of the company contemplated in that subsection have or had any interest in or association with and shall also report on the affairs of such individual, trust, partnership, close corporation or body corporate so far as the results of his or her investigation are relevant to the investigation of the affairs of the said company.

[Sub-s. (2) added by s. 13 of Act 35 of 1998.]

[S. 259 substituted by s. 23 of Act 64 of 1977.]

### **260 Production of documents and evidence on investigation**

#### Cases

(1) Any director, officer or agent of a company or other body corporate whose affairs are being

investigated by an inspector under this Act, shall at the request of such inspector produce to him all books and documents of or relating to the company or other body corporate, in his custody or under his control, and afford the inspector such assistance within his power in connection with the investigation as the inspector may require.

(2) An inspector may for the purpose of any investigation conducted by him-

- (a) summon any director, officer, employee, member or agent of the company or other body corporate to appear before him at a time and place specified in the summons, to be interrogated or to produce any book or document so specified;
- (b) administer an oath to or accept an affirmation from any person appearing before him in pursuance of a summons, and interrogate such person and require him to produce any such book or document;
- (c) retain for examination any book or document produced to him in pursuance of a summons for a period not exceeding two months or for such further period or periods as the Registrar may on good cause shown, permit.

(3) A summons for the attendance of any person before an inspector or for the production to him of any book or document may be in such form as the inspector may determine, shall be signed by the inspector, and shall be served in the same manner as a subpoena in a criminal case issued by a magistrate's court.

(4) Any person duly summoned to appear before an inspector who without sufficient cause-

- (a) fails to attend at the time and place specified in the summons or to remain in attendance until excused by the inspector from further attendance; or
- (b) refuses upon being required to do so by the inspector, to take an oath or to affirm as a witness or refuses or fails to produce any book or document which he has been required to produce or to answer fully and satisfactorily to the best of his knowledge and belief all questions put to him by the inspector concerning the affairs of the company or other body corporate whose affairs are being investigated, whether or not the answer is likely to incriminate him,

shall be guilty of an offence: Provided that, save as otherwise provided in this subsection, in connection with the interrogation of any such person, or the production of any such book or document, the law relating to privilege, as applicable to a witness subpoenaed to give evidence or to produce any book or document before a court of law, shall apply.

(5) (a) If an inspector considers it necessary for the purposes of his investigation that a person whom he has no power to examine on oath should be so examined, he may apply to the Court for an order calling upon such person to appear before it for examination and the Court may thereupon if it thinks fit order that person to attend before it to be examined on oath on any matter relevant to the investigation, and on any such examination-

- (i) the inspector may take part therein either personally or by attorney or counsel;
- (ii) the Court may put such questions to the person examined as the Court thinks fit;
- (iii) the person examined shall answer all such questions as the Court may put or allow to be put to him.

(b) Notes of the examination shall be taken down in writing and shall be read over to or by and signed by the person examined, and may thereafter be used in evidence against him.

(c) The Court may allow the person examined such costs as in its discretion it may think fit, and any costs so allowed shall be paid as part of the costs of the investigation.

(6) In this section-

- (a) any reference to a director, officer, employee, member or agent of a company or other body corporate, includes a reference to a past director, officer, employee, member or agent of such company or other body corporate; and

(b) any reference to an agent of a company or other body corporate, includes a reference to the bankers, attorneys and auditor of the company or other body corporate.

(7) Any person examined under this section may at his own cost employ an attorney with or without counsel, who shall be at liberty to put to him such questions as the inspector or the Court may deem just for the purpose of enabling him to explain or qualify any answers given by him.

## **261 Inspector's report**

Cases

(1) (a) An inspector may make interim reports to the Minister in regard to any investigation conducted by him, shall make such reports if the Minister so directs, and shall on the conclusion of the investigation make a final report to the Minister.

(b) Any such report shall be written or printed as the Minister may direct.

(2) The Minister shall direct the Registrar-

(a) to send a copy of any report made by an Inspector to the registered office of the company or other body corporate concerned;

(b) to furnish a copy of such report on request and on payment of any fee that may be prescribed, to any person who is a member of the company or of any other body corporate dealt with in the report or whose interests as a creditor of the company or any such other body corporate appear to the Minister to be affected;

(c) where the inspector is appointed under section 257, to furnish a copy of the report to the applicants concerned at their request; and

(d) where the inspector is appointed under section 258 in pursuance of an order of the Court, to furnish a copy of the report to the Court,

and may direct the Registrar to cause any such report to be printed and published.

## **261A Preservation of secrecy**

An inspector may only disclose information acquired in the course of performing his or her duties in terms of this Act, if the disclosure is-

(a) required by this Act or in terms of any other law;

(b) required by a court; or

(c) in the public interest and the Minister has authorized the disclosure in writing.

[S. 261A inserted by s. 22 of Act 24 of 2006.]

## **262 Proceedings on inspector's report**

Cases

(1) If in the case of any company or other body corporate liable to be wound up under this Act, it appears to the Minister from any such report that it is expedient so to do by reason of any circumstance referred to in section 258 (2) (a) or (b), the Minister may, unless the company or other body corporate is already being wound up by the Court, make application for it to be so wound up if the Court thinks it just and equitable that it be wound up, or an application for an order such as is referred to in section 252 or both an application for an order that it be so wound up and an application for an order such as is referred to in the said section, and the Court may in that event make such order as it may consider appropriate.

(2) (a) If from any such report it appears to the Minister that proceedings ought in the public interest to be brought by any company or other body corporate dealt with by the report for the recovery of damages in respect of any fraud, delict or other misconduct in connection with the promotion or formation of that company or other body corporate or the management of its affairs, or for the recovery of any property of the company or other body corporate which has been misapplied or wrongfully retained, the Minister may bring proceedings for that purpose in the name of the company or other body corporate.

(b) The Minister shall indemnify the company or other body corporate against any costs or

expenses incurred by it in or in connection with any proceedings brought by virtue of paragraph (a).

***Matters Incidental to Investigations (ss 263-265)***

**263 Expenses of and incidental to investigation of company's affairs**

Cases

(1) The Minister shall in the first instance defray the expenses of and incidental to an investigation under section 257 or 258, but the following persons shall, to the extent stated, be liable to repay the Minister:

- (a) any person convicted of an offence disclosed by the investigation or ordered to pay damages or to restore any property in proceedings instituted under section 262 (2) (a), shall be liable for such amount, if any, as may be determined by the Court when convicting such person or ordering the payment of such damages or the restoration of such property;
- (b) in any case where no proceedings are instituted in respect of any such offence and no order for the payment of any such damages or the restoration of any such property is made-
  - (i) any body corporate whose affairs were the subject of the investigation; and
  - (ii) in the case of an investigation under section 257, the applicants concerned, shall be liable for such an amount as the Minister may in each case determine; and
- (c) any body corporate in whose name proceedings are instituted under section 262 (2) (a), shall be liable for the balance, if any, of such expenditure not recovered under paragraph (a), but not for an amount exceeding the amount or value of any property recovered in any such proceedings.

(2) The amount determined under subsection (1) (a) may be the full amount of the expenditure in question or such lesser amount or proportion thereof as the Court considers just.

(3) The provisions of subsection (1) (b) (i) shall not apply in any case where it appears from the relevant report that there was no substance in the allegations which gave rise to the investigation to which the report relates.

(4) Any amount for which a body corporate may be liable by virtue of the provisions of subsection (1) shall be a first charge on the amount or value of any property recovered in proceedings referred to in subsection (1) (c).

(5) An inspector may, if he deems fit, and shall, if the Minister so directs, include in his report on any investigation a recommendation as to the amount, if any, which in his opinion should under subsection (1) (b) be ordered to be paid by any body corporate or the applicants referred to therein.

(6) For the purposes of this section any costs or expenses incurred by the Minister in or in connection with proceedings instituted by him under section 262 (2) (a), including any amount which may become payable by him in terms of paragraph (b) of that subsection, shall be regarded as part of the expenditure incurred by him in respect of the investigation giving rise to such proceedings.

**264 Saving in respect of attorneys and bankers**

Nothing in this Act shall be construed as requiring the disclosure to the Minister or to an inspector-

- (a) by an attorney of any privileged communication made to him in his capacity as such, except as respects the name and address of his client; or
- (b) by a banker of any information as to the affairs of any of his customers except-
  - (i) a company or its nominee and any other body corporate whose affairs are being investigated; and
  - (ii) any person having an interest in shares held in the name of the banker's nominee.

**265 Report of inspectors to be evidence**

A copy of the report of any inspector appointed under this Act shall be admissible in any legal

proceedings as evidence of the opinion of the inspector in relation to any matter contained in the report.

***Proceedings on Behalf of Companies (ss 266-268)***

**266 Initiation of proceedings on behalf of company by a member**

Cases

(1) Where a company has suffered damages or loss or has been deprived of any benefit as a result of any wrong, breach of trust or breach of faith committed by any director or officer of that company or by any past director or officer while he was a director or officer of that company and the company has not instituted proceedings for the recovery of such damages, loss or benefit, any member of the company may initiate proceedings on behalf of the company against such director or officer or past director or officer in the manner prescribed by this section notwithstanding that the company has in any way ratified or condoned any such wrong, breach of trust or breach of faith or any act or omission relating thereto.

(2) (a) Any such member shall serve a written notice on the company calling on the company to institute such proceedings within one month from the date of service of the notice and stating that if the company fails to do so, an application to the Court under paragraph (b) will be made.

(b) If the company fails to institute such proceedings within the said period of one month, the member may make application to the Court for an order appointing a *curator ad litem* for the company for the purpose of instituting and conducting proceedings on behalf of the company against such director or officer or past director or officer.

(3) The Court on such application, if it is satisfied-

(a) that the company has not instituted such proceedings;

(b) that there are *prima facie* grounds for such proceedings; and

(c) that an investigation into such grounds and into the desirability of the institution of such proceedings is justified,

may appoint a provisional *curator ad litem* and direct him to conduct such investigation and to report to the Court on the return day of the provisional order.

(4) The Court may on the return day discharge the provisional order referred to in subsection (3) or confirm the appointment of the *curator ad litem* for the company and issue such directions as to the institution of proceedings in the name of the company and the conduct of such proceedings on behalf of the company by the *curator ad litem*, as it may think necessary and may order that any resolution ratifying or condoning the wrong, breach of trust or breach of faith or any act or omission in relation thereto shall not be of any force or effect.

**267 Powers of *curator ad litem***

(1) A provisional *curator ad litem* appointed by the Court under section 266 (3) and a *curator ad litem* whose appointment is confirmed by the Court under section 266 (4) shall, in addition to the powers expressly granted by the Court in connection with the investigation, proceedings and enforcement of a judgment, have the same powers as an inspector under section 260, and the provisions of that section shall, subject to the provisions of subsection (2) of this section, apply *mutatis mutandis* to the provisional *curator ad litem* and to the *curator ad litem* and to the directors, officers, employees, members and agents of the company concerned.

(2) If the disclosure of any information about the affairs of a company to a provisional *curator ad litem* or a *curator ad litem* would in the opinion of the company be harmful to the interests of the company, the Court may on an application for relief by that company, if it is satisfied that the said information is not relevant to the investigation, grant such relief.

**268 Security for costs by applicant for appointment of *curator ad litem***

The Court may, if it appears that there is reason to believe that the applicant in respect of an application under section 266 (2) will be unable to pay the costs of the respondent company if

successful in its opposition, require sufficient security to be given for those costs and costs of the provisional *curator ad litem* before a provisional order is made.

**CHAPTER IXA  
SECRETARY FOR PUBLIC COMPANIES (ss 268A-268I)**

[Chapter IXA inserted by s. 18 of Act 37 of 1999.]

**268A Mandatory appointment of secretary**

The directors of any public company having a share capital, excluding a share block company as defined in section 1 of the Share Blocks Control Act, 1980 (Act 59 of 1980), shall appoint a secretary who is permanently resident in the Republic and who, in the opinion of the directors, has the requisite knowledge and experience to carry out the duties of a secretary of a public company.

[S. 268A inserted by s. 19 of Act 37 of 1999.]

**268B First appointment of secretary**

The majority of the subscribers to the memorandum of a public company or its directors shall appoint the first secretary of that company and the provisions of sections 269 (1), (2), (4) and (5) shall apply *mutatis mutandis* to such first appointment.

[S. 268B inserted by s. 18 of Act 37 of 1999.]

**268C Filling of casual vacancy of secretary**

(1) A casual vacancy in the office of secretary shall be filled by the directors of the public company within 90 days of the vacancy occurring.

(2) The public company shall and any director may, if the directors fail to appoint a secretary in terms of subsection (1), within seven days after the expiration of the 90 day period, lodge with the Registrar a notice to that effect.

(3) The directors of a public company who knowingly fail to comply with subsection (1) and a public company which fails to comply with subsection (2), shall be guilty of an offence.

(4) During any period that the office of secretary is vacant, the directors may generally or specifically authorize any officer of the company to carry out certain or all of the secretary's duties.

(5) If the directors fail to appoint a secretary within the 90 day period, the Registrar or the Court, upon application by a member or director, may order the public company and its directors to appoint a secretary.

(6) If a public company and its directors knowingly fail to appoint a secretary within two months of being ordered to do so by the Registrar or the Court in terms of subsection (5), the company and its directors shall be guilty of an offence.

[S. 268C inserted by s. 18 of Act 37 of 1999.]

**268D Body corporate or partnership may be appointed secretary**

(1) A body corporate or partnership may be appointed to hold the office of secretary of a public company provided that at least one person in the employment of that body corporate or partnership complies with the requirements referred to in section 268A.

(2) A change in the membership of a body corporate which holds office as secretary shall not constitute a casual vacancy in the office of secretary, provided that the body corporate continues to have at least one person in its employment who complies with the requirements referred to in section 268A.

(3) A change in the composition of a partnership which holds office as secretary shall not constitute a casual vacancy in the office of secretary provided that the new partnership continues to have as a partner or employee at least one person who complies with the requirements referred to in section 268A.

(4) A body corporate or partnership which holds office as secretary shall immediately upon the services of the last remaining person who complies with the requirements referred to in section 268A no longer being available, notify the directors of the public company thereof and that notification shall

be deemed to be a resignation of the secretary by which a casual vacancy shall have been constituted.

[S. 268D inserted by s. 18 of Act 37 of 1999.]

### **268E Consent to act as secretary, entries in register of directors and officers and lodging of returns**

(1) A person who accepts an appointment as secretary shall sign and lodge with the company the prescribed form referred to in section 211 confirming such person's consent to act as secretary, or if a partnership or body corporate is appointed as secretary, the written consent of the partners or the directors of such partnership or body corporate to so act.

(2) No person shall act as secretary and no appointment of secretary shall have legal force for the purposes of this Act or any other law, unless the prescribed form of consent has been lodged with the company and the company has complied with the provisions of sections 215 and 216.

(3) The provisions of section 214 shall apply *mutatis mutandis* to the appointment of a secretary.

[S. 268E inserted by s. 18 of Act 37 of 1999.]

### **268F Disqualification for appointment as secretary**

The provisions of section 218 (1) (b), (c) and (d) and (2) and (3) shall apply *mutatis mutandis* to the appointment of a secretary.

[S. 268F inserted by s. 18 of Act 37 of 1999.]

### **268G Duties of secretary**

A secretary's duties include, but are not restricted to-

- (a) providing the directors of the company collectively and individually with guidance as to their duties, responsibilities and powers;
- (b) making the directors aware of all law and legislation relevant to or affecting the company and reporting at any meetings of the shareholders of the company or of the company's directors, any failure to comply with such law or legislation;
- (c) ensuring that minutes of all shareholders' meetings, directors' meetings and the meetings of any committees of the directors are properly recorded in accordance with section 242;
- (d) certifying in the annual financial statements of the company that the company has lodged with the Registrar all such returns as are required of a public company in terms of this Act and that all such returns are true, correct and up to date;
- (e) ensuring that a copy of the company's annual financial statements is sent, in accordance with section 302, to every person who is entitled thereto in terms of this Act.

[S. 268G inserted by s. 18 of Act 37 of 1999.]

### **268H Name of secretary to be stated on trade catalogues, trade circulars and business letters of company**

(1) The first names, or the initials thereof, and the surname of the secretary of a public company shall be stated on every trade catalogue, trade circular and business letter bearing the company's name.

(2) A company which fails to comply with the provisions of subsection (1), shall be guilty of an offence.

[S. 268H inserted by s. 18 of Act 37 of 1999.]

### **268I Notice to be given of resignation or removal of secretary**

(1) When during any financial year the secretary of a public company resigns, or is removed from office, the company shall in the prescribed form notify the Registrar thereof within 21 days of such resignation or removal.

(2) If the secretary is removed the secretary may require the company, in its annual financial statements relating to that financial year, to include a statement, not exceeding a reasonable length,

setting out the secretary's contention as to the circumstances that resulted in the removal.

(3) If the secretary wishes to exercise the power referred to in subsection (2), the secretary shall give written notice to that effect to the company by not later than the end of the financial year in which the removal took place and such notice shall include the statement referred to in subsection (2).

(4) The statement of the secretary referred to in subsection (2) shall be included in the directors' report in the company's annual financial statements and if no directors' report is required in respect of the company's annual financial statements, it shall be included under a separate heading in the company's annual financial statements.

(5) A company and its directors who knowingly fail to comply with the provisions of this section, shall be guilty of an offence.

[S. 268I inserted by s. 18 of Act 37 of 1999.]

**CHAPTER X**  
**AUDITORS (ss 269-283)**  
**Appointment (ss 269-276)**

**269 First appointment of auditor of company**

(1) When the memorandum and articles of a company to be incorporated are lodged with the Registrar for registration, a written consent by a person to his appointment as auditor of the company to be formed may be lodged simultaneously, and such auditor shall be deemed to have been appointed as such by the company.

(2) If no appointment of auditor of a company is made under subsection (1), the directors of the company shall appoint the first auditor of the company within twenty-one days after the date of incorporation of the company.

(3) The auditor of a company appointed under subsection (1) or (2) shall hold office until the conclusion of the first annual general meeting of the company.

(4) If the directors of a company fail to appoint an auditor of the company as provided in subsection (2), the Registrar may appoint such first auditor.

(5) If the directors of a company fail to appoint the first auditor of the company as required by subsection (2), every director shall be guilty of an offence.

(6) No person or firm may be appointed as auditor of a company unless that person or firm is a registered auditor.

[Sub-s. (6) added by s. 23 of Act 24 of 2006.]

(7) In this Chapter registered auditor, firm and Regulatory Board have the same meanings as in the Auditing Profession Act, 2005 (Act 26 of 2005).

[Sub-s. (7) added by s. 23 of Act 24 of 2006.]

**269A Audit committees for public interest companies**

(1) In every financial year in which a company is a widely held company, its board of directors shall appoint an audit committee for the following financial year.

(2) Subsection (1) shall not apply to a company-

- (a) if the audit committee of a holding company will perform the functions required under section 270A (1) on behalf of that company;
- (b) if the company ceases to be a widely held company in the manner contemplated in section 1 (7);
- (c) if the company belongs to a category of companies specified by the Minister under section 269B.

(3) An audit committee must have at least two members and consist only of non-executive directors of the company who must act independently.

(4) For the purposes of this Chapter-

- (a) financial year shall be construed in accordance with section 285;

- (b) a director is a non-executive director of a company if the director-
  - (i) is not involved in the day to day management of the business and has not in the past three financial years been a full-time salaried employee of the company or its group;
  - (ii) is not a member of the immediate family of an individual mentioned in subparagraph (i);
- (c) a director acts independently if that director-
  - (i) expresses opinions, exercises judgment and makes decisions impartially;
  - (ii) is not related to the company or to any shareholder, supplier, customer or other director of the company in a way that would lead a reasonable and informed third party to conclude that the integrity, impartiality or objectivity of that director is compromised by that relationship.

[S. 269A inserted by 24 of Act 24 of 2006.]

### **269B Minister's powers in respect of audit committees**

(1) The Minister may by publication in the *Gazette* specify certain categories of companies that are not required to appoint an audit committee in terms of section 269A (1).

(2) The Minister must be satisfied that little or no benefit would result from the appointment of an audit committee by companies in a category mentioned in subsection (1).

[S. 269B inserted by 24 of Act 24 of 2006.]

### **270 Annual appointment of auditor**

(1) A company shall at every annual general meeting appoint an auditor or auditors to hold office from the conclusion of that meeting until the conclusion of the next annual general meeting of the company.

(2) A retiring auditor shall be deemed to be reappointed at any annual general meeting without any resolution being passed, unless-

- (a) he is not qualified for reappointment; or
- (b) a resolution has been passed under section 278; or
- (c) he has given the company and the Registrar notice in writing of his unwillingness to be reappointed at the next annual general meeting;

[Para. (c) substituted by s. 20 of Act 111 of 1976.]

- (d) an audit committee appointed by the company in terms of section 269A (1) objects to the reappointment; or

[Para. (d) added by s. 25 of Act 24 of 2006.]

- (e) section 274 A (1) applies.

[Para. (e) added by s. 25 of Act 24 of 2006.]

(3) The provisions of subsection (2) shall not apply where notice of an intended resolution to appoint some person or persons in place of a retiring auditor has been duly given under section 279 but cannot be proceeded with by reason of the death, incapacity or disqualification of that person or of all those persons.

### **270A Functions and funding of audit committees**

(1) An audit committee of a widely held company must with respect to the financial year for which it is appointed-

- (a) nominate for appointment as auditor of the company under section 270 a registered auditor who, in the opinion of the audit committee, is independent of the company;
- (b) determine the fees to be paid to the auditor and the auditor's terms of engagement;
- (c) ensure that the appointment of the auditor complies with this Act and any other legislation relating to the appointment of auditors;
- (d) determine, subject to this Chapter, the nature and extent of any non-audit services which

- the auditor may provide to the company;
- (e) pre-approve any proposed contract with the auditor for the provision of non-audit services to the company;
  - (f) insert in the financial statements to be issued in respect of that financial year a report
    - (i) describing how the audit committee carried out its functions; and
    - (ii) stating whether the audit committee is satisfied that the auditor was independent of the company;
  - (g) receive and deal appropriately with any complaints (whether from within or outside the company) relating either to the accounting practices and internal audit of the company or to the content or auditing of its financial statements, or to any related matter; and
  - (h) perform other functions determined by the board.

(2) Nothing in this section precludes the appointment by a widely held company at its annual general meeting of an auditor other than one nominated by the audit committee, and where such an auditor is to be appointed paragraph (a) of subsection (1) shall not apply, but the appointment shall not be valid unless the audit committee is satisfied that the proposed auditor is independent of the company.

(3) The appointment of an audit committee shall not reduce the functions of the board of directors of the company except with respect to the appointment, fees and terms of engagement of the auditor.

(4) A widely held company shall meet all expenses reasonably incurred by its audit committee, including the fees of any consultant or specialist engaged by the audit committee to assist it in the performance of its duties.

(5) In considering whether, for the purposes of subsection (1) (a), (1) (f) (ii) or (2), a registered auditor is independent of a company, the audit committee shall in relation to the company and any subsidiary or parent of the company or, if the company is a member of a group, any other member of the group-

- (a) ascertain that the auditor does not, except as auditor or in rendering services permitted under subsection (1) (e), receive any remuneration or other benefit;
- (b) consider the extent of any consultancy, advisory or other work undertaken by the auditor;
- (c) consider whether the auditor's independence may have been prejudiced as a result of any previous appointment as auditor; and
- (d) consider compliance with other criteria specified for independence by the Independent Regulatory Board for Auditors.

[S. 270A inserted by s. 26 of Act 24 of 2006.]

## **271 Where meeting fails to appoint auditor, and notice to Registrar**

(1) Where at an annual general meeting of a company no auditor is appointed or reappointed, the directors shall, within thirty days as from the date of the meeting, appoint a person or persons to fill the vacancy, and if they fail to do so, the Registrar may at any time do so.

(2) The company shall and any director may, if the directors fail to appoint an auditor as provided in subsection (1), within seven days after the expiration of the period mentioned in the said subsection, lodge with the Registrar a notice in the prescribed form to that effect.

(3) Any company which fails, and any director or officer of such company who knowingly fails, to comply with the provisions of subsection (2), shall be guilty of an offence.

(4) In the case of a widely held company with an audit committee, an appointment by the directors in terms of subsection (1) shall only be valid if the audit committee is satisfied that the auditor is independent of the company.

[Sub-s. (4) added by s. 27 of Act 24 of 2006.]

## 272 Minister may appoint joint auditor

The Minister may at any time, in the case of a company having a share capital, on the application of one hundred members or of members holding not less than one-twentieth of the issued share capital, and, in the case of a company not having a share capital, on the application of not less than one-tenth of the members, appoint, for such period and at such remuneration (payable by the company) as he may determine, an auditor to act jointly with any other auditor of the company.

## 273 Filling of casual vacancies

(1) Subject to the provisions of section 280, a casual vacancy in the office of auditor of a company-

- (a) shall, if such auditor be the only incumbent, be filled by the directors within thirty days, and the provisions of section 271 shall *mutatis mutandis* apply in regard to the filling of such vacancy and the duty of the company; or
- (b) may, if there be more than one incumbent, be filled by the directors, but while any such vacancy continues, the surviving or continuing auditor shall act as auditor of the company.

(2) If a vacancy arises in the office of auditor of a widely held company during the tenure of an audit committee, subsection (1) does not apply and the directors shall within 21 days propose to the audit committee a registered auditor to be appointed as the new auditor.

[Sub-s. (2) added by s. 28 of Act 24 of 2006.]

(3) If, in a case contemplated in subsection (2), the former designated auditor was a member of a firm and the firm itself is not disqualified or removed, only another member of the firm may be proposed to the audit committee to be the new designated auditor.

[Sub-s. (3) added by s. 28 of Act 24 of 2006.]

(4) If, within 10 days of the making of a proposal to an audit committee under subsection (2), the audit committee does not give notice in writing to the directors rejecting the proposed auditor, the directors shall proceed to the appointment, either by appointing the auditor or, as the case may require, by selecting the new designated auditor.

[Sub-s. (4) added by s. 28 of Act 24 of 2006.]

(5) In this Chapter designated auditor means the individual contemplated in subsection 274 (3).

[Sub-s. (5) added by s. 28 of Act 24 of 2006.]

## 274 Appointment of firm as auditor

(1) This section applies where the auditor appointed in terms of section 270 (1) is a firm.

(2) A change in the composition of the members of a firm appointed as auditor of a company for a financial year shall not itself constitute a casual vacancy in the office of auditor for that year, but if, by comparison with the membership of that firm at the time of its latest appointment, less than one half of the members remain after such change, the occasion of that change shall be taken as a resignation of the auditor and a casual vacancy shall be taken to have arisen accordingly.

(3) The appointment of a firm as auditor of a widely held company shall not be valid unless the appointment specifies, in addition to the name of the firm, the name of the individual registered auditor (being a member of the firm) who undertakes the audit.

[S. 274 substituted by s. 29 of Act 24 of 2006.]

## 274A Rotation of auditors

(1) The same individual may not serve as the auditor or designated auditor of a widely held company for more than five consecutive financial years.

(2) Where an individual has served as the auditor or designated auditor of a widely held company for two or more consecutive financial years and then ceases to be the auditor or designated auditor, the individual may not be appointed again as the auditor or designated auditor of that company until after the expiry of at least two further financial years.

[S. 274A inserted by s. 30 of Act 24 of 2006.]

## **275 Disqualification for appointment as auditor**

(1) No person shall be qualified for appointment as auditor of a company if he is-

(a) a director, officer or employee of the company;

[Para. (a) substituted by s. 18 (a) of Act 59 of 1978.]

(b) a director, officer or employee of any company performing secretarial work for the company;

[Para. (b) substituted by s. 18 (b) of Act 59 of 1978.]

(c) a partner or employer or employee of a director or an officer of the company;

(d) a person who by himself or his partner or employee habitually or regularly performs the duties of secretary or bookkeeper of the company;

(e) .....

[Para. (e) repealed by s. 28 of Act 80 of 1991.]

(f) a person who at any time during the financial year was a director or officer of the company; or

(g) .....

[Para. (g) substituted by s. 8 (a) of Act 82 of 1992 and deleted by s. 31 (a) of Act 24 of 2006.]

(2) Any person who in terms of subsection (1) is disqualified for appointment as the auditor of a company shall likewise be disqualified for appointment as the auditor of any other body corporate which is a subsidiary or holding company of that company or is a subsidiary of such holding company, or would be so disqualified if such body corporate were a company.

[Sub-s. (2) substituted by s. 27 of Act 64 of 1977.]

(3) The provisions of subsection (1) shall not be construed as prohibiting the appointment as auditor of a private company, no shares of which are held by a public company, of a person who by himself or herself or his or her partner or employee habitually or regularly performs the duties of secretary or bookkeeper of such private company if he or she is registered with the Regulatory Board and all the shareholders of such private company agree in writing to his or her appointment and the relevant circumstances are set out in the auditor's report on the affairs and annual financial statements of such private company.

[Sub-s. (3) substituted by s. 8 (b) of Act 82 of 1992 and by s. 31 (b) of Act 24 of 2006.]

(4) Any person who acts as the auditor of a company or other body corporate while disqualified as aforesaid, shall be guilty of an offence.

(5) For the purposes of this section '**secretarial work**' does not include share transfer secretarial work.

## **275A Certain non-audit services not open to current auditor of widely held company**

(1) An auditor appointed to a widely held company may not for the duration of the appointment perform for that company services prohibited under the code of professional conduct mentioned in section 21 (2) (a) of the Auditing Profession Act, (Act 26 of 2005).

(2) The Independent Regulatory Board for Auditors shall in the code mentioned in subsection (1) define and prohibit the provision by an auditor of certain non-audit services in circumstances in which these will be subject to the auditor's own auditing.

(3) Subsection (1) does not affect the power of an audit committee under section 270A (1) (d) or (e) to further limit the services which an auditor of that company may render.

[S. 275A inserted by s. 32 of Act 24 of 2006.]

## **276 Notice by, and entries in register of directors and officers and lodging of returns pertaining to, auditors**

(1) The written consent contemplated in section 269 (1) shall be given by the person concerned on the prescribed form.

(2) Any other person who consents to his appointment as auditor of a company, other than a retiring auditor contemplated in section 270 (2), shall give notice in the prescribed form to the company concerned of such consent on his part.

(3) (a) Any auditor of a company shall give notice on the prescribed form to the company concerned of any change in his or her particulars which are in terms of section 215 (2) to be entered in the register referred to in that section, and he or she shall give such notice within fourteen days after the occurrence of any such change.

(b) The requirements of paragraph (a) are met if the auditor gives notice of the relevant changes to the Registrar in the prescribed electronic format and also to the company concerned.

[Sub-s. (3) substituted by s. 33 of Act 24 of 2006.]

(4) (a) A company shall, after any entry has been made in the register referred to in section 215 in respect of particulars pertaining to the auditor of the company, lodge with the Registrar a return in the prescribed form, and the company shall lodge such return within fourteen days after an auditor has vacated his or her office or after receipt of a notice contemplated in subsection (2) or (3) of this section, as the case may be.

(b) If the auditor of the company has given notice to the Registrar of any changes contemplated in subsection (3) and in the manner contemplated therein, the lodging of a return by the company in respect of such changes is not required.

[Sub-s. (4) substituted by s. 33 of Act 24 of 2006.]

(5) Any company which fails to lodge a return contemplated in subsection (4), and any person who fails to comply with any provision of subsection (2) or (3), shall be guilty of an offence.

[S. 276 substituted by s. 16 of Act 83 of 1981.]

### **Removal and Resignation of Auditor (ss 277-280)**

#### **277 Removal of auditor appointed by directors or Registrar, and filling of vacancy**

Subject to the provisions of section 279, a company may at a general meeting by resolution remove any auditor appointed by the directors or the Registrar under section 269 or 271 or by the directors under section 273 before the expiration of his term of office and at the same meeting appoint another person as auditor in his place: Provided that where an auditor has reason to believe that in the conduct of the affairs of the company a material irregularity has taken place or is taking place which has caused or is likely to cause financial loss to the company or to any of its members or creditors, and he has made a report thereon in writing to the directors of the company, he may not be removed from office until the provisions of section 26 (3) (b) of the Public Accountants' and Auditors' Act, 1951 (Act 51 of 1951), have been complied with.

[S. 277 substituted by s. 21 of Act 111 of 1976.]

#### **278 Removal of auditor and appointment of new auditor**

Any company may, subject to the provisions of section 279, at an annual general meeting by resolution passed by not less than three-fourths of such members entitled to vote as are present in person or by proxy, determine that any person then holding office as its auditor shall not be reappointed or that some other person shall be appointed as the auditor of the company: Provided that where an auditor has reason to believe that in the conduct of the affairs of the company a material irregularity has taken place or is taking place which has caused or is likely to cause financial loss to the company or to any of its members or creditors, and he has made a report thereon in writing to the directors of the company, he may not be removed from office until the provisions of section 26 (3) (b) of the Public Accountants' and Auditors' Act, 1951 (Act 51 of 1951), have been complied with.

[S. 278 substituted by s. 22 of Act 111 of 1976.]

#### **279 Special notice of removal for auditor**

(1) Special notice to the company shall be required for a resolution to be proposed at a general meeting under section 277 or at an annual general meeting under section 278 and upon receipt of

notice of such a proposed resolution the company shall forthwith deliver a copy thereof to the auditor concerned.

(2) (a) Where any such notice is given and the auditor concerned makes in respect of the proposed resolution representations (not exceeding a reasonable length) in writing to the company and requests their notification to members of the company, the company shall, unless the representations are received by it too late for it to do so-

- (i) in any notice of the proposed resolution given to members of the company, state that such representations have been made; and
- (ii) send a copy of the representations to every member of the company to whom notice of the meeting is sent (whether such notice is sent before or after receipt of the representations by the company).

(b) If a copy of such representations is not sent as aforesaid because of their being received too late or because of the company's default, the auditor may (without prejudice to his right to be heard orally) require that the representations shall be read out at the meeting.

(c) No copy of such representations shall be sent out and the representations need not be read out at the meeting if, on the application either of the company or of any person who claims to be aggrieved, the Court is satisfied that the rights conferred by this section are being abused to secure needless publicity for defamatory matter.

(d) The Court may on an application under paragraph (c) order the company's or the said person's costs to be paid in whole or in part by the auditor, notwithstanding that he is not a party to the application.

## **280 Resignation of auditor**

(1) The auditor of a company may at any time during the period of his office resign as such provided the requirements of this section are complied with.

(2) An auditor intending to resign shall deliver to the company and to the Registrar a written notification in the prescribed form to the effect that he or she has no reason to believe that in the conduct of the affairs of the company a reportable irregularity, within the meaning of the Auditing Profession Act, 2005 (Act 26 of 2005), has taken place or is taking place which has caused or is likely to cause financial loss to the company or to any of its members or creditors other than an irregularity (if any) which has been reported to the Regulatory Board under that Act, and it shall not be necessary that such an auditor shall have carried out, for the purposes of such notification, a special audit subsequent to the date up to which the last annual financial statements on which he or she has already reported, were made up.

[Sub-s. (2) substituted by s. 34 of Act 24 of 2006.]

(3) The directors of the company shall forthwith upon receipt of the said written notification appoint an auditor in accordance with section 273 to fill the vacancy and shall lodge the said notification together with the return required under section 276 with the Registrar.

[Sub-s. (3) substituted by s. 34 of Act 24 of 2006.]

(4) The resignation of an auditor shall become effective upon the receipt by the Registrar of the written notification referred to in subsection (2).

(5) If the directors fail to appoint an auditor to fill the vacancy within three months after the receipt of the written notification referred to in subsection (2), any person who-

- (a) at the expiration of that period of three months was a director of the company; and
- (b) was aware of the vacancy but failed to take all reasonable steps to ensure that it would be filled in accordance with subsection (3),

shall together with the company be jointly and severally liable for all debts incurred by the company during the existence of the vacancy.

[Sub-s. (5) substituted by s. 34 of Act 24 of 2006.]

[S. 280 amended by s. 23 (1) of Act 111 of 1976 and substituted by s. 9 of Act 82 of 1992.]

***Rights, Duties and Remuneration (ss 281-283)***

**281 Auditor's right of access to books and to be heard at general meetings**

An auditor of a company shall-

- (a) have the right of access at all times to the accounting records and all books and documents of the company, and be entitled to require from the directors or officers of the company such information and explanations as he thinks necessary for the performance of his duties as auditor;
- (b) in the case of an auditor of a holding company, have the right of access to all current and former financial statements of any subsidiary of such holding company and be entitled to require from the directors or officers of such holding company or subsidiary all such information and explanations in connection with any such statements and in connection with the accounting records, books and documents of the subsidiary as he may consider necessary; and  
[Para. (b) substituted by s. 25 of Act 64 of 1977.]
- (c) be entitled to attend any general meeting of the company and to receive all notices of and other communications relating to any general meeting which any member of the company is entitled to receive and to be heard at any general meeting which he attends on any part of the business of the meeting which concerns him as auditor.

**282 Duties of auditor**

The auditor of a company shall report to its members in such manner and on such matters as are prescribed by this Act and carry out all other duties imposed on him by this Act or any other law.

**283 Remuneration of auditor**

(1) Save as is otherwise provided in this Act, the remuneration of the auditor of a company shall be determined by agreement with the company.

(2) All payments made or to be made by a company to its auditor, specifying the remuneration for the audit, the remuneration for other specified services, the auditor's expenses and payments in respect of the audit and any other matter, shall be included under a separate heading in the income statement in respect of the accounting period concerned.

**CHAPTER XI**

**ACCOUNTING AND DISCLOSURE (ss 284-310)**

***Accounting Records (ss 284-287)***

**284 Duty of company to keep accounting records**

Cases

(1) Every company shall keep in one of the official languages of the Republic such accounting records as are necessary fairly to present the state of affairs and business of the company and to explain the transactions and financial position of the trade or business of the company, including-

- (a) records showing the assets and liabilities of the company;
- (b) a register of fixed assets showing the respective dates of acquisition and the cost thereof, depreciation, if any, the date of any revaluation and the revalued amount, the respective dates of any disposals and the consideration received in respect thereof: Provided that in respect of fixed assets acquired before the commencement of this Act, a company may, as at the end of its first financial year after the said commencement, take an inventory of all fixed assets and make a realistic allocation of the total value of fixed assets as shown in the financial statements as at that date over the inventory of assets;

[Para. (b) amended by s. 10 of Act 82 of 1992.]

- (c) records containing entries from day to day in sufficient detail of all cash received and

- paid out and of the matters in respect of which receipts and payments take place;
- (d) where the trade or business of the company has involved dealings in goods, records of all goods sold and purchased and (except in the case of ordinary retail trade) records showing the goods and the buyers and the sellers thereof in sufficient detail to enable the nature of those goods and those buyers and sellers to be identified; and
  - (e) statements of the annual stocktaking.

(2) The accounting records referred to in subsection (1) may be kept by making entries in bound books or by recording the matters in question in any other manner, and where such records are not kept by making entries in bound books, adequate precautions shall be taken for guarding against falsification and facilitating its discovery.

(3) The accounting records shall be kept at the registered office of the company or at such other place as the directors think fit and shall at all times be open to inspection by the directors and if such records are kept at a place outside the Republic, there shall be sent to and kept at a place in the Republic, and be at all times open to inspection by the directors, such financial statements and returns with respect to the business dealt with in those records as will disclose with reasonable accuracy the financial position of that business at intervals not exceeding twelve months, subject to section 285, and will enable the company's financial statements to be prepared in accordance with this Act.

[Sub-s. (3) substituted by s. 35 of Act 24 of 2006.]

(4) (a) Any company which fails to comply with any provision of this section and every director or officer thereof who is a party to such failure or who fails to take all reasonable steps to secure compliance by the company with any such provision, shall be guilty of an offence.

(b) In any proceedings against any director or officer of a company in respect of an offence consisting of a failure to take reasonable steps to secure compliance by a company with the requirements of this section, it shall be a defence to prove that the accused had reasonable grounds for believing and did believe that a competent and reliable person was charged with the duty of seeing that those requirements were complied with and was in a position to discharge that duty and that the accused had no reason to believe that the said person had failed in any way to discharge that duty.

(5) For the purposes of subsection (1), the expression 'fixed assets' shall not include any assets acquired or used solely for the purposes of carrying on mining operations.

### **285 Determination of financial year of company**

(1) The financial year of a company shall, subject to the provisions of this section and any other law, be its annual accounting period, the commencing date of which and the date on which it ends in the next succeeding calendar year, shall be determined upon the incorporation of the company:

Provided that the first financial year of a company shall, where the commencing date so determined-

- (a) is a date more than three months after such incorporation, be the period commencing on such incorporation and ending on the date immediately preceding the commencing date so determined; or
- (b) is a date not more than three months after such incorporation, be the period commencing on such incorporation and ending on the date so determined as the end of the financial year in the next calendar year.

(2) A company may at any time before the end of its current financial year on payment of the prescribed fee and on lodgment with the Registrar of the prescribed form-

- (a) change the end of that financial year to a date being not more than six months earlier; or
- (b) with the approval of the Registrar given on good cause shown, change the end of that financial year to a date being not more than six months later,

[Para. (b) amended by s. 12 (1) of Act 29 of 1982.]

and in such a case every subsequent financial year of the company shall end, subject to the provisions of this section, on the date as so changed.

[Sub-s. (2) substituted by s. 12 of Act 76 of 1974 and by s. 3 of Act 115 of 1979.]

(3) Any reference in this Act to the financial year of a company shall be construed as including a reference to any period which in terms of this section is stated to be a financial year of that company.

### **285A General requirements for financial statements**

(1) A widely held company-

- (a) must comply with financial reporting standards;
- (b) must comply with the provisions of this Act and Schedule 4 that are applicable to public interest companies;
- (c) must prepare financial statements that fairly present the financial position and the results of the operations of the company (and its subsidiaries, if applicable) in accordance with paragraph (a).

(2) A limited interest company-

- (a) must comply with the accounting standards developed for limited interest companies under section 440S (1) (b);
- (b) must comply with the provisions of this Act and Schedule 4 that are applicable to limited interest companies;
- (c) must prepare financial statements that fairly present the financial position and the results of operations of the company (and its subsidiaries, if applicable) in accordance with paragraphs (a) and (b).

(3) Financial statements must clearly state that they have been prepared in accordance with-

- (a) this Act prior to its amendment by the Corporate Laws Amendment Act, 2006;
- (b) financial reporting standards; or
- (c) the requirements of subsection (2) (c).

[S. 285A inserted by s. 36 of Act 24 of 2006.]

### **286 Duty to make out annual financial statements and to lay them before annual general meeting**

#### Cases

(1) The directors of a company shall in respect of every financial year of the company cause to be made out in one of the official languages of the Republic annual financial statements and shall lay them before the annual general meeting of the company required to be held in terms of section 179 in respect of that financial year.

(2) The annual financial statements required to be made out under subsection (1) shall consist of-

- (a) a balance sheet, income statement and additional components required in terms of financial reporting standards;
- (b) a summary of significant accounting policies and other explanatory notes on the components referred to in paragraph (a);
- (c) a directors' report complying with the requirements of this Act; and
- (d) an auditor's report as required by section 301.

[Sub-s. (2) amended by s. 11 of Act 82 of 1992 and substituted by s. 37 (a) of Act 24 of 2006.]

(3) .....

[Sub-s. (3) deleted by s. 37 (b) of Act 24 of 2006.]

(4) (a) Any director or officer of a company who fails to take all reasonable steps to comply or to secure compliance with the provisions of this section or with any other requirements of this Act as to matters to be stated in annual financial statements, shall be guilty of an offence.

(b) In any proceedings against any director or officer of a company under paragraph (a), the defence referred to in section 284 (4) (b) shall be available to him.

### **287 Offence to issue incomplete or non-compliant financial statements**

If any financial statements of a company which are incomplete in any material particular or otherwise do not comply with the requirements of this Act, are issued, circulated or published, the company and every director or officer thereof who is a party to such issue, circulation or publication, shall be guilty of an offence.

[S. 287 substituted by s. 38 of Act 24 of 2006.]

### **287A False or misleading reports**

(1) If any financial report of a company is false or misleading in a material respect, any person who is a party to the preparation, approval, publication, issue or supply of that report and who knows or ought reasonably to suspect that it is false or misleading is guilty of an offence unless subsection (3) applies.

(2) For the purposes of subsection (1), a person shall be regarded as a party to the preparation of a financial report which is false or misleading if-

- (a) the report includes or is otherwise based on a scheme, structure or form of words devised, prepared or recommended by that person; and
- (b) the scheme, structure or form of words is of such a nature that that person knew or ought reasonably to have suspected that its inclusion or other use in connection with the preparation of the report would cause the report to be false or misleading.

(3) If any person is found guilty of an offence under section 287 in respect of a failure to comply with, or an omission from, financial statements, such person shall not also be guilty of an offence under this section in respect of the same failure or omission.

[S. 287A inserted by s. 39 of Act 24 of 2006.]

### ***Accounting by Holding Companies (ss 288-294)***

#### **288 Obligation to lay group statements before annual general meeting**

(1) Where at the end of its financial year a company, which is not a wholly owned subsidiary of another company incorporated in the Republic (including an external company which is a subsidiary of a company incorporated in the Republic), has subsidiaries, group annual financial statements shall be made out and shall be laid before the annual general meeting of the company before which its own annual financial statements are so laid under section 286 (1).

(2) .....

[Sub-s. (2) substituted by s. 24 of Act 111 of 1976 and deleted by s. 40 (a) of Act 24 of 2006.]

(3) (a) Any director or officer of a company who fails to take all reasonable steps to comply or to secure compliance with the provisions of this section or with any other requirements of this Act as to matters to be stated in group financial statements, shall be guilty of an offence.

[Para. (a) substituted by s. 40 (b) of Act 24 of 2006.]

(b) In any proceedings against any director or officer of a company under paragraph (a), the defence referred to in section 284 (4) (b) shall be available to him.

[S. 288 substituted by s. 13 of Act 76 of 1974.]

#### **289 .....**

[S. 289 amended by s. 12 of Act 82 of 1992 and repealed by s. 41 of Act 24 of 2006.]

#### **290 Group financial statements for limited interest companies**

(1) A limited interest company need not consolidate financial statements, if the directors of the company are of the opinion that the required information about the state of affairs, business and profit or loss of the company and its subsidiaries would be presented more effectively and meaningfully in the manner set out in subsection (2).

(2) If consolidated annual financial statements are not made out, group annual financial statements may consist of-

- (a) one set of consolidated annual financial statements dealing with the company and one group of subsidiaries and one or more sets dealing with other groups of subsidiaries;

- (b) separate annual financial statements dealing with each of the subsidiaries;
- (c) statements annexed to the company's own annual financial statements dealing with subsidiaries and their effect on the financial statements of the company; or
- (d) any combination of the forms described in paragraph (a), (b) or (c).

(3) Group financial statements may be wholly or partly incorporated in the company's own financial statements.

[S. 290 substituted by s. 14 of Act 76 of 1974 and by s. 42 of Act 24 of 2006.]

**291** .....

[S. 291 amended by s. 15 of Act 76 of 1974 and repealed by s. 43 of Act 24 of 2006.]

**292** .....

[S. 292 repealed by s. 16 of Act 76 of 1974.]

**293 Accounting periods of company and subsidiary to be the same**

The directors of any subsidiary shall, notwithstanding anything to the contrary in this Act or in its articles, cause annual financial statements as required by section 286 to be made out so as to cover an accounting period or accounting periods ending on the same date or dates as the period or periods covered by the annual financial statements of its holding company or holding companies.

[S. 293 substituted by s. 17 of Act 76 of 1974.]

**294** .....

[S. 294 substituted by s. 18 of Act 76 of 1974 and repealed by s. 43 of Act 24 of 2006.]

*Disclosure of Certain Matters in Financial Statements (ss 295-297)*

**295 Annual financial statements to disclose loans to and security for benefit of directors and managers**

(1) The annual financial statements of a company shall state-

- (a) the amount and particulars of every loan referred to in section 226 (1) which has during the financial year concerned been made by virtue of the provisions of section 226 (2) (a), (b) or (e), including every such loan which has during the said financial year been repaid;
- (b) the particulars of every security (and of the transaction to which it relates) referred to in section 226 (1), which has during the financial year concerned been provided by virtue of the provisions of section 226 (2) (a), (b) or (e), including every such security which has during the said financial year been cancelled;
- (c) the balance outstanding of every loan described in paragraph (a), made at any time before the said financial year and outstanding at the end thereof; and
- (d) the particulars of every security (and of the transaction to which it relates) described in paragraph (b), provided at any time before the said financial year and still in existence at the end thereof (including, if applicable, the balance outstanding on the said transaction to which it relates).

(2) If a company which has made a loan or provided any security referred to in subsection (1) is a subsidiary and its holding company is by this Act required to make out group annual financial statements or otherwise to furnish particulars of such subsidiary, there shall be included therein the information provided for in subsection (1).

(3) Where a loan is a loan of shares, debentures or other property, or where any security is provided in respect of a loan of shares, debentures or other property, the requirements of this section may be complied with by stating the particulars in the directors' report or by way of a note to the annual financial statements.

(4) If the provisions of this section are not complied with in respect of the annual financial statements of a company, the auditor of the company shall in his report relating to such annual financial statements include a statement containing such information in regard to the matter as he is

reasonably able to furnish.

(5) (a) Any director or manager or past director or manager of a company or of its holding company (if any) or of any other subsidiary of that holding company shall at the written request of the first-mentioned company or its auditor in writing give such information, including particulars relating to his control of a company or body corporate contemplated in section 226 (1) (b), as the company or its auditor may require for compliance with the provisions of this section.

(b) Any director or manager or past director or manager referred to in paragraph (a) who fails to comply with such request within one month from the date thereof, shall be guilty of an offence.

[S. 295 amended by s. 19 of Act 76 of 1974 and substituted by s. 25 of Act 111 of 1976.]

## **296 Annual financial statements to disclose loans made to and security provided for benefit of directors or managers before their appointment**

(1) The annual financial statements of a company shall state-

- (a) the amount and particulars of every loan which has at any time been made by the company to any person before his appointment as director or manager of the company, if-
  - (i) the loan was still in existence at the date of such appointment; and
  - (ii) such appointment was made at any time during the financial year concerned; and
- (b) the particulars of every security (and of the transaction to which it relates) which has at any time been provided by the company for the benefit of any person before his appointment as director or manager of the company, if-
  - (i) the security was still in existence at the date of such appointment; and
  - (ii) such appointment was made at any time during the financial year concerned.

(2) For the purposes of subsection (1)-

- (a) 'loan' includes-
  - (i) a loan of money, shares, debentures or any other property; and
  - (ii) any credit extended by a company where the debt concerned is not payable or being paid in accordance with normal business practice in respect of payment of debts of the same kind; and

(b) 'security' includes a guarantee.

(3) The provisions of section 295 (2), (3) and (4) shall *mutatis mutandis* apply with reference to loans and securities contemplated in this section.

(4) This section shall not apply in respect of a loan made or security provided *bona fide* in the ordinary course of the business of a company actually and regularly carrying on the business of the making of loans or the provision of security.

[S. 296 substituted by s. 26 of Act 111 of 1976.]

## **297 Annual financial statements to disclose directors' emoluments and pensions**

(1) The annual financial statements of a company shall contain particulars showing-

- (a) the amount of the emoluments received by directors;
- (b) the amount of the pensions paid or receivable by directors and past directors;
- (c) the amount of any compensation paid to directors and past directors in respect of loss of office; and
- (d) details of directors' service contracts.

[Sub-s. (1) substituted by s. 19 (a) of Act 37 of 1999.]

(1A) (a) The information required to be furnished in terms of this section shall in each case be furnished in two separate categories, namely, one dealing with the executive directors in the aggregate (and past directors where appropriate), and the other dealing with non-executive directors in the aggregate (and past directors where appropriate).

(b) For the purposes of this section, '**executive director**' means a director who is involved in

the day-to-day management of the company and 'non-executive director' means a director who has no involvement in the day-to-day management of the company.

[Sub-s. (1A) inserted by s. 19 (b) of Act 37 of 1999.]

(2) The information to be disclosed under subsection (1) (a) shall show the amount of any emoluments paid to or receivable by persons in respect of-

- (a) services rendered as directors of the company;
- (b) services rendered while being directors of the company-
  - (i) as directors of any of its subsidiaries; and
  - (ii) otherwise in connection with the carrying on of the affairs of the company or any of its subsidiaries.

[Sub-s. (2) substituted by s. 19 (c) of Act 37 of 1999.]

(2A) For the purposes of this section '**emoluments**' includes the following:

- (a) (i) Fees paid for services rendered as directors; and
- (ii) any amounts paid to a person in respect of such person's acceptance of the office of director, which shall for the purposes of this section be deemed to be fees paid for services rendered;
- (b) basic salary;
- (c) bonuses and performance related payments;
- (d) sums paid by way of expense allowances;
- (e) the estimated monetary value of any other material benefits received;
- (f) contributions paid under any pension scheme not otherwise required to be disclosed in terms of subsection (3) (a);
- (g) (i) gains made on the exercise of share options, the gain being the difference between the price paid for the shares and the market price of the shares on the date of exercise, and that date being the date on which the director takes ownership of the shares and is entitled to dispose of them; and
- (ii) the details of such gains shall be presented in tabular form, unless inappropriate, with explanatory notes where necessary.

[Sub-s. (2A) inserted by s. 19 (d) of Act 37 of 1999.]

(3) The information to be disclosed under subsection (1) (b)-

- (a) shall include details of the amount of any pension paid or receivable in respect of any services of any directors and past directors of the company whether to or by such directors or past directors or on any of their nomination or, by virtue of dependence on or other connection with any of them, to or by any other person, but shall not include any pension paid or receivable under a pension scheme, if the contributions payable thereunder are substantially adequate for the maintenance thereof; and
- (b) shall distinguish between pensions in respect of services as directors or otherwise of the company or its subsidiary, and other pensions.

[Sub-s. (3) substituted by s. 19 (e) of Act 37 of 1999.]

(3A) For the purposes of this section-

- (a) '**pension**' includes any superannuation allowance, superannuation gratuity or similar payment;
- (b) '**pension scheme**' means a scheme for the provision of pensions in respect of services rendered as directors or otherwise which is maintained in whole or in part by means of contributions; and
- (c) '**contribution**', in relation to a pension scheme, means any payment (including any insurance premium) paid for the purposes of the scheme by or in respect of persons rendering services in respect of which pensions will or may become payable under the

scheme, but does not include any payment in respect of two or more persons if the amount paid in respect of each of them is not ascertainable.

[Sub-s. (3A) inserted by s. 19 (f) of Act 37 of 1999.]

(4) The information to be disclosed under subsection (1) (c)-

- (a) shall include any amounts paid to or receivable by directors or past directors by way of compensation in respect of-
  - (i) the loss of office as a director of the company; or
  - (ii) the loss, while being directors of the company or on, or in connection with, ceasing to be directors of the company, or any other office in connection with the carrying on of the company's affairs or of any office as director or otherwise in connection with the management of the affairs of any subsidiary thereof; and
- (b) shall distinguish between compensation in respect of the office of director, whether of the company or its subsidiary, and compensation in respect of other offices.

[Sub-s. (4) substituted by s. 19 (g) of Act 37 of 1999.]

(4A) For the purposes of this section '**compensation for loss of office**' includes sums paid as consideration for or in connection with a person's retirement from office.

[Sub-s. (4A) inserted by s. 19 (h) of Act 37 of 1999.]

(5) The information to be disclosed under paragraphs (a), (b) and (c) of subsection (1)-

- (a) shall include all relevant sums paid by or receivable from-
  - (i) the company; and
  - (ii) the company's subsidiaries; and
  - (iii) any other person,
 except sums to be accounted for to the company or any of its subsidiaries, or, by virtue of section 227 to past or present members of the company or any of its subsidiaries or any class of those members; and
- (b) shall distinguish, in the case of the amount to be shown under subsection (1) (c), between the sums respectively paid by or receivable from the company, the company's subsidiaries and other persons.

[Sub-s. (5) amended by s. 19 (i) of Act 37 of 1999.]

(6) The amounts to be shown under this section for any financial year shall be the sums receivable in respect of that year, whenever paid, or, in the case of sums not receivable in respect of a period, the sums paid during that year, so however, that where any sums are not shown in the annual financial statements for the relevant financial year on the ground that the person receiving them is liable to account therefor as mentioned in subsection (5) (a), but the liability is thereafter wholly or partly released or is not enforced within a period of two years, those sums shall, to the extent to which the liability is released or not enforced, be shown in the first annual financial statements in which it is practicable to show them and shall be distinguished from the amounts to be shown therein apart from this provision.

(7) For the purpose of enabling them to show separately the respective amounts received under different headings as required by this section, the directors of a company may apportion any payments received or receivable in such manner as they consider appropriate.

(8) In this section any reference to a company's subsidiary shall for the purpose of subsections (2) and (3) include a reference to a company which was a subsidiary of the first-mentioned company at the time the services contemplated in the said subsections were rendered, and, for the purposes of subsection (4), include a reference to a company which was such a subsidiary immediately before the loss of office as director of the company concerned.

[Sub-s. (8) substituted by s. 26 of Act 64 of 1977.]

(8A) The information to be disclosed under paragraph (d) of subsection (1) shall include details

of-

- (a) directors' service contracts with notice periods in excess of one year and with provisions for predetermined compensation on termination of the contracts exceeding one year's salary and benefits in kind, giving reasons for such notice period; and
- (b) the unexpired term of any director's service contract of a director proposed for election or re-election at the forthcoming annual general meeting or, if any director proposed for election or re-election does not have a director's service contract, a statement to that effect.

[Sub-s. (8A) inserted by s. 19 (j) of Act 37 of 1999.]

(9) Every director or past director of a company shall at the written request of the company or its auditor give notice in writing to the company or the auditor, within twenty-one days from the date of such request, of such matters relating to himself as may be necessary for the purposes of this section, and shall if he fails to comply with any such request, be guilty of an offence.

(10) If in respect of any annual financial statements the requirements of this section are not complied with, the auditor of the company by whom the annual financial statements are examined, shall include in his report thereon, so far as he is reasonably able to do so, a statement giving the required particulars or, in the event that such auditor is unable to furnish the required particulars, he shall make a statement to that effect in his report.

[Sub-s. (10) substituted by s. 19 (k) of Act 37 of 1999.]

***Further Requirements as to Financial Statements (s 298)***

**298 Approval and signing of financial statements**

(1) The annual financial statements of a company other than the auditor's report, shall be approved by its directors and signed on their behalf by two of the directors or, if there is only one director, by that director, and group annual financial statements shall similarly be approved and signed by the directors of the holding company.

(2) If a copy of any annual financial statements, or group annual financial statements which have not been approved and signed as required by subsection (1), is issued, circulated or published, every director or officer of the company concerned who is a party to such issue, circulation or publication thereof, shall be guilty of an offence.

[S. 298 substituted by s. 20 of Act 76 of 1974.]

***Directors' Report (s 299)***

**299 Directors' report**

(1) Except in the case of a company which is a wholly-owned subsidiary of any other company incorporated in the Republic, every company shall, as part of its annual financial statements, lay before the annual general meeting a report by the directors with respect to the state of affairs, the business and the profit or loss of the company or of the company and its subsidiaries, if any.

(2) The directors' report shall deal with every matter which is material for the appreciation by the members of the company of the state of affairs, the business and the profit or loss of the company or of the company and its subsidiaries, if any, and shall for that purpose be in accordance with and include at least the matters prescribed by Schedule 4, in so far as these are applicable, and comply with any other requirements of this Act.

(3) Any director of a company who fails to take all reasonable steps to ensure compliance with the provisions of this section, shall be guilty of an offence.

***Auditor's Duties as to Annual Financial Statements (ss 300-301)***

**300 Auditor's duties as to annual financial statements and other matters**

Cases

It shall be the duty of the auditor of a company-

- (a) to examine the annual financial statements and group annual financial statements to be

laid before its annual general meeting;

[Para. (a) substituted by s. 21 (a) of Act 76 of 1974.]

- (b) to satisfy himself that proper accounting records as required by this Act have been kept by the company and that proper returns adequate for the purposes of his audit have been received from branches not visited by him;
- (c) to satisfy himself that the minute books and attendance registers in respect of meetings of the company and of directors and managers have been kept in proper form as required by this Act;
- (d) to satisfy himself that a register of interests in contracts as required by section 240 has been kept and that the entries therein are in accord with the minutes of directors' meetings;
- (e) to examine or satisfy himself as to the existence of any securities of the company;
- (f) to obtain all the information and explanations which to the best of his knowledge and belief are necessary for the purposes of carrying out his duties;
- (g) to satisfy himself that the company's annual financial statements are in agreement with its accounting records and returns;
- (h) to examine group annual financial statements and satisfy himself that they comply with the requirements of this Act;

[Para. (h) substituted by s. 21 (b) of Act 76 of 1974.]

- (i) to examine such of the accounting records of the company and carry out such tests in respect of such records and such other auditing procedures as he or she considers necessary in order to satisfy himself or herself that the annual financial statements or group annual financial statements fairly present the financial position of the company or of the company and its subsidiaries and the results of its operations and those of its subsidiaries, in conformity with the requirements of section 285A;

[Para. (i) substituted by s. 21 (c) of Act 76 of 1974 and by s. 44 of Act 24 of 2006.]

- (j) to satisfy himself that statements made by the directors in their reports do not conflict with a fair interpretation or distort the meaning of the annual financial statements and accompanying notes;
- (jA) when he gets to know, or has reason to believe, that the company is not carrying on business or is not in operation and has no intention of resuming operations in the foreseeable future, to report forthwith accordingly by registered post to the Registrar;

[Para. (jA) inserted by s. 10 of Act 31 of 1986 and amended by s. 28 of Act 35 of 2001.]

- (k) to comply with any other duty imposed on him by this Act; and
- (l) to comply with any applicable requirements of the Auditing Profession Act, 2005 (Act 26 of 2005).

[Para. (l) substituted by s. 13 of Act 82 of 1992 and by s. 44 of Act 24 of 2006.]

### **300A Attendance of auditors**

(1) The designated auditor must meet with the audit committee of a widely held company not more than one month before the board meets to approve the financial statements of the company for any financial year, so as to consider matters which appear to the auditor or the audit committee to be of importance and relevant to the proposed financial statements and to the affairs of the company generally.

(2) The designated auditor must attend every annual general meeting of a widely held company where the financial statements of the company for a financial year are to be considered or agreed to, so as to respond according to his or her knowledge and ability to any question relevant to the audit of the financial statements.

(3) Should the designated auditor fail to attend a meeting as required by subsection (1) or

subsection (2), the auditor is guilty of an offence unless-

- (a) the designated auditor is prevented by circumstances beyond his or her control from attending the meeting;
- (b) the designated auditor arranges for another auditor with knowledge of the audit to attend and carry out the duties of the designated auditor at the meeting; and
- (c) if the designated auditor is a member of a firm, the individual attending the meeting in place of the designated auditor is a member of that firm.

(4) If in the case of a limited interest company due notice is given of the intention to move a resolution requiring the presence of the auditor at an annual general meeting of the company where financial statements of the company for any financial year are to be considered, the auditor shall attend that meeting and respond according to his or her knowledge and ability to any question which is put to the auditor and is relevant to the audit of the financial statements.

(5) If an auditor fails to comply with subsection (4), the auditor is guilty of an offence unless-

- (a) the auditor is prevented by circumstances beyond his or her control from attending the meeting; and
- (b) the auditor arranges for another auditor with knowledge of the audit to attend and carry out the duties of the auditor at the meeting.

(6) In this section designated auditor has the meaning given to it in section 273 (5).

[S. 300A inserted by s. 45 of Act 24 of 2006.]

### **301 Auditor's report**

(1) When the auditor of a company has complied with the requirements of, and has satisfied himself as to the matters stated in, section 300, and has carried out his audit free from any restrictions whatsoever, he shall make a report to the members of the company to the effect that he has examined the annual financial statements and group annual financial statements and that in his opinion they fairly present the financial position of the company and its subsidiaries and the results of its operations and that of its subsidiaries in the manner required by this Act.

[Sub-s. (1) substituted by s. 22 of Act 76 of 1974.]

(2) In the event of the auditor being unable to make such a report or to make it without qualification, he shall include in his report a statement to that effect and set forth the facts or circumstances which prevent him from so making his report or from making it without qualification.

(3) The auditor's report under subsection (1) shall, unless all the members present agree to the contrary, be read out at the annual general meeting.

### *Issue of Copies of Annual Financial Statements (s 302)*

### **302 Duty of company to send annual financial statements to members and Registrar**

Cases

(1) A copy of the annual financial statements of a company and the group annual financial statements, if any, shall not less than twenty-one days before the date of the annual general meeting of the company be sent to every member of the company and every holder of debentures of the company (whether or not such member or holder of debentures is entitled to receive notices of general meetings of the company) and to all persons other than members or holders of debentures of the company who are entitled to receive such notices: Provided that, if so authorized by a company's articles, a copy of its financial statements may be made available in electronic format to all persons who have agreed thereto in writing

[Sub-s. (1) amended by s. 26 of Act 35 of 2001.]

(2) The provisions of subsection (1) shall not be construed as requiring a copy of the said statements to be sent-

- (a) in the case of a company not having a share capital, to any member or holder of debentures of the company who is not entitled to receive notices of general meetings of

the company;

- (b) to any member or holder of debentures of a company who is entitled to receive such notices and whose address is not known to the company;
- (c) to more than one of the joint holders of any shares or debentures of a company none of whom is entitled to receive such notices;
- (d) in the case of joint holders of any such shares or debentures of whom some are and others are not entitled to receive such notices, to any such joint holder who is not so entitled.

(3) Any such copy not sent to members and debenture-holders and other persons referred to in subsection (1) at least twenty-one days before the date of the relevant meeting shall be deemed to have been so sent if it is so agreed by all the members entitled to attend and vote at the meeting.

(4) A public company shall on the day on which it sends such copies to its members as provided in subsection (1), send to the Registrar under cover of the prescribed form a copy, certified to be a true copy by a director and the secretary of the company-

- (a) of the annual financial statements and group annual financial statements, if any; and  
[Para. (a) substituted by s. 23 (a) of Act 76 of 1974.]
- (b) of the annual financial statements of every private company which is a subsidiary of that public company.

[Para. (b) substituted by s. 23 (b) of Act 76 of 1974.]

(4A) (a) The Registrar may on application by any public company made to him on the prescribed form, on good cause shown and on payment of the prescribed fee, exempt such a public company from the requirements of subsection (4) (b).

(b) Any such exemption by the Registrar shall expire after two years but may be renewed on application by the company.

[Sub-s. (4A) inserted by s. 23 (c) of Act 76 of 1974.]

(5) If default is made in complying with the provisions of subsection (1) or (4), the company concerned, and every director who knowingly is a party to the default, shall be guilty of an offence.

### ***Interim Accounting (ss 303-308)***

#### **303 Half-yearly interim reports**

Every widely held company, other than a wholly owned subsidiary, shall not later than three months after the expiration of the first period of six months of its financial year send to every member and holder of debentures of the company an interim report on the business and operations of the company or, in the case of a holding company, of the company and its subsidiaries, during the said period of six months, and the results thereof: Provided that-

- (a) the first interim report to be sent to members and holders of debentures of a company after its incorporation shall-
  - (i) in any case where proviso (a) to section 285 (1) applies and where the period of the first financial year of the company exceeds nine months, be in respect of a period of six months commencing on the date of incorporation of the company; and
  - (ii) in any case where proviso (b) to section 285 (1) applies, be in respect of a period commencing on the date of incorporation of the company and ending six months before the end of its first financial year;
- (b) where a company has changed the end of its financial year under section 285 (2) (b) an additional interim report shall be made out for the period from the beginning of the financial year so changed to the date of the end of the financial year before it was so changed.

[S. 303 substituted by s. 24 of Act 76 of 1974 and amended by s. 46 of Act 24 of 2006.]

### 304 Provisional annual financial statements

(1) Every widely held company, other than a wholly owned subsidiary, which does not within three months after the end of its financial year issue copies of its annual financial statements in terms of section 302 (1) shall not later than the date on which the said period of three months expires send to every member and holder of debentures of the company a copy of the provisional annual financial statements of the company or, in the case of a holding company, of the company and its subsidiaries during that accounting period, and the results thereof.

[Sub-s. (1) substituted by s. 25 of Act 76 of 1974 and by s. 47 of Act 24 of 2006.]

(2) If a limited interest company has not issued its annual financial statements in terms of section 302 (1) within six months after the end of its financial year, the Registrar may, on application to him or her in the prescribed manner, by any member of that company, and on good cause shown, require that company by written notice to lodge with him or her provisional annual financial statements as referred to in subsection (1) of this section within a period of six weeks from the date of such notice and thereupon the said company shall, unless it issues its annual financial statements within the said period, lodge provisional annual financial statements with the Registrar within the said period.

[Sub-s. (2) substituted by s. 47 of Act 24 of 2006.]

### 305 Form and contents of interim report and provisional annual financial statements

(1) .....

[Sub-s. (1) deleted by s. 48 (a) of Act 24 of 2006.]

(2) Provisional annual financial statements shall not be required to be audited.

(3) Every interim report and all provisional annual financial statements of a company shall be approved by the directors and signed on their behalf by two of the directors or, if there is only one director, by that director.

[Sub-s. (3) substituted by s. 48 (b) of Act 24 of 2006.]

[S. 305 substituted by s. 26 of Act 76 of 1974.]

### 306 Copies of interim report and provisional annual financial statements to be lodged with Registrar

Every company which issues an interim report or provisional annual financial statements shall, within seven days from the date of issue, lodge a copy of such interim report or provisional annual financial statements under cover of the prescribed form with the Registrar.

[S. 306 substituted by s. 27 of Act 76 of 1974.]

### 307 Registrar may grant exemptions and extensions of time

(1) If the Registrar approves, no half-yearly interim reports shall be required under section 303 if the directors of the company are of the opinion that such reports-

- (a) would be misleading to the members of the company or harmful to the business of the company; or
- (b) would entail unnecessary expense or for any other reason would serve no useful purpose.

(2) The provisions of section 291 (3) shall apply *mutatis mutandis* with reference to any application of the company for the Registrar's approval under subsection (1) of this section and to the period of any exemption.

(3) The Registrar may on application by any company made to him before the expiry of the periods in which an interim report under section 303 or provisional annual financial statements under section 304 are required to be issued, on good cause shown and on payment of the prescribed fee, extend the said periods respectively by such period as he may in each case deem fit.

[Sub-s. (3) substituted by s. 28 of Act 76 of 1974.]

### 308 Offences under sections 303 to 306, inclusive

Any company which fails to comply with any requirements of section 303, 304, 305 or 306 and

any director of a company who fails to take all reasonable steps to secure compliance with any such requirement, shall be guilty of an offence.

***Right of Members and Others to Copies of Annual Financial Statements and Interim Reports (ss 309-310)***

**309 Right of members and others to copies of annual financial statements and interim reports**

Cases

(1) Any member or holder of debentures of a company shall be entitled to be furnished on demand without charge with a copy of the last annual financial statements (including group annual financial statements) and provisional annual financial statements and of the last interim report of the company.

[Sub-s. (1) substituted by s. 29 of Act 76 of 1974.]

(2) A judgment creditor of a private company shall, where it appears from the return of the person whose duty it is to execute the judgment in question that he has not found sufficient disposable property to satisfy that judgment, be entitled to be furnished on demand without charge with a copy of the last annual financial statement of the company.

(3) (a) Any company which fails to comply with a demand under this section within seven days after the making thereof, and any director of the company who knowingly is a party to the default, shall be guilty of an offence.

(b) It shall be a defence to a charge under paragraph (a) to prove that the person concerned had previously demanded a copy of the document to which the charge relates and that such copy had been supplied.

**310 .....**

[S. 310 amended by s. 27 of Act 64 of 1977 and repealed together with its heading by s. 19 of Act 59 of 1978.]

**CHAPTER XII**

**COMPROMISE, AMALGAMATION, ARRANGEMENT AND TAKE-OVERS (ss 311-321)**

**311 Compromise and arrangement between company, its members and creditors**

Cases

(1) Where any compromise or arrangement is proposed between a company and its creditors or any class of them or between a company and its members or any class of them, the Court may, on the application of the company or any creditor or member of the company or, in the case of a company being wound up, of the liquidator, or if the company is subject to a judicial management order, of the judicial manager, order a meeting of the creditors or class of creditors, or of the members of the company or class of members (as the case may be), to be summoned in such manner as the Court may direct.

(2) If the compromise or arrangement is agreed to by-

(a) a majority in number representing three-fourths in value of the creditors or class of creditors; or

(b) a majority representing three-fourths of the votes exercisable by the members or class of members,

(as the case may be) present and voting either in person or by proxy at the meeting, such compromise or arrangement shall, if sanctioned by the Court, be binding on all the creditors or the class of creditors, or on the members or class of members (as the case may be) and also on the company or on the liquidator if the company is being wound up or on the judicial manager if the company is subject to a judicial management order.

(3) No such compromise or arrangement shall affect the liability of any person who is a surety for the company.

(4) If the compromise or arrangement is in respect of a company being wound up and provides

for the discharge of the winding-up order or for the dissolution of the company without winding up, the liquidator of the company shall lodge with the Master a report in terms of section 400 (2) and a report as to whether or not any director or officer or past director or officer of the company is or appears to be personally liable for damages or compensation to the company or for any debts or liabilities of the company under any provision of this Act, and the Master shall report thereon to the Court.

(5) The Court, in determining whether the compromise or arrangement should be sanctioned or not, shall have regard to the number of members or members of a class present or represented at the meeting referred to in subsection (2) voting in favour of the compromise or arrangement and to the report of the Master referred to in subsection (4).

(6) (a) An order by the Court sanctioning a compromise or arrangement shall have no effect until a certified copy thereof has been lodged with the Registrar under cover of the prescribed form and registered by him.

(b) A copy of such order of court shall be annexed to every copy of the memorandum of the company issued after the date of the order.

(7) If a company fails to comply with the provisions of subsection (6) (b), the company and every director and officer of the company who is a party to the failure, shall be guilty of an offence.

(8) In this section 'company' means any company liable to be wound up under this Act and the expression 'arrangement' includes a reorganization of the share capital of the company by the consolidation of shares of different classes or by the division of shares into shares of different classes or by both these methods.

### **312 Information as to compromises and arrangements**

#### Cases

(1) Where a meeting of creditors or any class of creditors or of members or any class of members is summoned under section 311 for the purpose of agreeing to a compromise or arrangement, there shall-

- (a) with every notice summoning the meeting which is sent to a creditor or member, be sent also a statement-
  - (i) explaining the effect of the compromise or arrangement;
  - (ii) stating all relevant information material to the value of the shares and debentures concerned in any arrangement; and
  - (iii) in particular stating any material interests of the directors of the company, whether as directors or as members or as creditors of the company or otherwise, and the effect thereon of the compromise or arrangement, in so far as it is different from the effect on the like interests of other persons; and
- (b) in every notice summoning the meeting which is given by advertisement, be included either such a statement as aforesaid or a notification of the place at which and the manner in which creditors or members entitled to attend the meeting may obtain copies of such a statement.

(2) Where the compromise or arrangement affects the rights of debenture-holders of the company, the said statement shall give the like explanation and statement as respects the trustee of any deed for securing the issue of the debentures as it is required to give as respects the company's directors.

(3) Where a notice given by advertisement includes a notification that copies of the said statement can be obtained by creditors or members entitled to attend the meeting, every such creditor or member shall, on making application in the manner indicated by the notice, be furnished by the company free of charge with a copy of the statement.

(4) Where a company makes default in complying with any requirement of this section, the company and every director or officer of the company who is a party to the default, shall be guilty of

an offence, and for the purpose of this subsection any liquidator of the company and any trustee of a deed for securing the issue of debentures of the company shall be deemed to be an officer of the company: Provided that a person shall not be liable under this subsection if he shows that the default was due to the refusal of any other person, being a director or trustee for debenture-holders, to supply the necessary particulars as to his interests and that fact has been stated in the statement.

(5) It shall be the duty of every director of a company and of every trustee for debenture-holders to give notice to the company of such matters relating to himself as may be necessary for the purposes of this section, and if he makes default in complying with such duty, he shall be guilty of an offence.

### **313 Provisions facilitating reconstruction or amalgamation**

(1) If an application is made to the Court under section 311 for the sanctioning of a compromise or arrangement proposed between a company and any such persons as are referred to in that section, and it is shown to the Court that the compromise or arrangement has been proposed for the purposes of or in connection with a scheme for the reconstruction of any company or companies or the amalgamation of any two or more companies, and that under the scheme the whole or any part of the undertaking or the property of any company concerned in the scheme (in this section referred to as the 'transferor company') is to be transferred to another company (in this section referred to as the 'transferee company') the Court may, either by the order sanctioning the compromise or arrangement or by any subsequent order, make provision for all or any of the following matters:

- (a) The transfer to the transferee company of the whole or any part of the undertaking and of the property or liabilities of any transferor company;
- (b) the allotment or appropriation by the transferee company of any shares, debentures or other like interests in that company which under the compromise or arrangement are to be allotted or appropriated by that company to or for any person;
- (c) the continuation by or against the transferee company of any legal proceedings pending by or against any transferor company;
- (d) the dissolution, without winding up, of any transferor company;
- (e) the provision to be made for any persons who, within such time and in such manner as the Court may direct, dissent from the compromise or arrangement;
- (f) such incidental, consequential and supplemental matters as are necessary to secure that the reconstruction or amalgamation shall be fully and effectively carried out:

Provided that no order for the dissolution, without winding up, of any transferor company shall be made under this subsection prior to the transfer in due form of all the property and liabilities of the said company.

(2) Where an order under this section provides for the transfer of property or liabilities, that property shall by virtue of the order vest in, subject to transfer in due form, and those liabilities shall become the liabilities of, the transferee company.

(3) If an order is made under this section, every company in relation to which the order is made shall, within thirty days after the making of the order, cause a copy thereof to be lodged with the Registrar, under cover of the prescribed form, for registration, and if default is made in complying with this subsection, the company shall be guilty of an offence.

(4) In this section the expression '**property**' includes property, rights and powers of every description, and the expression '**liabilities**' includes duties.

(5) Notwithstanding the provisions of section 311 (8) the expression '**company**' in this section does not include any company other than a company within the meaning of this Act.

### **314 .....**

Cases

[S. 314 amended by s. 30 of Act 76 of 1974 and repealed by s. 6 of Act 78 of 1989.]

**315 to 321 inclusive .....**

[Ss. 315 to 321 inclusive repealed by s. 6 of Act 78 of 1989.]

**CHAPTER XIII**  
**EXTERNAL COMPANIES (ss 322-336)**  
*Registration (ss 322-324)*

**322 Registration of memorandum of external company**

## Cases

(1) Every external company shall within twenty-one days after the establishment of a place of business in the Republic lodge with the Registrar, in the prescribed manner-

- (a) a certified copy of the memorandum of the company, and if the said memorandum is not in one of the official languages of the Republic, a certified translation thereof in one of those languages;
- (b) a notice under section 170 in the prescribed form of the registered office and postal address of the company;
- (c) the consent of and the name and address of the auditor of the company in the Republic;
- (d) a notice of the financial year of the company under section 285;
- (e) a list in the prescribed form containing particulars-
  - (i) in respect of each director, his full forenames and surname and any former forenames and surname, his nationality, his occupation, his residential, business and postal addresses and the date of appointment (distinguishing between directors resident in the Republic and non-resident directors): Provided that the provisions of section 215 (3) shall apply *mutatis mutandis* to a former forename and surname of a director;
  - (ii) in respect of the local manager and in respect of the secretary, his full forenames and surname, his nationality, his occupation, his residential, business and postal addresses, the date of appointment, and in the case of any local manager or secretary being a corporate body, its registered office;
  - (iii) the name and address of the auditor of the company in the Republic;
- (f) .....  
 [Para. (f) deleted by s. 20 (1) of Act 59 of 1978.]
- (g) a notice in the prescribed form of the name and address of the person authorized by the company to accept service on behalf of the company under section 326; and
- (h) .....  
 [Para. (h) deleted by s. 13 (1) of Act 29 of 1982.]

(2) The Registrar, upon payment of the prescribed fee, shall register the said memorandum in the register kept by him under section 5, distinguishing the registration from the registrations in respect of companies incorporated in the Republic, and shall issue a certificate of registration under his hand and seal to the company.

(3) (a) An external company in respect of which a notice has been published under section 31 (2) (b) of the Registration and Incorporation of Companies in South West Africa Proclamation, 1978, of the State President, in the *Gazette*, shall be deemed to be registered under the provisions of this section as an external company from the date mentioned in the notice.

(b) The provisions of section 335 (5), (6) and (7) shall apply *mutatis mutandis* in respect of such a company.

[Sub-s. (3) added by Proclamation 234 of 1978.]

(4) Upon the registration of the memorandum of an external company the Registrar shall allocate a registration number to the company concerned.

[Sub-s. (4) added by s. 6 of Act 29 of 1985.]

### 323 Effect of registration of memorandum of external company

#### Cases

(1) Upon the registration of the memorandum of an external company the external company shall be a body corporate in the Republic subject to the applicable provisions of this Act.

(2) A certificate of registration given by the Registrar in respect of any external company shall upon its mere production, in the absence of proof of fraud, be conclusive evidence that all the requirements of this Act in respect of registration and of matters precedent and incidental thereto have been complied with.

### 324 Power of external company to own immovable property in Republic

(1) Save as may be expressly provided in any other law, an external company of which the memorandum has been registered under section 322 shall have the same power to own immovable property in the Republic as if it were a company incorporated in the Republic.

(2) As from a date three months after the commencement of this Act, no external company shall be capable of acquiring the ownership of immovable property in the Republic unless its memorandum has been or is deemed to be registered under section 322.

#### *Administrative and Other Duties of External Companies (ss 325-336)*

### 325 External company to have an auditor

(1) Every external company shall appoint and shall at all times have an auditor within the meaning of this Act and shall not later than fourteen days after such appointment or any change in the office of auditor, lodge with the Registrar in the prescribed form a notice stating the name and address of such auditor or the change in such office.

(2) The auditor of any external company may at any time resign as such and the provisions of section 280 shall *mutatis mutandis* apply with reference to such resignation.

(3) If an external company fails to appoint an auditor as provided in subsection (1), the Registrar shall appoint such auditor.

(4) The provisions of subsection (1) shall not apply where the sole purpose of the external company in establishing a place of business in the Republic is to establish a share registration office or a share transfer office.

### 326 External company to have person authorized to accept service

(1) Every external company shall appoint and shall at all times have one or more persons resident in the Republic authorized by the company to accept on its behalf service of process and any notices required to be served on the company, notwithstanding the provisions of section 71.

(2) Any person authorized as aforesaid shall be entitled to withdraw from such authorization after having given one month's written notice of such withdrawal to the company and shall at the same time lodge two copies of such notice with the Registrar under cover of the prescribed form.

(3) Every external company shall within twenty-one days after receipt of the notice referred to in subsection (2) or after the termination of such authorization in any other manner, lodge with the Registrar a notice in the prescribed form stating the alteration and the name and address of the new authorized person appointed by the company.

### 327 Register of directors and managers and secretaries, changes therein and power of Registrar to call for particulars

(1) The provisions of sections 211, 215 and 216 shall *mutatis mutandis* apply to a director, local manager and local secretary of an external company: Provided that-

(a) where a director is not resident in the Republic-

- (i) the entries referred to in section 216 (1) shall be made in the register not later than the end of the financial year of the company and the return referred to in section 216 (2) shall be lodged with the Registrar within fourteen days after the date of such entries; and

[Sub-para. (i) substituted by s. 11 of Act 31 of 1986.]

- (ii) the form of consent prescribed under section 211 may be signed by the director or his duly authorized agent on his behalf;
- (b) the provisions of section 211 in respect of such form shall not apply where the sole purpose of the company in establishing a place of business in the Republic is to establish a share registration office or a share transfer office.

[Sub-s. (1) substituted by s. 21 (1) of Act 59 of 1978 and amended by s. 7 of Act 29 of 1985.]

(2) Every external company shall, within twenty-one days after the date of a written request by the Registrar to that effect, lodge with the Registrar complete particulars of the present residential, business and postal addresses of every director not resident in the Republic, together with a complete list containing the names and registered offices of companies incorporated in the Republic and other external companies of which such director is also a director.

### **328 Changes in memorandum of external company**

If any alteration is made in the memorandum of an external company, the company shall within three months of such alteration lodge with the Registrar under cover of the prescribed form for registration, a certified copy of the instrument showing the alteration, and if such instrument is in a foreign language, a certified translation thereof in one of the official languages of the Republic.

### **329 External company to keep accounting records and lodge annual financial statements and interim report**

(1) Every external company shall keep in one of the official languages of the Republic such accounting records, including the matters referred to in section 284 (1) (a) to (e) inclusive, as are necessary fairly to present the state of affairs and business of the company in the Republic and to explain the transactions concerning its trade and business and its financial position in the Republic.

(2) The provisions of section 285 in respect of the financial year of a company and section 303 in respect of interim reports shall apply *mutatis mutandis* to every external company.

(3) Every external company shall within six months after the end of every financial year lodge with the Registrar, under cover of the prescribed form, a copy of its annual financial statements together with the report of the auditor of the company, in respect of its financial position, trade and business in the Republic.

(4) The provisions of sections 281, 282 and 283 in regard to the rights, duties and remuneration of auditors and of Chapter XI in regard to the financial statements of companies shall apply *mutatis mutandis* to the financial statement and report required by subsection (3) of this section in respect of every external company.

(5) Every external company shall within six months after the end of its financial year, lodge with the Registrar a certified copy of its latest complete annual financial statements as prepared under the requirements of the foreign jurisdiction in which it was incorporated and, if such statements are in a foreign language, a certified translation thereof in one of the official languages of the Republic.

(6) The Minister, when he considers it to be in the public interest, may exempt an external company from all or any of the obligations imposed by this section and may also do so on application by such external company on the ground that the required disclosure of information or of any particular information will be harmful to the company or will be impracticable or will be of no real benefit to the members of the company in the Republic in view of the insignificant amounts involved: Provided that such application shall be renewed every two years.

### **330 .....**

[S. 330 amended by s. 23 (1) of Act 59 of 1978, substituted by s. 14 (1) of Act 29 of 1982 and repealed by s. 12 of Act 31 of 1986.]

### **331 Further administrative duties of external company**

(1) Every external company shall-

- (a) conspicuously exhibit outside all its places of business in the Republic the name of the company and the foreign country in which the company is incorporated; and
- (b) have the name of the company and of the foreign country in which the company is incorporated, as well as the registration number referred to in section 322 (4), mentioned in legible characters in all bill-heads and letter-heads and in all notices, advertisements and other official publications of the company, and for the purposes of this subsection the provisions of section 50 shall *mutatis mutandis* apply.

[Para. (b) substituted by s. 8 of Act 29 of 1985.]

(2) An external company shall not issue or send to any person in the Republic any trade catalogue, trade circular or business letter bearing the company's name unless the names of its directors, their nationality if not South African, the names of its local managers and its local secretary are stated therein.

[Sub-s. (2) substituted by s. 24 of Act 59 of 1978.]

### **332 Deregistration of external company**

(1) If any external company ceases to have a place of business in the Republic, it shall forthwith give notice of that fact to the Registrar.

(2) If the Registrar has reasonable cause to believe that an external company has ceased to have a place of business in the Republic, he shall send by registered post to the company at its postal address and at the address of its registered office, to the person authorized to accept service on its behalf and to its auditor, letters requiring details of its said place of business, if any.

[Sub-s. (2) substituted by s. 25 (a) of Act 59 of 1978 and amended by s. 28 of Act 35 of 2001.]

(3) If the Registrar does not within one month of sending the letters receive any answer thereto or if he receives an answer to the effect that the company has ceased to have a place of business in the Republic, he may publish in the *Gazette* and may by registered post send to the company at its postal address and at the address of its registered office, to the person authorized to accept service on its behalf and to its auditor, a notice to the effect that at the expiration of a period of two months from the date of that notice the said company will, unless good cause is shown to the contrary, be deregistered.

[Sub-s. (3) substituted by s. 25 (b) of Act 59 of 1978 and amended by s. 28 of Act 35 of 2001.]

(4) At the expiration of the period of two months mentioned in any notice referred to in subsection (3) or upon receipt from any external company of a notice contemplated in subsection (1), the Registrar may, unless good cause to the contrary has been shown by the company, deregister the company and shall, if he so deregisters the company, give notice to that effect in the *Gazette* and the date of the publication of such notice in the *Gazette* shall be deemed to be the date of deregistration: Provided that the liability (if any) of every director, officer and member of the company shall continue and may be enforced as if the company had not been deregistered.

[Sub-s. (4) added by s. 25 (c) of Act 59 of 1978.]

### **333 Offences in respect of external companies**

(1) Any company incorporated outside the Republic which establishes a place of business in the Republic without complying with the requirements of section 322 (1), and every director, officer or agent of that company, shall be guilty of an offence.

(2) Every external company which and every director and officer of such company who fails to comply with any requirement of section 325, 326, 327, 328, 329, or 331 shall be guilty of an offence.

[Sub-s. (2) substituted by s. 15 (1) of Act 29 of 1982 and by s. 13 of Act 31 of 1986.]

### **334 Transfer of undertaking of external company and exemption from transfer duty under a scheme**

(1) Notwithstanding anything to the contrary contained in any law, whenever an external company satisfies the Court that it carries on its principal business within the Republic and that-

- (a) it is being or is about to be wound up voluntarily or dissolved for the purpose of

transferring the whole of its business and all its rights, obligations and property, wherever situate, to a company which has been or will be incorporated under this Act (in this section referred to as the new company) for the purpose of taking over and acquiring such business, rights, obligations and property; or

- (b) all the issued shares of that external company have been, are being or are about to be acquired by such new company under a scheme in terms of which such transfer to the said new company is to take place; and
- (c) the sole consideration for such transfer or acquisition is the issue to the members of the external company of shares of the new company in proportion to their shareholdings in the external company; and
- (d) no shares in the new company will be available for issue to any persons other than the members of the external company,

the Court may order that, on the certificate of the Registrar that the external company is being or is about to be wound up voluntarily or dissolved or that all the shares of the external company have been or are about to be acquired for the said purpose, that the said new company has been incorporated and is entitled to commence business and that the shares of the new company have been issued in the said proportion to the members of the external company-

- (i) as from a date specified by it, the whole of the business and all rights, obligations and property of the external company, wherever situate, shall be transferred (subject to transfer in due form) to, shall vest in and shall be binding upon the new company;
- (ii) no transfer or stamp duty shall be payable in respect of the transfer of any property from the external company to the new company; and
- (iii) any licence, exemption, permit, certificate or authority held in terms of any law by the external company in respect of its business or property, shall, with effect from the date specified under paragraph (i), be deemed for the purposes of such law to be held by the new company in respect of the business or property so transferred.

(2) In subsection (1) the expression 'the Court' means any provincial or local division of the High Court of South Africa within whose jurisdiction the registered office of the external company concerned is situate, and such Court shall have the power to issue such order in respect of any property wherever situate in the Republic.

[Sub-s. (2) amended by s. 5 (b) of Act 20 of 2004.]

### **335 Registration of external companies as companies in the Republic**

#### Cases

(1) Any external company having a share capital which has a place of business in the Republic and which has complied with the provisions of section 322 of this Act may, subject to the provisions of this section, make application for registration under Chapter IV of this Act.

- (2) If any such external company making such an application satisfies the Minister that-
  - (a) it conducts the whole or the major portion of its business in the Republic and that the greater part of its assets (other than interests in subsidiary companies incorporated outside the Republic) is situated in the Republic;
  - (b) the majority of its directors are or will be South African citizens;
  - (c) the majority of its shareholders are resident in the Republic and that the company has resolved to make an application under this section;
  - (d) its registration and incorporation in the foreign country concerned will, upon registration in the Republic under Chapter IV of this Act, be terminated in accordance with the laws of such foreign country;
  - (e) it has lodged with the Registrar such documents necessary for registration under Chapter IV of this Act as the Registrar may require, and that it has paid all fees and

duties payable under this Act or any other Act; and

(f) it has complied with such other requirements as the Registrar may deem necessary, the Minister may by notice in the *Gazette* declare that such external company shall, subject to compliance with the provisions of subsection (3), be deemed, with effect from the date of termination of its registration and incorporation in the foreign country concerned, to be a company incorporated under Chapter IV of this Act.

[Sub-s. (2) amended by ss. 46 and 47 of Act 97 of 1986.]

(3) The Registrar shall, with effect from the date of termination of its registration and incorporation in the foreign country, effect the necessary registration in respect of such company in the manner and form prescribed by and subject to the applicable provisions of Chapter IV of this Act and shall simultaneously cancel the registration in respect of the external company under section 322.

(4) Upon such registration in respect of an external company the Registrar shall issue to such company under his hand and seal a certificate to the effect that such registration has taken place and that it is deemed that the company has been incorporated under the Act.

(5) If at the date of such registration any action, arbitration or proceeding or any cause of action, arbitration or proceeding shall be pending or existing by or against or in favour of the external company the same shall not abate or be discontinued or be in any way prejudicially affected by reason of such registration but may be continued, prosecuted and enforced by, against or in favour of the external company as if such registration had not taken place but not further or otherwise.

(6) All contracts, agreements, conveyances, deeds, leases, and other instruments affecting the external company and in force at the date of such registration shall as from that date be as binding and of as full force against or in favour of the company and may be enforced by, against or in favour of the company as fully and effectually as if the external company had at all material times been incorporated under this Act.

(7) All books, registers and documents which if such registration had not taken place would have been evidence in respect of any matter for or against the external company shall on and after the date of such registration be admitted in evidence in respect of the same or a like matter for or against the company.

### **336 Application of this Chapter to foreign companies under repealed Act**

Cases

As from the commencement of this Act the provisions of this Chapter, excluding the registration required under section 322, shall apply to external companies which prior to the said commencement complied with section 201 of the repealed Act, and such companies shall be deemed to have complied with section 322 of this Act and their memorandums shall be deemed to have been registered under the last-mentioned section.

## **CHAPTER XIV WINDING-UP OF COMPANIES (ss 337-426)**

Cases

### **General (ss 337-343)**

### **337 Definitions**

Cases

In this Chapter, unless the context otherwise indicates-

'company' includes a company, external company and any other body corporate;

'contributory', in relation to a company limited by guarantee, means any person who has undertaken to contribute to the assets of the company in terms of section 52 (3) (b) in the event of its being wound up and, in relation to any company which is unable to pay its debts and is being wound up by the Court or by a creditors' voluntary winding-up, includes any person who is liable to contribute

to the costs, charges and expenses of the winding-up of the company.

### **338 Application of repealed Act where winding-up has already commenced**

Cases

(1) The provisions of this Act relating to the winding-up of a company shall not apply to any company if its winding-up was commenced before the commencement of this Act, and the winding-up of any such company shall be continued as if this Act had not been passed.

(2) When a company having shares which are not fully paid-up, is wound up under this Act, the provisions of the repealed Act in respect of such shares and the contributories in relation thereto shall continue to apply in respect of such a company, notwithstanding the repeal of that Act.

### **339 Law of insolvency to be applied *mutatis mutandis***

Cases

In the winding-up of a company unable to pay its debts the provisions of the law relating to insolvency shall, in so far as they are applicable, be applied *mutatis mutandis* in respect of any matter not specially provided for by this Act.

### **340 Voidable and undue preferences**

Cases

(1) Every disposition by a company of its property which, if made by an individual, could, for any reason, be set aside in the event of his insolvency, may, if made by a company, be set aside in the event of the company being wound up and unable to pay all its debts, and the provisions of the law relating to insolvency shall *mutatis mutandis* be applied to any such disposition.

(2) For the purpose of this section the event which shall be deemed to correspond with the sequestration order in the case of an individual shall be-

(a) in the case of a winding-up by the Court, the presentation of the application, unless that winding-up has superseded a voluntary winding-up, when it shall be the registration in terms of section 200 of the special resolution to wind up the company;

[Para. (a) substituted by s. 17 (a) of Act 83 of 1981.]

(b) in the case of a voluntary winding-up, the registration in terms of section 200 of the special resolution to wind up the company;

[Para. (b) substituted by s. 17 (b) of Act 83 of 1981.]

(c) in the case of a winding-up of any company unable to pay its debts by the Court superseding a judicial management order, the presentation of the application to the Court in terms of section 433 (l) or 440.

(3) Any cession or assignment by a company of all its property to trustees for the benefit of all its creditors shall be void.

### **341 Dispositions and share transfers after winding-up void**

Cases

(1) Every transfer of shares of a company being wound up or alteration in the status of its members effected after the commencement of the winding-up without the sanction of the liquidator, shall be void.

(2) Every disposition of its property (including rights of action) by any company being wound-up and unable to pay its debts made after the commencement of the winding-up, shall be void unless the Court otherwise orders.

### **342 Application of assets and costs of winding-up**

Cases

(1) In every winding-up of a company the assets shall be applied in payment of the costs, charges and expenses incurred in the winding-up and, subject to the provisions of section 435 (1) (b),

the claims of creditors as nearly as possible as they would be applied in payment of the costs of sequestration and the claims of creditors under the law relating to insolvency and, unless the memorandum or articles otherwise provide, shall be distributed among the members according to their rights and interests in the company.

(2) The provisions of the law relating to insolvency in respect of contributions by creditors towards any costs shall apply to every winding-up of a company.

### **343 Modes of winding-up**

- (1) A company may be wound up -
- (a) by the Court; or
  - (b) voluntarily.
- (2) A voluntary winding-up of a company may be -
- (a) a creditors' voluntary winding-up; or
  - (b) a members' voluntary winding-up.

#### *Winding-up by the Court (ss 344-348)*

### **344 Circumstances in which company may be wound up by Court**

Cases

A company may be wound up by the Court if-

- (a) the company has by special resolution resolved that it be wound up by the Court;
- (b) the company commenced business before the Registrar certified that it was entitled to commence business;
- (c) the company has not commenced its business within a year from its incorporation, or has suspended its business for a whole year;
- (d) in the case of a public company, the number of members has been reduced below seven;
- (e) seventy-five per cent of the issued share capital of the company has been lost or has become useless for the business of the company;
- (f) the company is unable to pay its debts as described in section 345;
- (g) in the case of an external company, that company is dissolved in the country in which it has been incorporated, or has ceased to carry on business or is carrying on business only for the purpose of winding up its affairs;
- (h) it appears to the Court that it is just and equitable that the company should be wound up.

### **345 When company deemed unable to pay its debts**

Cases

- (1) A company or body corporate shall be deemed to be unable to pay its debts if-
- (a) a creditor, by cession or otherwise, to whom the company is indebted in a sum not less than one hundred rand then due -
    - (i) has served on the company, by leaving the same at its registered office, a demand requiring the company to pay the sum so due; or
    - (ii) in the case of any body corporate not incorporated under this Act, has served such demand by leaving it at its main office or delivering it to the secretary or some director, manager or principal officer of such body corporate or in such other manner as the Court may direct,
 and the company or body corporate has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor; or
  - (b) any process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned by the sheriff or the messenger with an endorsement that he has not found sufficient disposable property to satisfy the judgment, decree or order or that any disposable property found did not upon sale satisfy such process; or
- [Para. (b) substituted by s. 26 of Act 59 of 1978.]

(c) it is proved to the satisfaction of the Court that the company is unable to pay its debts.

(2) In determining for the purpose of subsection (1) whether a company is unable to pay its debts, the Court shall also take into account the contingent and prospective liabilities of the company.

### **346 Application for winding-up of company**

Cases

(1) An application to the Court for the winding-up of a company may, subject to the provisions of this section, be made-

- (a) by the company;
- (b) by one or more of its creditors (including contingent or prospective creditors);
- (c) by one or more of its members, or any person referred to in section 103(3), irrespective of whether his name has been entered in the register of members or not;  
[Para. (c) substituted by s. 11(a) of Act 70 of 1984.]
- (d) jointly by any or all of the parties mentioned in paragraphs (a), (b) and (c);
- (e) in the case of any company being wound up voluntarily, by the Master or any creditor or member of that company; or
- (f) in the case of the discharge of a provisional judicial management order under section 428 (3) or 432 (2), by the provisional judicial manager of the company.

[Para. (f) added by s. 11 (c) of Act 70 of 1984.]

(2) A member of a company shall not be entitled to present an application for the winding-up of that company unless he has been registered as a member in the register of members for a period of at least six months immediately prior to the date of the application or the shares he holds have devolved upon him through the death of a former holder and unless the application is on the grounds referred to in section 344 (b), (c), (d), (e) or (h).

(3) Every application to the Court referred to in subsection (1), except an application by the Master in terms of paragraph (e) of that subsection, shall be accompanied by a certificate by the Master, issued not more than ten days before the date of the application, to the effect that sufficient security has been given for the payment of all fees and charges necessary for the prosecution of all winding-up proceedings and of all costs of administering the company in liquidation until a provisional liquidator has been appointed, or, if no provisional liquidator is appointed, of all fees and charges necessary for the discharge of the company from the winding-up.

<sup>i</sup>\*(4) (a) Before an application for the winding-up of a company is presented to the Court, a copy of the application and of every affidavit confirming the facts stated therein shall be lodged with the Master, or, if there is no Master at the seat of the Court, with an officer in the public service designated for that purpose by the Master by notice in the *Gazette*.

(b) The Master or any such officer may report to the Court any facts ascertained by him which appear to him to justify the Court in postponing the hearing or dismissing the application and shall transmit a copy of that report to the applicant or his agent and to the company.

(4A) (a) When an application is presented to the court in terms of this section, the applicant must furnish a copy of the application-

- (i) to every registered trade union that, as far as the applicant can reasonably ascertain, represents any of the employees of the company; and
- (ii) to the employees themselves-
  - (aa) by affixing a copy of the application to any notice board to which the applicant and the employees have access inside the premises of the company; or
  - (bb) if there is no access to the premises by the applicant and the employees, by affixing a copy of the application to the front gate of the premises, where applicable, failing which to the front door of the premises from which the company conducted any business at the time of the application;

- (iii) to the South African Revenue Service; and
- (iv) to the company, unless the application is made by the company, or the court, at its discretion, dispenses with the furnishing of a copy where the court is satisfied that it would be in the interests of the company or of the creditors to dispense with it.

(b) The applicant must, before or during the hearing, file an affidavit by the person who furnished a copy of the application which sets out the manner in which paragraph (a) was complied with.

[Sub-s. (4A) added by s. 7 of Act 69 of 2002.]

### **346A Service of winding-up order**

- (1) A copy of a winding-up order must be served on-
  - (a) every trade union referred to in subsection (2);
  - (b) the employees of the company by affixing a copy of the application to any notice board to which the employees have access inside the debtor's premises, or if there is no access to the premises by the employees, by affixing a copy to the front gate, where applicable, failing which to the front door of the premises from which the debtor conducted any business at the time of the presentation of the application;
  - (c) the South African Revenue Service; and
  - (d) the company, unless the application was made by the company.

(2) For the purposes of serving the winding-up order in terms of subsection (1), the sheriff must establish whether the employees of the company are represented by a registered trade union and determine whether there is a notice board inside the premises of the company to which the employees have access.

[S. 346A inserted by s. 8 of Act 69 of 2002.]

### **347 Power of Court in hearing application**

#### Cases

(1) The Court may grant or dismiss any application under section 346, or adjourn the hearing thereof, conditionally or unconditionally, or make any interim order or any other order it may deem just, but the Court shall not refuse to make a winding-up order on the ground only that the assets of the company have been mortgaged to an amount equal to or in excess of those assets or that the company has no assets.

(1A) Whenever the court is satisfied that an application for the winding-up of a company is an abuse of the court's procedure or is malicious or vexatious, the court may allow the company forthwith to prove any damages which it may have sustained by reason of the application and award it such compensation as the court may deem fit.

[Sub-s. (1A) inserted by s. 9 of Act 69 of 2002.]

(2) Where the application is presented by members of the company and it appears to the Court that the applicants are entitled to relief, the Court shall make a winding-up order, unless it is satisfied that some other remedy is available to the applicants and that they are acting unreasonably in seeking to have the company wound up instead of pursuing that other remedy.

(3) Where the application is presented on the ground that the company commenced business before the Registrar had certified that it was entitled to commence business, the Court may, instead of granting a winding-up order, give directions that the company shall obtain such certificate from the Registrar or make such other order as it thinks fit and the Court may order the costs or any part thereof to be paid by any person who in the opinion of the Court is responsible for the default.

(4) Where the application is presented to the Court by-

- (a) any applicant under section 346 (1) (e), the Court may in the winding-up order or by any subsequent order confirm all or any of the proceedings in the voluntary winding-up; or

(b) any member under that section, the Court shall satisfy itself that the rights of the member will be prejudiced by the continuation of a voluntary winding-up.

(5) The Court shall not grant a final winding-up order in the case of a company or other body corporate which is already being wound up by order of Court within the Republic.

### **348 Commencement of winding-up by Court**

Cases

A winding-up of a company by the Court shall be deemed to commence at the time of the presentation to the Court of the application for the winding-up.

#### ***Voluntary Winding-up (ss 349-353)***

### **349 Circumstances under which company may be wound up voluntarily**

Cases

A company, not being an external company, may be wound up voluntarily if the company has by special resolution resolved that it be so wound up.

[S. 349 substituted by s. 18 of Act 83 of 1981.]

### **350 Members' voluntary winding-up and security**

Cases

(1) A voluntary winding-up of a company shall be a members' voluntary winding-up if the resolution contemplated in section 349 so states, but such a resolution shall be of no force and effect unless-

- (a) it has been registered in terms of section 200; and
- (b) prior to the registration thereof-
  - (i) security has been furnished to the satisfaction of the Master for the payment of the debts of the company within a period not exceeding twelve months from the commencement of the winding-up of the company; or
  - (ii) the Master has dispensed with the furnishing of such security on production to him of-
    - (aa) a sworn statement by the directors of the company that it has no debts; and
    - (bb) a certificate by the auditor of the company that to the best of his knowledge and belief and according to the records of the company, it has no debts.

[Sub-s. (1) substituted by s. 19 of Act 83 of 1981.]

(2) The costs incurred in furnishing the security referred to in paragraph (b) of subsection (1) may be recovered from the company concerned.

(3) Unless otherwise provided, in a members' voluntary winding-up the liquidator may without the sanction of the Court exercise all powers by this Act given to the liquidator in a winding-up by the Court, subject to such directions as may be given by the company in general meeting.

### **351 Creditors' voluntary winding-up**

Cases

(1) A voluntary winding-up of a company shall be a creditors' voluntary winding-up if the resolution contemplated in section 349 so states, but such a resolution shall be of no force and effect unless it has been registered in terms of section 200.

[Sub-s. (1) substituted by s. 20 of Act 83 of 1981.]

(2) Unless otherwise provided, in a creditors' voluntary winding-up the liquidator may without the sanction of the Court exercise all powers by this Act given to the liquidator in a winding-up by the Court subject to such directions as may be given by the creditors.

### **352 Commencement of voluntary winding-up**

(1) A voluntary winding-up of a company shall commence at the time of the registration in terms of section 200 of the special resolution authorising the winding-up.

(2) The Registrar shall forthwith after the registration by him of a special resolution referred to in subsection (1), transmit a copy thereof to the Master.

[S. 352 substituted by s. 21 of Act 83 of 1981.]

### **353 Effect of voluntary winding-up on status of company and on directors**

(1) A company which is being wound up voluntarily shall, notwithstanding anything contained in its articles, remain a corporate body and retain all its powers as such, but shall from the commencement of the winding-up cease to carry on its business except in so far as may be required for the beneficial winding-up thereof.

(2) As from the commencement of a voluntary winding-up all the powers of the directors of the company concerned shall cease except in so far as their continuance is sanctioned-

- (a) by the liquidator or the creditors in a creditors' voluntary winding-up; or
- (b) by the liquidator or the company in general meeting in a members' voluntary winding-up.

### ***General Provisions Affecting all Windings-up (ss 354-366)***

#### **354 Court may stay or set aside winding-up**

Cases

(1) The Court may at any time after the commencement of a winding-up, on the application of any liquidator, creditor or member, and on proof to the satisfaction of the Court that all proceedings in relation to the winding-up ought to be stayed or set aside, make an order staying or setting aside the proceedings or for the continuance of any voluntary winding-up on such terms and conditions as the Court may deem fit.

(2) The Court may, as to all matters relating to a winding-up, have regard to the wishes of the creditors or members as proved to it by any sufficient evidence.

#### **355 Notice to creditors or members in review by Court in winding-up, and no re-opening of confirmed account**

(1) In any review by the Court of any matter under the winding-up of a company where the general body of creditors, members or contributories is affected, notice to the liquidator shall be notice to them.

(2) The Court shall not authorise the re-opening of any duly confirmed account or plan of distribution or of contribution otherwise than as is provided in section 408.

#### **356 Notice of winding-up of company**

Cases

(1) The Master shall upon receipt of a copy of any winding-up order of any company lodged with him give notice of such winding-up in the *Gazette*.

(2) Any company which has passed a special resolution under section 349 for its voluntary winding-up, shall within 28 days after the registration of that resolution in terms of section 200-

- (a) lodge with the Master a certified copy of the resolution concerned, together with
  - (i) in the case of a members' voluntary winding-up if any further resolution nominating a person or persons for appointment as liquidator or liquidators of the company has been passed, a certified copy of that resolution; or
  - (ii) in the case of a creditors' voluntary winding-up, two certified copies of the statement referred to in section 363 (1); and
- (b) give notice of the voluntary winding-up of the company in the *Gazette*.

[Sub-s. (2) substituted by s. 22 of Act 83 of 1981 and amended by s. 12 of Act 70 of 1984.]

(3) Any company which fails to comply with any provision of subsection (2) and every director or officer thereof who knowingly authorised or permitted such failure, shall be guilty of an offence.

#### **357 Notice of winding-up to certain officials and their duties thereanent**

Cases

(1) A copy of every winding-up order, whether provisional or final and of any order staying, amending or setting such order aside, made by the Court, shall forthwith be transmitted by the Registrar of the Court to-

- (a) the sheriff of the province in which the registered office of the company or main office of the body corporate is situate and to the sheriff of every province in which it appears that the company or such body corporate owns property;
- (b) every registrar or other officer charged with the maintenance of any register under any Act in respect of any property within the Republic which appears to be an asset of such company;
- (c) the messenger of every magistrate's court by the order whereof it appears that property of such company is under attachment.

(2) Where the assets of any such company are under four hundred rand in value, the Court may direct that its movable assets may, upon such terms as to security as it may determine, remain in the custody of such person as may be specified in the directions, and in that event it shall not be necessary to transmit a copy of any order to any sheriff or messenger.

(3) A copy of every special resolution for the voluntary winding-up of any company passed under section 349 and of every order of court amending or setting aside the proceedings in relation to the winding-up shall, within fourteen days after the registration of the resolution in terms of section 200 or the making of the order, be transmitted by that company to the officers and registrars referred to in paragraphs (a), (b) and (c) of subsection (1).

[Sub-s. (3) substituted by s. 23 of Act 83 of 1981.]

(4) (a) Any officer and registrar to whom a copy of any such order or resolution is transmitted in terms of subsection (1) or (3) shall record such copy and note thereon the day and hour of receipt thereof.

(b) Any registrar and officer referred to in paragraph (b) of subsection (1) shall upon receipt of a copy of any order or resolution referred to in subsection (1) or (3), enter a *caveat* in his register accordingly.

(5) Any company which fails to comply with any of the requirements of subsection (3) and every director or officer of such a company who knowingly is a party to such failure, shall be guilty of an offence.

### **358 Stay of legal proceedings before winding-up order granted**

At any time after the presentation of an application for winding-up and before a winding-up order has been made, the company concerned or any creditor or member thereof may-

- (a) where any action or proceeding by or against the company is pending in any court in the Republic, apply to such court for a stay of the proceedings; and
- (b) where any other action or proceeding is being or about to be instituted against the company, apply to the Court to which the application for winding-up has been presented, for an order restraining further proceedings in the action or proceeding,

and the court may stay or restrain the proceedings accordingly on such terms as it thinks fit.

### **359 Legal proceedings suspended and attachments void**

Cases

(1) When the Court has made an order for the winding-up of a company or a special resolution for the voluntary winding-up of a company has been registered in terms of section 200-

- (a) all civil proceedings by or against the company concerned shall be suspended until the appointment of a liquidator; and
- (b) any attachment or execution put in force against the estate or assets of the company after the commencement of the winding-up shall be void.

[Sub-s. (1) amended by s. 24 of Act 83 of 1981.]

(2) (a) Every person who, having instituted legal proceedings against a company which were suspended by a winding-up, intends to continue the same, and every person who intends to institute legal proceedings for the purpose of enforcing any claim against the company which arose before the commencement of the winding-up, shall within four weeks after the appointment of the liquidator give the liquidator not less than three weeks' notice in writing before continuing or commencing the proceedings.

(b) If notice is not so given the proceedings shall be considered to be abandoned unless the Court otherwise directs.

### **360 Inspection of records of company being wound up**

Cases

(1) Any member or creditor of any company unable to pay its debts and being wound up by the Court or by a creditors' voluntary winding-up may apply to the Court for an order authorising him to inspect any or all of the books and papers of that company, whether in possession of the company or the liquidator, and the Court may impose any condition it thinks fit in granting that authority.

(2) The provisions of subsection (1) shall not be construed as affecting any powers or rights conferred by any law upon any department of State or any person acting under its authority at all times to inspect or cause to be inspected, the books and papers of any company being wound up.

### **361 Custody of or control over, and vesting of property of, company**

Cases

(1) In any winding-up by the Court all the property of the company concerned shall be deemed to be in the custody and under the control of the Master until a provisional liquidator has been appointed and has assumed office.

(2) In any winding-up of any company, at all times while the office of the liquidator is vacant or he is unable to perform his duties, the property of the company shall be deemed to be in the custody and under the control of the Master.

(3) If for any reason it appears expedient, the Court may by the winding-up order or by any subsequent order direct that all or any part of the property, immovable and movable (including rights of action), belonging to the company, or to trustees on its behalf, shall vest in the liquidator in his official capacity, and thereupon the property or the part thereof specified in the order shall vest accordingly, and the liquidator may, after giving such indemnity (if any) as the Court may direct, bring or defend in his official capacity any action or other legal proceedings relating to that property, or necessary to be brought or defended for the purpose of effectually winding-up the company and recovering its property.

### **362 Court may order directors, officers and others to deliver property to liquidator or to pay into bank**

(1) The Court may at any time after making a winding-up order or after a special resolution for the voluntary winding-up of a company has been registered in terms of section 200, order any director, member, trustee, banker, agent or officer of the company concerned to pay, deliver, convey, surrender or transfer to the liquidator of the company forthwith, or within such time as the Court directs, any money, property or books and papers in his hands to which the company is *prima facie* entitled.

[Sub-s. (1) substituted by s. 25 of Act 83 of 1981.]

(2) The Court may order any director, member, purchaser or other person from whom money is due to any company which is being wound up, to pay the same into a banking institution registered under the Banks Act, 1965 (Act 23 of 1965), to be named by the Court for the account of the liquidator instead of to the liquidator, and such order may be enforced in the same manner as if it had ordered payment to the liquidator.

(3) All moneys paid into a banking institution as aforesaid in the event of a winding-up by the Court shall be subject in all respects to the orders of the Court.

### **363 Directors and others to submit statement of affairs**

(1) Where it is intended to pass a resolution for a creditors' voluntary winding-up of a company, the directors of that company shall make out or cause to be made out, in the prescribed form, a statement as to the affairs of the company and lay it before the meeting convened for the purpose of passing such a resolution.

[Sub-s. (1) substituted by s. 26 of Act 83 of 1981.]

(2) Where an order for the winding-up of a company has been made by the Court-

- (a) the persons who at the time of the winding-up order were directors and officers of the company; and
- (b) such persons who have been directors or officers of the company or who participated in its formation, at any time within one year before the winding-up order, as may be required to do so by the Master,

shall make out or cause to be made out, in the prescribed form, such statement as to the affairs of the company and lodge two certified copies thereof with the Master within fourteen days from the date of the winding-up order in question or within such extended time as the Master or the Court may for special reasons appoint.

(3) The Master may exempt any person referred to in subsection (2) from the obligation to comply with the requirements of that subsection if such person satisfies him by affidavit that he is unable to make out or cause to be made out or to verify such statement as to the affairs of the company concerned.

(4) The statement as to the affairs of a company referred to in subsection (1) or (2)-

- (a) shall contain such matter and be in such form as prescribed including particulars of the company's assets, debts, liabilities (including contingent and prospective liabilities), any pending legal proceedings by or against it, the names, addresses and nature of the businesses of its creditors, the security held by each of them, the dates when each of the securities was given and, in the case of such a statement under subsection (2), such further information as the Master may require; and
- (b) shall be verified by affidavit by each of the persons referred to in subsection (1) or (2) and such verifying affidavit shall be annexed to the said statement.

(5) The Master shall transmit a copy of any statement as to the affairs of a company lodged with him in terms of this section to the liquidator on his appointment.

(6) Any person shall be entitled by himself or his agent, on payment of the prescribed fee, to inspect or apply for a copy of or an extract from any statement as to the affairs of a company lodged with the Master in pursuance of this section.

(7) Any person who is required to make or cause to be made any statement as to the affairs of a company in terms of this section, shall be paid by the Master, out of the assets of the company, such costs and expenses incurred by him in respect of the preparation and making of such statement as the Master may consider reasonable.

(8) Any person who fails to comply with any requirement of subsection (1), (2) or (4) shall be guilty of an offence.

### **363A Change of address by directors and secretaries and certain former directors and secretaries**

(1) Any person who is a director or secretary of a company which is being wound up and who, after the winding-up of such company has commenced but before the liquidator's final account has in terms of section 408 been confirmed, changes his residential or postal address, shall notify the liquidator by registered post of his new residential or postal address within fourteen days after such change, or, if the liquidator has not been appointed on the date of such change, within fourteen days after the appointment of the liquidator.

(2) Any person who fails to comply with any requirement of subsection (1) shall be guilty of an offence.

(3) Whenever at the trial of any person charged with an offence referred to in subsection (2) it is proved that such person is a director or secretary of a company which is being wound up and that he has changed his residential or postal address after the winding-up of that company has commenced and that the liquidator has no written record of such change, it shall be presumed, unless the contrary is proved, that he did not notify the liquidator of such change.

[S. 363A inserted by s. 8 of Act 84 of 1980.]

### **364 Master to summon first meetings of creditors and members and purpose thereof**

Cases

(1) As soon as may be after a final winding-up order has been made by the Court or a special resolution for a creditors' voluntary winding-up of a company has been registered in terms of section 200, the Master shall summon-

- (a) a meeting of the creditors of the company for the purpose of
  - (i) considering the statement as to the affairs of the company lodged with the Master under section 363;
  - (ii) the proof of claims against the company; and
  - (iii) nominating a person or persons for appointment as liquidator or liquidators; and
- (b) a meeting of the members of the company or, in the case where the winding-up concerns a company limited by guarantee, a meeting of the contributories in respect of that company, for the purpose of-
  - (i) considering the said statement as to the affairs of the company; and
  - (ii) nominating a person or persons for appointment as liquidator or liquidators, unless the company in general meeting, when passing a resolution provided for in section 349, has already disposed of the matters referred to in subparagraphs (i) and (ii).

[Sub-s. (1) amended by s. 27 of Act 83 of 1981.]

(2) Meetings of creditors under this section shall be summoned and held as nearly as may be in the manner provided by the law relating to insolvency, and meetings of members or contributories in the manner prescribed by regulation: Provided that, in the case of a meeting of creditors, the Master may direct the company concerned or the provisional liquidator to send a notice of such meeting by post to every creditor of the company.

### **365 Offences in securing nomination as liquidator and restriction on voting at meetings**

(1) Any person who gives or agrees or offers to give to any member, creditor or contributory of a company any reward with a view to securing his own nomination or appointment or to securing or preventing the nomination or appointment of any person as the company's liquidator, shall be guilty of an offence.

(2) (a) The provisions of the law relating to insolvency in respect of voting, the manner of voting and voting by an agent at meetings of creditors, shall apply *mutatis mutandis* to any meeting referred to in sections 351 and 364: Provided that in any winding-up by the court a director or former director of a company shall have no voting right in respect of the nomination of a liquidator on the ground of his loan account with the company or claims for arrear salary, travelling expenses or allowances due by the company or claims paid by such director or former director on behalf of the company.

(b) The provisions of paragraph (a) shall *mutatis mutandis* apply to a person to whom a right contemplated in the said paragraph has been ceded.

[Sub-s. (2) substituted by s. 27 of Act 111 of 1976.]

### **366 Claims and proof of claims**

Cases

- (1) In the winding-up of a company by the Court and by a creditors' voluntary winding-up-
- (a) the claims against the company shall be proved at a meeting of creditors *mutatis mutandis* in accordance with the provisions relating to the proof of claims against an insolvent estate under the law relating to insolvency;
  - (b) a secured creditor shall be under the same obligation to set a value upon his security as if he were proving his claim against an insolvent estate under the law relating to insolvency, and the value of his vote shall be determined in the same manner as is prescribed under that law;
  - (c) a secured creditor and the liquidator shall, where the company is unable to pay its debts, have the same right respectively to take over the security as a secured creditor and a trustee would have under the law relating to insolvency.

(2) The Master may, on the application of the liquidator, fix a time or times within which creditors of the company are to prove their claims or otherwise be excluded from the benefit of any distribution under any account lodged with the Master before those debts are proved.

### *Liquidators (ss 367-385)*

#### **367 Appointment of liquidator**

Cases

For the purpose of conducting the proceedings in a winding-up of a company the Master shall appoint a liquidator or liquidators as hereinafter provided.

#### **368 Appointment of provisional liquidator**

Cases

As soon as a winding-up order has been made in relation to a company, or a special resolution for a voluntary winding-up of a company has been registered in terms of section 200, the Master may, in accordance with policy determined by the Minister, appoint any suitable person as provisional liquidator of the company concerned, who shall give security to the satisfaction of the Master for the proper performance of his or her duties as provisional liquidator and who shall hold office until the appointment of a liquidator.

[S. 368 substituted by s. 28 of Act 83 of 1981 and by s. 16 of Act 16 of 2003.]

#### **369 Determination of person to be appointed liquidator**

(1) In the case of a members' voluntary winding-up of a company, the Master shall, subject to the provisions of section 370, appoint the person or persons nominated by the company in the resolution referred to in section 356 (2) (a) (i) as liquidator or liquidators of the company concerned.

[Sub-s. (1) amended by s. 29 (a) of Act 83 of 1981.]

(2) (a) In the case of a creditors' voluntary winding-up and a winding-up by the Court of a company, the Master shall, subject to the provisions of section 370, appoint the person or persons nominated by any meetings referred to in section 364 as liquidator or liquidators of the company concerned, if the same person or persons have been nominated by the said meetings.

[Para. (a) amended by s. 29 (b) of Act 83 of 1981.]

(b) If the said meetings have nominated different persons, the Master shall, subject to the provisions of section 370, decide the difference and appoint all or any of the persons so nominated, as he thinks fit, as liquidator or liquidators of the company concerned.

#### **370 Master may decline to appoint nominated person as liquidator**

(1) If a person who has been nominated as liquidator by meetings of creditors and members or contributories of a company was not properly nominated or is disqualified from being nominated or appointed as liquidator under section 372 or 373 or has failed to give within a period of seven days as from the date upon which he was notified that the Master had accepted his nomination or within such further period as the Master may allow, the security mentioned in section 375 (1) or, if in the opinion of the Master the person nominated as liquidator should not be appointed as liquidator of the company

concerned, the Master shall give notice in writing to the person so nominated that he declines to accept his nomination or to appoint him as liquidator and shall in that notice state his reason for declining to accept his nomination or to appoint him: Provided that if the Master declines to accept the nomination for appointment as liquidator because he is of the opinion that the person nominated should not be appointed as liquidator, it shall be sufficient if the Master states, in that notice, as such reason, that he is of the opinion that the person nominated should not be appointed as liquidator of the company concerned.

(2) (a) When the Master has so declined to accept the nomination of any person or to appoint him as liquidator or the Minister has under section 371 (3) set aside the appointment of a liquidator, the Master shall convene meetings of creditors and members or contributories of the company concerned for the purpose of nominating another person for appointment as liquidator in the place of the person whose nomination as liquidator the Master has declined to accept or whom the Master has declined to appoint or whose appointment has been so set aside.

(b) In the notice convening the said meetings the Master shall state that he has declined to accept the nomination for appointment as liquidator of the person previously nominated or to appoint the person so nominated and the reasons therefor, subject to the proviso to subsection (1), or that the appointment of the person previously appointed as liquidator has been set aside by the Minister, as the case may be, and that the meetings are convened for the purpose of nominating another person for appointment as liquidator.

(c) The Master shall post a copy of such notice to every creditor whose claim against the company was previously proved and admitted.

(d) The meetings referred to in paragraph (a) shall be deemed to be continuations of the first meetings of creditors, members or contributories or of the meetings referred to in sections 350 and 364.

(3) If the Master again declines for any reason mentioned in subsection (1) to accept the nomination for appointment as liquidator by the meetings mentioned in subsection (2), or to appoint a person so nominated, he shall-

(a) act in accordance with the provisions of subsection (1); and

(b) if the person so nominated was nominated as sole liquidator or if all the persons so nominated have not been appointed by him or her, appoint, in accordance with the policy determined by the Minister, as liquidator or liquidators of the company concerned any other person or persons not disqualified from being liquidator of that company.

[Para. (b) substituted by s. 4 of Act 22 of 2005.]

### **371 Remedy of aggrieved persons**

#### Cases

(1) Any person aggrieved by the appointment of a liquidator or the refusal of the Master to accept the nomination of a liquidator or to appoint a person nominated as a liquidator, may within a period of seven days from the date of such appointment or refusal request the Master in writing to submit his reasons for such appointment or refusal to the Minister.

(2) The Master shall within seven days of the receipt by him of the request referred to in subsection (1) submit to the Minister, in writing, his reasons for such appointment or refusal together with any relevant documents, information or objections received by him.

(3) The Minister may, after consideration of the reasons referred to in subsection (2) and any representations made in writing by the person who made the request referred to in subsection (1) and of all relevant documents, information or objections submitted to him or the Master by any interested person, confirm, uphold or set aside the appointment or the refusal by the Master and, in the event of the refusal by the Master being set aside, direct the Master to accept the nomination of the liquidator concerned and to appoint him as liquidator of the company concerned.

(4) .....

[Sub-s. (4) deleted by s. 49 of Act 88 of 1996.]

### **372 Persons disqualified from appointment as liquidator**

No person shall be qualified for nomination or appointment as the liquidator of a company, if he is-

- (a) an insolvent;
- (b) a minor or any other person under legal disability;
- (c) a person declared under section 373 to be incapable of being appointed as a liquidator, while he remains so incapable;
- (d) a person removed from an office of trust by the Court on account of misconduct or a person who is the subject of any order under this Act disqualifying him from being a director;
- (e) a corporate body;
- (f) any person who has at any time been convicted (whether in the Republic or elsewhere) of theft, fraud, forgery or uttering a forged document or perjury and has been sentenced therefor to imprisonment without the option of a fine or to a fine exceeding twenty rand;
- (g) any person who has by means of any misrepresentation or any reward, whether directly or indirectly induced or attempted to induce any person to vote for him in the nomination of a liquidator or to effect or assist in effecting his nomination or appointment as liquidator of any company;
- (h) a person who does not reside in the Republic;
- (i) any person who at any time during a period of twelve months immediately preceding the winding-up of a company acted as a director, officer or auditor of that company; and
- (j) any agent authorised specially or under a general power of attorney to vote for or on behalf of a creditor at a meeting of creditors of the company concerned and acting or purporting to act under such special authority or general power of attorney:

Provided that the provisions of paragraph (i) shall not apply to an auditor in the case of the voluntary winding-up of the company concerned by the members as contemplated in section 350.

[S. 372 amended by s. 28 of Act 64 of 1977.]

### **373 Persons disqualified by Court from being appointed or acting as liquidators**

The Court may, on the application of any interested person, declare any person proposed to be appointed or appointed as liquidator, to be disqualified from holding office, and, if he has been appointed, may remove him from office, and may, if it thinks fit, declare him incapable for life or for such period as it may determine of being appointed as a liquidator under this Act-

- (a) if he has accepted or offered or agreed to accept or solicited from any auctioneer, agent or other person employed on behalf of a company in liquidation, any share of the commission or remuneration of such auctioneer, agent or person or any other benefit; or
- (b) if he has, in order to obtain or in return for the vote of any creditor, member or contributory, or in order to exercise any influence upon his nomination or appointment as liquidator-
  - (i) procured or been privy to the wrongful insertion or omission of the name of any person in or from any list or schedule required by this Act; or
  - (ii) directly or indirectly given or agreed to give any consideration to any person; or
  - (iii) offered or agreed with any person to abstain from investigating any transactions of or relating to the company or of any of its directors or officers; or
  - (iv) been guilty of or privy to the splitting of claims for the purpose of increasing the number of votes.

### **374 Master may appoint co-liquidator at any time**

Cases

Whenever the Master considers it desirable he or she may, in accordance with policy determined by the Minister, appoint any person not disqualified from holding the office of liquidator and who has given security to his or her satisfaction, as a co-liquidator with the liquidator or liquidators of the company concerned.

[S. 374 substituted by s. 17 of Act 16 of 2003.]

### **375 Appointment, commencement of office and validity of acts of liquidator**

(1) When the person to be appointed to the office of liquidator of a company has been determined and when such person has given security to the satisfaction of the Master for the proper performance of his duties as liquidator, except where in the case of a members' voluntary winding-up the company concerned has resolved that no security shall be required, the Master shall appoint him as liquidator of the company by issuing to him a certificate of appointment.

(2) The said certificate of appointment shall be valid throughout the Republic.

(3) A liquidator shall be entitled to act as such from the date of his certificate of appointment.

(4) The acts of a liquidator shall be valid notwithstanding any defects that may afterwards be discovered in his appointment or qualification.

(5) Upon receipt of such certificate of appointment the liquidator shall-

(a) within seven days after receipt thereof send a copy thereof to the Registrar under cover of the prescribed form; and

(b) give notice of his appointment in the *Gazette*.

### **376 Title of liquidator**

A liquidator shall be described as the liquidator of the particular company in respect of which he has been appointed, and not by his individual name.

### **377 Filling of vacancies**

(1) When a vacancy occurs in the office of liquidator, the Master shall-

(a) in the case of a winding-up by the Court or a creditors' voluntary winding-up, convene meetings of creditors and members or contributories of the company concerned; and

(b) in the case of a members' voluntary winding-up, convene or direct the company concerned to convene a meeting of members; or

(c) if there is a remaining liquidator or liquidators, direct him or them to convene the meetings referred to in paragraph (a) or (b),

for the purpose of nominating a person or persons for appointment as liquidator to fill the vacancy: Provided that if the Master is of the opinion that the remaining liquidator or liquidators will be able to complete the winding-up, he may dispense with the appointment of a liquidator to fill the vacancy and may direct the remaining liquidator or liquidators to complete the winding-up.

(2) All the provisions of this Act relating to the convening and conduct of the said meetings and the nomination and appointment of a liquidator shall apply to the filling of a vacancy in the office of liquidator.

(3) Subject to the proviso to subsection (1), if for any reason a vacancy is not filled as provided in this section, the Master may, in accordance with policy determined by the Minister, appoint any person as provisional liquidator or as liquidator to fill such vacancy.

[Sub-s. (3) substituted by s. 18 of Act 16 of 2003.]

### **378 Leave of absence or resignation of liquidator**

(1) A liquidator shall not be absent from the Republic for a period exceeding 60 days unless-

(a) the Master has before his departure from the Republic granted him permission in writing to be absent; and

(b) he complies with such conditions as the Master may think fit to impose.

[Sub-s. (1) substituted by s. 13 (a) of Act 70 of 1984.]

(2) At the request of a liquidator the Master may relieve him of his office or direct him to

resign, upon such conditions as the Master may think fit.

(3) Every liquidator who is permitted to absent himself from the Republic for a period exceeding 60 days or who is relieved of his office by the Master or so resigns therefrom, shall give notice thereof in the *Gazette*.

[Sub-s. (3) substituted by s. 13 (b) of Act 70 of 1984.]

### **379 Removal of liquidator by Master and by the Court**

Cases

(1) The Master may remove a liquidator from his office on the ground-

- (a) that he was not qualified for nomination or appointment as liquidator or that his nomination or appointment was for any other reason illegal or that he has become disqualified from being nominated or appointed as a liquidator or has been authorised, specially or under a general power of attorney, to vote for or on behalf of a creditor, member or contributory at a meeting of creditors, members or contributories of the company of which he is the liquidator and has acted or purported to act under such special authority or general power of attorney; or
- (b) that he has failed to perform satisfactorily any duty imposed upon him by this Act or to comply with a lawful demand of the Master or a commissioner appointed by the Court under this Act; or
- (c) that his estate has become insolvent or that he has become mentally or physically incapable of performing satisfactorily his duties as liquidator; or
- (d) that the majority (reckoned in number and in value) of creditors entitled to vote at a meeting of creditors or, in the case of a members' voluntary winding-up, a majority of the members of the company, or, in the case of a winding-up of a company limited by guarantee, the majority of the contributories, has requested him in writing to do so; or
- (e) that in his opinion the liquidator is no longer suitable to be the liquidator of the company concerned.

(2) The Court may, on application by the Master or any interested person, remove a liquidator from office if the Master fails to do so in any of the circumstances mentioned in subsection (1) or for any other good cause.

### **380 Notice of removal of liquidator**

The Master shall give notice in the *Gazette* of the removal of any liquidator.

### **381 Control of Master over liquidators**

(1) The Master shall take cognisance of the conduct of liquidators and shall, if he has reason to believe that a liquidator is not faithfully performing his duties and duly observing all the requirements imposed on him by any law or otherwise with respect to the performance of his duties, or if any complaint is made to him by any creditor, member or contributory in regard thereto, enquire into the matter and take such action thereon as he may think expedient.

(2) The Master may at any time require any liquidator to answer any enquiry in relation to any winding-up in which such liquidator is engaged, and may, if he thinks fit, examine such liquidator or any other person on oath concerning the winding-up.

(3) The Master may at any time appoint a person to investigate the books and vouchers of a liquidator.

(4) The Court may, upon the application of the Master, order that any costs reasonably incurred by him in performing his duties under this section be paid out of the assets of the company or by the liquidator *de bonis propriis*.

(5) Any expenses incurred by the Master in carrying out any provision of this section shall, unless the Court otherwise orders, be regarded as part of the costs of the winding-up of that company.

### **382 Plurality of liquidators, liability and disagreement**

(1) When two or more liquidators have been appointed they shall act jointly in performing their functions as liquidators and shall be jointly and severally liable for every act performed by them jointly.

(2) Whenever two or more liquidators disagree on any matter relating to the company of which they are liquidators, one or more of them may refer the matter to the Master who may thereupon determine the question in issue or give directions as to the procedure to be followed for the determination thereof.

### **383 Cost and reduction of security by liquidator**

(1) The cost of giving security by a person appointed as liquidator to an amount which the Master considers reasonable shall, subject to the provisions of section 89 (1) of the Insolvency Act, 1936 (Act 24 of 1936), be paid out of the assets of the company concerned as part of the costs of liquidation thereof.

(2) When a liquidator has in the course of the winding-up of a company accounted to the satisfaction of the Master for any property belonging to the company, he may in writing apply for the consent of the Master to a reduction of the security given by him and the Master, if he is satisfied that the reduced security will suffice to indemnify the company and the creditors and contributories thereof against any maladministration on the part of the liquidator in respect of the remaining property belonging to the company, may consent wholly or in part to such reduction.

### **384 Remuneration of liquidator**

Cases

(1) In any winding-up a liquidator shall be entitled to a reasonable remuneration for his services to be taxed by the Master in accordance with the prescribed tariff of remuneration: Provided that, in the case of a members' voluntary winding-up, the liquidator's remuneration may be determined by the company in general meeting.

(2) The Master may reduce or increase such remuneration if in his opinion there is good cause for doing so, and may disallow such remuneration either wholly or in part on account of any failure or delay by the liquidator in the discharge of his duties.

(3) No person who employs or is a fellow employee or in the ordinary employment of the liquidator, shall be entitled to receive any remuneration out of the assets of the company concerned for services rendered in the winding-up thereof and no liquidator shall be entitled either by himself or his partner to receive out of the assets of the company any remuneration for his services except the remuneration to which he is entitled under this Act.

### **385 Certificate of completion of duties by liquidator and cancellation of security**

(1) When a liquidator of a company has performed all the duties prescribed by this Act and complied with all the requirements of the Master, he may apply in writing to the Master for a certificate to that effect.

(2) The Master shall, when he issues the said certificate, additionally state therein that he consents to the reduction of the security given by the liquidator to a stated amount or to its cancellation.

### ***Powers of Liquidators (ss 386-390)***

#### **386 General powers**

Cases

(1) The liquidator in any winding-up shall have power-

- (a) to execute in the name and on behalf of the company all deeds, receipts and other documents, and for that purpose to use the company's seal;
- (b) to prove a claim in the estate of any debtor or contributory of the company and receive payment in full or a dividend in respect thereof;
- (c) to draw, accept, make and endorse any bill of exchange or promissory note in the name

and on behalf of the company: Provided that no liquidator shall, except with the leave of the Court or the authority referred to in subsection (3) or (4), or for the purposes of carrying on the business of the company in terms of subsection (4) (f) have power to impose any additional liabilities upon the company;

- (d) to summon any general meeting of the company or the creditors or contributories of the company for the purpose of obtaining its or their authority or sanction with respect to any matter or for such other purposes as he may consider necessary;
- (e) subject to the provisions of subsections (3), (4) and (5), to take such measures for the protection and better administration of the affairs and property of the company as the trustee of an insolvent estate may take in the ordinary course of his duties and without the authority of a resolution of creditors.

(2) Subject to the consent of the Master, a liquidator may, at any time before a general meeting contemplated in subsection (1) (d) is convened for the first time, terminate any lease in terms of which the company is the lessee of movable or immovable property.

[Sub-s. (2) substituted by s. 9 (a) of Act 84 of 1980.]

(2A) At any time before a general meeting contemplated in subsection 1 (d) is convened for the first time the liquidator shall, if satisfied that any movable or immovable property of the company ought forthwith to be sold, recommend to the Master in writing accordingly, stating his reasons for such recommendation.

[Sub-s. (2A) inserted by s. 9 (b) of Act 84 of 1980.]

(2B) The Master may thereupon authorise the sale of such property or any portion thereof on such conditions and in such manner as he may determine: Provided that if such property or a portion thereof is subject to a preferential right, the Master shall not authorise the sale of such property or portion unless the person entitled to such preferential right has given his consent thereto in writing.

[Sub-s. (2B) inserted by s. 9 (b) of Act 84 of 1980.]

(3) The liquidator of a company-

- (a) in a winding-up by the Court, with the authority granted by meetings of creditors and members or contributories or on the directions of the Master given under section 387;
- (b) in a creditors' voluntary winding-up, with the authority granted by a meeting of creditors; and
- (c) in a members' voluntary winding-up, with the authority granted by a meeting of members,

shall have the powers mentioned in subsection (4).

(4) The powers referred to in subsection (3) are-

- (a) to bring or defend in the name and on behalf of the company any action or other legal proceedings of a civil nature, and, subject to the provisions of any law relating to criminal procedure, any criminal proceedings: Provided that immediately upon the appointment of a liquidator and in the absence of the authority referred to in subsection (3), the Master may authorise, upon such terms as he thinks fit, any urgent legal proceedings for the recovery of outstanding accounts;
- (b) to agree to any reasonable offer of composition made to the company by any debtor and to accept payment of any part of a debt due to the company in settlement thereof or to grant an extension of time for the payment of any such debt;
- (c) to compromise or admit any claim or demand against the company, including an unliquidated claim;
- (d) except where the company being wound up is unable to pay its debts, to make any arrangement with creditors, including creditors in respect of unliquidated claims;
- (e) to submit to the determination of arbitrators any dispute concerning the company or any

- claim or demand by or upon the company;
- (f) to carry on or discontinue any part of the business of the company in so far as may be necessary for the beneficial winding-up thereof: Provided that, if he considers it necessary, the liquidator may carry on or discontinue any part of the business of the company concerned before he has obtained the leave of the Court or the authority referred to in subsection (3), but shall not in that event be entitled, as between himself and the creditors or contributories of the company, to include the cost of any goods purchased by him in the costs of the winding-up of the company unless such goods were necessary for the immediate purpose of carrying on the business of the company and there are funds available for payment of the cost of such goods after providing for the costs of winding-up;
  - (g) to exercise *mutatis mutandis* the same powers as are by sections 35 and 37 of the Insolvency Act, 1936, (Act 24 of 1936), conferred upon a trustee under that Act, on the like terms and conditions as are therein mentioned: Provided that the powers conferred by section 35 aforesaid, shall not be exercised unless the company is unable to pay its debts;
  - (h) to sell any movable and immovable property of the company by public auction, public tender or private contract and to give delivery thereof;
  - (i) to perform any act or exercise any power for which he is not expressly required by this Act to obtain the leave of the Court.

(5) In a winding-up by the Court, the Court may, if it deems fit, grant leave to a liquidator to raise money on the security of the assets of the company concerned or to do any other thing which the Court may consider necessary for winding up the affairs of the company and distributing its assets.

(6) The Master may restrict the powers of a provisional liquidator.

### **387 Exercise of liquidator's powers in winding-up by Court**

Cases

(1) Subject to the provisions of this Act, the liquidator of a company which is being wound up by the Court, shall, in the administration of the assets of the company, have regard to any directions that may be given by resolution of the creditors or members or contributories of the company at any general meeting.

(2) In regard to any matter which has been submitted by the liquidator for the directions of creditors and members or contributories in general meeting, but as to which no directions have been given or as to which there is a difference between the directions of creditors and members or contributories, the liquidator may apply to the Master for directions and the Master may give or refuse to give directions as he may deem fit.

(3) Where the Master has refused to give directions as aforesaid or in regard to any other particular matter arising under the winding-up, the liquidator may apply to the Court for directions.

(4) Any person aggrieved by any act or decision of the liquidator may apply to the Court after notice to the liquidator and thereupon the Court may make such order as it thinks just.

### **388 Court may determine questions in voluntary winding-up**

Cases

(1) Where a company is being wound up voluntarily, the liquidator or any member or creditor or contributory of the company may apply to the Court to determine any question arising in the winding-up or to exercise any of the powers which the Court might exercise if the company were being wound up by the Court.

(2) The Court may, if satisfied that the determination of any such question or the exercise of any such power will be just and beneficial, accede wholly or partly to the application on such terms and conditions as it may determine, or make such other order on the application as it thinks fit.

### **389 Exercise of power to make arrangement and the binding of dissentient creditors**

(1) Any arrangement entered into between a company able to pay its debts and about to be or in the course of being wound up and its creditors shall, subject to the provisions of subsection (2), be binding on the company if sanctioned by a special resolution of members and on the creditors of the company if acceded to by three-fourths in number and value of such creditors.

(2) Any such creditor or member may, within three weeks from the completion of the arrangement, bring the same under review by the Court, and the Court may amend, vary, set aside or confirm the arrangement as it thinks just.

### **390 Exercise of power of liquidator in voluntary winding-up to accept shares for assets of company**

(1) Where a company is proposed to be or is being wound up voluntarily and the whole or part of its business or property is proposed to be transferred or sold to another company, whether registered under this Act or not (in this section called the transferee company), the liquidator of the first-mentioned company (in this section called the transferor company) may, with the sanction of a special resolution of that company, conferring either a general authority on the liquidator or an authority in respect of any particular arrangement, receive in compensation or part compensation for the transfer or sale, shares, policies or other like interests in the transferee company, for distribution among the members of the transferor company, or may enter into any other arrangement, whereby the members of the transferor company may, in lieu of receiving cash, shares, policies or other like interests, or in addition thereto, participate in the profits of or receive any other benefit from the transferee company: Provided that, in the case of a creditors' voluntary winding-up, the powers of the liquidator conferred by this section shall not be exercised save with the consent of three-fourths in number and value of the creditors present or represented at a meeting called by him for that purpose and of which not less than fourteen days' notice has been given, or with the sanction of the Court.

(2) Any sale or arrangement in pursuance of this section shall be binding on the members of the transferor company.

(3) If any member of the transferor company who did not vote in favour of the special resolution, expresses his dissent therefrom in writing addressed and delivered to the liquidator or left at the registered office of the company within seven days after the passing of the resolution, he may require the liquidator either to abstain from carrying the resolution into effect or to purchase his interest at a price to be determined by agreement or by arbitration in the manner provided by this section.

(4) If the liquidator elects to purchase such member's interest, the purchase money shall be paid before the company is dissolved and be raised by the liquidator in such manner as may be determined by special resolution of the company concerned.

(5) A special resolution shall not be invalid for the purposes of this section by reason that it is passed before or concurrently with a resolution for winding-up the company or for nominating liquidators, but if an order is made within a year of such resolution for winding-up the company by the Court, the special resolution shall not be valid unless sanctioned by the Court.

(6) For the purposes of an arbitration under this section, the provisions of the Arbitration Act, 1965 (Act 42 of 1965), shall apply.

### *Duties of Liquidators (ss 391-411)*

#### **391 General duties**

##### Cases

A liquidator in any winding-up shall proceed forthwith to recover and reduce into possession all the assets and property of the company, movable and immovable, shall apply the same so far as they extend in satisfaction of the costs of the winding-up and the claims of creditors, and shall distribute the balance among those who are entitled thereto.

### 392 Liquidator's duty to give information to Master

Every liquidator shall give the Master such information and such access to and facilities for inspecting the books and documents of the company and generally such aid as may be requisite for enabling that officer to perform his duties under this Act.

### 393 Liquidator's duty to keep records and inspection thereof

(1) Immediately after his appointment a liquidator shall open a book or other record wherein he shall enter from time to time a statement of all moneys, goods, books, accounts and other documents received by him on behalf of the company.

(2) The Master may at any time in writing require the liquidator to produce any such book or record for inspection.

(3) Any creditor or contributory may, subject to the control of the Master, at all reasonable times personally or by his agent inspect any such book or record.

### 394 Banking accounts and investments

#### Cases

(1) The liquidator of a company-

- (a) shall open a current account from which amounts are withdrawable by cheque in the name of the company in liquidation with a banking institution registered under the Banks Act, 1965 (Act 23 of 1965), within the Republic, and shall from time to time deposit therein to the credit of the company all moneys received by him on its behalf;
- (b) may open a savings account in the name of such company with such a banking institution, a mutual building society registered under the Mutual Building Societies Act, 1965 (Act 24 of 1965), or a building society registered under the Building Societies Act, 1986 (Act 82 of 1986), within the Republic, and may transfer thereto moneys deposited in the account referred to in paragraph (a) and not immediately required for the payment of any claim against such company;
- (c) may place moneys deposited in the account referred to in paragraph (a) and not immediately required for the payment of any claim against such company, on interest-bearing deposit with such banking institution, mutual building society or building society within the Republic;
- (d) shall not withdraw any money from any account referred to in paragraph (b) or (c) otherwise than by way of a transfer to the said current account.

[Sub-s. (1) substituted by s. 6 of Act 63 of 1988.]

(2) Whenever required by the Master to do so, the liquidator shall in writing notify the Master of the banking institution or building society and the office, branch office or agency thereof with which he has opened an account referred to in subsection (1), and furnish the Master with a bank statement or other sufficient evidence of the state of the account.

(3) A liquidator shall not transfer any such account from any such office, branch office or agency to any other such office, branch office or agency except after written notice to the Master.

(4) All cheques or orders drawn upon any such account shall contain the name of the payee and the cause of payment and shall be drawn to order and be signed by the liquidator or his duly authorised agent.

(5) The Master and any surety for the liquidator or any person authorised by such surety shall have the same right to information in regard to that account as the liquidator himself possesses, and may examine all vouchers in relation thereto, whether in the possession of the banking institution or building society or of the liquidator.

(6) The Master may, after notice to the liquidator, in writing direct the manager of any office, branch office or agency with which an account referred to in subsection (1) has been opened, to pay over into the Guardians' Fund all moneys standing to the credit of that account at the time of the

receipt, by the said manager, of that direction, and all moneys which may thereafter be paid into that account, and the said manager shall carry out that direction.

(7) (a) Any liquidator who without lawful excuse, retains or knowingly permits his co-liquidator to retain any sum of money exceeding forty rand belonging to the company concerned longer than the earliest day after its receipt on which it was possible for him or his co-liquidator to pay the money into the bank, or uses or knowingly permits his co-liquidator to use any assets of the company except for its benefit, shall, in addition to any other penalty to which he may be liable, be liable to pay to the company an amount not exceeding double the sum so retained or double the value of the assets so used.

(b) The amount which the liquidator is so liable to pay, may be recovered by action in any competent court at the instance of the co-liquidator, the Master or any creditor or contributory.

### **395 Liquidator's duties as to contributories**

(1) In the case of a winding-up by the Court or of a creditors' voluntary winding-up of a company, the liquidator shall, if necessary, settle a list of contributories.

(2) A past member of a company limited by guarantee shall not be liable to contribute to its assets unless-

- (a) at the commencement of the winding-up there is unsatisfied debt or liability of the company contracted before he ceased to be a member; and
- (b) it appears to the liquidator that the present members are unable to satisfy the contributions required to be made by them in pursuance of this Act.

### **396 Notices to contributories and objections**

(1) As soon as the liquidator has settled the list of contributories, he shall send a notice to every person included in the list, stating that fact and the extent of the liability of that person.

(2) Any person who objects to his inclusion in the list, shall be entitled within fourteen days from the date of the notice to file an objection with the liquidator in the form of an affidavit giving full reasons why he should not be included in the list.

(3) The liquidator may accept the objection and amend the list of contributories or he may reject such objection and shall, if the objection is rejected, notify the person concerned accordingly by registered post.

(4) A person whose objection has been rejected, shall be entitled, within fourteen days from the date of the notice provided for in subsection (3), to apply to the Master for a ruling as to whether his name should be included in the list, and the Master shall direct the liquidator to include his name in or to exclude it from the said list.

### **397 Recovery of contributions and nature of liability**

(1) (a) A liquidator shall proceed to recover from the contributories a proportion of or the full amount of their liability as may be required from time to time, taking into consideration the probability that some of the contributories may partly or wholly fail to pay the amount demanded from them.

(b) In the event of the death of any contributory or the insolvency of his estate, the liquidator may recover the contribution from the estate concerned.

(2) (a) The liability for the payment of any amount by a contributory to the company shall be a debt due by him to the company as from the date on which the amount was demanded from him by the liquidator.

(b) A contributory shall not be entitled to set off against his liability any amount due to him by the company in respect of dividends, profits or directors' remuneration.

### **398 Adjustment of rights of contributories inter se**

The liquidator shall adjust the rights of the contributories among themselves, and distribute any surplus among the persons entitled thereto.

### **399 Evidence as to contributions and contributories**

(1) A letter of demand by the liquidator to a contributory for the payment of a contribution shall be *prima facie* evidence that the amount thereby appearing to be due, is due.

(2) All books and papers of the company and of the liquidator shall, as between the contributories and the company, be *prima facie* evidence of the truth of all matters therein recorded.

#### **400 Liquidator's duty to expose offences and to report thereon**

Cases

(1) A liquidator shall examine the affairs and transactions of the company before its winding-up in order to ascertain-

- (a) whether any of the directors and officers or past directors and officers of the company have contravened or appear to have contravened any provision of this Act or have committed or appear to have committed any other offence; and
- (b) in respect of any of the persons referred to in paragraph (a), whether there are or appear to be any grounds for an order by the Court under section 219 disqualifying a director from office as such.

(2) A liquidator shall, before lodging his final account with the Master, submit to him a report containing full particulars of any such contraventions or offences, suspected contraventions or offences and any such ground which he has ascertained.

(3) (a) Any report submitted to the Master under subsection (2) shall be confidential and shall not be available for inspection by any person.

(b) If any such report contains particulars of contraventions or offences committed or suspected to have been committed or of any of the said grounds, the Master shall forthwith transmit a copy thereof to the Director of Public Prosecutions concerned.

[Sub-s. (3) amended by s. 5 (a) of Act 20 of 2004.]

(4) A liquidator shall conduct such further investigation and shall render such assistance in connection with any prosecution or contemplated prosecution as the Master or the Director of Public Prosecutions may require.

[Sub-s. (4) amended by s. 5 (a) of Act 20 of 2004.]

#### **401 Director of Public Prosecutions may make application to Court for disqualification of director**

When a Director of Public Prosecutions, upon receipt of the report referred to in section 400 (3) (b) and after such further enquiry as he may deem fit, is satisfied that there are grounds for an application to the Court for an order in terms of section 219, he may make such application to the Court.

[S. 401 amended by s. 5 (a) of Act 20 of 2004.]

#### **402 Liquidator's duty to present report to creditors and contributories**

Cases

Except in the case of a members' voluntary winding-up, a liquidator shall, as soon as practicable and, except with the consent of the Master, not later than three months after the date of his appointment, submit to a general meeting of creditors and contributories of the company concerned a report as to the following matters:

- (a) the amount of capital issued by the company and the estimated amount of its assets and liabilities;
- (b) if the company has failed, the causes of the failure;
- (c) whether or not he has submitted or intends to submit to the Master a report under section 400 (2);
- (d) whether or not any director or officer or former director or officer appears to be personally liable for damages or compensation to the company or for any debts or liabilities of the company as provided in this Act;

- (e) any legal proceedings by or against the company which may have been pending at the date of the commencement of winding-up or which may have been or may be instituted;
- (f) whether or not further enquiry is in his opinion desirable in regard to any matter relating to the promotion, formation or failure of the company or the conduct of its business;
- (g) whether or not the company has kept the accounting records required by section 284, and, if not, in what respects the requirements of that section have not been complied with;
- (h) the progress and prospects of the winding-up; and
- (i) any other matter which he may think fit or in regard to which he may desire the directions of the creditors or the contributories.

### **403 Liquidator's duty to file liquidation and distribution account**

#### Cases

(1) (a) Every liquidator shall, unless he receives an extension of time as hereinafter provided, frame and lodge with the Master not later than six months after his appointment an account of his receipts and payments and a plan of distribution or, if there is a liability among creditors and contributories to contribute towards the costs of the winding-up, a plan of contribution apportioning their liability.

(b) If the final account lodged under paragraph (a) is not a final account, the liquidator shall from time to time and as the Master may direct, but at least once in every period of six months (unless he receives an extension of time), frame and lodge with the Master a further account and plan of distribution: Provided that the Master may at any time and in any case where the liquidator has funds in hand, which ought in the opinion of the Master to be distributed or applied towards the payment of debts, direct the liquidator in writing to frame and lodge with him an account and plan of distribution in respect of such funds within a period specified.

(2) Any account shall be lodged in duplicate in the prescribed form, shall be fully supported by vouchers, including the liquidator's bank statements or certified extracts from his bank and building society accounts showing all deposits and withdrawals, and shall be verified by an affidavit in the prescribed form.

### **404 Master may grant extension of time for lodging account**

(1) If any liquidator is unable to lodge an account with the Master under section 403 he shall before the expiration of any relevant period prescribed under that section-

- (a) make and lodge with the Master an affidavit stating the reasons why he is not able to lodge an account, the amount of funds in hand available for distribution, a summary of the position in respect of the winding-up, and whether he has applied for an extension of time, and shall send a copy thereof to each creditor of the company; and
- (b) lodge with the Master written reasons for his inability to lodge the account in question together with a statement of the grounds, if any, upon which he claims an extension of time within which to lodge such account,

and the Master may thereupon grant such an extension of time as he may in the circumstances think necessary.

(2) If any liquidator fails to lodge an account with the Master as required by section 403 and to comply with paragraphs (a) and (b) of subsection (1) of this section, the Master or any person having an interest in the company may serve a notice on the liquidator requiring him within two weeks after the date of the notice-

- (a) to lodge the account in question with the Master; or
- (b) to comply with the requirements of the said paragraphs (a) and (b) of the said subsection,

and the Master may, if the account has not been lodged but paragraphs (a) and (b) of the said

subsection have been complied with, grant such an extension of time as he may in the circumstances think necessary.

(3) Any liquidator who fails to satisfy the Master that he ought to receive an extension of time for the lodging of any account, may, after notice to the Master and to the person referred to in subsection (2), apply to the Court for an order granting such an extension of time within which to lodge that account.

#### **405 Failure of liquidator to lodge account or to perform duties**

(1) If any liquidator fails to lodge an account with the Master as and when required by or under this Chapter or to lodge any vouchers in support of such account or to perform any other duty imposed upon him by this Chapter or to comply with any reasonable demand of the Master for information or proof required by him in connection with the liquidation of the company, the Master or any person having an interest in the company may, after giving the liquidator not less than two weeks' notice, apply to the Court for an order directing the liquidator to lodge such account or vouchers in support thereof or to perform such duty or to comply with such demand.

(2) The costs adjudged to the Master or to such person shall, unless ordered otherwise by the Court, be paid by the liquidator *de bonis propriis*.

#### **406 Places for and periods of inspection of account**

(1) Every liquidator's account shall lie open for inspection for such period, not being less than fourteen days, as the Master may determine-

- (a) at the office of the Master; and
- (b) if the office of the Master and the registered office of the company are not situated in the same district-
  - (i) at the office of the magistrate of the district in which such registered office is situated; or
  - (ii) if such registered office is situated in a portion of such district in respect of which an additional or assistant magistrate permanently performs the functions of the magistrate of the district at a place other than the seat of magistracy of that district, at the office of such additional or assistant magistrate; and
- (c) if the company also carried on business at any other place, then also at the office of the magistrate (including any additional or assistant magistrate) of the district or the portion thereof in which any such other place is situate, as may be determined by the liquidator with the approval of the Master.

(2) The liquidator shall lodge a copy of the account with every magistrate, additional magistrate or assistant magistrate in whose offices the account is to lie open for inspection.

(3) The liquidator shall give due notice in the *Gazette* of the places at which any such account will lie open for inspection and shall in that notice state the period during which the account will lie open for inspection and shall transmit by post or deliver a similar notice to every creditor who has proved a claim against the company.

(4) The magistrate shall cause to be affixed in some public place in or about his office a list of all such accounts as have been lodged in his office, showing the respective periods during which they will lie open for inspection, and shall upon the expiry of any such period endorse on the account in question his certificate that the account has lain open at his office for inspection in terms of this section and transmit the account to the Master.

#### **407 Objections to account**

##### Cases

(1) Any person having an interest in the company being wound up may, at any time before the confirmation of an account, lodge with the Master an objection to such account stating the reasons for the objection.

(2) If the Master is of opinion that any such objection ought to be sustained, he shall direct the liquidator to amend the account or give such other directions as he may think fit.

(3) If in respect of any account the Master is of the opinion that any improper charge has been made against the assets of a company or that the account is in any respect incorrect and should be amended, he may, whether or not any objection to the account has been lodged with him, direct the liquidator to amend the account, or he may give such other directions as he may think fit.

(4) (a) The liquidator or any person aggrieved by any direction of the Master under this section, or by the refusal of the Master to sustain an objection lodged thereunder, may within fourteen days after the date of the Master's direction and after notice to the liquidator apply to the Court for an order setting aside the Master's decision, and the Court may on any such application confirm the account in question or make such order as it thinks fit.

(b) If any such direction given by the Master under this section affects the interests of a person who has not lodged an objection with the Master, such account as amended shall again lie open for inspection in the manner and with the notice as prescribed in section 406, unless the person affected consents in writing to the immediate confirmation of the account.

#### **408 Confirmation of account**

##### Cases

When an account has lain open for inspection as prescribed in section 406 and-

- (a) no objection has been lodged; or
- (b) an objection has been lodged and the account has been amended in accordance with the direction of the Master and has again lain open for inspection, if necessary, as in section 407 (4) (b) prescribed, and no application has been made to the Court within the prescribed time to set aside the Master's decision; or
- (c) an objection has been lodged but has been withdrawn or has not been sustained and the objector has not applied to the Court within the prescribed time,

the Master shall confirm the account and his confirmation shall have the effect of a final judgment, save as against such persons as may be permitted by the Court to re-open the account after such confirmation but before the liquidator commences with the distribution.

#### **409 Distribution of estate**

##### Cases

(1) Immediately after the confirmation of any account the liquidator shall proceed to distribute the assets in accordance therewith or to collect from the creditors and contributories liable to contribute thereunder the amounts for which they may respectively be liable.

(2) The liquidator shall give notice of the confirmation of the account in the *Gazette* and shall in such notice state, according to the circumstances, that a dividend is being paid or that a contribution is to be collected and that every creditor and contributory liable to contribute is required to pay to the liquidator the amount for which he is liable and the address at which the contribution is to be paid.

#### **410 Liquidator's duty as to receipts and unpaid dividends**

(1) The liquidator shall without delay lodge with the Master the receipts for any dividends paid or other proof of payment thereof.

(2) If any dividend remains unpaid for a period of two months (or such longer period as the Master may approve) after the confirmation of the relevant account, the liquidator shall immediately pay the amount to the Master for deposit in the Guardians' Fund for the account of the creditor or member concerned.

(3) (a) Any failure by a liquidator to furnish the Master within the said period of two months with a proper receipt or other proof of payment in respect of any dividend which has not been deposited as aforesaid, shall be *prima facie* evidence that such dividend has been retained by him and has not been dealt with as prescribed in this section, and the Master may thereafter institute

proceedings against the liquidator under section 405.

(b) The Court may at the hearing of such proceedings order the liquidator to pay any such dividend which has not been paid or deposited and in addition to pay to the Master for the benefit of the Consolidated Revenue Fund an amount equal to the amount of such dividend.

(4) Any creditor or member of a company entitled to any dividend may, if payment thereof is delayed, after notice to the liquidator, apply to the Court for an order compelling the liquidator to pay that dividend to such creditor or member.

#### **411 Payment of money deposited with Master**

Any person claiming to be entitled to any money deposited with the Master by a liquidator under the provisions of this Act may apply to the Master for payment thereof, and the Master may, on a certificate by the liquidator or on other sufficient evidence that the person claiming such payment is entitled thereto, pay the amount in question to the person concerned.

#### *Provisions as to Meetings in Winding-up (ss 412-416)*

#### **412 Meetings of creditors and members and voting at meetings of creditors**

(1) In any winding-up of a company, meetings of creditors and members or contributories shall, save as otherwise provided in this Act, be convened and held in the following manner:

- (a) In the case of meetings of creditors, as nearly as may be in the manner prescribed for the holding of meetings of creditors under the law relating to insolvency; and
- (b) in the case of meetings of members or contributories, in the manner prescribed by regulation.

(2) The provisions of section 52 of the Insolvency Act, 1936 (Act 24 of 1936), shall *mutatis mutandis* apply to the right of any creditor to vote at a meeting of creditors in a winding-up of a company.

#### **413 Meetings to ascertain wishes of creditors and others**

Where by this Act the Court is authorised, in relation to a winding-up, to have regard to the wishes of creditors, members or contributories-

- (a) the value of the respective creditors' claims and the voting rights of the various members or contributories of the company in terms of its memorandum or articles shall also be taken into consideration; and
- (b) the Court may, if it thinks fit, for the purpose of ascertaining the wishes of such creditors, members or contributories direct meetings of the creditors, members or contributories to be called, held and conducted in such manner as it directs, and may appoint a person to act as chairman of any such meeting and to report the result thereof to the Court.

#### **414 Duty of directors and officers to attend meetings**

##### Cases

(1) In any winding-up of a company unable to pay its debts, every director and officer of the company shall-

- (a) attend the first and second meetings of creditors of the company, including any such meeting which is adjourned, unless the Master or the officer presiding or to preside at any such meeting has, after consultation with the liquidator, authorised him in writing to absent himself from that meeting;
- (b) attend any subsequent meeting or adjourned meeting of creditors of the company which the liquidator has in writing required him to attend.

(2) The Master or officer who is to preside or presides at any meeting of creditors, may subpoena any person-

- (a) who is known or on reasonable grounds believed to be or to have been in possession of any property which belongs or belonged to the company or to be indebted to the

company, or who in the opinion of the Master or such other officer may be able to give material information concerning the company or its affairs, in respect of any time before or after the commencement of the winding-up, to appear at such meeting, including any such meeting which has been adjourned, for the purpose of being interrogated; or

- (b) who is known or on reasonable grounds believed to have in his possession or custody or under his control any book or document containing any such information as is referred to in paragraph (a), to produce that book or document or an extract therefrom at any such meeting or adjourned meeting.

(3) Any director or officer of a company who fails to comply with any provision of this section, shall be guilty of an offence.

#### **415 Examination of directors and others at meetings**

##### Cases

(1) The Master or officer presiding at any meeting of creditors of a company which is being wound-up and is unable to pay its debts, may call and administer an oath to or accept an affirmation from any director of the company or any other person present at the meeting who was or might have been subpoenaed in terms of section 414 (2) (a), and the Master or such officer and any liquidator of the company and any creditor thereof who has proved a claim against the company, or the agent of such liquidator or creditor, may interrogate the director or person so called and sworn concerning all matters relating to the company or its business or affairs in respect of any time, either before or after the commencement of the winding-up, and concerning any property belonging to the company: Provided that the Master or such officer shall disallow any question which is irrelevant or would in his opinion prolong the interrogation unnecessarily.

(2) In connection with the production of any book or document in compliance with a subpoena issued under section 414 (2) (b) or the interrogation of a person under subsection (1) of this section, the law relating to privilege as applicable to a witness subpoenaed to produce a book or document or give evidence in a magistrate's court shall apply: Provided that a banker at whose bank the company concerned keeps or at any time kept an account, shall be obliged, if subpoenaed to do so under section 414 (2) (b), to produce-

- (a) any cheque in his possession which was drawn by the company within one year before the commencement of the winding-up; or
- (b) if any cheque so drawn is not available, any record of the payment, the date of payment and the amount of the cheque which may be available to him, or a copy of such record, and shall, if called upon to do so, give any other information available to him in connection with any such cheque or the account of the company.

(3) No person interrogated under subsection (1) shall be entitled at such interrogation to refuse to answer any question upon the ground that the answer would tend to incriminate him or her and shall, if he or she does so refuse on that ground, be obliged to so answer at the instance of the Master or officer presiding at such meeting: Provided that the Master or officer presiding at such meeting may only oblige the person in question to so answer after the Master or officer presiding at such meeting has consulted with the Director of Public Prosecutions who has jurisdiction.

[Sub-s. (3) substituted by s. 10 (a) of Act 55 of 2002.]

(4) The Master or officer presiding at any meeting aforesaid shall record or cause to be recorded in the manner provided by the rules of court for the recording of evidence in a civil case before a magistrate's court the statement of any person giving evidence under this section: Provided that if a person who may be required to give evidence under this section, has made to the liquidator or his agent a statement which has been reduced to writing, or has delivered a statement in writing to the liquidator or his agent, that statement may be read by or read over to that person when he is called as a witness under this section and, if then adhered to by him, shall be deemed to be evidence given under

this section.

(5) Any incriminating answer or information directly obtained, or incriminating evidence directly derived from, an interrogation in terms of subsection (1) shall not be admissible as evidence in criminal proceedings in a court of law against the person concerned or the body corporate of which he or she is or was an officer, except in criminal proceedings where the person concerned is charged with an offence relating to-

- (a) the administering or taking of an oath or the administering or making of an affirmation;
- (b) the giving of false evidence;
- (c) the making of a false statement; or
- (d) a failure to answer lawful questions fully or satisfactorily.

[Sub-s. (5) substituted by s. 10 (b) of Act 55 of 2002.]

(6) Any person called upon to give evidence under this section may be represented at his interrogation by an attorney with or without counsel.

(7) Any person other than a director or officer of the company concerned subpoenaed to attend a meeting of creditors for the purpose of being interrogated under this section shall be entitled to such witness fees, to be paid out of the funds of the company, as he would be entitled to if he were a witness in civil proceedings in a magistrate's court.

(8) Any director or other officer of a company who is called upon to attend any meeting of creditors held after the second meeting or an adjourned second meeting, shall be entitled to an allowance out of the funds of the company to defray his necessary expenses in connection with such attendance.

#### **416 Application of provisions of Insolvency Act, 1936**

##### Cases

(1) The provisions of sections 66, 67 and 68 of the Insolvency Act, 1936 (Act 24 of 1936), shall, in so far as they can be applied and are not inconsistent with the provisions of this Act, *mutatis mutandis* apply in relation to-

- (a) any person who is in terms of section 414 (1) of this Act required to attend any meeting of a company being wound up and which is unable to pay its debts, as if such person were an insolvent required to attend any meeting referred to in section 64 of the Insolvency Act, 1936; and
- (b) any person subpoenaed in terms of section 414 (2) of this Act to attend any meeting of the creditors of such a company or to produce any book or document at any such meeting,

and the provisions of section 65 of the Insolvency Act, 1936, shall, in so far as they can be applied and are not inconsistent with the provisions of this Act, *mutatis mutandis* apply in relation to the production of any book or document or the interrogation of any person under section 415 of this Act, as if such person had been subpoenaed to produce any book or document or were being interrogated under the said section 65 of the Insolvency Act, 1936.

(2) In applying the said sections 66, 67 and 68 of the Insolvency Act, 1936, in terms of subsection (1) of this section, any reference in any of the said sections or in section 64 or 65 of that Act-

- (a) to the estate of an insolvent, shall be construed as a reference to the estate of the company concerned;
- (b) to the trustee of an insolvent estate, shall be construed as a reference to the liquidator of such company;
- (c) to a meeting of the creditors of an insolvent, shall be construed as a reference to a meeting of the creditors of such company;
- (d) to a creditor who has proved a claim against an insolvent estate, shall be construed as a

- reference to a person who has proved a claim against such company;
- (e) to the business or affairs or property of an insolvent, shall be construed as a reference to the business or affairs or property of such company;
  - (f) to any person indebted to an insolvent estate, shall be construed as a reference to a person indebted to such company;
  - (g) to the sequestration of an insolvent estate, shall be construed as a reference to the commencement of the winding-up of such company.

*Examination of Persons in Winding-up (ss 417-418)*

**417 Summoning and examination of persons as to affairs of company**

Cases

(1) In any winding-up of a company unable to pay its debts, the Master or the Court may, at any time after a winding-up order has been made, summon before him or it any director or officer of the company or person known or suspected to have in his possession any property of the company or believed to be indebted to the company, or any person whom the Master or the Court deems capable of giving information concerning the trade, dealings, affairs or property of the company.

[Sub-s. (1) substituted by s. 9 (a) of Act 29 of 1985.]

(1A) Any person summoned under subsection (1) may be represented at his attendance before the Master or the Court by an attorney with or without counsel.

[Sub-s. (1A) inserted by s. 9 (b) of Act 29 of 1985.]

(2) (a) The Master or the Court may examine any person summoned under subsection (1) on oath or affirmation concerning any matter referred to in that subsection, either orally or on written interrogatories, and may reduce his answers to writing and require him to sign them.

[Para. (a) substituted by s. 9 (c) of Act 29 of 1985.]

(b) Any such person may be required to answer any question put to him or her at the examination, notwithstanding that the answer might tend to incriminate him or her and shall, if he or she does so refuse on that ground, be obliged to so answer at the instance of the Master or the Court: Provided that the Master or the Court may only oblige the person in question to so answer after the Master or the Court has consulted with the Director of Public Prosecutions who has jurisdiction.

[Para. (b) substituted by s. 11 (a) of Act 55 of 2002.]

(c) Any incriminating answer or information directly obtained, or incriminating evidence directly derived from, an examination in terms of this section shall not be admissible as evidence in criminal proceedings in a court of law against the person concerned or the body corporate of which he or she is or was an officer, except in criminal proceedings where the person concerned is charged with an offence relating to -

- (i) the administering or taking of an oath or the administering or making of an affirmation;
- (ii) the giving of false evidence;
- (iii) the making of a false statement; or
- (iv) a failure to answer lawful questions fully and satisfactorily.

[Para. (c) added by s. 11 (b) of Act 55 of 2002.]

(3) The Master or the Court may require any such person to produce any books or papers in his custody or under his control relating to the company but without prejudice to any lien claimed with regard to any such books or papers, and the Court shall have power to determine all questions relating to any such lien.

[Sub-s. (3) substituted by s. 9 (d) of Act 29 of 1985.]

(4) If any person who has been duly summoned under subsection (1) and to whom a reasonable sum for his expenses has been tendered, fails to attend before the Master or the Court at the time appointed by the summons without lawful excuse made known to the Master or the Court at the time of the sitting and accepted by the Master or the Court, the Master or the Court may cause him to be

apprehended and brought before him or it for examination.

[Sub-s. (4) substituted by s. 9 (d) of Act 29 of 1985.]

(5) Any person summoned by the Master under subsection (1) shall be entitled to such witness fees as he would have been entitled to if he were a witness in civil proceedings in a magistrate's court.

[Sub-s. (5) added by s. 9 (e) of Act 29 of 1985.]

(6) Any person who applies for an examination or enquiry in terms of this section or section 418 shall be liable for the payment of the costs and expenses incidental thereto, unless the Master or the Court directs that the whole or any part of such costs and expenses shall be paid out of the assets of the company concerned.

[Sub-s. (6) added by s. 9 (e) of Act 29 of 1985.]

(7) Any examination or enquiry under this section or section 418 and any application therefor shall be private and confidential, unless the Master or the Court, either generally or in respect of any particular person, directs otherwise.

[Sub-s. (7) added by s. 9 (e) of Act 29 of 1985.]

#### **418 Examination by commissioners**

##### Cases

(1) (a) Every magistrate and every other person appointed for the purpose by the Master or the Court shall be a commissioner for the purpose of taking evidence or holding any enquiry under this Act in connection with the winding-up of any company.

(b) The Master or the Court may refer the whole or any part of the examination of any witness or of any enquiry under this Act to any such commissioner, whether or not he is within the jurisdiction of the Court which issued the winding-up order.

(c) The Master, if he has not himself been appointed under paragraph (a), the liquidator or any creditor, member or contributory of the company may be represented at such an examination or enquiry by an attorney, with or without counsel, who shall be entitled to interrogate any witness: Provided that a commissioner shall disallow any question which is irrelevant or would in his opinion prolong the interrogation unnecessarily.

(d) The provisions of section 417 (1A), (2) (b) and (5) shall apply *mutatis mutandis* in respect of such an examination or enquiry.

(2) A commissioner shall in any matter referred to him have the same powers of summoning and examining witnesses and of requiring the production of documents, as the Master who or the Court which appointed him, and, if the commissioner is a magistrate, of punishing defaulting or recalcitrant witnesses, or causing defaulting witnesses to be apprehended, and of determining questions relating to any lien with regard to documents, as the Court referred to in section 417.

(3) If a commissioner-

(a) has been appointed by the Master, he shall, in such manner as the Master may direct, report to the Master; or

(b) has been appointed by the Court, he shall, in such manner as the Court may direct, report to the Master and the Court,

on any examination or enquiry referred to him.

(4) Any witness who has given evidence before the Master or the Court under section 417 or before a commissioner under this section, shall be entitled, at his cost, to a copy of the record of his evidence.

(5) Any person who-

(a) has been duly summoned under this section by a commissioner who is not a magistrate and who fails, without sufficient cause, to attend at the time and place specified in the summons; or

(b) has been duly summoned under section 417 (1) by the Master or under this section by a

commissioner who is not a magistrate and who -

- (i) fails, without sufficient cause, to remain in attendance until excused by the Master or such commissioner, as the case may be, from further attendance;
- (ii) refuses to be sworn or to affirm as a witness; or
- (iii) fails, without sufficient cause-
  - (aa) to answer fully and satisfactorily any question lawfully put to him in terms of section 417 (2) or this section; or
  - (bb) to produce books or papers in his custody or under his control which he was required to produce in terms of section 417 (3) or this section,

shall be guilty of an offence.

[S. 418 substituted by s. 10 of Act 29 of 1985.]

### *Dissolution of Companies and other Bodies Corporate (ss 419-422)*

#### **419 Dissolution of companies and other bodies corporate**

Cases

(1) In any winding-up, when the affairs of a company have been completely wound up, the Master shall transmit to the Registrar a certificate to that effect and send a copy thereof to the liquidator.

(2) The Registrar shall record the dissolution of the company and shall publish notice thereof in the prescribed manner.

[Sub-s. (2) substituted by s. 49 of Act 24 of 2006.]

(3) The date of dissolution of the company shall be the date of recording referred to in subsection (2).

(4) In the case of any other body corporate the certificate of the Master under subsection (1) shall constitute its dissolution.

#### **420 Court may declare dissolution void**

Cases

When a company has been dissolved, the Court may at any time on an application by the liquidator of the company, or by any other person who appears to the Court to have an interest, make an order, upon such terms as the Court thinks fit, declaring the dissolution to have been void, and thereupon any proceedings may be taken against the company as might have been taken if the company had not been dissolved.

[S. 420 substituted by s. 10 of Act 84 of 1980.]

#### **421 Registrar to keep a register of directors of dissolved companies**

(1) The Registrar shall establish and maintain a register of directors of companies which have been dissolved and were unable to pay their debts, and cause to be entered therein, in respect of each such director-

- (a) his full forenames and surname, and any former forenames and surname, his nationality, if not South African, his occupation, his date of birth and his last known residential and postal addresses;
- (b) the name of the company of which he was a director when such company was dissolved for the reason that it was unable to pay its debts and, where more than one company was dissolved at the same time, the names of those companies;
- (c) the date of his appointment as director;
- (d) the date of dissolution of the company or companies.

(2) The liquidator shall, within fourteen days after the date of the certificate referred to in section 419 (1), send to the Registrar on a prescribed form, in duplicate, in respect of each director of the company who was a director thereof at a date within two years before the commencement of the winding-up, the particulars referred to in subsection (1) (a) to (d) of this section, together with a

statement as to which director, in his opinion, was the effective cause of the company being unable to pay its debts.

(3) The Registrar shall, under cover of a prescribed form, send to each director one copy of the particulars furnished under subsection (2) in respect of that director, and where the liquidator has in a statement furnished under the said subsection expressed any opinion as to which director was the effective cause of the company being unable to pay its debts, the Registrar shall at the same time send a copy of such statement to the director named therein.

(4) A director may, within one month of the date of the form referred to in subsection (3), object, by affidavit or otherwise, to his name being entered in the register referred to in subsection (1).

(5) If after considering the objections made by or on behalf of a director or if a director fails to object and the Registrar is of opinion that the name of the director should be entered in the register, he shall inform such director accordingly.

(6) The Registrar shall, on the expiration of one month after the date of his decision under subsection (5) or, if an application under subsection (7) is then pending, after the application has been disposed of and the Court has not ordered otherwise, enter the name of the director in the register.

(7) Any person aggrieved by the decision of the Registrar to make an entry or not to make an entry in the register, shall be entitled, within one month of the date of such decision, to apply to the Court for relief, and the Court shall have power to consider the merits of the matter, to receive further evidence and to make any order it deems fit.

(8) Any liquidator who fails to comply with the provisions of subsection (2), shall be guilty of an offence.

(9) The provisions of section 9 as to the inspection of documents kept by the Registrar and extracts therefrom certified by the Registrar shall *mutatis mutandis* apply to the register to be maintained by him under this section.

#### **422 Disposal of records of dissolved company**

(1) When any company has been wound up and is about to be dissolved, the books and papers of the company and of the liquidator may be disposed of-

- (a) in the case of a winding-up by the Court, in such way as the Master may direct;
- (b) in the case of a members' voluntary winding-up, in such way as the company by special resolution may direct;
- (c) in the case of a creditors' voluntary winding-up, in such way as the creditors may direct.

(2) After five years from the dissolution of the company, no responsibility shall rest on the liquidator, or any person to whom the custody of the books and papers has been committed, by reason of the same not being forthcoming to a person claiming to be interested therein.

#### ***Personal Liability of Delinquent Directors and Others and Offences (ss 423-426)***

#### **423 Delinquent directors and others to restore property and to compensate the company**

Cases

(1) Where in the course of the winding-up or judicial management of a company it appears that any person who has taken part in the formation or promotion of the company, or any past or present director or any officer of the company has misapplied or retained or become liable or accountable for any money or property of the company or has been guilty of any breach of faith or trust in relation to the company the Court may, on the application of the Master or of the liquidator or of any creditor or member or contributory of the company, enquire into the conduct of the promoter, director or officer concerned and may order him to repay or restore the money or property or any part thereof, with interest at such rate as the Court thinks just, or to contribute such sum to the assets of the company by way of compensation in respect of the misapplication, retention, breach of faith or trust as the Court thinks just.

[Sub-s. (1) substituted by s. 28 of Act 111 of 1976.]

(2) This section shall apply notwithstanding that the offence is one for which the offender may be criminally responsible.

#### **424 Liability of directors and others for fraudulent conduct of business**

##### Cases

(1) When it appears, whether it be in a winding-up, judicial management or otherwise, that any business of the company was or is being carried on recklessly or with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, the Court may, on the application of the Master, the liquidator, the judicial manager, any creditor or member or contributory of the company, declare that any person who was knowingly a party to the carrying on of the business in the manner aforesaid, shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Court may direct.

(2) (a) Where the Court makes any such declaration, it may give such further directions as it thinks proper for the purpose of giving effect to the declaration, and in particular may make provision for making the liability of any such person under the declaration a charge on any debt or obligation due from the company to him, or on any mortgage or charge or any interest in any mortgage or charge on any assets of the company held by or vested in him or any company or person on his behalf or any person claiming as assignee from or through the person liable or any company or person acting on his behalf, and may from time to time make such further orders as may be necessary for the purpose of enforcing any charge imposed under this subsection.

(b) For the purposes of this subsection, the expression 'assignee' includes any person to whom or in whose favour, by the directions of the person liable, the debt, obligation, mortgage or charge was created, issued or transferred or the interest was created, but does not include an assignee for valuable consideration given in good faith and without notice of any of the matters on the ground of which the declaration is made.

(3) Without prejudice to any other criminal liability incurred, where any business of a company is carried on recklessly or with such intent or for such purpose as is mentioned in subsection (1), every person who was knowingly a party to the carrying on of the business in the manner aforesaid, shall be guilty of an offence.

(4) The provisions of this section shall have effect notwithstanding that the person concerned may be criminally liable in respect of the matters on the ground of which the declaration is made.

#### **425 Application of criminal provisions of the law relating to insolvency**

##### Cases

If any person who is or was a director or officer of a company in respect of which a winding-up order has been granted, whether or not such order has been discharged or confirmed under the provisions of this Act, and which is or was unable to pay its debts, has committed any act or made any omission in relation to any assets, books, records, documents, business or the affairs of such company, which act or omission, if such act had been committed or such omission had been made by a person whose estate was sequestrated on the date upon which the winding-up of such company commenced, in relation to his assets, books, documents, business or affairs, or those of his estate, would have constituted an offence under the law relating to insolvency, such past or present director or officer shall be guilty of such offence and liable on conviction to the penalties provided therefor in the said law relating to insolvency, and all the provisions of the said law relating to insolvency shall *mutatis mutandis* apply in respect of such act or omission, the method of establishing the same, and such past or present director or officer charged with the same.

#### **426 Private prosecution of directors and others**

(1) If it appears in the course of the winding-up of a company that any past or present director, member or officer of the company has been guilty of an offence for which he is criminally liable under this Act or, in relation to the company or the creditors of the company, under the common law, the

liquidator shall cause all the facts known to him which appear to constitute the offence, to be laid before the Director of Public Prosecutions concerned and, if the said Director of Public Prosecutions certifies that he declines to prosecute, the liquidator may, subject to the provisions of section 386 (3) and (4), institute and conduct a private prosecution in respect of such offence.

(2) The Court may, upon application by the liquidator, order the whole or any portion of the costs and expenses incidental to such private prosecution to be paid out of the assets of the company in priority to all other liabilities.

[S. 426 amended by s. 5 (a) of Act 20 of 2004.]

## CHAPTER XV

### JUDICIAL MANAGEMENT (ss 427-440)

#### 427 Circumstances in which company may be placed under judicial management

Cases

(1) When any company by reason of mismanagement or for any other cause-

(a) is unable to pay its debts or is probably unable to meet its obligations; and

(b) has not become or is prevented from becoming a successful concern,

and there is a reasonable probability that, if it is placed under judicial management, it will be enabled to pay its debts or to meet its obligations and become a successful concern, the Court may, if it appears just and equitable, grant a judicial management order in respect of that company.

(2) An application to Court for a judicial management order in respect of any company may be made by any of the persons who are entitled under section 346 to make an application to Court for the winding-up of a company, and the provisions of section 346 (4) (a) as to the application for winding-up shall *mutatis mutandis* apply to an application for a judicial management order.

(3) When an application for the winding-up of a company is made to Court under this Act and it appears to the Court that if the company is placed under judicial management the grounds for its winding-up may be removed and that it will become a successful concern and that the granting of a judicial management order would be just and equitable, the Court may grant such an order in respect of that company.

#### 428 Provisional judicial management order

Cases

(1) The Court may on an application under section 427 (2) or (3) grant a provisional judicial management order, stating the return day, or dismiss the application or make any other order that it deems just.

(2) A provisional judicial management order shall contain-

(a) directions that the company named therein shall be under the management, subject to the supervision of the Court, of a provisional judicial manager appointed as hereinafter provided, and that any other person vested with the management of the company's affairs shall from the date of the making of the order be divested thereof; and

(b) .....

[Para. (b) deleted by s. 11 of Act 84 of 1980.]

(c) such other directions as to the management of the company, or any matter incidental thereto, including directions conferring upon the provisional judicial manager the power, subject to the rights of the creditors of the company, to raise money in any way without the authority of shareholders as the Court may consider necessary,

and may contain directions that while the company is under judicial management, all actions, proceedings, the execution of all writs, summonses and other processes against the company be stayed and be not proceeded with without the leave of the Court.

(3) The Court which has granted a provisional judicial management order, may at any time and in any manner, on the application of the applicant, a creditor or member, the provisional judicial

manager or the Master, vary the terms of such order or discharge it.

#### **429 Custody of property and appointment of provisional judicial manager on the granting of judicial management order**

Cases

Upon the granting of a provisional judicial management order-

- (a) all the property of the company concerned shall be deemed to be in the custody of the Master until a provisional judicial manager has been appointed and has assumed office;
- (b) the Master shall without delay-
  - (i) appoint, in accordance with policy determined by the Minister, a provisional judicial manager (who shall not be the auditor of the company or any person disqualified under this Act from being appointed as liquidator in a winding-up) who shall give such security for the proper performance of his or her duties in his or her capacity as such, as the Master may direct, and who shall hold office until discharged by the Court as provided in section 432 (3) (a);  
[Sub-para. (i) substituted by s. 19 of Act 16 of 2003.]
  - (ii) convene separate meetings of the creditors, the members and debenture-holders (if any) of the company for the purposes referred to in section 431.

#### **430 Duties of provisional judicial manager upon appointment**

Cases

A provisional judicial manager shall-

- (a) assume the management of the company and recover and reduce into possession all the assets of the company;
- (b) within seven days after his appointment lodge with the Registrar, under cover of the prescribed form, a copy of his letter of appointment as provisional judicial manager; and
- (c) prepare and lay before the meetings convened under section 429 (b) (ii) a report containing-
  - (i) an account of the general state of the affairs of the company;
  - (ii) a statement of the reasons why the company is unable to pay its debts or is probably unable to meet its obligations or has not become or is prevented from becoming a successful concern;
  - (iii) a statement of the assets and liabilities of the company;
  - (iv) a complete list of creditors of the company (including contingent and prospective creditors) and of the amount and the nature of the claim of each creditor;
  - (v) particulars as to the source or sources from which money has been or is to be raised for purposes of carrying on the business of the company; and
  - (vi) the considered opinion of the provisional judicial manager as to the prospects of the company becoming a successful concern and of the removal of the facts or circumstances which prevent the company from becoming a successful concern.

#### **431 Purpose of meetings convened under section 429 (b) (ii)**

Cases

(1) Any meeting convened under section 429 (b) (ii) shall be presided over by the Master or a magistrate having jurisdiction in the area where the meeting is held and shall be convened and held in the manner prescribed by section 412 in respect of a meeting in the winding-up of a company.

(2) The purpose of any such meeting shall be-

- (a) to consider the report of the provisional judicial manager under section 430 (c) and the desirability or otherwise of placing the company finally under judicial management, taking into account the prospects of the company becoming a successful concern;

- (b) to nominate the person or persons (not being disqualified under section 429 (b) (i)) whose names shall be submitted to the Master for appointment as final judicial manager or managers;
- (c) in the case of any such meeting of creditors, the proving of claims against the company; and
- (d) to consider the passing of a resolution referred to in section 435 (1).

[Para. (d) added by s. 12 (c) of Act 84 of 1980.]

(3) The chairman of any such meeting shall prepare and lay before the Court a report of the proceedings of such meeting, including a summary of the reasons for any conclusion arrived at under subsection (2) (a).

(4) The provisions of this Act relating to the proof of claims against a company which is being wound up and to the nomination and appointment of a liquidator of any such company shall *mutatis mutandis* apply with reference to the proof of claims against a company which has been placed under judicial management and the nomination and appointment of a judicial manager of such a company.

### **432 Return day of provisional order of judicial management and powers of the Court**

Cases

(1) Any return day fixed under section 428 (1) shall not be later than sixty days after the date of the provisional judicial management order but may be extended by the Court on good cause shown.

(2) On such return day the Court may after consideration of-

- (a) the opinion and wishes of creditors and members of the company;
- (b) the report of the provisional judicial manager under section 430;
- (c) the number of creditors who did not prove claims at the first meeting of creditors and the amounts and nature of their claims;
- (d) the report of the Master; and
- (e) the report of the Registrar,

grant a final management order if it appears to the Court that the company will, if placed under judicial management, be enabled to become a successful concern and that it is just and equitable that it be placed under judicial management, or may discharge the provisional order or make any other order it may deem just.

(3) A final judicial management order shall contain-

- (a) directions for the vesting of the management of the company, subject to the supervision of the Court, in the final judicial manager, the handing over of all matters and the accounting by the provisional judicial manager to the final judicial manager and the discharge of the provisional judicial manager, where necessary;
- (b) .....

[Para. (b) deleted by s. 13 of Act 84 of 1980.]

- (c) such other directions as to the management of the company, or any matter incidental thereto, including directions conferring upon the final judicial manager the power, subject to the rights of the creditors of the company, to raise money in any way without the authority of shareholders, as the Court may consider necessary.

(4) The Court which has granted a final judicial management order, may at any time and in any manner vary the terms of such order on the application of the Master, the final judicial manager or a representative acting on behalf of the general body of creditors of the company concerned by virtue of a resolution passed by a majority in value and number of such creditors at a meeting of those creditors.

### **433 Duties of final judicial manager**

Cases

A judicial manager shall, subject to the provisions of the memorandum and articles of the company concerned in so far as they are not inconsistent with any direction contained in the relevant

## judicial management order-

- (a) take over from the provisional judicial manager and assume the management of the company;
- (b) conduct such management, subject to the orders of the Court, in such manner as he may deem most economic and most promotive of the interests of the members and creditors of the company;
- (c) comply with any direction of the Court made in the final judicial management order or any variation thereof;
- (d) lodge with the Registrar-
  - (i) a copy of the judicial management order and of the Master's letter of appointment under cover of the prescribed form;
  - (ii) in the event of the judicial management order being cancelled, a copy of the order cancelling it,
    - within seven days of his appointment or of the cancellation of such judicial management order, as the case may be;
- (e) .....
  - [Para. (e) deleted by s. 14 of Act 31 of 1986.]
- (f) keep such accounting records and prepare such annual financial statements, interim reports and provisional annual financial statements as the company or its directors would have been obliged to keep or prepare if it had not been placed under judicial management;
- (g) convene the annual general meeting and other meetings of members of the company provided for by this Act and in that regard comply with all the requirements with which the directors of the company would in terms of this Act have been obliged to comply if the company had not been placed under judicial management;
- (h) convene meetings of the creditors of the company by notices issued separately on the dates on which the notices convening annual general meetings of the company are issued or on which any interim report is sent out to members and in the case of a private company not later than six months after the end of its financial year, and submit to such meetings reports showing the assets and liabilities of the company, its debts and obligations as verified by the auditor of the company, and all such information as may be necessary to enable the creditors to become fully acquainted with the company's position as at the date of the end of the financial year or the end of the period covered by any such interim report or, in the case of a private company, as at a date six months after the end of its financial year;
- (i) lodge with the Master copies of all the documents submitted to the meetings as provided in paragraphs (g) and (h);
- (j) examine the affairs and transactions of the company before the commencement of the judicial management in order to ascertain whether any director, past director, officer or past officer of the company has contravened or appears to have contravened any provision of this Act or has committed any other offence, and within six months from the date of his appointment submit to the Master such reports as are in terms of section 400 required to be submitted to the Master by a liquidator, and in relation to which the provisions of that section shall apply;
- (k) examine the affairs and transactions of the company before the commencement of the judicial management in order to ascertain whether any director, past director, officer or past officer of the company is or appears to be personally liable for damages or compensation to the company or for any debts or liabilities of the company, and within

six months from the date of his appointment prepare and submit to the Master and to the next succeeding meeting of members and of creditors of the company, a report containing full particulars of any such liability; and

- (l) if at any time he is of opinion that the continuation of the judicial management will not enable the company to become a successful concern, apply to the Court, after not less than fourteen days' notice by registered post to all members and creditors of the company, for the cancellation of the relevant judicial management order and the issue of an order for the winding-up of the company.

#### **434 Application of assets during judicial management**

Cases

(1) A judicial manager shall not without the leave of the Court sell or otherwise dispose of any of the company's assets save in the ordinary course of the company's business.

(2) Any moneys of the company becoming available to the judicial manager shall be applied by him in paying the costs of the judicial management and in the conduct of the company's business in accordance with the judicial management order and so far as the circumstances permit in the payment of the claims of creditors which arose before the date of the order.

(3) The costs of the judicial management and the claims of creditors of the company shall be paid *mutatis mutandis* in accordance with the law relating to insolvency as if those costs were costs of the sequestration of an estate and those claims were claims against an insolvent estate.

#### **434A Remuneration of provisional judicial manager or judicial manager**

(1) The provisional judicial manager or the judicial manager shall be entitled to such remuneration for his services as may be fixed by the Master from time to time.

(2) In fixing the remuneration the Master shall take into account the manner in which the provisional judicial manager or the judicial manager has performed his functions and any recommendation by the members or creditors of the company relating to such remuneration.

(3) The provisions of sections 151 and 151*bis* of the Insolvency Act, 1936 (Act 24 of 1936), shall apply with reference to any fixing of remuneration by the Master under this section.

[S. 434A inserted by s. 14 of Act 84 of 1980.]

#### **435 Pre-judicial management creditors may consent to preference**

Cases

(1) (a) The creditors of a company whose claims arose before the granting of a judicial management order in respect of such company may at a meeting convened by the judicial manager or provisional judicial manager for the purpose of this subsection or by the Master in terms of section 429 (b) (ii), resolve that all liabilities incurred or to be incurred by the judicial manager or provisional judicial manager in the conduct of the company's business shall be paid in preference to all other liabilities not already discharged exclusive of the costs of the judicial management, and thereupon all claims based upon such first-mentioned liabilities shall have preference in the order in which they were incurred over all unsecured claims against the company except claims arising out of the costs of the judicial management.

[Para. (a) substituted by s. 15 (a) of Act 84 of 1980.]

(b) If a judicial management order is superseded by a winding-up order-

- (i) the preference conferred in terms of paragraph (a) shall remain in force except in so far as claims arising out of the costs of the winding-up are concerned; and
- (ii) all claims based on such liabilities incurred by the judicial manager shall be taken to have been proved and the provisions of section 366 shall not apply in respect thereof.

(2) (a) A meeting convened by the provisional judicial manager or the judicial manager in terms of subsection (1) shall be convened by him by written notice sent by registered post at least ten days before the date of the meeting, as specified in the notice, to every creditor of the company whose

name and address is known to him, and also by notice in one or more newspapers circulating in the district where the company's main place of business is situated.

(b) The last-mentioned notice shall comply with the provisions of section 40 (3) (c) of the Insolvency Act, 1936 (Act 24 of 1936), and shall appear at least ten days before the date of the meeting.

[Sub-s. (2) substituted by s. 29 of Act 111 of 1976 and by s. 15 (b) of Act 84 of 1980.]

(3) The provisional judicial manager or the judicial manager, as the case may be, shall preside over a meeting referred to in subsection (2), and the laws relating to insolvency shall apply *mutatis mutandis* in respect of the conduct of any such meeting, the right to vote thereat, the manner of voting and the calculation of the value of votes, as if such meeting were a meeting of creditors in an insolvent estate: Provided that for the purposes of voting at any such meeting convened by a provisional judicial manager, the claims of creditors shall be determined to the satisfaction of the provisional judicial manager.

[Sub-s. (3) added by s. 15 (b) of Act 84 of 1980.]

### **436 Voidable and undue preferences in judicial management**

Cases

(1) Every disposition of its property which if made by an individual could for any reason be set aside in the event of his insolvency, may, if made by a company unable to pay its debts, be set aside by the Court at the suit of the judicial manager in the event of the company being placed under judicial management, and the provisions of the law relating to insolvency shall *mutatis mutandis* apply in respect of any such disposition.

(2) For the purposes of this section the event which shall be deemed to correspond with a sequestration order under the Insolvency Act, 1936 (Act 24 of 1936), in the case of an insolvent, shall be the presentation to the Court of the application in pursuance of which a judicial management order is granted.

### **437 Period of judicial management to be discounted in determining preference under mortgage bond**

Cases

The time during which any company being a mortgage debtor in respect of any mortgage bond, is subject to a judicial management order, shall be excluded in the calculation of any period of time for the purpose of determining whether such mortgage bond confers any preference in terms of section 88 of the Insolvency Act, 1936 (Act 24 of 1936), as applied to the winding-up of companies by this Act.

### **438 Position of auditor in judicial management**

Cases

Notwithstanding the granting of a judicial management order in respect of any company and for so long as the order is in force, the provisions of this Act relating to the appointment and reappointment of an auditor and the rights and duties of an auditor shall continue to apply as if any reference in the said provisions to the directors of the company were a reference to the judicial manager.

### **439 Application to judicial management of certain provisions of winding-up**

Cases

(1) In every case in which a company is placed under judicial management, the provisions of sections 12 (2), 360, 412, 423, 424 and 425 shall apply as if the company under judicial management were a company being wound up and the judicial manager were the liquidator.

(2) The provisions of section 417 and, if the Court so orders, any provision of sections 414, 415, 416 and 418, shall apply in a judicial management as they apply in a winding-up of a company which is unable to pay its debts, any reference to the liquidator being taken to be a reference to the

judicial manager.

#### 440 Cancellation of judicial management order

Cases

(1) If at any time on application by the judicial manager or any person having an interest in the company it appears to the Court which granted a judicial management order that the purpose of such order has been fulfilled or that for any reason it is undesirable that such order should remain in force, the Court may cancel such order and thereupon the judicial manager shall be divested of his functions.

(2) In cancelling any such order the Court shall give such directions as may be necessary for the resumption of the management and control of the company by the officers thereof, including directions for the convening of a general meeting of members for the purpose of electing directors of the company.

### CHAPTER XVA REGULATION OF SECURITIES (ss 440A-440N)

Cases

[Superscriptions inserted by s. 4 (a) of Act 78 of 1989.]

#### 440A Definitions

(1) In this Chapter, unless the context otherwise indicates-

**'acquisition'**, in relation to securities of any company, means the acquisition of securities in such company by any means whatsoever, including purchase or subscription;

[Definition of 'acquisition' substituted by s. 1 (a) of Act 69 of 1990.]

**'acting in concert'** means, subject to subsection (2) (a), acting in pursuance of an agreement, arrangement or understanding (whether formal or informal) between two or more persons pursuant to which they or any of them co-operate for the purposes of entering into or proposing an affected transaction;

[Definition of 'acting in concert' substituted by s. 1 (b) of Act 69 of 1990.]

**'affected transaction'** means any transaction (including a transaction which forms part of a series of transactions) or scheme, whatever form it may take, which-

(a) taking into account any securities held before such transaction or scheme, has or will have the effect of-

- (i) vesting control of any company (excluding a close corporation) in any person, or two or more persons acting in concert, in whom control did not vest prior to such transaction or scheme; or
- (ii) any person, or two or more persons acting in concert, acquiring, or becoming the sole holder or holders of, all the securities, or all the securities of a particular class, of any company (excluding a close corporation); or

(b) involves the acquisition by any person, or two or more persons acting in concert, in whom control of any company (excluding a close corporation) vests on or after the date of commencement of section 1 (c) of the Companies Second Amendment Act, 1990, of further securities of that company in excess of the limits prescribed in the rules; or

(c) is a disposal as contemplated in section 228;

[Para. (c) added by s. 14 (a) of Act 35 of 1998.]

[Definition of 'affected transaction' substituted by s. 1 (c) of Act 69 of 1990.]

**'chairperson'** means the chairperson of the panel designated in terms of section 440B (4) or (5);

[Definition of 'chairperson', formerly definition of 'chairman', amended by s. 20 of Act 35 of 1998.]

**'company'** includes an external company and any other body corporate;

**'control'** means, subject to subsection (2) (b), a holding or aggregate holdings of shares or other securities in a company entitling the holder thereof to exercise, or cause to be exercised, directly

or indirectly, the specified percentage or more of the voting rights at meetings of that company or any company controlled by it, irrespective of whether such holding or holdings confer *de facto* control;

[Definition of 'control' substituted by s. 14 (b) of Act 35 of 1998.]

**'executive director'** means the executive director or acting executive director of the panel appointed in terms of section 440B (11);

[Definition of 'executive director' substituted by s. 14 (c) of Act 35 of 1998.]

**'offeree company'** means any company the securities or part of the securities of which is or is to be the subject of any affected transaction or proposed affected transaction;

[Definition of 'offeree company' substituted by s. 1 (d) of Act 69 of 1990.]

**'offeror'** means any person or two or more persons acting in concert who enter into or propose any affected transaction;

**'panel'** means the Securities Regulation Panel established by section 440B;

**'rules'** means the rules made or amended from time to time by the panel and approved by the Minister and published by him by notice in the *Gazette*;

[Definition of 'rules' substituted by s. 1 (e) of Act 69 of 1990.]

**'security'** means any shares in the capital of a company and includes stock and debentures convertible into shares and any rights or interests in a company or in or in respect of any such shares, stock or debentures, and includes any 'financial instrument' as defined in the Financial Markets Control Act, 1989 (Act 55 of 1989);

[Definition of 'security' substituted by s. 1 (f) of Act 69 of 1990.]

**'specified percentage'** means the percentage, or different percentages in respect of different types of companies, prescribed in the rules for the purposes of determining control as defined in this section: Provided that the percentage shall in no case fall below 20 per cent of the issued securities of any class.

(2) For the purposes of subsection (1)-

(a) the following persons shall be deemed to be acting in concert with one another unless the contrary is established, namely-

(i) a company, its holding company, subsidiaries, companies which are subsidiaries of its holding company and their subsidiaries, and companies of which such companies are associated companies, and for the purposes hereof ownership or control by a company of 20 per cent of more of the equity share capital of another company shall constitute the latter company as the former company's associate;

(ii) a company with-

(aa) any of its directors or holders of its securities who are beneficial owners as referred to in section 440G (1);

[Para. (aa) substituted by s. 1 (g) of Act 69 of 1990.]

(bb) any company controlled by one or more of its directors; or

(cc) any trust of which any one or more of its directors is a beneficiary;

(iii) a company with any of its pension, provident or benefit funds; and

(b) a security which is convertible into a voting security shall, even before its conversion, be deemed to confer those voting rights which it would confer after conversion.

(3) When the panel makes or amends rules, it shall, not less than one month before submitting the rules to the Minister for his approval, publish the text of the proposed rules in the *Gazette*, together with a statement of its intention to so submit such rules.

[Sub-s. (3) substituted by s. 1 (h) of Act 69 of 1990.]

[S. 440A inserted by s. 4 (b) of Act 78 of 1989.]

#### **440B Establishment of panel**

(1) There is hereby established a body corporate to be known as the Securities Regulation

Panel.

(2) Subject to the provisions of subsection (6), the members of the panel shall be appointed by the Minister and shall consist of-

(a) the chairperson;

(b) the Minister or his or her nominee;

[Para. (b) substituted by s. 50 (a) of Act 24 of 2006.]

(c) the Commissioner of the Competition Commission or his or her nominee;

[Para. (c) substituted by s. 50 (a) of Act 24 of 2006.]

(d) three persons each nominated by the JSE Limited and the Banking Association (South Africa); and

[Para. (d) substituted by s. 50 (a) of Act 24 of 2006.]

(e) one person nominated by each of such bodies, associations and institutions, limited to a maximum of fifteen such bodies, associations and institutions which-

(i) the Minister in consultation with the panel, has determined as being sufficiently representative of the relevant interests in the regulation of securities; and

(ii) have been designated by the Minister by notice in the *Gazette*;

[Sub-s. (2) substituted by s. 15 (a) of Act 35 of 1998.]

(3) .....

[Sub-s. (3) deleted by s. 15 (b) of Act 35 of 1998.]

(4) The chairperson, who need not be one of the nominated members, shall be designated by the members of the panel nominated in terms of paragraph (e) of subsection (2).

[Sub-s. (4) substituted by s. 15 (c) of Act 35 of 1998.]

(5) The panel may designate a member of the panel as acting chairperson to exercise and perform the powers and duties of the chairperson whenever the chairperson is unable to do so or while the office of chairperson is vacant.

[Sub-s. (5) amended by s. 20 of Act 35 of 1998.]

(6) The panel shall be entitled, from time to time, to co-opt additional members.

[Sub-s. (6) substituted by s. 15 (d) of Act 35 of 1998.]

(7) Every member of the panel shall hold office for a period of not less than three and not more than five years, as the Minister may determine: Provided that any body, association or institution referred to in subsection (3) may apply to the Minister to have the person nominated by it and appointed by the Minister, replaced by any other nominee before the expiry of his term of office.

[Sub-s. (7) amended by s. 15 (e) of Act 35 of 1998.]

(8) If, during any period contemplated in subsection (7), a member of the panel nominated pursuant to subsection (2), dies, becomes incapacitated, resigns, or becomes disqualified from being appointed or acting as a director of a company in terms of section 218, or ceases for any other reason to be a member of the panel, the vacancy arising in this manner may be filled for the unexpired period of such member's term of office by a person nominated by the body, association or institution of which the member who ceases to be on the panel was a nominee.

[Sub-s. (8) substituted by s. 15 (f) of Act 35 of 1998 and by s. 50 (b) of Act 24 of 2006.]

(9) A member of the panel shall, on the expiry of his term of office, be eligible for reappointment.

(10) (a) The meetings of the panel shall be held at such times and places as the chairperson may determine.

(b) The person presiding at a meeting of the panel shall determine the procedure at such meeting.

(c) The decision of a majority of the members of the panel present at any meeting thereof at which there is a quorum (as determined in accordance with the rules of the panel) shall constitute the

decision of the panel, and in the case of an equality of votes, the chairperson shall have a casting vote in addition to his deliberative vote.

(d) No proceedings of the panel shall be invalid by reason only of the fact that a vacancy existed on the panel or that any member was not present during such proceedings or any part thereof.

[Sub-s. (10) amended by s. 20 of Act 35 of 1998.]

(11) The panel shall appoint an executive director to hold office for such period and on such conditions as the panel may determine and the panel may likewise appoint an acting executive director when the office of executive director is vacant or when the executive director is absent or for any reason unable to perform his or her functions.

[Sub-s. (11) substituted by s. 15 (g) of Act 35 of 1998.]

(12) .....

[Sub-s. (12) amended by s. 20 of Act 35 of 1998 and deleted by s. 50 (c) of Act 24 of 2006.]

(13) The panel may appoint such officers and employees as are required for the proper performance of the panel's functions.

(14) The panel may delegate any of its powers to any subcommittee which may be established by the panel.

[Sub-s. (14) substituted by s. 50 (d) of Act 24 of 2006.]

[S. 440B inserted by s. 4 (b) of Act 78 of 1989.]

#### 440C Functions of panel

(1) The functions of the panel shall be to-

(a) regulate, in such manner as it may deem necessary or appropriate-

(i) all transactions or schemes which constitute affected transactions;

(ii) all proposals which on successful completion or implementation would become affected transactions; and

(b) supervise dealings in securities that are contemplated in this Chapter.

[Para. (b) substituted by s. 2 (a) of Act 69 of 1990.]

(2) It shall not be the function of the panel to judge the commercial advantages and disadvantages of affected transactions.

(3) Without derogating from the provisions of subsection (1), the functions of the panel shall include the making of rules in respect of matters falling within the provisions of this Chapter, including rules relating to the following aspects of affected transactions, namely-

(i) the duties of the offeror; and

(ii) the duties of the offeree company.

(4) Subject to the provisions of this Chapter, the rules shall make provision for-

(a) the administration and financing of the panel;

(b) the remuneration and allowances of the executive director and the conditions upon which he is appointed;

(c) the remuneration and allowances of members and officers and employees of the panel, and the conditions upon which such members, officers and employees are appointed;

(d) appeals from decisions of the executive director to the panel;

[Para. (d) substituted by s. 51 (a) of Act 24 of 2006.]

(e) the effective monitoring of compliance with, and enforcement of, the rules;

[Para. (e) added by s. 2 (c) of Act 69 of 1990.]

(f) the dissolution of the panel.

[Para. (f) added by s. 2 (c) of Act 69 of 1990.]

[Sub-s. (4) amended by s. 2 (b) of Act 69 of 1990.]

(5) Rules made or amended by the panel and approved by the Minister shall be published by notice in the *Gazette*.

- (6) The panel or its executive director may-
- (a) consult with any person at the request of any interested party in a proposed affected transaction with a view to interpreting any aspect relating to any of the rules which have been made by the panel and which apply to such proposed affected transaction;
  - (b) issue information on current policy in regard to proposed affected transactions to serve as guidelines for the benefit of persons concerned in proposed affected transactions;
  - (c) receive and deal with representations relating to any matter with which it may deal in terms of this Chapter; and
  - (d) perform any other function assigned to it by this Chapter.

[Sub-s. (6) amended by s. 51 (b) of Act 24 of 2006.]

(7) .....

[Sub-s. (7) deleted by s. 2 (d) of Act 69 of 1990.]

[S. 440C inserted by s. 4 (b) of Act 78 of 1989.]

#### **440D Investigations by panel**

(1) For the purposes of performing its functions in terms of this Chapter, the executive director or the panel may-

- (a) summon any person who is believed to be able to furnish any information on the subject of an investigation or to have in his or her possession or under his or her control any book, document or other object which has any bearing upon that subject, to lodge such book, document or other object with the executive director within the period specified in the summons, or to appear before the executive director or the panel at a time and place specified in the summons, to be interrogated or to produce such book, document or other object; and
- (b) interrogate any such person under oath or affirmation administered by the chairperson or a person appointed by him or her, and examine or retain for examination any such book, document or other object: Provided that any person from whom any book, document or other object has been taken and retained under this subsection shall, so long as such book, document or object is in the possession of the executive director or the panel, at his or her request be allowed, at his or her own expense and under the supervision of the investigating officer, to make copies thereof or to take extracts therefrom at any reasonable time.

[Sub-s. (1) amended by ss. 16 (a) and 20 of Act 35 of 1998 and substituted by s. 52 (a) of Act 24 of 2006.]

(2) A summons for the attendance of any person before the panel or a committee thereof or for the production to the panel or a committee thereof of any book, document or other object shall be in the form prescribed by the panel, shall be signed by any member of the panel, by the executive director or by the chairperson of a committee and shall be served in the manner so prescribed.

[Sub-s. (2) substituted by s. 16 (b) of Act 35 of 1998.]

(3) Any person who has been summoned to attend before, or to produce any book, document or other object to the executive director or the panel and who, without sufficient cause, fails to attend at the time and place specified in the summons or to remain in attendance until he or she is excused by the chairperson thereof from further attendance or, having attended, refuses to be sworn or to make an affirmation after he or she has been asked by the chairperson (or a person appointed by him or her) to do so or, having been sworn or having made affirmation, fails to answer fully and satisfactorily any question lawfully put to him or her, or fails to produce any book, document or other object in his or her possession or under his or her control which he or she has been summoned to produce, shall be guilty of an offence.

[Sub-s. (3) amended by s. 20 of Act 35 of 1998 and substituted by s. 52 (a) of Act 24 of 2006.]

(4) Any person who, after having been sworn or having made affirmation, gives false evidence before the executive director or the panel on any matter, knowing such evidence to be false or not believing it to be true, shall be guilty of an offence.

[Sub-s. (4) substituted by s. 52 (a) of Act 24 of 2006.]

(5) The law relating to privilege as applicable to a witness giving evidence before, or summoned to produce a book, document or other object to, a provincial division of the High Court of South Africa shall apply in relation to any person summoned under this section.

[Sub-s. (5) amended by s. 5 (b) of Act 20 of 2004.]

(6) Nothing contained in this Chapter shall be deemed to compel the production by a legal adviser of a letter, report or other document containing a privileged communication made by or to him as legal adviser, or to authorize the seizure or retention thereof.

[S. 440D inserted by s. 4 (b) of Act 78 of 1989.]

#### **440E Financing of panel**

(1) All fees payable under the rules contemplated in section 440C (4) (a) shall be paid to the panel and shall constitute its funds, and the panel shall utilize its funds for defraying expenses incurred in connection with the performance of its functions.

(2) The panel may invest any unexpended portion of its moneys and may establish reserve funds and pay into them such amounts as it may deem necessary or expedient.

[S. 440E inserted by s. 4 (b) of Act 78 of 1989.]

#### **440F .....**

[S. 440F inserted by s. 4 (b) of Act 78 of 1989, substituted by s. 3 of Act 69 of 1990 and repealed by s. 17 of Act 135 of 1998.]

#### **440G .....**

[S. 440G inserted by s. 4 (b) of Act 78 of 1989, amended by s. 4 of Act 69 of 1990 and repealed by s. 20 of Act 37 of 1999.]

#### **440H Operation of Chapter in relation to other laws**

The provisions of this Chapter shall be in addition to and not in substitution for any other law which is not in conflict with or inconsistent with this Chapter.

[S. 440H inserted by s. 4 (b) of Act 78 of 1989.]

#### **440I Preservation of secrecy**

(1) No person shall disclose any information acquired by him or her in the exercise of his or her powers or the performance of his or her duties in terms of this Chapter and relating to the business or affairs of any other person, except-

- (a) for the purposes of exercising his or her powers or performing his or her duties in terms of this Act;
- (b) for the purposes of legal proceedings under this Act;
- (c) when required to do so by any court or under any law;
- (d) when co-operating with another body performing substantially the same functions as the panel, or any other body controlled by the aforementioned body, for the purpose of obtaining or furnishing any information relevant to any aspect of the functions of the panel or such body.

[Sub-s. (1) substituted by s. 17 of Act 35 of 1998.]

(2) Any person who contravenes the provisions of subsection (1) shall be guilty of an offence.

[S. 440I inserted by s. 4 (b) of Act 78 of 1989.]

#### **440J Limitation of liability**

The panel or any member thereof, any committee of the panel or member of such committee, or any employee or representative of the panel, shall not be liable for any loss sustained by or damage caused to any person as a result of anything done or omitted by the said panel, committee, member,

employee or representative in the *bona fide* or negligent, but not grossly negligent, exercise of any power or carrying out of any duty or performance of any function under or in terms of this Act or the rules.

[S. 440J inserted by s. 4 (b) of Act 78 of 1989 and substituted by s. 5 of Act 69 of 1990 and by s. 18 of Act 35 of 1998.]

#### **440K Compulsory acquisition of securities of minority in affected transaction**

(1) (a) If an offer for the acquisition of securities under an affected transaction involving the transfer of securities or any class of securities of a company to an offeror, has within four months after the date of the making of such offer been accepted by the holders of not less than nine-tenths of the securities or any class of securities whose transfer is involved (other than securities already held at the date of the issue of the offer by, or by a nominee for, the offeror or its subsidiary), the offeror may at any time within two months after the date of such acceptance give notice in the prescribed manner to any holder of such securities who has not accepted the said offer, that he or it desires to acquire his or its securities, and where such notice is given, the offeror shall be entitled and bound to acquire those securities on the terms on which under the affected transaction the securities of the holders who have accepted the offer, were or are to be transferred to the offeror, unless on an application made by such holder within six weeks from the date on which the notice was given, the Court-

- (i) orders that the offeror shall not be so entitled and bound; or
- (ii) imposes conditions of acquisition different from those of the offer.

(b) If the said offer has not been accepted to the extent necessary for entitling the offeror to give notice under subsection (1) (a), the Court may, on application by the offeror, issue an order authorizing him to give notice under that subsection if the Court is satisfied that-

- (i) the offeror has after reasonable enquiry been unable to trace one or more of the persons holding securities to which the offer relates;
- (ii) the securities whose transfer is involved, by virtue of acceptances of the offer, together with the securities held by the person or persons referred to in subparagraph (i), amount to not less than the minimum specified in subsection (1) (a); and
- (iii) the consideration offered is fair and reasonable,

but the Court shall not issue an order under this paragraph unless it considers that it is just and equitable to do so having regard, in particular, to the number of holders of securities who have been traced but who have not accepted the offer.

(2) Where a notice has been given by the offeror under subsection (1) and the Court, on an application made by a holder of the securities who has not accepted the offer, has not ordered as contemplated in subsection (1) (a), the offeror shall, on the expiration of six weeks from the date on which the notice was given, or, if an application to the Court by such holder is then pending, after the application has been disposed of, transmit a copy of the notice to the offeree company, together with an instrument of transfer executed on behalf of such holder by any person appointed by the offeror, and pay or transfer to the offeree company the amount or other consideration representing the price payable by the offeror for the securities which by virtue of this section he or it is entitled to acquire, and, subject to the payment of the stamp duties ordinarily payable, the offeree company shall thereupon register the offeror as the holder of those securities: Provided that an instrument of transfer shall not be required for any security for which a share warrant is for the time being outstanding.

(3) Where, in pursuance of an affected transaction referred to in subsection (1), securities of an offeree company were or are to be transferred to a person and those securities, together with any other securities of the said offeree company held by, or by a nominee for, the offeror or its subsidiary at the date of the acceptance of the offer in question, comprise or include nine-tenths of the securities in the offeree company or of any class of those securities, then-

- (a) the offeror shall within a month from the date of such acceptance (unless he or it has

already complied with this requirement under subsection (1)) give notice of that fact in the prescribed manner to the holders of the remaining securities or of the remaining securities of that class, as the case may be, who have not accepted the offer under the affected transaction in question; and

- (b) any such holder may within three months from the giving of the notice to him require the offeror to acquire the securities in question,

and where a holder gives notice under paragraph (b) in relation to any securities, the offeror shall be entitled and bound to acquire those securities on the conditions on which under the affected transaction the securities of the holders who have accepted the offer were or are to be transferred to him or it, or on such other conditions as may be agreed upon or as the Court on the application of either the offeror or the holder may think fit to order.

(4) Any sum, and any dividend or other sum accruing from any other consideration, received by the offeree company under this section shall be paid into a separate bank account with a banking institution registered under the Banks Act, 1965 (Act 23 of 1965), and any such sums, dividend or any other consideration so received shall be held in trust by the offeree company for the person entitled to the securities in respect of which the said sums, dividend or other consideration was received.

(5) In this section any reference to a 'holder of securities who has not accepted the offer' includes any holder who has failed or refused to transfer his securities to the offeror in accordance with the affected transaction.

[S. 440K inserted by s. 6 of Act 69 of 1990.]

#### **440L Restriction in respect of affected transaction**

Subject to any exemption by the panel, no person shall enter into or propose an affected transaction, except in accordance with the rules.

[S. 440L inserted by s. 6 of Act 69 of 1990.]

#### **440M Actions**

(1) If any person who is not exempted from compliance with the rules acts in contravention of any of the rules, the panel may apply to the Court for an order compelling such person to comply with the relevant rule, and the Court may in its discretion issue such an order.

(2) If the panel has reason to suspect that any person who is not exempted from compliance with the rules-

- (a) is likely to act in contravention of any of the rules; or  
 (b) has so contravened any of the rules, or that such a contravention is likely to be continued or repeated,

the panel may apply to the Court for an order-

- (i) prohibiting the anticipated contravention referred to in paragraph (a);  
 (ii) prohibiting the continuation or repetition of a contravention referred to in paragraph (b);  
 or  
 (iii) prohibiting the person concerned from continuing with an affected transaction or proposed affected transaction.

(3) If it is proved to the satisfaction of the Court, in the case of an application for an order referred to in-

- (a) subsection (2) (i), that there is a reasonable likelihood that the rule in question will be contravened by the person concerned as contemplated in subsection (2) (a);  
 (b) subsection (2) (ii), that there is a reasonable likelihood that a contravention will be continued or repeated as contemplated in subsection (2) (b);  
 (c) subsection (2) (iii), that there is a reasonable likelihood that a contravention has been committed or is being continued as contemplated in subsection (2) (b),

the Court may issue the relevant order applied for.

(4) Any person who contravenes any of the rules shall be liable to any other person for any loss or damage suffered by that person as a result of such contravention.

(5) The provisions of this section shall not affect the right to any remedy which any person may otherwise have.

[S. 440M inserted by s. 6 of Act 69 of 1990.]

#### **440N Application of Maintenance and Promotion of Competition Act, 1979**

The provisions of the Maintenance and Promotion of Competition Act, 1979 (Act 96 of 1979), shall not apply to anything done by the panel in the exercise or performance of a power or duty conferred or imposed by or under this Chapter.

[S. 440N inserted by s. 6 of Act 69 of 1990.]

### **CHAPTER XVB**

#### **FINANCIAL REPORTING STANDARDS (ss. 440O to 440JJ)**

[Chapter XVB inserted by s. 53 of Act 24 of 2006.]

#### **440O Definitions and preliminary**

(1) For the purposes of this Chapter-

'**advertise**' includes notification to interested persons;

'**exchange**' means an exchange licensed in terms of section 10 of the Securities Services Act, 2004 (Act 36 of 2004);

'**nominated officer**' means the person referred to in section 440V (2); and

'**regulator**' means a statutory body with powers to regulate or supervise companies or the trading of shares in companies and includes any self-regulatory organisation as defined in section 1 of the Securities Services Act, 2004, having such powers.

(2) Any duty to be performed in terms of this Chapter by a chairperson may in his or her absence be performed by a deputy chairperson.

[S. 440O inserted by s. 53 of Act 24 of 2006.]

#### **440P Establishment of Council**

(1) There is hereby established a body corporate known as the Financial Reporting Standards Council.

(2) The Council's objective is to establish financial reporting standards which promote sound and consistent accounting practices.

(3) The Council shall consist of-

- (a) four persons registered and practising as auditors;
- (b) two persons responsible for preparing financial statements on behalf of public interest companies;
- (c) two persons responsible for preparing financial statements for limited interest companies;
- (d) four users of financial statements;
- (e) two persons knowledgeable in company law nominated by the Minister;
- (f) one person nominated by the executive officer of the Financial Services Board; and
- (g) one person each nominated by every exchange which imposes adherence to financial reporting standards as a listing requirement.

(4) The Council shall be autonomous and its members shall serve to promote the objective of the Council.

[S. 440P inserted by s. 53 of Act 24 of 2006.]

#### **440Q Appointment and removal of Council members**

(1) The Minister shall appoint as members of the Council-

- (a) the persons nominated from time to time under section 440P (3) (e) to (g); and
- (b) persons selected in terms of subsection (2).

(2) The Minister shall-

- (a) advertise any vacancies under section 440P (3) (a) to (d) and allow at least one month for nominations;
- (b) select and appoint persons -
  - (i) with the qualifications, knowledge and experience necessary to further the objective of the Council;
  - (ii) who are not full-time employees of the government or of a statutory body;
- (c) appoint the chairperson and deputy chairperson of the Council.

(3) Members appointed in terms of subsection (2) (b) and (c) shall be appointed every three years and may not serve for more than six consecutive years.

(4) For the sake of continuity, the Minister shall ensure that five or more of the persons appointed-

- (a) at the time the Council is established, shall be former members of the Accounting Practices Board; and
- (b) at every subsequent appointment, shall be former members of the Council.

(5) The Minister-

- (a) must remove a member of the Council-
  - (i) who becomes insolvent, is certified as mentally unfit, or is convicted of an offence and sentenced to imprisonment without the option of a fine;
  - (ii) who becomes permanently incapacitated;
  - (iii) who has been absent without the chairperson's leave, or in the case of the chairperson, without the deputy chairperson's leave, from three consecutive meetings of the Council; or
  - (iv) contemplated in section 440P (3) (a) to (d), who ceases to be a user, preparer or auditor of financial statements;
- (b) may remove a member of the Council for-
  - (i) non-performance of duties;
  - (ii) serious misconduct; or
  - (iii) conduct that undermines the integrity or objective of the Council.

(6) A vacancy arising at any time other than the close of a three-year cycle shall be filled in the manner described in subsection (2).

[S. 440Q inserted by s. 53 of Act 24 of 2006.]

#### **440R Officers and meetings of Council**

(1) The Council must-

- (a) determine the procedures to be followed at its meetings;
- (b) meet at least three times a year on dates set by the chairperson.

(2) Each member of the Council shall have one vote and a decision of the majority of the members present at a meeting, where at least three quarters of the members are present, constitutes a decision of the Council.

(3) The Council may establish and appoint members to subcommittees to assist in performing the functions of the Council.

(4) Meetings of the Council shall be open to the public.

[S. 440R inserted by s. 53 of Act 24 of 2006.]

#### **440S Functions of Council**

(1) The Council shall-

- (a) establish financial reporting standards for public interest companies; and
- (b) develop accounting standards for limited interest companies.

(2) Financial reporting standards mentioned in subsection (1) (a) shall be in accordance with

the International Financial Reporting Standards of the International Accounting Standards Board or its successor body.

(3) Standards mentioned in subsection (1) (b) shall be developed in consultation with representatives of limited interest companies.

[S. 440S inserted by s. 53 of Act 24 of 2006.]

#### **440T Interested persons in respect of Council**

A person wishing to receive notice of vacancies on the Council, advance notice of meetings of the Council or drafts of any prospective amendment to financial reporting standards may register with the Council as an interested person.

[S. 440T inserted by s. 53 of Act 24 of 2006.]

#### **440U Approval and publication of standards**

(1) The Council must-

- (a) give notice to interested persons of any prospective amendment of financial reporting standards, with at least one month to return comment;
- (b) consider any comments made before voting on an amendment;
- (c) submit financial reporting standards to the Minister.

(2) The Minister shall issue financial reporting standards on the advice of the Council by publication in the *Gazette*.

[S. 440U inserted by s. 53 of Act 24 of 2006.]

#### **440V Monitoring**

(1) The Minister may, after consultation with the Financial Services Board, specify, by proclamation in the *Gazette*, types or categories of public interest companies to be monitored in terms of this section.

(2) The Minister shall nominate a suitably qualified officer who shall-

- (a) monitor the financial reports and accounting practices of public interest companies contemplated in subsection (1) in order to detect non-compliance with financial reporting standards that may prejudice users; and
- (b) where reasonable grounds exist for suspecting such non-compliance:
  - (i) document the incident; and
  - (ii) refer it to the executive officer of the Financial Reporting Investigations Panel referred to in section 440W.

(3) For the purposes of subsection (2), the nominated officer may in writing direct any person believed to have knowledge or information relating to a company mentioned in subsection (1) to-

- (a) deliver or produce information;
- (b) submit written answers to questions;
- (c) appear at a place designated by the nominated officer to be questioned.

(4) The powers conferred by subsection (3) are subject to the law of privilege.

[S. 440V inserted by s. 53 of Act 24 of 2006.]

#### **440W Establishment of Panel**

(1) There is hereby established a body corporate known as the Financial Reporting Investigations Panel.

(2) The Panel's objective is to contribute to the reliability of financial reports by investigating alleged non-compliance with financial reporting standards and recommending appropriate measures for rectification or restitution.

(3) The Panel shall consist of-

- (a) an executive officer;
- (b) six auditors;
- (c) six chartered accountants that are not registered as auditors;

- (d) four persons qualified in law;
- (e) one person nominated by the executive officer of the Financial Services Board; and
- (f) one person, nominated by the exchange in question, for each exchange that imposes adherence to accounting standards as a listing requirement.

[S. 440W inserted by s. 53 of Act 24 of 2006.]

#### **440X Appointment and removal of members of Panel**

- (1) The Minister shall appoint as members of the Panel-
  - (a) the persons nominated under section 440W (3) (e) and (f); and
  - (b) persons selected in terms of subsection (2).
- (2) The Minister shall-
  - (a) advertise vacancies under section 440W (3) (a) to (d) and allow at least one month for nominations;
  - (b) select candidates who-
    - (i) have the qualifications, knowledge and experience necessary to further the objective of the Panel;
    - (ii) are not full-time employees of government or of a statutory body;
  - (c) appoint a chairperson and deputy chairperson from members nominated under section 440W (c) and (e).

(3) Members appointed under subsection (2) shall be appointed every three years and may not serve for more than six consecutive years.

(4) For the sake of continuity, the Minister shall ensure that five or more of the candidates appointed-

- (a) at the time the Panel is established, shall be members of the GAAP Monitoring Panel of the JSE Limited; and
- (b) at every subsequent appointment, shall be former members of the Panel.

(5) The Minister-

- (a) must remove a member of the Panel who-
  - (i) becomes insolvent;
  - (ii) is certified as mentally unfit;
  - (iii) is convicted of an offence and sentenced to imprisonment without the option of a fine;
  - (iv) fails to disclose a conflict of interests; or
  - (v) is permanently incapacitated; and
- (b) may remove a member of the Panel if the member-
  - (i) regularly declines nomination to an investigation committee;
  - (ii) is not conscientious in the performance of an investigation;
  - (iii) engages in an activity that may undermine the integrity or objective of the Panel.

(6) A vacancy arising at any time other than the close of a three-year cycle shall be filled in the manner described in subsection (2).

[S. 440X inserted by s. 53 of Act 24 of 2006.]

#### **440Y Interested persons in respect of Panel**

A person wishing to receive notice of vacancies on the Panel may register with the executive officer of the Panel as an interested person.

[S. 440Y inserted by s. 53 of Act 24 of 2006.]

#### **440Z Officers and meetings of Panel**

- (1) The Panel shall-
  - (a) determine the procedures to be followed at its meetings;
  - (b) determine the procedures to be followed by an investigation committee;

(c) meet at least twice a year on dates set by the chairperson.

(2) The procedures determined under subsection (1) (b) shall be in accordance with the Promotion of Administrative Justice Act, 2000 (Act 3 of 2000).

(3) Each member present at a meeting of the Panel shall have one vote and the decision of a majority of the members at any meeting of the Panel where at least two thirds of the members are present, constitutes a decision of the Panel.

[S. 440Z inserted by s. 53 of Act 24 of 2006.]

#### **440AA Investigation of non-compliance**

(1) Any person who has reason to believe that a financial report of a widely held company failed to comply with a financial reporting standard may refer the matter to the executive officer of the Panel for investigation.

(2) Every matter referred to the executive officer shall be noted and the following information recorded:

- (a) the date of receipt;
- (b) the name of the company suspected of non-compliance;
- (c) the nature of the alleged non-compliance;
- (d) the financial report containing evidence of the alleged non-compliance;
- (e) whether the matter was referred to the chairperson of the Panel under subsection (3) and the reasons therefor; and
- (f) if the matter was investigated, the report of the investigation committee;
- (g) the persons to whom the report mentioned in paragraph (d) was published;
- (h) the date of publication; and
- (i) if an administrative penalty was agreed to under section 440FF (2), the amount of the penalty agreed upon and how it was calculated.

(3) The executive officer shall within five business days of a matter being referred under subsection (1) assess whether the matter warrants investigation and, if so, submit all relevant information to the chairperson of the Panel, with reference to the financial reporting standards in question.

(4) The chairperson shall within seven business days of receipt of a recommendation under subsection (3)-

- (a) appoint an investigation committee; and
- (b) notify the company being investigated.

(5) Members appointed to an investigation committee shall recuse themselves if-

- (a) they have an interest in the company being investigated or in the outcome of the investigation;
- (b) serving on the committee would give rise to any other conflict of interest.

(6) An investigation committee shall consist of-

- (a) one Panel member qualified in law; and
- (b) two or more Panel members qualified in accounting.

(7) The investigation committee shall-

- (a) follow the procedures determined from time to time by the Panel;
- (b) investigate whether there was a failure to comply with financial reporting standards;
- (c) if necessary, consult with any specialist advisors;
- (d) assess the materiality of any failure and its prejudice to users;
- (e) within 18 business days of its commencement, deliver a written report on the findings of its investigation to the executive officer; and
- (f) if appropriate, make recommendations on how non-compliance may be rectified.

(8) If the committee has not concluded its investigation within the 18 business days

contemplated in subsection (7) (e), the committee shall deliver a provisional report, and the executive officer may then allow additional time or otherwise direct how the investigation should proceed.

(9) If the members of the committee did not reach consensus on the fact or extent of the alleged non-compliance, the written report mentioned in subsection (7) (e) must record the different opinions.

(10) The Minister may, in respect of a particular investigation, by proclamation in the *Gazette*, extend the number of days prescribed in subsections (3), (4) and (7).

[S. 440AA inserted by s. 53 of Act 24 of 2006.]

#### **440BB Powers of investigation committee**

(1) For the purposes of section 440AA (7), an investigation committee may in writing direct any person believed to have knowledge or information relating to a company under investigation to-

- (a) deliver or produce information;
- (b) submit written responses to questions posed by the committee;
- (c) appear at a place designated by the committee to be questioned.

(2) The powers conferred by subsection (1) are subject to the law of privilege.

[S. 440BB inserted by s. 53 of Act 24 of 2006.]

#### **440CC Confidentiality**

(1) A member of an investigation committee shall keep confidential the names of the other members of the committee and any information disclosed to him or her during the course of an investigation and not publish it to any other person or use it for any purpose other than to discharge duties in terms of this Chapter or to comply with any law.

(2) Any person who contravenes the provisions of subsection (1) shall be guilty of an offence.

[S. 440CC inserted by s. 53 of Act 24 of 2006.]

#### **440DD Advisors**

Section 440AA (5) and section 440CC shall, with the necessary changes, apply also to specialist advisors consulted under section 440AA (7) (c).

[S. 440DD inserted by s. 53 of Act 24 of 2006.]

#### **440EE Publication**

(1) The executive officer shall within five business days of the receipt of a report of an investigation committee issue a copy thereof to the company investigated.

(2) Any response by the company must be submitted to the executive officer in writing within seven business days of receipt of the report, and referred back to the investigation committee.

(3) After due consideration of the response, the investigation committee may amend the report and must within 14 business days of receipt of the company's response resubmit the report to the executive officer.

(4) If no response was received by the date specified in subsection (2), within two business days of that date, or if a response was received, within two business days of the resubmission of the report, the executive officer-

- (a) shall publish the report to-
  - (i) the Registrar; and
  - (ii) any exchange on which shares of the company are listed;
- (b) may, if it is in the interest of users, publish the report to-
  - (i) any other regulator;
  - (ii) any professional body representing accountants or auditors; or
  - (iii) the news media.

(5) The Registrar shall make a report available for inspection by the public within two months after its publication.

[S. 440EE inserted by s. 53 of Act 24 of 2006.]

#### **440FF Offence and penalty**

(1) A widely held company which issues a financial report that fails to comply with a financial reporting standard, and every director of the company who has signed or was party to the preparation or approval of the financial report, shall be guilty of an offence.

(2) A company under investigation may with the agreement of the Minister-

- (a) pay an administrative penalty;
- (b) revise and republish the financial report;
- (c) take any other remedial action; or
- (d) undertake any combination of the measures listed in paragraphs (a) to (c), within a designated time.

(3) The amount and action contemplated in subsection (2) shall be decided by the nominated officer in consultation with the executive officer and the chairperson of the Panel, and be based on-

- (a) the nature, extent and materiality of the failure;
- (b) whether the failure was deliberate or reckless;
- (c) any prospective loss or damage to users as a result of the failure;
- (d) the probable influence of the failure on the economic decisions of users;
- (e) any previous failures of the same company;
- (f) any other relevant factor.

(4) If a company and the Minister do not reach agreement under subsection (2), or if the company fails to pay or take remedial action as agreed, the Minister must refer the matter to the National Director of Public Prosecutions.

(5) A court shall not convict a company or director of an offence under subsection (1) or section 287 if-

- (a) it is satisfied that the company has performed substantially in terms of an agreement under subsection (2); or
- (b) the company or director has been convicted of an offence under section 287A.

[S. 440FF inserted by s. 53 of Act 24 of 2006.]

#### **440GG Limitation of liability**

Neither the Council, the Panel nor their respective members and employees shall be held liable for any loss sustained or damages caused to any person as a result of any *bona fide* act or omission relating to the performance of their duties under this Chapter, unless gross negligence is proved.

[S. 440GG inserted by s. 53 of Act 24 of 2006.]

#### **440HH Annual reports**

The chairperson of the Council and the executive officer of the Panel shall submit to the Minister an annual report on their respective activities in the preceding calendar year.

[S. 440HH inserted by s. 53 of Act 24 of 2006.]

#### **440II Administrative support**

(1) The Minister, in support of the Council and the Panel, shall-

- (a) provide offices;
- (b) employ staff;
- (c) open and operate banking accounts;
- (d) insure against risk;
- (e) perform other administrative acts;
- (f) perform legal acts and institute or defend any legal action; and
- (g) meet all reasonable expenditure.

(2) The Minister may delegate to each of the executive officers of the Council and the Panel any power necessary for the performance of the acts in subsection (1).

[S. 440II inserted by s. 53 of Act 24 of 2006.]

#### **440JJ Remuneration and reimbursements**

The Minister shall, from funds appropriated by Parliament for that purpose, remunerate members appointed under sections 440Q (1) (b) and 440X (1) (b) and reimburse reasonable expenses incurred in the performance of their duties.

[S. 440JJ inserted by s. 53 of Act 24 of 2006.]

## CHAPTER XVI PENALTIES FOR OFFENCES (s 441)

### 441 Penalties for offences

#### Cases

(1) Any company, director, officer or person convicted of any offence referred to in any of the undermentioned sections shall be liable to be sentenced, in the case of an offence referred to-

- (a) in section 440F (1), to a fine or to imprisonment for a period not exceeding 10 years or to both such fine and such imprisonment;

[Para. (a) substituted by s. 7 (a) of Act 69 of 1990.]

- (b) in section 132, to a fine or to imprisonment for a period not exceeding 10 years or to both such fine and such imprisonment;

- (bA) in section 440FF (1), to a fine not exceeding R1 000 000;

[Para. (bA) inserted by s. 54 (a) of Act 24 of 2006.]

- (c) in section 440I (2), 440CC (2) or that section as applied by 440DD, to a fine or to imprisonment for a period not exceeding five years or to both a fine and such imprisonment;

[Para. (c) substituted by s. 54 (b) of Act 24 of 2006.]

- (d) in section 37, 140A, 143, 145, 145A, 146, 146A, 147 (2) (a), 148, 149, 153 (4), 156, 162, 169, 218, 219, 255, 256 (5), 260, 284, 287A, 424 or 440D (3) or (4), to a fine or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment;

[Para. (d) substituted by s. 21 (a) of Act 37 of 1999 and by s. 54 (c) of Act 24 of 2006.]

- (e) in section 15A, 38, 141, 153 (3), 165, 222, 226, 234, 237, 238, 249 (1), 250, 251 or 275, to a fine or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment;

- (f) in section 90, 286, 288, 297, 298, 299, 300A, 302, 308, 312 (5), 363, 363A, 365, 414, 418 (5) or 421, to a fine or to imprisonment for a period not exceeding six months or to both a fine and such imprisonment;

[Para. (f) substituted by s. 54 (c) of Act 24 of 2006.]

- (g) in section 242, 268C, 268I or 287 to a fine or to imprisonment not exceeding a period of three months or to both a fine and such imprisonment;

[Para. (g) substituted by s. 21 (b) of Act 37 of 1999 and by s. 54 (c) of Act 24 of 2006.]

- (h) in section 168, 185, 256 (6), 312 (4), 331 (1) or 333 (1), to a fine;

[Para. (h) substituted by s. 21 (c) of Act 37 of 1999 and by s. 27 of Act 35 of 2001.]

- (i) in section 81, 93, 164, 166, 170, 207, 211 (7), 239, 291 or 295, to a fine;

- (j) in section 112, 113, 131 or 179, to a fine;

- (k) in section 49, 50, 67, 68, 147 (2) (b), 181, 186, 189, 192, 206, 313 or 333 (2), to a fine;

- (l) in section 204 or 245, to a fine for every meeting in respect of which the contravention has taken place;

- (m) in section 171, 200 (5), 268H or 311, to a fine;

[Para. (m) substituted by s. 21 (d) of Act 37 of 1999.]

- (n) in section 215, to a fine and an additional fine not exceeding R40 for every day during which the contravention continues;

- (o) in section 172, to a fine for every day during which the contravention continues;

- (p) in section 46, 51, 58, 80, 96, 98, 102, 139, 200 (6), 213, 253, 269, 271, 309, 356 or 357, to a fine for every day during which the contravention continues;
- (q) in section 211 (6), 216 (5), 252 or 276 (5), to a fine for every day during which the contravention continues.

[Sub-s. (1) amended by s. 30 of Act 111 of 1976, by s. 29 of Act 64 of 1977, by section s. 27 of Act 59 of 1978, by s. 16 of Act 84 of 1980, by s. 30 of Act 83 of 1981, by s. 11 of Act 29 of 1985 and by s. 15 of Act 31 of 1986 and substituted by s. 5 of Act 78 of 1989 and by s. 19 of Act 35 of 1998.]

(2) The Court convicting any company, director, officer or person for failure to perform any act required to be performed by it or him by or under this Act, may, in addition to any penalty which the Court imposes, order such company, director, officer or person to perform such act within such period as the Court may fix.

## CHAPTER XVII

### REPEAL OF LAWS AND COMMENCEMENT OF ACT (ss 442-443)

#### 442 Repeal of laws

The laws specified in Schedule 5 are hereby repealed to the extent set out in the third column of that Schedule.

#### 443 Short title and date of commencement

This Act shall be called the Companies Act, 1973, and shall come into operation on the first day of January, 1974, except sections 15 and 18 which shall come into operation on promulgation of this Act, and except such other sections as may be determined by the Minister which shall come into operation on a date fixed by the State President by proclamation in the *Gazette*.

### Schedule 1

Cases

## TABLE A

### ARTICLES FOR A PUBLIC COMPANY HAVING A SHARE CAPITAL

#### Interpretation

1. In these articles, unless the context otherwise indicates-
  - (a) 'the Act' means the Companies Act, 1973; and
  - (b) 'foreign committee' means a committee appointed under article 64 of these articles.

#### Commencement of Business

2. The directors shall have regard to the restrictions on the commencement of business imposed by section 172 of the Act.

#### Shares and Certificates of Shares

3. Subject to the provisions, if any, of the memorandum, and without prejudice to any special rights previously conferred on the holders of existing shares, any share may be issued with such preferred, deferred or other special rights, or subject to such restrictions (whether in regard to dividend, voting, return of share capital or otherwise) as the company may from time to time determine, and the company may determine that any preference shares shall be issued on the condition that they are, or are at the option of the company, liable to be redeemed.

4. Every person whose name is entered in the register of members shall be entitled to one certificate for all the shares registered in his name, or to several certificates, each for a part of such shares. Every share certificate shall specify the number of shares in respect of which it is issued. Every original member shall be entitled to one share certificate free of charge but for every subsequent certificate the directors may make such charge as from time to time they may think fit: Provided that if a share certificate is defaced, lost or destroyed, it may be renewed on payment of such fee, if any, not exceeding twenty-five cents, and on such terms, if any, as to evidence and indemnity as the directors may think fit.

5. Share certificates shall be issued under the authority of the directors, or the foreign

committee when authorised thereto by resolution of the directors, in such manner and form as the directors shall from time to time prescribe. If any shares are numbered all such shares shall be numbered in numerical progression beginning with the number one, and each share shall be distinguished by its appropriate number; and, if any shares are not numbered, each share certificate in respect of such shares shall be numbered in numerical progression and each share certificate distinguished by its appropriate number and by such endorsement as may be required under section 95 (2) of the Act.

6. A certificate for shares registered in the names of two or more persons shall be delivered to the person first named in the register as a holder thereof, and delivery of a certificate for a share to that person shall be a sufficient delivery to all joint holders of that share.

#### **Variation of Rights**

7. If at any time the share capital is divided into different classes of shares, the rights attached to any class (unless otherwise provided by the terms of issue of the shares of that class) may be varied with the consent in writing of the holders of three-fourths of the issued shares of that class or with the sanction of a resolution passed at a separate general meeting of the holders of the shares of the class, and the provisions of section 199 of the Act shall *mutatis mutandis* apply to the said resolution and meeting as if the resolution were a special resolution. To every such separate general meeting the provisions of these articles relating to general meetings shall *mutatis mutandis* apply but so that the necessary quorum, unless the company has only one member, shall be two persons holding or representing by proxy at least one-third of all the issued shares of the class.

#### **Register of Members**

8.(a) The company shall maintain at its registered office a register of members of the company as provided in section 105 of the Act. The register of members shall be open to inspection, as provided in section 113 of the Act.

(b) The company may maintain a branch register under section 110 of the Act and the provisions of paragraph (a) shall *mutatis mutandis* apply to such register.

#### **Payment of Commission**

9.(a) The company may pay a commission at a rate not exceeding ten per cent of the issue price of a share to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, for any shares of the company or for procuring or agreeing to procure, whether absolutely or conditionally, subscriptions for any shares of the company.

(b) Such commission may be paid in cash or by the allotment of shares of the company.

(c) The company may, on any issue of shares, pay such brokerage as may be lawful.

#### **Transfer and Transmission of Shares**

10. The instrument of transfer of any share of the company, not being a security in terms of section 134 of the Act, shall be executed both by the transferor and transferee, and the transferor shall be deemed to remain the holder of the share until the name of the transferee is entered in the register of members in respect thereof.

11. Subject to such of the restrictions as may be applicable, any member may transfer all or any of his shares by instrument in writing in any usual or common form or any other form which the directors may approve.

12. The directors may suspend the registration of transfers during the fourteen days immediately preceding any general meeting of the company and at any other times, provided that the periods of suspension shall not in any one year exceed sixty days.

13. The directors may decline to recognise any instrument of transfer unless-

(a) a sum not exceeding twenty-five cents is paid to the company in respect thereof;

(b) the instrument of transfer is accompanied by the certificate of the shares to which it relates, and such other evidence as the directors may reasonably require to show the

right of the transferor to make the transfer; and

(c) the share transfer duty thereon has been paid.

14. Every instrument of transfer shall be left at a transfer office of the company at which it is presented for registration, accompanied by a certificate of the shares to be transferred. Every power of attorney given by a shareholder authorising the transfer of shares, shall, when lodged, produced or exhibited to the company or any of its proper officers, be deemed as between the company and the donor of the power to continue and remain in full force and effect, and the company may allow that power to be acted upon until such time as express notice in writing of its revocation has been lodged at such of the company's transfer offices as the power was lodged, produced, or exhibited as aforesaid. The company shall not be bound to allow the exercise of any act or matter by an agent for a shareholder unless a duly certified copy of that agent's authority be produced and lodged with the company.

15. The executor of the estate of a deceased sole holder of a share shall be the only person recognised by the company as having any title to the share. In the case of a share registered in the names of two or more holders, the survivors or survivor, or the executor of the deceased survivor shall be the only persons recognised by the company as having any title to the share.

16. Any person becoming entitled to a share in consequence of the death or insolvency of a member shall, upon such evidence being produced as may from time to time be required by the directors, have the right, either to be registered as a member in respect of the share or instead of being registered himself, to make such transfer of the share as the deceased or insolvent could have made, but the directors shall, in either case, have the same right to decline or suspend registration as they would have had in the case of a transfer of the share by the deceased or insolvent before the death or insolvency.

17. The parent or guardian of a minor and the *curator bonis* of a lunatic member and any person becoming entitled to shares in consequence of the death or insolvency of any member or the marriage of any female member or by any lawful means other than by transfer in accordance with these articles, may, upon producing such evidence as sustains the character in which he proposes to act under this article, or of his title, as the directors think sufficient, transfer those shares to himself or any other person subject to the articles as to transfer hereinbefore contained.

This article is hereinafter referred to as the 'transmission clause'.

18. A person becoming entitled to a share by reason of the death or insolvency of the holder shall be entitled to the same dividends and other advantages to which he would be entitled if he were the registered holder of the share, except that he shall not, before being registered as a member in respect of the share, be entitled in respect of it to exercise any right conferred by membership in relation to meetings of the company.

19. A person who submits proof of his appointment as the executor, administrator, trustee, curator or guardian in respect of the estate of a deceased member of the company or the estate of a member whose estate has been sequestrated, or who is otherwise under a disability or as the liquidator of any body corporate which is a member of the company shall be entered in the register or members of the company *nomine officii*, and shall thereafter, for all purposes, be deemed to be a member of the company.

### **Conversion of Shares into Stock**

20. The company may by special resolution convert all or any of its paid-up shares into stock, and reconvert such stock into any number of paid-up shares.

21. The holders of stock may transfer the same, or any part thereof, in the same manner, and subject to the same articles as the shares from which the stock arose might prior to conversion have been transferred, or as near thereto as circumstances permit; but the directors may from time to time fix the minimum amount of stock transferable, and restrict or forbid the transfer of fractions of such

minimum, but the minimum shall not exceed the nominal amount, in the case of shares of par value or the issue price in the case of shares of no par value, of the shares from which the stock arose.

22. The holders of stock shall, according to the amount of the stock held by them, have the same rights, privileges, and advantages as regards dividends, voting at meetings of the company and other matters as if they held the shares from which the stock arose, but no such privilege or advantage (except participation in the dividends and profits of the company) shall be conferred by any such aliquot part of stock as would not, if existing in shares, have conferred that privilege or advantage.

23. Such of the articles of the company (other than those relating to share warrants) as are applicable to shares shall apply to stock, and the word 'share' and 'shareholder' therein shall include 'stock' and 'stock-holder'.

### Share Warrants

24. The company may issue share warrants, and accordingly the directors or, if so authorised, any foreign committee, may, in their discretion, with respect to any share, on application in writing signed by the person registered as holder of the share, and authenticated by such evidence as the directors or foreign committee may from time to time require as to the identity of the person signing the request, and on receiving the certificate of the share and the stamp duty (if any), on the warrant and such sum as the directors may from time to time require, issue a warrant, duly stamped, if stamp duty is payable, stating that the bearer of the warrant is entitled to the shares therein specified and may provide by coupons or otherwise for the payment of dividends or other moneys, on the shares included in the warrant.

25. A share warrant shall entitle the bearer to the shares included in it and the shares shall be transferred by the delivery of the share warrant, and the provisions of the articles of the company with respect to transfer and transmission of shares shall not apply thereto.

26. The bearer of a share warrant shall, on surrender of the warrant to the company for cancellation, and on payment of such sum as the directors may from time to time prescribe, be entitled to have his name entered as a member in the register of members in respect of the shares included in the warrant.

27. The bearer of a share warrant may at any time deposit the warrant at the office of the company, and so long as the warrant remains so deposited the depositor shall have the same right of signing a requisition for calling a meeting of the company, and of attending and voting and exercising the other privileges of a member at any meeting held after the expiration of two clear days from the time of the deposit, as if his name were inserted in the register of members as the holder of the shares included in the deposited warrant. Not more than one person shall be recognised as depositor of the share warrant. The company shall, on two days' written notice, return the deposited share warrant to the depositor.

28. Save as herein otherwise expressly provided, no person shall as bearer of a share warrant, sign a requisition for calling a meeting of the company, or attend, or vote, or exercise any other privilege of a member at a meeting of the company, or be entitled to receive any notices from the company; but the bearer of a share warrant shall be entitled in all other respects to the same privileges and advantages as if he were named in the register of members as the holder of the shares included in the warrant, and he shall be a member of the company.

29. The directors may from time to time make rules as to the terms on which (if they think fit) a new share warrant or coupon may be issued by way of renewal in case of defacement, loss or destruction.

### Alteration of Capital

30.(a) The company may from time to time by special resolution increase the share capital by such sum divided into shares of such amount, or may increase the number of its shares of no par value to such number, as the resolution shall prescribe.

(b) The company may increase its share capital constituted by shares of no par value by transferring reserves or profits to the stated capital, with or without a distribution of shares.

(c) New shares shall be subject to the same provisions as to transfer, transmission and otherwise as the shares in the original capital.

31. The company may, by special resolution-

- (a) consolidate and divide all or any of its share capital into shares of larger amount than its existing shares or consolidate and reduce the number of the issued shares of no par value;
- (b) increase the number of its issued no par value shares without an increase of its stated capital;
- (c) sub-divide its existing shares or any of them into shares of smaller amount than is fixed by its memorandum;
- (d) convert all of its ordinary or preference share capital consisting of shares having a par value into stated capital constituted by shares of no par value;
- (e) convert its stated capital constituted either by ordinary or preference shares of no par value into share capital consisting of shares having a par value;
- (f) cancel any shares which, at the date of the passing of the resolution, have not been taken by any person, or which no person has agreed to take;
- (g) reduce its share capital, stated capital, any capital redemption fund or any share premium account in any manner and with, and subject to, any incident authorised, and consent required, by law;
- (h) subject to the provisions of section 99 of the Act, convert its issued preference shares into shares which can be redeemed.

#### **General Meetings**

32. The company shall hold its first annual general meeting within eighteen months after the date of its incorporation and shall thereafter in each year hold an annual general meeting: Provided that not more than fifteen months shall elapse between the date of one annual general meeting and that of the next and that an annual general meeting shall be held within six months after the expiration of the financial year of the company.

33. Other general meetings of the company may be held at any time.

34. Annual general meetings and other general meetings shall be held at such time and place as the directors shall appoint or at such time and place as is determined if the meetings are convened under section 179 (4), 181, 182 or 183 of the Act.

#### **Notice of General Meetings**

35. An annual general meeting and a meeting called for the passing of a special resolution shall be called by not less than twenty-one clear days' notice in writing and any other general meeting shall be called by not less than fourteen clear days' notice in writing. The notice shall be exclusive of the day on which it is served or deemed to be served and of the day for which it is given, and shall specify the place, the day and the hour of the meeting and shall be given in manner hereinafter mentioned or in such other manner, if any, as may be prescribed by the company in general meeting, to such persons as are, under these articles, entitled to receive such notices from the company: Provided that a meeting of the company shall, notwithstanding the fact that it is called by shorter notice than that specified in this article, be deemed to have been duly called if it is so agreed by a majority in number of the members having a right to attend and vote at the meeting, being a majority holding not less than ninety-five per cent of the total voting rights of all the members.

#### **Proceedings at General Meetings**

36. The annual general meeting shall deal with and dispose of all matters prescribed by the Act, including the sanctioning of a dividend, the consideration of the annual financial statements, the

election of directors and the appointment of an auditor, and may deal with any other business laid before it. All business laid before any other general meeting shall be considered special business.

37. No business shall be transacted at any general meeting unless a quorum of members is present at the time when the meeting proceeds to business. Save as herein otherwise provided, three members present in person or by proxy, or if the company is a wholly owned subsidiary, the nominee of the holding company, present in person or by proxy, shall be a quorum.

38. If within half an hour after the time appointed for the meeting a quorum is not present, the meeting, if convened upon the requisition of members, shall be dissolved; in any other case it shall stand adjourned to a day not earlier than seven days and not later than twenty-one days after the date of the meeting and if at such adjourned meeting a quorum is not present within half an hour after the time appointed for the meeting the members present in person or by proxy shall be a quorum.

39. Where a meeting has been adjourned as aforesaid, the company shall, upon a date not later than three days after the adjournment, publish in a newspaper circulating in the province where the registered office of the company is situated, a notice stating-

- (a) the date, time and place to which the meeting has been adjourned;
- (b) the matter before the meeting when it was adjourned; and
- (c) the ground for the adjournment.

40. The chairman, if any, of the board of directors shall preside as chairman at every general meeting of the company. If there is no such chairman, or if at any meeting he is not present within fifteen minutes after the time appointed for holding the meeting or is unwilling to act as chairman, the members present shall elect one of their number to be chairman.

41. The chairman may, with the consent of any meeting at which a quorum is present (and shall, if so directed by the meeting), adjourn the meeting from time to time and from place to place, but no business shall be transacted at any adjourned meeting other than the business left unfinished at the meeting at which the adjournment took place. When a meeting is adjourned, the provisions of articles 38 and 39 shall *mutatis mutandis* apply to such adjournment.

42. At any general meeting a resolution put to the vote of the meeting shall be decided on a show of hands, unless a poll is (before or on the declaration of the result of the show of hands) demanded by the chairman or members referred to in section 198 (1) (b) of the Act, and, unless a poll is so demanded, a declaration by the chairman that a resolution has, on a show of hands, been carried or carried unanimously or by a particular majority or negatived, and an entry to that effect in the book containing the minutes of the proceedings of the company, shall be conclusive evidence of the fact, without proof of the number or proportion of the votes recorded in favour of or against such resolution. The demand for a poll may be withdrawn.

43. If a poll is duly demanded it shall be taken in such manner as the chairman directs, and the result of the poll shall be deemed to be the resolution of the meeting at which the poll was demanded. Scrutineers shall be elected to determine the result of the poll. In the case of an equality of votes, whether on a show of hands or on a poll, the chairman of the meeting at which the show of hands takes place, or at which the poll is demanded, shall be entitled to a second or casting vote.

44. A poll demanded on the election of a chairman or on a question of adjournment, shall be taken forthwith. A poll demanded on any other question shall be taken at such time as the chairman of the meeting directs. The demand for a poll shall not prevent the continuation of a meeting for the transaction of any business other than the question upon which the poll has been demanded.

#### **Inspection of Minutes**

45. The minutes kept of every general meeting and annual general meeting of the company under section 204 of the Act, may be inspected and copied as provided in section 113 of the Act.

#### **Votes of Members**

46. Subject to any rights or restrictions for the time being attached to any class or classes of

shares, on a show of hands every member present in person and if a member is a body corporate, its representative, shall have one vote and on a poll every member present in person or by proxy shall be entitled to exercise the voting rights determined by section 195 of the Act.

47. In the case of joint holders the vote of the person whose name appears first in the register of members and who tenders a vote, whether in person or by proxy, shall be accepted to the exclusion of the votes of the other joint holders.

48. The parent or guardian of a minor, and the *curator bonis* of a lunatic member, and also any person entitled under the transmission clause to transfer any shares, may vote at any general meeting in respect thereof in the same manner as if he were the registered holder of those shares: Provided that forty-eight hours at least before the time of holding the meeting at which he proposes to vote he shall satisfy the directors that he is such parent, guardian or *curator* or that he is entitled under the transmission clause to transfer those shares, or that the directors have previously admitted his right to vote in respect of those shares. Co-executors of a deceased member in whose name shares stand in the register shall, for the purposes of this article, be deemed to be joint holders of those shares.

49. On a poll, votes may be given either personally or by proxy.

**Proxies**

50. The instrument appointing a proxy shall be in writing under the hand of the appointer or of his agent duly authorised in writing, or, if the appointer is a body corporate, under the hand of an officer or agent authorised by the body corporate. A proxy need not be a member of the company. The holder of a general or special power of attorney, whether he is himself a member or not, given by a shareholder shall be entitled to attend meetings and to vote, if duly authorised under that power to attend and take part in the meetings.

51. The instrument appointing a proxy and the power of attorney or other authority, if any, under which it is signed or a notarially certified copy of such power or authority shall be deposited at the registered office of the company not less than forty-eight hours before the time for holding the meeting at which the person named in the instrument proposes to vote, and in default of complying herewith the instrument of proxy shall not be treated as valid. No instrument appointing a proxy shall be valid after the expiration of six months from the date when it was signed, unless so specifically stated in the proxy itself, and no proxy shall be used at an adjourned meeting which could not have been used at the original meeting.

52. The instrument appointing a proxy shall be in the following form or as near thereto as circumstances permit:

' ..... Limited

I, .....of .....  
being a member of the .....Limited,  
hereby appoint

..... of ..... or failing him  
..... of ..... or failing him  
..... of .....,

as my proxy to vote for me and on my behalf at the annual general or general meeting (as the case may be) of the company to be held on the..... day of ..... and at any adjournment thereof as follows:

|                     | <i>In favour of</i> | <i>Against</i> |
|---------------------|---------------------|----------------|
| Resolution to ..... |                     |                |
| Resolution to ..... |                     |                |
| Resolution .....    |                     |                |

to.....

\_\_\_\_\_

(Indicate instruction to proxy by way of a cross in space provided above.)

Unless otherwise instructed, my proxy may vote as he thinks fit.

Signed this ..... day of .....

.....

*Signature*

**Directors**

53. The number of the directors shall not be less than two and the names of the first directors may be determined in writing by a majority of the subscribers of the memorandum. Until directors are appointed, whether or not the directors have been named by a majority of the subscribers of the memorandum, every subscriber of the memorandum shall be deemed for all purposes to be a director of the company.

54. The remuneration of the directors shall from time to time be determined by the company in general meeting.

55. If any director be called upon to perform extra services or to make any special exertions in going or residing abroad, or otherwise, for any of the purposes of the company, the company may remunerate that director either by a fixed sum or by a percentage of profits or otherwise as may be determined, and such remuneration may be either in addition to, or in substitution for, the remuneration determined under article 54.

56. The shareholding qualification of a director shall be the holding of at least one share of the company, and it shall be his duty to comply with the provisions of section 213 of the Act, except where the company is a wholly owned subsidiary, when a director shall not be required to hold a share of the company.

**Alternate Directors**

57. Each director shall have the power to nominate any person who is a shareholder of the company (except where the company is a wholly owned subsidiary, when such person need not be a shareholder) possessing the necessary qualifications of a director, to act as alternate director in his place during his absence or inability to act as such director, provided that the appointment of an alternate director shall be approved by the board, and on such appointment being made, the alternate director shall, in all respects, be subject to the terms, qualifications, and conditions existing with reference to the other directors of the company.

58. The alternate directors, whilst acting in the stead of the directors who appointed them, shall exercise and discharge all the powers, duties and functions of the directors they represent. The appointment of an alternate director shall be revoked, and the alternate director shall cease to hold office, whenever the director who appointed him ceases to be a director or gives notice to the secretary of the company that the alternate director representing him has ceased to do so, and in the event of the disqualification or resignation of any alternate director during the absence or inability to act of the director whom he represents, the vacancy so arising shall be filled by the chairman of the directors who shall nominate a person who is a shareholder of the company (except where the company is a wholly owned subsidiary, when such person need not be a shareholder of the company) to fill such vacancy, subject to the approval of the board.

**Powers and Duties of Directors**

59. The business of the company shall be managed by the directors who may pay all expenses incurred in promoting and incorporating the company, and may exercise all such powers of the company as are not by the Act, or by these articles, required to be exercised by the company in general meeting, subject to these articles, to the provisions of the Act, and to such regulations, not inconsistent with the aforesaid articles or provisions, as may be prescribed by the company in general meeting, but no regulation prescribed by the company in general meeting shall invalidate any prior act of the

directors which would have been valid if such regulation had not been prescribed.

#### **Borrowing Powers**

60. The directors may exercise all the powers of the company to borrow money and to mortgage or bind its undertaking and property or any part thereof, and to issue debentures, debenture stock and other securities whether outright or as security for any debt, liability or obligation of the company or of any third party: Provided that the amount for the time being remaining undischarged in respect of moneys borrowed or secured by the directors as aforesaid (apart from temporary loans obtained from the company's bankers in the ordinary course of business) shall not at any time, without the prior sanction of the company in general meeting, exceed one-half of the amount of the issued share capital plus the amount of the share premium account (if any) or of the stated capital.

#### **Managing Director**

61. The directors may from time to time appoint one or more of their body to the office of managing director or manager for such term and at such remuneration (whether by way of salary or commission or participation in profits or partly in one way and partly in another) as they may think fit and may revoke such appointment subject to the terms of any agreement entered into in any particular case. A director so appointed shall not, while holding such office, be subject to retirement by rotation, or taken into account in determining the rotation of retirement of directors; but his appointment shall determine if he ceases for any reason to be a director.

62. The directors may from time to time entrust to or confer upon a managing director or manager, for the time being, such of the powers and authorities vested in them as they may think fit, and may confer such powers and authorities for such time and to be exercised for such objects and purposes and upon such terms and conditions and with such restrictions as they may think expedient, and they may confer such powers and authorities either collaterally or to the exclusion of, or in substitution for, all or any of the powers and authorities of the directors and may from time to time revoke or vary all or any of such powers and authorities.

#### **Minutes**

63. The directors shall, in terms of section 204 of the Act, cause minutes to be kept-

- (a) of all appointments of officers;
- (b) of names of directors present at every meeting of the company and of the directors; and
- (c) of all proceedings at all meetings of the company and of the directors.

Such minutes shall be signed by the chairman of the meeting at which the proceedings took place or by the chairman of the next succeeding meeting.

#### **Foreign Committees**

64. The directors may from time to time appoint persons resident in a foreign country to be a foreign committee for the company in that country with such powers and duties as the directors may from time to time determine. The directors may from time to time establish branch registers of members and transfer offices in foreign countries, close them at any time and may appoint and remove agents for any purposes in any foreign country.

#### **Disqualification of Directors**

65. The office of director shall be vacated if the director-

- (a) ceases to be a director or becomes prohibited from being a director by virtue of any provision of the Act; or
- (b) without the consent of the company in general meeting holds any other office of profit under the company except that of managing director or manager; or
- (c) resigns his office by notice in writing to the company and the Registrar; or
- (d) for more than six months is absent without permission of the directors from meetings of directors held during that period; or
- (e) is directly or indirectly interested in any contract or proposed contract with the company

and fails to declare his interest and the nature thereof in the manner required by the Act.

### **Rotation of Directors**

66. At the first annual general meeting of the company all the directors shall retire from office, and at the annual general meeting in every subsequent year one-third of the directors for the time being, or if their number is not three or a multiple of three, the number nearest to one-third, shall retire from office.

67. The directors to retire in every year shall be those who have been longest in office since their last election, but as between persons who became directors on the same day, those to retire shall, unless they otherwise agree among themselves, be determined by lot.

68. A retiring director shall be eligible for re-election.

69. The company, at the annual general meeting at which a director retires in the manner aforesaid or at any other general meeting may fill the vacancy by electing a person thereto.

70. If at any meeting at which an election of directors ought to take place the offices of the retiring directors are not filled, unless it is expressly resolved not to fill such vacancies, the meeting shall stand adjourned and the provisions of articles 38 and 39 shall apply *mutatis mutandis* to such adjournment, and if at such adjourned meeting the vacancies are not filled, the retiring directors or such of them as have not had their offices filled shall be deemed to have been re-elected at such adjourned meeting unless a resolution for the re-election of any such director shall have been put to the meeting and negatived.

71. The company may from time to time in general meeting increase or reduce the number of directors, and may also determine in what rotation such increased or reduced number is to retire from office.

72. Unless the shareholders otherwise determine in general meeting any casual vacancy occurring on the board of directors may be filled by the directors, but the director so appointed shall be subject to retirement at the same time as if he had become a director on the day on which the director in whose stead he is appointed, was last elected a director.

73. The directors shall have power at any time, and from time to time, to appoint a person as an additional director but so that the total number of directors shall not at any time exceed the number fixed according to these articles, and such director shall retire from office at the next following annual general meeting and shall then be eligible for re-election, but shall not be taken into account in determining which directors are to retire by rotation at such meeting.

74. .....

[Article 74 deleted by Proclamation R263 of 1977.]

### **Proceedings of Directors**

75. The directors may meet together for the despatch of business, adjourn and otherwise regulate their meetings as they think fit. Questions arising at any meeting shall be decided by a majority of votes. In the event of an equality of votes, the chairman shall have a second or casting vote. A director may, and the secretary on the requisition of a director shall, at any time convene a meeting of the directors.

76. Subject to the provisions of sections 234 and 241, inclusive, of the Act, a director shall not vote in respect of any contract or proposed contract with the company in which he is interested, or any matter arising therefrom, and if he does so vote, his vote shall not be counted.

77. The quorum necessary for the transaction of the business of the directors may be fixed by the directors, and unless so fixed shall, when the number of directors exceeds three, be three and when the number of directors does not exceed three, shall be two.

78. The continuing directors may act notwithstanding any vacancy on their body, but, if and so long as their number is reduced below the number fixed by or pursuant to these articles as the necessary quorum of directors, the continuing directors may act for the purpose of increasing the

number of directors to that number, or of convening a general meeting of the company, but for no other purpose.

79. The directors may elect a chairman of their meetings and determine the period for which he is to hold office, but if no such chairman is elected, or if at any meeting the chairman is not present within five minutes after the time appointed for holding the same, the directors present may elect one of their number to be chairman of the meeting.

80. The directors may delegate any of their powers to committees consisting of such member or members of their body as they think fit. Any committee so formed shall, in the exercise of the powers so delegated, conform to the rules that may be imposed on it by the directors.

81. A committee may elect a chairman of its meetings. If no such chairman is elected, or if at any meeting the chairman is not present within five minutes after the time appointed for holding the same, the members present may elect one of their number to be chairman of the meeting.

82. A committee may meet and adjourn as it thinks fit. Questions arising at any meeting shall be determined by a majority of votes of the members present, and in the event of an equality of votes the chairman shall have a second or casting vote.

83. All acts done by any meeting of the directors or a committee of directors or by any person acting as a director shall, notwithstanding that it be afterwards discovered that there was some defect in the appointment of any such directors or person acting as aforesaid or that they or any of them were disqualified, be as valid as if every such person had been duly appointed and were qualified to be a director.

#### **Dividends and Reserve**

84. The company in annual general meeting may declare dividends but no dividend shall exceed the amount recommended by the directors.

85. The directors may from time to time pay to the members such interim dividends as appear to the directors to be justified by the profits of the company.

86. No dividend shall be paid otherwise than out of profits, or bear interest against the company.

87. The directors may, before recommending any dividend, set aside out of the profits of the company such sums as they think fit as a reserve or reserves, which shall, at the discretion of the directors, be applicable for any purpose to which the profits of the company may be properly applied and, pending such application may, at the like discretion, either be employed in the business of the company or be invested in such investments (other than shares of the company) as the directors may from time to time think fit. The directors may also without placing the same to reserve carry forward any profits which they may think prudent not to divide.

88. Notice of any dividend that may have been declared shall be given in the manner hereinafter provided to the persons entitled to share therein.

89. Every dividend or other moneys payable in cash in respect of shares may be paid by cheque, warrant, coupon or otherwise as the directors may from time to time determine, and shall, if paid otherwise than by coupon, either be sent by post to the registered address of the member entitled thereto or be given to him personally, and the receipt or endorsement on the cheque or warrant of the person whose name appears in the register as the shareholder, or his duly authorised agent, or the surrender of any coupon shall be a good discharge to the company in respect thereof. Any one of two or more joint holders may give effectual receipts for any dividends or other moneys payable in respect of the shares held by them as joint holders.

90. The company shall not be responsible for the loss in transmission of any cheque, warrant, coupon or other document sent through the post to the registered address of any member, whether or not it was so sent at his request.

#### **Accounting Records**

91. The directors shall cause such accounting records as are prescribed by section 284 of the Act to be kept. Proper accounting records shall not be deemed to be kept if there are not kept such accounting records as are necessary fairly to present the state of affairs and business of the company and to explain the transactions and financial position of the trade or business of the company.

92. The accounting records shall be kept at the registered office of the company or at such other place or places as the directors think fit, and shall always be open to inspection by the directors.

93. The directors shall from time to time determine whether and to what extent and at what times and places and under what conditions or regulations the accounting records of the company or any of them shall be open to inspection by members not being directors, and no member (not being a director) shall have any right of inspecting any accounting records or documents of the company except as conferred by the Act or authorised by the directors or by the company in general meeting.

#### **Annual Financial Statements and Interim Reports**

94. The directors shall from time to time, in accordance with sections 286 and 288 of the Act, cause to be prepared and laid before the company in general meeting such annual financial statements, group annual financial statements and group reports (if any) as are referred to in those sections.

95. The directors shall, in accordance with section 303 of the Act, prepare or cause to be prepared interim reports, a copy of which shall be sent to every member of the company and to the Registrar.

96. A copy of any annual financial statements, group annual financial statements and group reports which are to be laid before the company in annual general meeting, shall not less than twenty-one days before the date of the meeting be sent to every member of, and every holder of debentures of, the company and to the Registrar: Provided that this article shall not require a copy of those documents to be sent to any person of whose address the company is not aware or to more than one of the joint holders of any shares or debentures.

#### **Audit**

97. An auditor shall be appointed in accordance with Chapter X of the Act.

#### **Notices**

98. A notice may be given by the company to any member either by advertisement or personally, or by sending it by post in a prepaid letter addressed to such member at his registered address, or (if he has no registered address in the Republic) at the address (if any) within the Republic supplied by him to the company for the giving of notices to him. Any notice which may be given by advertisement shall be inserted in the *Gazette* and in such newspapers as the directors may from time to time determine.

99. Whenever a notice is to be given personally or sent by post, the notice may be given by the company to the joint holders of a share by giving the notice to the joint holder named first in the register in respect of the share.

100. Whenever a notice is to be given personally or sent by post, the notice may be given by the company to the persons entitled to a share in consequence of the death or insolvency of a member, or by sending it through the post in a prepaid letter addressed to them by name, or by the title of representatives of the deceased, or trustees of the insolvent or by any like description, at the address (if any) in the Republic supplied for the purpose by the persons claiming to be so entitled, or (until such address has been so supplied) by giving the notice in any manner in which the same might have been given if the death or insolvency had not occurred.

101. Notice of every general meeting shall be given in any manner authorised-

- (a) to every member of the company (including bearers of share warrants) except, in the case of notices to be given personally or sent by post, those members who (having no registered address within the Republic) have not supplied to the company an address within the Republic for the giving of notices to them;

- (b) to every person entitled to a share in consequence of the death or insolvency of a member who, but for his death or insolvency, would have been entitled to receive notice of the meeting; and
- (c) to the auditor for the time being of the company.

No other person shall be entitled to receive notice of general meetings.

102. Any notice by post shall be deemed to have been served at the time when the letter containing the same was posted, and any notice by advertisement shall be deemed to have been given on the day upon which the advertisement was published in the *Gazette*, and in proving the giving of the notice by post, it shall be sufficient to prove that the letter containing the notice was properly addressed and posted.

103. A notice given to any member shall be binding on all persons claiming on his death or on any transmission of his interests.

104. The signature to any notice given by the company may be written or printed, or partly written and partly printed.

105. When a given number of days' notice or notice extending over any other period is required to be given, the day of service shall not be counted in such number of days or period.

106. If the company has a seal, it shall not be affixed to any instrument except by the authority of a resolution of the directors, and shall be affixed in the manner and subject to such safeguards as the directors may from time to time determine.

#### **Winding-up**

107. If the company be wound up, the assets remaining after payment of the debts and liabilities of the company and the costs of the liquidation shall be applied as follows:

- (a) To repay to the members the amounts paid up on the shares respectively held by each of them; and
- (b) the balance (if any) shall be distributed among the members in proportion to the number of shares respectively held by each of them:

Provided that the provisions of this article shall be subject to the rights of the holders of shares (if any) issued upon special conditions.

108. In a winding-up, any part of the assets of the company, including any shares or securities of other companies, may, with the sanction of a special resolution of the company, be divided among the members of the company *in specie*, or may, with the same sanction, be vested in trustees for the benefit of such members, and the liquidation of the company may be closed and the company dissolved.

### **TABLE B ARTICLES FOR A PRIVATE COMPANY HAVING A SHARE CAPITAL**

#### **Interpretation**

1. In these articles, unless the context otherwise indicates-

- (a) 'the Act' means the Companies Act, 1973; and
- (b) 'foreign committee' means a committee appointed under article 65 of these articles.

#### **Restrictions**

2. The directors shall have regard to the restrictions on the commencement of business imposed by section 172 of the Act.

3. The company is a private company and accordingly-

- (a) the right to transfer its shares is restricted;
- (b) the number of members of the company (exclusive of persons who are in the employment of the company and of persons who having been formerly in the employment of the company were, while in such employment, and have continued since the determination of such employment, to be members of the company) is limited to

fifty;

- (c) any invitation to the public to subscribe for any shares or debentures of the company is prohibited; and
- (d) the company shall not have power to issue share warrants to bearer.

4. Where two or more persons hold one or more shares of the company jointly they shall for the purposes of article 3 be treated as a single member.

### **Shares and Certificates of Shares**

5. Subject to the provisions, if any, of the memorandum, and without prejudice to any special rights previously conferred on the holders of existing shares, any share may be issued with such preferred, deferred, or other special rights, or subject to such restrictions (whether in regard to dividend, voting, return of share capital or otherwise) as the company may from time to time determine, and the company may determine that any preference shares shall be issued on the condition that they are or are at the option of the company, liable to be redeemed.

6. Every person whose name is entered as a member in the register of members shall be entitled to one certificate for all the shares registered in his name, or to several certificates, each for a part of such shares. Every share certificate shall specify the number of shares in respect of which it is issued. Every original member shall be entitled to one share certificate free of charge but for every subsequent certificate the directors may make such charge as from time to time they may think fit: Provided that if a share certificate is defaced, lost or destroyed, it may be renewed on payment of such fee, if any, not exceeding twenty-five cents, and on such terms, if any, as to evidence and indemnity as the directors may think fit.

7. Share certificates shall be issued under the authority of the directors, or the foreign committee when authorised thereto by resolution of the directors, in such manner and form as the directors shall from time to time prescribe. If any shares are numbered, all such shares shall be numbered in numerical progression beginning with the number one, and each share shall be distinguished by its appropriate number; and if any shares are not numbered, each share certificate in respect of such shares shall be numbered in numerical progression and each share certificate distinguished by its appropriate number and by such endorsement as may be required under section 95 (2) of the Act.

8. A certificate for shares registered in the names of two or more persons shall be delivered to the person first named in the register as a holder thereof, and delivery of a certificate for a share to that person shall be a sufficient delivery to all joint holders of that share.

### **Variation of Rights**

9. If at any time the share capital is divided into different classes of shares, the rights attached to any class (unless otherwise provided by the terms of issue of the shares of that class) may be varied with the consent in writing of the holders of three-fourths of the issued shares of that class or with the sanction of a resolution passed at a separate general meeting of the holders of the shares of the class, and the provisions of section 199 of the Act shall *mutatis mutandis* apply to the said resolution and meeting as if the resolution were a special resolution. To every such separate general meeting the provisions of these articles relating to general meetings shall *mutatis mutandis* apply but so that the necessary quorum, unless the company has only one member, shall be two persons holding or representing by proxy at least one-third of all the issued shares of the class.

### **Register of Members**

10.(a) The company shall maintain at its registered office a register of members of the company as provided in section 105 of the Act. The register of members shall be open to inspection as provided in section 113 of the Act.

(b) The company may maintain a branch register under section 110 of the Act and the provisions of paragraph (a) shall *mutatis mutandis* apply to such register.

### Transfer and Transmission of Shares

11. The directors shall have power to refuse to register the transfer of any shares without giving reasons therefor.

12. The instrument of transfer of any share of the company, not being a security in terms of section 134 of the Act, shall be executed both by the transferor and transferee, and the transferor shall be deemed to remain the holder of the share until the name of the transferee is entered in the register of members in respect thereof.

13. Subject to such of the restrictions as may be applicable, any member may transfer all or any of his shares by instrument in writing in any usual or common form or any other form which the directors may approve.

14. The directors may decline to recognise any instrument of transfer unless-

- (a) a sum not exceeding twenty-five cents is paid to the company in respect thereof;
- (b) the instrument of transfer is accompanied by the certificate of the shares to which it relates, and such other evidence as the directors may reasonably require to show the right of the transferor to make the transfer; and
- (c) the share transfer duty thereon has been paid.

15. Every instrument of transfer shall be left at a transfer office of the company at which it is presented for registration, accompanied by a certificate of the shares to be transferred. Every power of attorney given by a shareholder authorising the transfer of shares, shall, when lodged, produced or exhibited to the company or any of its proper officers, be deemed as between the company and the donor of the power to continue and remain in full force and effect, and the company may allow that power to be acted upon until such time as express notice in writing of its revocation has been lodged at such of the company's transfer offices as the power was lodged, produced, or exhibited as aforesaid. The company shall not be bound to allow the exercise of any act or matter by an agent for a shareholder unless a duly certified copy of that agent's authority be produced and lodged with the company.

16. The executor of the estate of a deceased sole holder of a share shall be the only person recognised by the company as having any title to the share. In the case of a share registered in the names of two or more holders, the survivors or survivor, or the executor of the deceased survivor shall be the only persons recognised by the company as having any title to the share.

17. Any person becoming entitled to a share in consequence of the death or insolvency of a member shall, upon such evidence being produced as may from time to time be required by the directors, have the right, either to be registered as a member in respect of the share or instead of being registered himself, to make such transfer of the share as the deceased or insolvent could have made, but the directors shall, in either case, have the same right to decline or suspend registration as they would have had in the case of a transfer of the share by the deceased or insolvent before the death or insolvency.

18. The parent or guardian of a minor and the *curator bonis* of a lunatic member and any person becoming entitled to shares in consequence of the death or insolvency of any member or the marriage of any female member or by any lawful means other than by transfer in accordance with these articles, may, upon producing such evidence as sustains the character in which he proposes to act under this article, or of his title, as the directors think sufficient, transfer those shares to himself or any other person, subject to the articles as to transfer hereinbefore contained.

This article is hereinafter referred to as the 'transmission clause'.

19. A person becoming entitled to a share by reason of the death or insolvency of the holder shall be entitled to the same dividends and other advantages to which he would be entitled if he were the registered holder of the share, except that he shall not, before being registered as a member in respect of the share, be entitled in respect of it to exercise any right conferred by membership in

relation to meetings of the company.

20. Any person who submits proof of his appointment as the executor, administrator, trustee, curator or guardian in respect of the estate of a deceased member of the company, or of a member whose estate has been sequestrated or of a member who is otherwise under a disability or as the liquidator of any body corporate which is a member of the company, shall be entered in the register of members of the company *nomine officii*, and shall thereafter, for all purposes, be deemed to be a member of the company.

21. If a member of the company desires to sell all or any of his shares of the company he shall give notice, in writing, of his intention to sell, to the directors of the company, and state the price he requires for the shares.

22. The directors shall within one month of the date of receipt of the notice referred to in article 21 advise every other member of the company of the contents thereof and each such member shall be entitled to acquire the shares so offered within one month after the date of the receipt of such advice: Provided that if more than one member makes an offer for all of the shares so offered, the shares shall be sold to each such member in equal proportions, and where fractional proportions of shares remain, such members shall become joint holders of such fractional proportions of the shares.

23. If the members of the company are unable to agree upon the selling price of the shares, the auditor of the company may be requested to determine the true and fair value thereof and the members shall accept that value as the selling price of the shares.

24. If none of the members of the company offers to purchase the shares within the time referred to in article 22, or if members of the company offer to purchase a part of the shares so offered, the member who is offering the shares for sale may offer the shares or the remaining portion of the shares which have not been purchased by members of the company, for sale to any other person and, notwithstanding the provisions of article 11, the directors shall approve the registration of the shares in the name of that person unless they have good reason to refuse such registration.

#### **Conversion of Shares into Stock**

25. The company may by special resolution convert all or any of its paid-up shares into stock, and reconvert such stock into any number of paid-up shares.

26. The holders of stock may transfer the same, or any part thereof, in the same manner, and subject to the same articles as the shares from which the stock arose might prior to conversion have been transferred, or as near thereto as circumstances permit, but the directors may from time to time fix the minimum amount of stock transferable, and restrict or forbid the transfer of fractions of such minimum, but the minimum shall not exceed the nominal amount, in the case of shares of par value, or the issue price in the case of shares of no par value, of the shares from which the stock arose.

27. The holders of stock shall, according to the amount of the stock held by them, have the same rights, privileges, and advantages as regards dividends, voting at meetings of the company and other matters as if they held the shares from which the stock arose, but no such privilege or advantage (except participation in the dividends and profits of the company) shall be conferred by any such aliquot part of stock as would not, if existing in shares, have conferred that privilege or advantage.

28. Such of the articles of the company as are applicable to shares shall apply to stock, and the word 'share' and 'shareholder' therein shall include 'stock' and 'stock-holder'.

#### **Alteration of Capital**

29.(a) The company may from time to time by special resolution increase the share capital by such sum dividend into shares of such amount, or may increase the number of its shares of no par value to such number, as the resolution shall prescribe.

(b) The company may increase its share capital constituted by shares of no par value by transferring reserves or profits to the stated capital, with or without a distribution of shares.

(c) New shares shall be subject to the same provisions as to transfer, transmission and

otherwise as the shares in the original capital.

30. The company may, by special resolution-

- (a) consolidate and divide all or any of its share capital into shares of larger amount than its existing shares or consolidate and reduce the number of the issued shares of no par value;
- (b) increase the number of its issued no par value shares without an increase of its stated capital;
- (c) sub-divide its existing shares or any of them into shares of smaller amount than is fixed by its memorandum;
- (d) convert all of its ordinary or preference share capital consisting of shares having a par value into stated capital constituted by shares of no par value;
- (e) convert its stated capital constituted either by ordinary or preference shares of no par value into share capital consisting of shares having a par value;
- (f) cancel any shares which, at the date of the passing of the resolution, have not been taken by any person, or which no person has agreed to take;
- (g) reduce its share capital, stated capital, any capital redemption fund or any share premium account in any manner and with, and subject to, any incident authorised, and consent required, by law;
- (h) subject to the provisions of section 99 of the Act, convert its issued preference shares into shares which can be redeemed.

#### **General Meetings**

31. The company shall hold its first annual general meeting within eighteen months after the date of its incorporation and shall thereafter in each year hold an annual general meeting: Provided that not more than fifteen months shall elapse between the date of one annual general meeting and that of the next and that an annual general meeting shall be held within six months after the expiration of the financial year of the company.

32. Other general meetings of the company may be held at any time.

33. Annual general meetings and other general meetings shall be held at such time and place as the directors shall appoint or at such time and place as is determined if the meetings are convened under section 179 (4), 181, 182 or 183 of the Act.

#### **Notice of General Meetings**

34. An annual general meeting and a meeting called for the passing of a special resolution shall be called by not less than twenty-one clear days' notice in writing and any other general meeting shall be called by not less than fourteen clear days' notice in writing. The notice shall be exclusive of the day on which it is served or deemed to be served and of the day for which it is given, and shall specify the place, the day and the hour of the meeting and shall be given in manner hereinafter mentioned or in such other manner, if any, as may be prescribed by the company in general meeting, to such persons as are, under these articles, entitled to receive such notices from the company: Provided that a meeting of the company shall, notwithstanding the fact that it is called by shorter notice than that specified in this article, be deemed to have been duly called if it is so agreed by a majority in number of the members having a right to attend and vote at the meeting, being a majority holding not less than ninety-five per cent of the total voting rights of all the members.

#### **Proceedings at General Meetings**

35. The annual general meeting shall deal with and dispose of all matters prescribed by the Act, including the sanctioning of a dividend, the consideration of the annual financial statements, the election of directors and the appointment of an auditor, and may deal with any other business laid before it. All business laid before any other general meeting shall be considered special business.

36. No business shall be transacted at any general meeting unless a quorum of members is

present at the time when the meeting proceeds to business. Save as herein otherwise provided, two members present in person or by proxy, or if the company has one member, such member present in person or by proxy, or if the company is a wholly owned subsidiary, the nominee of the holding company in person or by proxy, shall be a quorum.

37. If within half an hour after the time appointed for the meeting a quorum is not present, the meeting, if convened upon the requisition of members, shall be dissolved, in any other case it shall stand adjourned to a day not earlier than seven days and not later than twenty-one days after the date of the meeting and if at such adjourned meeting a quorum is not present within half an hour after the time appointed for the meeting the members present in person or by proxy, shall be a quorum.

38. Where a meeting has been adjourned as aforesaid, the company shall, upon a date not later than three days after the adjournment send a written notice to each member of the company stating-

- (a) the date, time and place to which the meeting has been adjourned;
- (b) the matter before the meeting when it was adjourned; and
- (c) the ground for the adjournment.

39. The chairman, if any, of the board of directors shall preside as chairman at every general meeting of the company.

40. If there is no such chairman, or if at any meeting he is not present within fifteen minutes after the time appointed for holding the meeting or is unwilling to act as chairman, the members present shall elect one of their number to be chairman.

41. The chairman may, with the consent of any meeting at which a quorum is present (and shall if so directed by the meeting), adjourn the meeting from time to time and from place to place, but no business shall be transacted at any adjourned meeting other than the business left unfinished at the meeting at which the adjournment took place. When a meeting is adjourned, the provisions of articles 37 and 38 shall *mutatis mutandis* apply to such adjournment.

42. At any general meeting a resolution put to the vote of the meeting shall be decided on a show of hands, unless a poll is (before or on the declaration of the result of the show of hands) demanded by the chairman or members referred to in section 198 (1) (b) of the Act, and unless a poll is so demanded, a declaration by the chairman that a resolution has, on a show of hands, been carried or carried unanimously or by a particular majority or negatived, and an entry to that effect in the book containing the minutes of the proceedings of the company, shall be conclusive evidence of the fact, without proof of the number or proportion of the votes recorded in favour of or against such resolution. The demand for a poll may be withdrawn.

43. If a poll is duly demanded it shall be taken in such manner as the chairman directs, and the result of the poll shall be deemed to be the resolution of the meeting at which the poll was demanded. Scrutineers shall be elected to determine the result of the poll.

44. In the case of an equality of votes, whether on a show of hands or on a poll, the chairman of the meeting at which the show of hands takes place, or at which the poll is demanded, shall be entitled to a second or casting vote.

45. A poll demanded on the election of a chairman or on a question of adjournment, shall be taken forthwith. A poll demanded on any other question shall be taken at such time as the chairman of the meeting directs. The demand for a poll shall not prevent the continuation of a meeting for the transaction of any business other than the question upon which the poll has been demanded.

#### **Inspection of Minutes**

46. The minutes kept of every general meeting and annual general meeting of the company under section 204 of the Act, may be inspected and copied as provided in section 113 of the Act.

#### **Votes of Members**

47. Subject to any rights or restrictions for the time being attached to any class or classes of shares, on a show of hands every member present in person and if a member is a body corporate, its

representative, shall have one vote, and on a poll every member present in person or by proxy shall be entitled to exercise the voting rights determined by section 195 of the Act.

48. In the case of joint holders the vote of the person whose name appears first in the register of members and who tenders a vote, whether in person or by proxy, shall be accepted to the exclusion of the votes of the other joint holders.

49. The parent or guardian of a minor, and the *curator bonis* of a lunatic member, and also any person entitled under the transmission clause to transfer any shares, may vote at any general meeting in respect thereof in the same manner as if he were the registered holder of those shares: Provided that forty-eight hours at least before the time of holding the meeting at which he proposes to vote he shall satisfy the directors that he is such parent, guardian or *curator* or that he is entitled under the transmission clause to transfer those shares, or that the directors have previously admitted his right to vote in respect of those shares. Co-executors of a deceased member in whose name shares stand in the register shall, for the purposes of this article, be deemed to be joint holders of those shares.

50. On a poll, votes may be given either personally or by proxy.

**Proxies**

51. The instrument appointing a proxy shall be in writing under the hand of the appointer or of his agent duly authorised in writing, or, if the appointer is a body corporate, under the hand of an officer or agent authorised by the body corporate. A proxy need not be a member of the company. The holder of a general or special power of attorney, whether he is himself a member or not, given by a shareholder shall be entitled to attend meetings and to vote, if duly authorised under that power to attend and take part in the meetings.

52. The instrument appointing a proxy and the power of attorney or other authority, if any, under which it is signed or a notarially certified copy of such power or authority shall be deposited at the registered office of the company not less than forty-eight hours before the time for holding the meeting at which the person named in the instrument proposes to vote, and in default of complying herewith the instrument of proxy shall not be treated as valid. No instrument appointing a proxy shall be valid after the expiration of six months from the date when it was signed, unless so specifically stated in the proxy itself, and no proxy shall be used at an adjourned meeting which could not have been used at the original meeting.

53. The instrument appointing a proxy shall be in the following form or as near thereto as circumstances permit:

' ..... Limited

I, ..... of.....

being a member of the ..... Limited,

hereby appoint

..... of ..... or failing him

..... of ..... or failing him

..... of ..... or failing him

..... of .....,

as my proxy to vote for me and on my behalf at the annual general or general meeting (as the case may be) of the company to be held on the ..... day of..... and at any adjournment thereof as follows:

|                     | <i>In favour of</i> | <i>Against</i> |
|---------------------|---------------------|----------------|
| Resolution to ..... | .....               | .....          |
| Resolution to ..... | .....               | .....          |
| Resolution .....    | .....               | .....          |

to..... |\_\_\_\_\_||\_\_\_\_\_||

(Indicate instruction to proxy by way of a cross in space provided above.)

Unless otherwise instructed, my proxy may vote as he thinks fit.

Signed this .....day of.....

.....

*Signature*

(Note: A member entitled to attend and vote is entitled to appoint a proxy to attend, speak and on a poll vote in his stead, and such proxy need not also be a member of the company.)'

**Directors**

54. The number of the directors shall not be less than one and the names of the first directors may be determined in writing by a majority of the subscribers of the memorandum. Until directors are appointed, whether or not the directors have been named by a majority of subscribers of the memorandum, every subscriber of the memorandum shall be deemed for all purposes to be a director of the company.

55. The remuneration of the directors shall from time to time be determined by the company in general meeting.

56. If any director be called upon to perform extra services or to make any special exertions in going or residing abroad, or otherwise, for any of the purposes of the company, the company may remunerate that director either by a fixed sum or by a percentage of profits or otherwise as may be determined, and such remuneration may be either in addition to, or in substitution for, the remuneration determined under article 55.

57. The shareholding qualification of a director shall be the holding of at least one share in the company, and it shall be his duty to comply with the provisions of section 213 of the Act, except where the company is a wholly owned subsidiary when a director shall not be required to hold a share of the company.

**Alternate Directors**

58. Each director shall have the power to nominate any person whether a member of the company or not possessing the necessary qualifications of a director, to act as alternate director in his place during his absence or inability to act as such director, provided that the appointment of an alternate director shall be approved by the board, and on such appointment being made, the alternate director shall, in all respects, be subject to the terms, qualifications, and conditions existing with reference to the other directors of the company.

59. The alternate directors, whilst acting in the stead of the directors who appointed them, shall exercise and discharge all the powers, duties and functions of the directors they represent. The appointment of an alternate director shall be revoked, and the alternate director shall cease to hold office, whenever the director who appointed him ceases to be a director or gives notice to the secretary of the company that the alternate director representing him has ceased to do so, and in the event of the disqualification or resignation of any alternate director during the absence or inability to act of the director whom he represents, the vacancy so arising shall be filled by the chairman of the directors who shall nominate a person to fill such vacancy, subject to the approval of the board.

**Powers and Duties of Directors**

60. The business of the company shall be managed by the directors who may pay all expenses incurred in promoting and incorporating the company, and may exercise all such powers of the company as are not by the Act, or by these articles, required to be exercised by the company in general meeting, subject to these articles, to the provisions of the Act, and to such regulations, not inconsistent with the aforesaid articles or provisions, as may be prescribed by the company in general meeting, but no regulation prescribed by the company in general meeting shall invalidate any prior act of the directors which would have been valid if such regulation had not been made.

### **Borrowing Powers**

61. The directors may exercise all the powers of the company to borrow money and to mortgage or bind its undertaking and property or any part thereof, and to issue debentures, debenture stock and other securities whether outright or as security for any debt, liability or obligation of the company or of any third party: Provided that the amount for the time being remaining undischarged in respect of moneys borrowed or secured by the directors as aforesaid (apart from temporary loans obtained from the company's bankers in the ordinary course of business) shall not at any time, without the prior sanction of the company in general meeting, exceed one-half of the amount of the issued share capital plus the amount of the share premium account (if any), or of the stated capital.

### **Managing Director**

62. The directors may from time to time appoint one or more of their body to the office of managing director or manager for such term and at such remuneration (whether by way of salary or commission or participation in profits or partly in one way and partly in another) as they may think fit and may revoke such appointment subject to the terms of any agreement entered into in any particular case. A director so appointed shall not, while holding such office, be subject to retirement by rotation, or be taken into account in determining the rotation of retirement of directors, but his appointment shall determine if he ceases for any reason to be a director.

63. The directors may from time to time entrust to or confer upon a managing director or manager, for the time being, such of the powers and authorities vested in them as they may think fit, and may confer such powers and authorities for such time and to be exercised for such objects and purposes and upon such terms and conditions and with such restrictions as they may think expedient, and they may confer such powers and authorities either collaterally or to the exclusion of, or in substitution for, all or any of the powers and authorities of the directors and may from time to time revoke or vary all or any of such powers and authorities.

### **Minutes and Minute Books**

64. The directors shall, in terms of section 204 of the Act, cause minutes to be kept-

- (a) of all appointments of officers;
- (b) of names of directors present at every meeting of the company and of the directors; and
- (c) of all proceedings at all meetings of the company and of the directors.

Such minutes shall be signed by the chairman of the meeting at which the proceedings took place or by the chairman of the next succeeding meeting.

### **Foreign Committees**

65. The directors may from time to time appoint persons resident in a foreign country to be a foreign committee for the company in that country with such powers and duties as the directors may from time to time determine. The directors may from time to time establish branch registers of members and transfer offices in foreign countries, close them at any time and may appoint and remove agents for any purposes in any foreign country.

### **Disqualification of Directors**

66. The office of director shall be vacated if the director-

- (a) ceases to be a director or becomes prohibited from being a director by virtue of any provision of the Act; or
- (b) without the consent of the company in general meeting holds any other office of profit under the company except that of managing director or manager; or
- (c) resigns his office by notice in writing to the company and the Registrar; or
- (d) for more than six months is absent without permission of the directors from meetings of directors held during that period; or
- (e) is directly or indirectly interested in any contract or proposed contract with the company and fails to declare his interest and the nature thereof in the manner required by the Act.

### **Rotation of Directors**

67. The company in general meeting may from time to time determine the number of directors, their terms of office and the manner of their retirement. An annual general meeting or other general meeting of the company may fill any vacancy and a retiring director shall be eligible for re-election.

68. If at any meeting at which an election of directors ought to take place the offices of the retiring directors are not filled, unless it is expressly resolved not to fill such vacancies, the meeting shall stand adjourned and the provisions of articles 37 and 38 shall apply *mutatis mutandis* to such adjournment, and if at such adjourned meeting the vacancies are not filled, the retiring directors or such of them as have not had their offices filled shall be deemed to have been re-elected at such adjourned meeting unless a resolution for the re-election of any such director shall have been put to the meeting and negatived.

69. The company may from time to time in general meeting increase or reduce the number of directors, and may also determine in what rotation such increased or reduced number is to retire from office.

70. Unless the shareholders otherwise determine in general meeting any casual vacancy occurring on the board of directors may be filled by the directors, but the director so appointed shall be subject to retirement at the same time as if he had become a director on the day on which the director in whose stead he is appointed was last elected a director.

71. The directors shall have power at any time, and from time to time, to appoint a person as an additional director but so that the total number of directors shall not at any time exceed the number fixed according to these articles, and such director shall retire from office at the next following annual general meeting and shall then be eligible for re-election, but shall not be taken into account in determining which directors are to retire by rotation at such meeting.

72. ....

[Article 72 deleted by Proclamation R263 of 1977.]

### **Proceedings of Directors**

73. The directors may meet together for the despatch of business, adjourn and otherwise regulate their meetings as they think fit. Questions arising at any meeting shall be decided by a majority of votes. In the event of an equality of votes, the chairman shall have a second or casting vote. A director may, and the secretary on the requisition of a director shall, at any time convene a meeting of the directors.

74. Subject to the provisions of sections 234 to 241 inclusive of the Act, a director shall not vote in respect of any contract or proposed contract with the company in which he is interested, or any matter arising therefrom, and if he does so vote his vote shall not be counted: Provided that this article shall not apply where the company has only one director.

75. The quorum necessary for the transaction of the business of the directors, unless there is only one director, may be fixed by the directors, and unless so fixed shall, when the number of directors exceeds three, be three and when the number of directors does not exceed three, shall be two.

76. Subject to the provisions of the Act, a resolution in writing, signed by all the directors, shall be as valid and effectual as if it had been passed at a meeting of the directors duly convened and held.

77. The continuing directors may act notwithstanding any vacancy on their body, but, if and so long as their number is reduced below the number fixed by or pursuant to these articles as the necessary quorum of directors, the continuing directors may act for the purpose of increasing the number of directors to that number, or of convening a general meeting of the company, but for no other purpose.

78. The directors may elect a chairman of their meetings and determine the period for which he is to hold office, but if no such chairman is elected, or if at any meeting the chairman is not present within five minutes after the time appointed for holding the same, the directors present may elect one

of their number to be chairman of the meeting.

79. The directors may delegate any of their powers to committees consisting of such member or members of their body as they think fit. Any committee so formed shall, in the exercise of the powers so delegated, conform to any rules that may be imposed on it by the directors.

80. A committee may elect a chairman of its meetings. If no such chairman is elected, or if at any meeting the chairman is not present within five minutes after the time appointed for holding the same, the members present may elect one of their number to be chairman of the meeting.

81. A committee may meet and adjourn as it thinks fit. Questions arising at any meeting shall be determined by a majority of votes of the members present, and in the event of an equality of votes the chairman shall have a second or casting vote.

82. All acts done by any meeting of the directors or a committee of directors or by any person acting as a director shall, notwithstanding that it be afterwards discovered that there was some defect in the appointment of any such directors or person acting as aforesaid or that they or any of them were disqualified, be as valid as if every such person had been duly appointed and were qualified to be a director.

### **Dividends and Reserves**

83. The company in annual general meeting may declare dividends but no dividend shall exceed the amount recommended by the directors.

84. The directors may from time to time pay to the members such interim dividends as appear to the directors to be justified by the profits of the company.

85. No dividend shall be paid otherwise than out of profits or bear interest against the company.

86. The directors may, before recommending any dividend, set aside out of the profits of the company such sums as they think fit as a reserve or reserves, which shall, at the discretion of the directors, be applicable for any purpose to which the profits of the company may be properly applied and, pending such application may, at the like discretion, either be employed in the business of the company or be invested in such investments (other than shares of the company) as the directors may from time to time think fit. The directors may also without placing the same to reserve carry forward any profits which they may think prudent not to divide.

87. Notice of any dividend that may have been declared shall be given in the manner hereinafter provided to the persons entitled to share therein.

88. Every dividend or other moneys payable in cash in respect of shares may be paid by cheque, warrant, coupon or otherwise as the directors may from time to time determine, and shall, if paid otherwise than by coupon, either be sent by post to the registered address of the member entitled thereto or be given to him personally, and the receipt or endorsement on the cheque or warrant of the person whose name appears in the register as the shareholder, or his duly authorised agent, or the surrender of any coupon shall be a good discharge to the company in respect thereof. Any one of two or more joint holders may give effectual receipts for any dividends or other moneys payable in respect of the shares held by them as joint holders.

89. The company shall not be responsible for the loss in transmission of any cheque, warrant, coupon, or other document sent through the post to the registered address of any member, whether or not it was so sent at his request.

### **Accounting Records**

90. The directors shall cause such accounting records as are prescribed by section 284 of the Act to be kept. Proper accounting records shall not be deemed to be kept if there are not kept such accounting records as are necessary fairly to present the state of affairs and business of the company and to explain the transactions and financial position of the trade or business of the company.

91. The accounting records shall be kept at the registered office of the company or at such other place or places as the directors think fit, and shall always be open to inspection by the directors.

92. The directors shall from time to time determine whether and to what extent and at what times and places and under what conditions or regulations the accounting records of the company or any of them shall be open to inspection by members not being directors, and no member (not being a director) shall have any right of inspecting any accounting records or document of the company except as conferred by the Act or authorised by the directors or by the company in general meeting.

#### **Annual Financial Statements**

93. The directors shall from time to time, in accordance with sections 286 and 288 of the Act, cause to be prepared and laid before the company in general meeting such annual financial statements, group annual financial statements and group reports (if any) as are referred to in those sections.

94. A copy of any annual financial statements, group annual financial statements and group reports which are to be laid before the company in annual general meeting, shall not less than twenty-one days before the date of the meeting be sent to every member of, and every holder of debentures of, the company, and if the company is a controlled company, also to the Registrar: Provided that this article shall not require a copy of those documents to be sent to any person of whose address the company is not aware or to more than one of the joint holders of any shares or debentures.

#### **Audit**

95. An auditor shall be appointed in accordance with Chapter X of the Act.

#### **Notices**

96. A notice may be given by the company to any member either by advertisement or personally, or by sending it by post in a prepaid letter addressed to such member at his registered address or (if he has no registered address in the Republic) at the address (if any) within the Republic supplied by him to the company for the giving of notices to him.

97. Whenever a notice is to be given personally or sent by post, the notice may be given by the company to the joint holders of a share by giving the notice to the joint holder named first in the register in respect of the share.

98. Whenever a notice is to be given personally or sent by post, the notice may be given by the company to the persons entitled to a share in consequence of the death or insolvency of a member, or by sending it through the post in a prepaid letter addressed to them by name, or by the title of representatives of the deceased, or trustees of the insolvent or by any like description, at the address (if any) in the Republic supplied for the purpose by the persons claiming to be so entitled, or (until such address has been so supplied) by giving the notice in any manner in which the same might have been given if the death or insolvency had not occurred.

99. Notice of every general meeting shall be given in any manner authorised-

- (a) to every member of the company except, in the case of notices to be given personally or sent by post, those members who (having no registered address within the Republic) have not supplied to the company an address within the Republic for the giving of notices to them;
- (b) to every person entitled to a share in consequence of the death or insolvency of a member who, but for his death or insolvency, would have been entitled to receive notice of the meeting; and
- (c) to the auditor for the time being of the company.

No other person shall be entitled to receive notice of general meetings.

100. Any notice by post shall be deemed to have been served at the time when the letter containing the same was posted, and in proving the giving of the notice by post, it shall be sufficient to prove that the letter containing the notice was properly addressed and posted.

101. A notice given to any member shall be binding on all persons claiming on his death or on any transmission of his interests.

102. The signature to any notice given by the company may be written or printed, or partly

written and partly printed.

103. When a given number of days' notice or notice extending over any other period is required to be given, the day of service shall not be counted in such number of days or period.

104. If the company has a seal, it shall not be affixed to any instrument except by the authority of a resolution of the directors, and shall be affixed in the manner and subject to such safeguards as the directors may from time to time determine.

### Winding-up

105. If the company be wound up, the assets remaining after payment of the debts and liabilities of the company and the costs of the liquidation shall be applied as follows:

- (a) to repay to the members the amounts paid up on the shares respectively held by each of them; and
- (b) the balance (if any) shall be distributed among the members in proportion to the number of shares respectively held by each of them:

Provided that the provisions of this article shall be subject to the rights of the holders of shares (if any) issued upon special conditions.

106. In a winding-up, any part of the assets of the company, including any shares or securities of other companies may, with the sanction of a special resolution of the company, be paid to the members of the company *in specie*, or may, with the same sanction, be vested in trustees for the benefit of such members, and the liquidation of the company may be closed and the company dissolved.

### Schedule 2

## COMMON POWERS OF COMPANIES

Included in the powers of every company as laid down by section 34 of the Act, and subject to the provisions of the Act, the memorandum and articles of the company, are the following common powers:

- (a) To purchase or acquire in any way stock-in-trade, plant, machinery, land, buildings, agencies, shares, debentures and every other kind or description of movable and immovable property;
- (b) to manage, insure, sell, lease, mortgage, dispose of, give in exchange, work, develop, build on, improve, turn to account or in any way otherwise deal with its undertaking or all or any part of its property and assets;
- (c) to apply for, purchase or by any other means acquire, protect, prolong and renew any patents, patent rights, licences, trade marks, concessions or other rights and to deal with and alienate them as provided in paragraph [2] (b);
- (d) to borrow money;
- (e) to secure the payment of moneys borrowed in any manner including the mortgaging and pledging of property and, without detracting from the generality thereof, in particular by the issue of any kind of debenture or debenture stock, with or without security;
- (f) to lend money to any person or company;
- (g) to invest money in any manner;
- (h) to open and operate banking accounts and to overdraw such accounts;
- (i) to make, draw, issue, execute, accept, endorse and discount promissory notes, bills of exchange and any other kind of negotiable or transferable instruments;
- (j) to enter into indemnities, guarantees and suretyships and to secure payment thereunder in any way;
- (k) to form and have an interest in any company or companies for the purpose of acquiring the undertaking or all or any of the assets or liabilities of the company or for any other purpose which may seem, directly or indirectly, calculated to benefit the company, and to transfer to any such company or companies the undertaking or all or any of the assets

- or liabilities of the company;
- (l) to amalgamate with other companies;
  - (m) to take part in the management, supervision and control of the business or operations of any other company or business and to enter into partnerships;
  - (n) to remunerate any person or persons, either in cash or by the allotment of shares (credited as fully paid-up), for services rendered in its formation or in the development of its business;
  - (o) to make donations;
  - (p) to undertake and execute any trust;
  - (q) to act as principals, agents, contractors or trustees;
  - (r) to pay gratuities and pensions and establish pension schemes, profit-sharing plans and other incentive schemes in respect of its directors, officers and employees;
  - (s) to distribute *in specie* or in kind any of its assets among its members;
  - (t) to enter into contracts outside the Republic and to execute any contracts, deeds and documents in any foreign country; and
  - (u) to have a seal and to use such seal for any purpose in the Republic or in any foreign country.

### Schedule 3

## MATTERS WHICH MUST BE STATED IN A PROSPECTUS IN ADDITION TO THOSE SPECIFIED IN THE ACT

[Schedule 3 substituted by Proclamation R173 of 25 July 1975.]

### Interpretation

For the purposes of this Schedule, unless the context otherwise indicates-

- (a) in respect of any property hired or proposed to be hired by the company, this Schedule shall have effect as if the expression 'vendor' included the lessor and the expression 'purchase money' included the consideration for the lease;
- (b) 'mining company' means, without limiting the generality thereof, any company which carries on or proposes to carry on mining, development or prospecting for or exploitation of any mineral resources, or which acquires or proposes to acquire any mineral rights thereto or options thereon;
- (c) 'property' includes movable and immovable property and, without limiting the generality thereof, shares in any other body corporate but does not include any property if its purchase price is not material;
- (d) 'the Act' means the Companies Act, 1973;
- (e) 'vendor' includes any person who, directly or indirectly, sells or otherwise disposes of any property to the company.

### PART I

#### 1. *Name, address and incorporation*

(a) The name and address of the registered office and of the transfer office, the date of incorporation of the company and, if an external company, the country in which it is incorporated and the date of registration in the Republic.

(b) If the company is a subsidiary, the name and address of the registered office of its holding company, or of any body corporate which, had it been registered under the Act, would have been its holding company.

#### 2. *Directors and management*

(a) The names, occupations and addresses of the directors and proposed directors of the company (specifying the chairman and managing director, if any), and their nationalities, if not South African.

(b) The term of office for which any director has been or is to be appointed, the manner in and terms on which any proposed director will be appointed and particulars of any right held by any person relating to the appointment of any director.

(c) Particulars of any remuneration or proposed remuneration of the directors or proposed directors in their capacity as directors, managing directors or in any other capacity, whether determined by the articles or not, by the company and any subsidiary.

(d) If the business of the company or its subsidiary or any part thereof is managed or is proposed to be managed by a third party under a contract, the name and address (or the address of its registered office, if a company) of such third party and a description of the business so managed or to be managed.

(e) The borrowing powers of the company and its subsidiary exercisable by the directors and the manner in which such borrowing powers may be varied.

**3. Auditor**

The name and address of the auditor of the company.

**4. Attorney, banker, stockbroker, trustee and underwriter**

The names and addresses of the attorney, banker, stockbroker, trustee, if any, and underwriter, if any.

**5. Secretary**

The name, address and professional qualifications, if any, of the secretary of the company.

**6. History, state of affairs and prospects of company**

(a) The general history of the company and its subsidiary stating, *inter alia*-

- (i) the length of time during which the business of the company and of any subsidiary has been carried on;
- (ii) brief particulars of any alteration of capital during the past three years;
- (iii) a summary of any offers of shares of the company to the public for subscription or sale during the preceding three years, the prices at which such shares were offered, the number of shares allotted in pursuance thereof and whether issued to all shareholders in proportion to their shareholdings and, if not, to whom issued, the reasons why the shares were not so issued and the basis of allotment;
- (iv) the date of conversion into a public company.

(b) A general description of the business carried on or to be carried on by the company and its subsidiary and, where the company or its subsidiary carries on or proposes to carry on, two or more businesses which are material having regard to the profits or losses, assets employed or to be employed or any other factor, information as to the relative importance of each such business.

(c) The situation, area and tenure (including in the case of leasehold property the rental and unexpired term of the lease) of the principal immovable property held or occupied by the company and its subsidiary.

(d) Details of any change in the business of the company, if material, during the past five years.

(e) A general description giving a fair presentation of the state of affairs of the company and its subsidiary, including-

- (i) the name, date and place of incorporation and the issued or stated capital of its subsidiary, together with details of the shares held by the holding company, and the main business of its subsidiary and the date on which it became a subsidiary; and
- (ii) if material, a statement as to the estimated commitments of the company and its subsidiary for the purchase and erection of buildings, plant and machinery, the estimated date of completion and the commencement of the operational use thereof.

(f) For the company and each subsidiary, in respect of each of the preceding five years, particulars of-

- (i) the profits or losses before and after tax;
- (ii) the dividends paid;
- (iii) the dividends paid in cents per share; and
- (iv) the dividend cover for each year;

or where the company is a holding company, the same information *mutatis mutandis* for the company in consolidated form.

(g) If any part of the proceeds of the issue of shares is to be applied, directly or indirectly, to the acquisition by the company or its subsidiary of the shares of any other company or body corporate, in consequence of which that company or that body corporate will become a subsidiary of the company, in respect of each of the preceding five years, the same particulars relating to such company or body corporate as are required *mutatis mutandis* by subparagraph (f) and a general history of such company or body corporate, as required by subparagraphs (a) and (b).

(h) If any part of the proceeds of the issue of shares is to be applied, directly or indirectly, to the acquisition by the company or its subsidiary of a business undertaking, in respect of each of the preceding five years, particulars relating to such business undertaking of-

- (i) the profits before and after tax;
- (ii) its general history.

(i) The opinion of the directors, stating the grounds therefor, as to the prospects of the business of the company and of its subsidiary and of any subsidiary or business undertaking to be acquired.

#### **7. Purpose of the offer**

A statement of the purpose of the offer giving reasons why it is considered necessary for the company to raise the capital offered, and if the capital offered is more than the amount of the minimum subscription referred to in paragraph 21, the reasons for the difference between the capital offered and the said minimum subscription.

#### **8. Share capital of the company**

Particulars of the share capital-

- (a) if consisting of shares of par value, the authorised and issued share capital, share premium and share capital held in reserve, the number and classes of shares and their nominal value;
- (b) if consisting of shares of no par value, the stated capital, the number of shares issued and held in reserve and the classes of shares;
- (c) a description of the respective preferential conversion and exchange rights, rights to dividends, profits or capital of each class, including redemption rights and rights on liquidation or distribution of capital assets;
- (d) the number of founders' and management or deferred shares, if any, and the special rights attaching thereto.

#### **9. Loans**

(a) Details of material loans, including debentures, to the company and to its subsidiary at the date of the prospectus, stating-

- (i) whether such loans are secured or unsecured;
- (ii) the names of the lenders if not debenture-holders;
- (iii) the amount, terms and conditions of repayment;
- (iv) the rates of interest on each loan; and
- (v) details of the security, if any;

(b) details of material loans by the company or by its subsidiary, other than in the ordinary course of business, at the date of the prospectus, stating-

- (i) the date of the loan;
- (ii) the person to whom made;

- (iii) the rate of interest;
- (iv) if the interest is in arrear, the last date on which it was paid and the extent of the arrears;
- (v) the period of the loan;
- (vi) the security held;
- (vii) the value of such security and the method of valuation;
- (viii) if the loan is unsecured, the reasons therefor; and
- (ix) if the loan was made to another company, the names and addresses of the directors of such company.

**10. Options or preferential rights in respect of shares**

The substance of any contract or arrangement or proposed contract or arrangement, whereby any option or preferential right of any kind was or is proposed to be given to any person to subscribe for any shares of the company or its subsidiary, giving the number and description of any such shares, including, in regard to the option or right, particulars of-

- (a) the period during which it is exercisable;
- (b) the price to be paid for shares subscribed for under it;
- (c) the consideration given or to be given for it;
- (d) the names and addresses of the persons to whom it was given, other than to existing shareholders as such or to employees under a *bona fide* staff option scheme;
- (e) if given to existing shareholders as such, material particulars thereof; and
- (f) any other material fact or circumstance concerning the granting of such option or right.

Subscribing for shares shall, for the purpose of this paragraph, include acquiring them from a person to whom they were allotted or were agreed to be allotted with a view to his offering them for sale.

**11. Shares issued or to be issued otherwise than for cash**

The number of shares which within the preceding two years were issued, or were agreed to be issued, by the company or its subsidiary, to any person, otherwise than for cash, and the consideration for which those shares were issued or were agreed to be issued, and the value of the property, if any, acquired or to be acquired.

**12. Property acquired or to be acquired**

- (a) Particulars of any immovable property or other property of the nature of fixed assets purchased or acquired by the company or its subsidiary or proposed to be purchased or acquired, the purchase price of which is to be defrayed in whole or in part out of the proceeds of the issue, or is to be or was within the preceding two years paid in whole or in part in securities of the company or its subsidiary, or out of the funds of the company or its subsidiary, whether in cash or shares, or the purchase or acquisition of which has not been completed at the date of the prospectus, and the nature of the title or interest therein acquired or to be acquired by the company or its subsidiary;
- (b) details of the consideration given, or to be given, for the acquisition of any such property, specifying the value payable for goodwill, if any;
- (c) the names and addresses of the vendors and the consideration received or to be received by each;
- (d) brief particulars of any transaction relating to the property completed within the preceding two years in which any vendor of the property to the company or its subsidiary or any person who is or was at the time of the transaction a promoter or a director or proposed director of the company had any interest, direct or indirect: Provided that where the vendors or any of them are a partnership, the members of the partnership shall not be treated as separate vendors; and
- (e) particulars of the price at which any such property which is immovable property or an option over immovable property was purchased or sold within three years prior to the

date of the prospectus where any promoter or director had any interest, directly or indirectly, in such transaction or where any promoter or director was a member of a partnership, syndicate or other association of persons which had such an interest, with the dates of any such purchases and sales and the names of any such promoter or director, and the nature and extent of his interest; for the purposes of this subparagraph, shares of a company, the major asset of which is immovable property, shall be deemed to be immovable property.

**13. *Amounts paid or payable to promoters***

The amount paid within the preceding two years or proposed to be paid to any promoter, with his name and address, or to any partnership, syndicate or other association of which he is or was a member, and the consideration for such payment, and any other benefit given to such promoter, partnership, syndicate or other association within the said period or proposed to be given, and the consideration for the giving of such benefit.

**14. *Commissions paid or payable in respect of underwriting***

The amount, if any, or the nature and extent of any consideration, paid within the preceding two years, or payable as commission to any person (including commission so paid or payable to any sub-underwriter who is a promoter or director or officer of the company) for subscribing or agreeing to subscribe, or procuring or agreeing to procure subscriptions for any shares of the company, the name, occupation and address of each such person, particulars of the amounts underwritten or sub-underwritten by each and the rate of the commission payable for such underwriting or sub-underwriting contract with such person; and if such person is a company, the names of the directors of such company and the nature and extent of any interest, direct or indirect, in such company of any promoter, director or officer of the company in respect of which the prospectus is issued.

**15. *Preliminary expenses and issue expenses***

The amount or estimated amount of preliminary expenses, if incurred within two years of the date of the prospectus, and the persons by whom any of those expenses were paid or are payable, and the amount or estimated amount of the expenses of the issue and the persons by whom any of those expenses were paid or are payable.

**16. *Material contracts***

(a) The dates and the nature of, and the parties to, every material contract entered into by the company or its subsidiary, not being a contract entered into in the ordinary course of the business carried on or proposed to be carried on by the company or its subsidiary or a contract entered into more than two years before the date of the prospectus, and a reasonable time and place at which any such contract or a copy thereof may be inspected.

(b) A brief summary of existing contracts or proposed contracts, either written or oral, relating to the directors' and managerial remuneration, royalties, and secretarial and technical fees payable by the company and its subsidiary.

**17. *Interest of directors and promoters***

(a) Full particulars of the nature and extent of any material interest, direct or indirect, of every director or promoter in the promotion of the company and in any property proposed to be acquired by the company out of the proceeds of the issue, and where the interest of such director or promoter consists in being a member of a partnership, company, syndicate or other association of persons, the nature and extent of the interest of such partnership, company, syndicate or other association, and the nature and extent of such director's or promoter's interest in the partnership, company, syndicate or other association.

(b) Full particulars of the nature and extent of any material interest, direct or indirect, of every director or promoter in the property acquired or proposed to be acquired by the company or its subsidiary during the three years preceding the date of the prospectus.

(c) A statement of all sums paid or agreed to be paid within the three years preceding the date of the prospectus to any director or to any company in which he is beneficially interested or of which he is a director, or to any partnership, syndicate or other association of which he is a member, in cash or shares or otherwise, by any person either to induce him to become or to qualify him as a director, or otherwise for services rendered by him or by the company, partnership, syndicate or other association in connection with the promotion or formation of the company.

**18. Particulars of the offer**

(a) Particulars of the shares offered, including-

- (i) the class of shares;
- (ii) the nominal value of the shares, if applicable;
- (iii) the number of shares offered;
- (iv) the issue price; and
- (v) other conditions of the offer.

(b) Particulars of the debentures offered, including-

- (i) the class of debentures;
- (ii) the conditions of the debentures;
- (iii) if the debentures are secured, particulars of the security, specifying the property comprising the security and the nature of the title to the property; and
- (iv) other conditions of the offer.

**19. Time and date of the opening and of the closing of the offer**

The time and date of the opening and of the closing of the subscription lists or of the offer.

**20. Issue price**

(a) The amount payable by way of premium, if any, on each share which is to be issued or was issued in the five years preceding the date of the prospectus, stating the dates of issue, the reasons for any such premium, and, where some shares were or are to be issued at a premium and other shares at par or at a lower premium, also the reasons for the differentiation, and how any such premium was or is to be dealt with.

(b) Where no par value shares are to be issued or were issued within five years preceding the date of the prospectus, the dates of issue, the price at which they are to be or were issued, and the reasons for any differentiation.

**21. Minimum subscription**

(a) The minimum amount which, in the opinion of the directors, must be raised by the issue of the shares in order to provide the sums, or, if any part thereof is to be defrayed in any other manner, the balance of the sums required to be provided, in respect of each of the following matters:

- (i) The purchase price of any property purchased or to be purchased which is to be defrayed in whole or in part out of the proceeds of the issue;
- (ii) any preliminary expenses payable by the company, and any commission payable to any person in consideration of his agreeing to subscribe for, or of his procuring or agreeing to procure subscriptions for, any shares of the company;
- (iii) the repayment of any moneys borrowed by the company and its subsidiary in respect of any of the foregoing matters;
- (iv) working capital, stating the specific purposes for which it is to be used and the estimated amount required for each such purpose;
- (v) any other expenditure, stating the nature and purposes thereof and the estimated amount in each case; and

(b) the amounts to be provided in respect of the matters aforesaid otherwise than out of the proceeds of the issue, and the sources from which those amounts are to be provided.

**22. Statement as to adequacy of capital**

A statement that in the opinion of the directors the issued capital of the company (including the amount to be raised in pursuance of this offer) is adequate for the purposes of the business of the company and of its subsidiary, and if they are of the opinion that it is inadequate, the extent of the inadequacy and the manner in which and the sources from which the company and its subsidiary are or are to be financed.

**23. Statement as to listing on stock exchange**

A statement as to whether or not an application has been made under section 169 of the Act for a listing of the shares offered and the name of the Stock Exchange.

**24. Requirements for prospectus of mining company**

(a) A report by an expert containing information appropriate to the subject matter of the prospectus and including, if applicable-

- (i) a statement describing briefly the geological characteristics of the occurrence;
- (ii) details of previous operations and production relevant to the workability and payability of the proposed mining operations;
- (iii) survey, drilling and borehole results;
- (iv) ore reserves;
- (v) an interpretation of the information available with reference to the viability of the project.

(b) Material information not otherwise required by this Schedule relating to the mineral rights, or any other right to mine, mining title, including any Government mining lease, and immovable property available for the mine, including, if applicable-

- (i) whether the aforesaid is owned by the company, or in process of transfer or is under option or lease;
- (ii) the name of the farm on and district in which each is situated;
- (iii) the area of each;
- (iv) the aggregate price or other consideration for which they were or are to be acquired;
- (v) relevant details of any option as aforesaid.

(c) A statement by the directors of the plans for reaching the production stage or for increasing output, including information regarding-

- (i) shaft sinking and development;
- (ii) capital expenditure for each material stage of development.

**PART II**  
**REPORTS TO BE SET OUT**

**25. Report by auditor of company**

(1) A report by the auditor of the company with respect to-

- (a) profits or losses and assets and liabilities, in accordance with subparagraph (2) or (3) of this paragraph, as the case requires; and
- (b) the rates of the dividends, if any, paid by the company in respect of each class of shares of the company in respect of each of the five financial years immediately preceding the issue of the prospectus, giving particulars of each such class of shares on which such dividends were paid and particulars of the cases in which no dividends were paid in respect of any class of shares in respect of any of those years, and, if no annual financial statements were made out in respect of any part of the period of five years ending on a date three months before the issue of the prospectus, a statement of that fact.

(2) If the company has no subsidiary, the report shall-

- (a) in regard to profits or losses, deal with the profits or losses of the company in respect of each of the five financial years immediately preceding the issue of the prospectus; and
- (b) in regard to assets and liabilities, deal with the assets and liabilities of the company at

the last date to which the annual financial statements of the company were made out.

(3) If the company has a subsidiary, the report shall-

- (a) in regard to profits or losses, deal separately with the company's profits or losses as provided by subparagraph (2), and in addition, deal-
  - (i) as a whole with the combined profits or losses of all subsidiaries, as far as they concern members of the company; or
  - (ii) individually with the profits or losses of each subsidiary, so far as they concern members of the company; or
  - (iii) as a whole with the consolidated profits or losses of the company and (so far as concerns members of the company) of all subsidiaries; and
- (b) in regard to assets and liabilities, deal separately with the company's assets and liabilities as provided by subparagraph (2) and, in addition, deal-
  - (i) as a whole with the combined assets and liabilities of all subsidiaries, indicating the interests therein of members other than the company; or
  - (ii) individually with the assets and liabilities of each subsidiary, indicating the interests therein of members other than the company; or
  - (iii) as a whole with the consolidated assets and liabilities of the company and all subsidiaries, indicating the interests therein of members other than the company;
- (c) if a subsidiary incurred losses, state the amounts of such losses and the manner in which provision was made therefor.

(4) The auditor shall satisfy himself, as far as reasonably practicable, that, save as stated in his report-

- (a) the debtors and creditors do not include any accounts other than trade accounts;
- (b) the provisions for doubtful debts are adequate;
- (c) adequate provision has been made for obsolete, damaged or defective goods, and for supplies purchased at prices in excess of current market prices;
- (d) intercompany profits in the group have been eliminated;
- (e) there have been no material changes in the assets and liabilities of the company and of any subsidiary since the date of the last annual financial statements.

**26. Report by auditor where business undertaking to be acquired**

If the proceeds, or any part of the proceeds, of the issue of the shares or any other funds are to be applied directly or indirectly in the purchase of any business undertaking, a report made by an auditor (who shall be named in the prospectus) upon-

- (a) the profits or losses of the business undertaking in respect of each of the five financial years preceding the date of the prospectus; and
- (b) the assets and liabilities of the business undertaking at the last date to which the financial statements of the business undertaking were made out.

**27. Report by auditor where body corporate will become a subsidiary**

(1) If the proceeds or any part of the proceeds of the issue of the shares are to be applied, directly or indirectly, in any manner resulting in the acquisition by the company or its subsidiary of shares of any other body corporate by reason of which or of anything to be done in consequence thereof or in connection therewith, that body corporate will become a subsidiary of the company, a report made by an auditor (who shall be named in the prospectus) upon-

- (a) the profits or losses of the other body corporate in respect of each of the five financial years preceding the date of the prospectus; and
- (b) the assets and liabilities of the other body corporate at the last date to which the annual financial statements of the body corporate were made out.

(2) The said report shall-

- (a) indicate how the profits or losses of the other body corporate dealt with by the report would, in respect of the shares to be acquired, have concerned members of the company and what allowance would have fallen to be made, in respect of assets and liabilities so dealt with, for holders of other shares, if the company had at all material times held the shares to be acquired; and
- (b) where the other body corporate has a subsidiary, or, had it been a company in terms of the Act, would have had a subsidiary, deal with the profits or losses and the assets and liabilities of the body corporate and its subsidiary and such other body corporate as would have been its subsidiary if it had been a company in terms of the Act, in the manner provided by paragraph 25 (3) in relation to the company and its subsidiary.

**28. Auditor not qualified to make reports**

Any report by an auditor required by this Schedule shall not be made by any auditor who is a director, officer or employee or a partner of or in the employment of a director, officer or employee of the company or of the company's subsidiary or holding company or of any other subsidiary of the holding company.

**29. Qualification in respect of references to period of five years**

If in the case of a company which has been carrying on business, or of a business undertaking which has been carried on, for less than five years, the annual financial statements of the company or business undertaking have only been made out in respect of four years, three years, two years, or one year, this Part of this Schedule shall have effect as if references to four years, three years, two years or one year, as the case may be, were substituted for references to five years.

**30. Adjustment of figures in reports**

Any report required by this Part of this Schedule shall either indicate by way of note any adjustments as regards the figures of any profits or losses or assets and liabilities dealt with by the report which appear to the persons making the report necessary or shall make these adjustments and indicate that adjustments have been made.

**31. Report by directors as to material changes**

A report by the directors of the company setting out any material change in the assets or liabilities of the company or any subsidiary which may have taken place between the last date to which the annual financial statements of the company or any subsidiary, as the case may be, were made out, and the date of the prospectus.

**PART III**

**MATTERS WHICH MUST BE STATED IN A PROSPECTUS UNDER SECTION 148 (1) (b)  
OF THE ACT**

**32. Name, address and incorporation**

The name and address of the registered office and of the transfer office, and, if an external company, or a body corporate incorporated outside the Republic, the country in which it is incorporated.

**33. Description of business**

If there has been a material change in the nature of the activities of the company since the issue of its last financial statements, then a general description of the business carried on by the company and any subsidiary.

**34. Directors**

The names of the directors of the company.

**35. Secretary**

The name, address and professional qualifications, if any, of the secretary of the company.

**36. Purpose of the offer**

A statement of the purpose of the offer, giving reasons why it is considered necessary for the

company to raise the capital offered. If it is the intention to acquire a business undertaking or property, a brief history of such business undertaking or property must be given, including-

- (a) particulars of any such business undertaking or property purchased or acquired or proposed to be purchased or acquired by the company or its subsidiary, the purchase price of which is to be defrayed in whole or in part out of the proceeds of the issue;
- (b) the amount, if any, paid or payable as purchase money in cash or shares, for any such business undertaking or property as aforesaid, specifying the amount, if any, payable for goodwill;
- (c) the name and address of any vendor;
- (d) the amount payable in cash or shares to any vendor and, where there is more than one vendor or the company is a sub-purchaser, the amount so payable to each vendor.

**37. *Share capital of the company***

Particulars of the share capital-

- (a) if consisting of shares of par value, the authorised and issued share capital, share premium and share capital held in reserve, the number and classes of shares and their nominal value;
- (b) if consisting of shares of no par value, the stated capital, the number of shares issued and held in reserve and classes of shares;
- (c) a description of the respective preferential, conversion and exchange rights, rights to dividends, profits or capital of each class, including redemption rights and rights on liquidation or distribution of capital assets;
- (d) the number of founders' and management or deferred shares, if any, and any special rights attaching thereto.

**38. *Previous issues of debentures***

Where debentures are offered-

- (a) the aggregate amount raised before the date of the offer by the issue of debentures which have not been redeemed;
- (b) particulars of debentures issued during the preceding period of two years, specifying the classes of debentures, whether secured or unsecured and, if secured, the property comprising the security;
- (c) any material outstanding loans.

**39. *Options or preferential rights in respect of shares***

The substance of any contract or arrangement or proposed contract or arrangement, whereby any option or preferential right of any kind was or is proposed to be given to any person to subscribe for any shares of the company or its subsidiary, giving the number and description of any such shares, including, in regard to the option or right, particulars of-

- (a) the period during which it is exercisable;
- (b) the price to be paid for shares subscribed for under it;
- (c) the consideration given or to be given for it;
- (d) the names and addresses of the persons to whom it was given, other than existing shareholders as such or to employees under a *bona fide* staff option scheme;
- (e) if given to existing shareholders as such, material particulars thereof; and
- (f) any other material fact or circumstance concerning the granting of such option or right.

**40. *Material contracts***

The dates and nature of, and the parties to, every material contract entered into by the company or its subsidiary, not being a contract entered into in the ordinary course of the business carried on or intended to be carried on by the company or its subsidiary or a contract entered into more than two years before the date of the prospectus, and a reasonable time and place at which any such contract or a

copy thereof may be inspected.

**41. *Interest of directors***

(a) Full particulars of the nature and extent of any material interest, direct or indirect, of every director in any property proposed to be acquired by the company or its subsidiary out of the proceeds of the issue, and, where the interest of such director consists in being a member of a partnership, company, syndicate or other association of persons, the nature and extent of the interest of such partnership, company, syndicate or other association, and the nature and extent of such director's interest in the partnership, company, syndicate or other association.

(b) Full particulars of the nature and extent of any material interest, direct or indirect, of every director in the property acquired or proposed to be acquired by the company or its subsidiary during the three years preceding the date of the prospectus.

(c) A statement of all sums paid or agreed to be paid within the three years preceding the date of the prospectus to any director or to any company in which he is beneficially interested or of which he is a director, or to any partnership, syndicate or other association of which he is a member, in cash or shares or otherwise, by any person either to induce him to become or to qualify him as a director, or otherwise for services rendered by him or by the company, partnership, syndicate or other association in connection with the promotion or formation of the company.

**42. *Commissions paid or payable in respect of underwriting***

In respect of the issue, the amount, or the nature and extent of any consideration, paid or payable as commission to any person (including a sub-underwriter who is a director or officer of the company) for subscribing or agreeing to subscribe, or procuring or agreeing to procure subscriptions for any shares of the company which are being issued in terms of the prospectus, the name, occupation and address of each such person, particulars of the amounts which each has underwritten and the rate of the commission payable for such underwriting to such person; and if such a person is a company, the names of the directors of such company and the nature and extent of any interest, direct or indirect, in such company of any director or other officer of the company in respect of which the prospectus is issued.

**43. *Particulars of the offer-***

(a) Particulars of the shares offered, including-

- (i) the class of shares;
- (ii) the nominal value of the shares, if applicable;
- (iii) the number of shares offered;
- (iv) the issue price; and
- (v) other conditions of the offer.

(b) Particulars of debentures offered, including-

- (i) the class of debentures;
- (ii) the conditions of the debentures;
- (iii) if the debentures are secured, particulars of the security, specifying the property comprising the security and the nature of the title of the property; and
- (iv) other conditions of the offer.

**44. *Time and date of the opening and of the closing of the offer***

The time and date of the opening and of the closing of the subscription lists of the offer.

**45. *Statement where an offer is not underwritten***

In the event of the offer not being underwritten, a statement by the directors of the manner in which, and the sources from which, any shortfall in the amount proposed to be raised by means of the offer is to be financed.

**46. *Report by directors as to material changes***

A report by the directors of the company setting out any material change in the state of the

affairs of the company or its subsidiary which may have taken place between the last date to which the interim reports or the annual financial statements were made out and the date of the prospectus.

**47. Report by auditor where business undertaking is to be acquired**

If the proceeds, or any part of the proceeds, of the issue of the shares are to be applied, directly or indirectly, in the purchase of any business undertaking, a report made by an auditor (who shall be named in the prospectus) upon-

- (a) the profits or losses of the business undertaking in respect of each of the five financial years preceding the date of the prospectus; and
- (b) the assets and liabilities of the business undertaking at the last date to which the financial statements of the business undertaking were made out.

**48. Report by auditor where body corporate will become a subsidiary**

(1) If the proceeds or any part of the proceeds of the issue of the shares are to be applied, directly or indirectly, in any manner resulting in the acquisition by the company or its subsidiary of shares of any other body corporate by reason of which or of anything to be done in consequence thereof or in connection therewith, that body corporate will become a subsidiary of the company, a report made by an auditor (who shall be named in the prospectus) upon-

- (a) the profits or losses of the other body corporate in respect of each of the five financial years preceding the date of the prospectus; and
- (b) the assets and liabilities of the other body corporate at the last date to which the annual financial statements of the body corporate were made out.

(2) The said report shall-

- (a) indicate how the profits or losses of the other body corporate dealt with by the report would, in respect of the shares to be acquired, have concerned members of the company and what allowance would have fallen to be made, in respect of assets and liabilities so dealt with, for holders of other shares, if the company had at all material times held the shares to be acquired; and
- (b) where the other body corporate has a subsidiary or, had it been a company in terms of the Act, would have had a subsidiary, deal with the profits or losses and the assets and liabilities of the body corporate and its subsidiary and such other body corporate as would have been its subsidiary if it had been a company in terms of the Act, in the manner provided by paragraph 25 (3) in relation to the company and its subsidiary.

**PART IV**

**DIRECTIONS AS TO THE FORM OF A PROSPECTUS**

49. The information required to be stated in a prospectus shall be set out in print or type and shall not be less conspicuous than that in which any additional matter is printed or typed and shall be set out in separate paragraphs under the headings included in this Schedule.

50. A prospectus shall deal with each of the applicable paragraphs of this Schedule under its prescribed heading but not necessarily in the same order, and shall in each case by means of a number in brackets, or otherwise, refer to the number of the paragraph of this Schedule. In the last paragraph of the prospectus under the heading - 'Paragraphs of Schedule 3 which are not applicable' - the numbers of the paragraphs of this Schedule which are not applicable shall be stated.

51. As far as possible the general matter of a prospectus shall be presented in narrative form and statistical matter in tabular form.

**Schedule 4**

**REQUIREMENTS FOR FINANCIAL STATEMENTS**

[Heading substituted by s. 55 (a) of Act 24 of 2006.]

Cases

[Schedule 4 amended by Proc R13 of 1974, by Proc R19 of 1975, by Proc R219 of 1976, by Proc R262

of 1977 and by s. 106 of Act 82 of 1986, substituted by GN R2921 of 23 October 1992 and amended by Act 24 of 2006.]

**Preliminary (paras 1-3)**

1 .....

[Para. 1 deleted by s. 50 (b) of Act 24 of 2006.]

2 This Schedule has effect in addition to the requirements of the Act in respect of financial statements.

[Para. 2 substituted by s. 50 (c) of Act 24 of 2006.]

3 A company may, in addition to matters expressly permitted by this Schedule give any information required by this Schedule to be stated in a balance sheet or income statement, in the form of a note or annexure thereto if such presentation would be more effective or convenient.

**Interpretation (para 4)**

4 For the purposes of this Schedule, unless the context otherwise indicates-

- (a) **'accounting date'** means, in the case of annual financial statements, the date on which the financial year of a company terminates and in the case of interim reports, the date on which the accounting period concerned terminates;
- (b) **'accounting period'** means, in the case of annual financial statements, the financial year of the company and in the case of interim reports, the period concerned for which a report is required by the Act;
- (c) an **'associated company'** is an investee that is neither a subsidiary nor a joint venture of the investor, is held as a long term investment and provides the investor with the ability to exercise significant influence;
- (d) **'contingent right to the allotment of shares'** means any option to subscribe for shares and any other rights to the allotment of shares to any person whether arising on the conversion into shares of securities of any other description or otherwise;
- (e) **'convertible instruments'** are instruments which may be voluntarily exchanged for shares or debentures during a designated conversion period at a specified exchange ratio;
 

[Sub-para. (e) substituted by s. 55 (d) of Act 24 of 2006.]
- (f) **'current taxation'** is the amount of income tax payable or recoverable in respect of taxable income or tax loss for the period;
 

[Sub-para. (f) substituted by s. 55 (d) of Act 24 of 2006.]
- (g) **'deferred taxation'** is the tax payable or recoverable in future periods due to temporary differences.
 

[Sub-para. (g) substituted by s. 55 (d) of Act 24 of 2006.]
- (h) **'defined benefit plans'** are retirement benefit plans under which amounts to be paid as retirement benefits are determinable, usually by reference to employee's pensionable remuneration or years of service or both;
- (i) **'defined contribution plans'** are retirement benefit plans under which amounts to be paid as retirement benefits are determined by contributions to a fund together with investment earnings thereon;
- (j) **'distributable reserve'** means any amount which has been transferred to reserves and which may be distributed by way of dividend; and **non-distributable reserve** shall be construed accordingly;
- (k) **'earnings per share'** means the earnings attributable to each equity share, based on the consolidated net income for the period, after tax, and after deducting outside shareholders' interest and preference dividends, divided by the weighted average number of that class of share in issue;

- [Sub-para. (k) substituted by s. 55 (d) of Act 24 of 2006.]
- (l) **'effective tax rate'** is the taxation charge in the income statement expressed as a percentage of reported income;  
[Sub-para. (l) substituted by s. 55 (d) of Act 24 of 2006.]
- (m) .....  
[Sub-para. (m) deleted by s. 55 (e) of Act 24 of 2006.]
- (n) **'fellow subsidiary'** means, in relation to another company, a company which is a subsidiary of the same holding company of which that other company is a subsidiary;
- (o) **'financing activities'** are those activities which result in changes in the size and composition of the contributed equity and borrowings of the reporting entity;  
[Sub-para. (o) substituted by s. 55 (f) of Act 24 of 2006.]
- (p) **'group annual financial statements'** means the annual financial statements in respect of groups of companies as prescribed by section 289 of the Act;
- (q) **'group of companies or group'** means a holding company, not itself being a wholly owned subsidiary, together with all the companies being its subsidiaries;
- (r) **'intangible assets'** are identifiable non-monetary assets without physical substance;  
[Sub-para. (r) substituted by s. 55 (f) of Act 24 of 2006.]
- (rA) **'inventories'** are assets held for sale in the ordinary course of business, in the process of production for sale, or in the form of materials or supplies to be consumed in the production process or in the rendering of services;  
[Sub-para. (rA) inserted by s. 55 (g) of Act 24 of 2006.]
- (s) **'investing activities'** are those activities relating to the acquisition and disposal of long-term assets and other investments not falling within the definition of cash and cash equivalents;  
[Sub-para. (s) substituted by s. 55 (h) of Act 24 of 2006.]
- (t) **'listed investment'** means an investment in regard to which permission has been granted to deal therein on a recognised stock exchange or on any stock exchange of repute outside the Republic; and **'unlisted investment'** shall be construed accordingly;
- (u) **'market value'** is the amount for which an asset could be bought or sold between a knowledgeable, willing buyer and a knowledgeable, willing seller in an arm's length transaction;
- (v) **'material'** means anything that is significant in relation to the circumstances applicable to each company; and **'materially'** shall have a corresponding meaning;
- (vA) **'material item'** means any information relating to a company that, either by itself or in conjunction with other information, is of such an extent or nature that it could influence the economic decisions of users of the company's financial statements.  
[Sub-para. (vA) inserted by s. 55 (i) of Act 24 of 2006.]
- (w) **'provision'** means a liability of uncertain timing or amount;  
[Sub-para. (w) substituted by s. 55 (j) of Act 24 of 2006.]
- (x) **'retained equity income or deficit of an associated company'** is the investor's effective interest in the retained income or loss (net of dividends received) of the investee for the accounting period before prior year adjustments;  
[Sub-para. (x) substituted by s. 55 (j) of Act 24 of 2006.]
- (y) **'sale and leaseback transaction'** involves a company selling its assets to a lessor who, in turn, leases the same assets back to the company, which then becomes a lessee;
- (z) **'standard tax rates'** are the rates of tax as determined from time to time by tax legislation, at which companies pay tax on taxable income;
- (aa) .....

[Sub-para. (aa) deleted by s. 55 (k) of Act 24 of 2006.]

- (ab) **'the Act'** means the Companies Act, 1973 (Act 61 of 1973);
- (ac) **'timing differences'** are the differences between taxable income and reported income that arise because certain items of income and expense are included in taxable income in periods different from those in which they are included in reported income.

**Application (para 4A)**

- 4A** (a) Limited interest companies must comply with the whole of this Schedule.  
 (b) To the extent that there is no conflicting requirement in financial reporting standards, public interest companies must comply with Part III and with paragraphs 8-10, 14, 17, 23, 25-28, 30-33, 36, 37, 40-42, 45, 56-60 and 73 of this Schedule.

[Para. 4A inserted by s. 55 (l) of Act 24 of 2006.]

**PART I (paras 5-51)**

**A. GENERAL (paras 5-6)**

*Departure from accounting concepts* (para 5)

[Heading and subheading substituted by s. 55 (m) of Act 24 of 2006.]

**5** .....

[Para. 5 deleted by s. 50 (n) of Act 24 of 2006.]

*Disclosure of accounting policies* (para 6)

- 6** The accounting policies adopted by the company in determining the carrying amounts of the assets and liabilities and the resulting net income of the company shall be stated.

**B. BALANCE SHEET (paras 7-40)**

*Corresponding amounts of preceding year* (para 7)

- 7** Except in the case of the first balance sheet, the corresponding amounts at the end of the immediately preceding financial year in respect of all items shown in the balance sheet shall be stated.

**SHARE CAPITAL AND SHARES (paras 8-10)**

- 8** (1) There shall be stated-
- (a) the authorised and issued share capital;
  - (b) the classes of shares, the respective number and nominal value into which the authorised share capital is divided and in the case of shares of no par value, the number of such shares;
  - (c) the number of the issued shares and the amount of the issued share capital in respect of each class of shares;
  - (d) the amount of the share premium account; and
  - (e) the preliminary expenses, commission and expenses of share issue charged against the share premium account during the accounting period.
- (2) In respect of shares issued during the accounting period, there shall be stated-
- (a) the classes of shares issued;
  - (b) as regards each class of shares, the number issued, their aggregate nominal or stated value and the consideration received by the company for such allotment;
  - (c) as regards no par value shares, the preliminary expenses, commission and expenses of the creation or issue of any such shares charged against the stated capital account during the accounting period; and
  - (d) details of shares issued during the year to a director or a member of his or her immediate family.
- 9** (1) In respect of any part of the issued share capital that consists of redeemable preference shares, there shall be stated-
- (a) the earliest and latest dates on which the company has the power to redeem those

shares;

- (b) whether those shares must be redeemed in any event or are liable to be redeemed at the option of the company or of the preference shareholders;
- (c) the premium, if any, payable on redemption; and
- (d) the dividend rights of such redeemable preference shareholders.

(2) In respect of any part of the issued share capital that consists of preference shares convertible into ordinary shares, the following information shall be given:

- (a) The conditions and rights of conversion; or
- (b) a note specifying where these conditions and rights may be inspected.

**10** With respect to any contingent right to the allotment of shares in the company, the following particulars shall be given:

- (a) The number and description of the shares in relation to which the right is exercisable;
- (b) the period during which it is exercisable; and
- (c) the price to be paid for the shares allotted.

#### RESERVES (para 11)

**11** There shall be stated-

- (a) the amount of each of the reserves as at the date of the beginning of the accounting period and as at the accounting date;
- (b) the source and the amount of any transfers to reserves; and
- (c) the application and the amount of any transfers from reserves.

#### ACTUARIAL LIABILITIES AND PROVISIONS IN RESPECT OF LONG TERM INSURERS (para 12)

**12** In the case of a long term insurer, a report by the valuator appointed in terms of the Insurance Act, 1943 (Act 27 of 1943), shall be included in the financial statements which shall include, *inter alia*, information relating to liabilities under unmaturing policies, in accordance with a guideline issued by the Actuarial Society of South Africa, incorporated in guideline AC204 issued by the South African Institute of Chartered Accountants.

#### LIABILITIES (paras 13-18)

##### *General*

**13** The liabilities shall be summarised with such particulars as are necessary to disclose their general nature and shall be classified under headings and sub-headings appropriate to the company's business.

##### *Convertible instruments and debentures*

**14** There shall be stated-

- (a) the amount and classes of convertible instruments and debentures issued and the nature of the consideration received when issued otherwise than for cash in the year of issue, the conditions of conversion and the dates on which convertible instruments or debentures may, or shall, be redeemed, or where the conditions of conversion are numerous, a note where these conditions may be inspected;
- (b) where any of the company's convertible instruments and debentures are held by a nominee of, or trustee for, the company, the nominal amount of the convertible instruments and debentures and the amount at which they are stated in the books of the company;
- (c) particulars of any redeemed convertible instruments and debentures which the company has the power to re-issue; and
- (d) details of convertible instruments and debentures granted during the year to, or exercised by, a director or a member of his or her immediate family.

##### *Borrowings and obligations*

- 15** There shall be shown under separate headings-
- (a) the amounts of current borrowings, bank overdrafts and obligations including those arising from the capitalisation of leased assets, where the date of settlement, repayment or renewal is not more than one year after the accounting date;
  - (b) the amounts of long term borrowings and obligations including those arising from the capitalisation of leased assets, where the date of settlement, repayment or renewal is more than one year after the accounting date and the rates of interest in respect thereof, the respective dates of repayment or of renewal and, if repayable in instalments, the amounts thereof; and
  - (c) the aggregate of all interest bearing borrowings and obligations analysed between current and long term.

*Other liabilities*

- 16** There shall be shown under separate headings-
- (a) the amount which has been declared or which has been recommended for distribution by way of dividend;
  - (b) the liability for income tax payable;
  - (c) the liability for deferred taxation analysed by major category of timing difference; and
  - (d) the aggregate amounts of provisions (other than provisions for depreciation or diminution in value of current assets).

*Secured liabilities*

- 17** Where any liability is secured by an encumbrance over any assets, that fact shall be stated, specifying the amount of the liability and the nature of the encumbrance and amount of the assets by which it is secured.

*Indebtedness to companies in the group*

- 18** There shall be shown under separate headings the aggregate amount of indebtedness to-
- (a) the company's subsidiaries; and
  - (b) all bodies corporate of which it is a subsidiary or a fellow subsidiary.

ASSETS (paras 19-29)

*General*

- 19** The assets shall be summarised with such particulars as are necessary to disclose their general nature and shall be classified under headings and sub-headings appropriate to the company's business.
- 20** Fixed assets, capitalised leased assets, current assets and assets that are neither fixed nor current shall be separately identified.
- 21** The method or methods used to arrive at the amount of the fixed assets and the assets that are neither fixed nor current under each heading, shall be stated.

*Fixed assets*

- 22** (1) The method of arriving at the amount of any fixed asset whether tangible or intangible or any asset which is neither fixed nor current shall be to take the difference between-
- (a) its cost, or if it has been revalued, the amount of the valuation; and
  - (b) the aggregate amounts provided or written off since the date of acquisition or valuation, as the case may be, for depreciation or diminution of value.
- (2) In respect of the assets under each heading whose amounts are arrived at in accordance with subparagraph (1) of this paragraph, there shall be shown-
- (a) the aggregate of the amounts referred to in paragraph (a) of that subparagraph; and
  - (b) the aggregate of the amounts referred to in paragraph (b) thereof.
- (3) As regards any land and buildings which are fixed assets there shall also be stated-
- (a) a description of such land and buildings and the situation thereof;

- (b) the date of their acquisition by the company;
- (c) their purchase price; and
- (d) the costs of additions or improvements since the date of acquisition or valuation:

Provided that where there are more than five different items of land and buildings, the information may be included in a schedule or register and shall in that event state in a note to the balance sheet that the said schedule or register shall be open for inspection in terms of the provisions of section 113 of the Act:

Provided further that the requirements of subparagraph 3 (b), (c) and (d) shall not apply to land and buildings acquired or used solely for the purpose of carrying on mining operations, including housing for mine employees.

- (4) As regards any fixed assets referred to in subparagraph (3), the amount of which is arrived at by reference to a valuation, the provisions of subparagraphs (b) and (c) thereof shall not apply, but there shall be stated-
- (a) the most recent year in which the assets were severally valued;
  - (b) in the case of assets valued in the current year, the names and qualifications of the persons who valued them;
  - (c) the basis of valuation; and
  - (d) the policy regarding the frequency of valuation:

Provided that where there are more than five different items of land and buildings, the information required by subparagraph 4 (a), (b) and (c) may be included in a schedule or register and shall in that event state in a note to the balance sheet that the said schedule or register shall be open for inspection in terms of the provisions of section 113 of the Act.

*Interests in subsidiaries*

- 23** The aggregate amount of the interest in subsidiaries consisting of shares of, or amounts owning[sic] by, its subsidiaries, distinguishing shares from indebtedness, shall be set out in the balance sheet separately from the other assets or the company.

*Indebtedness of holding company and fellow subsidiaries*

- 24** The aggregate amount of the indebtedness to the company of all holding companies and fellow subsidiaries, shall be set out.

*Loans to, and security for, directors, managers and employees*

- 25** The aggregate amounts of any outstanding loans under section 38 (2) (b) and (c) of the Act and the particulars required by section 295 and 296 of the Act shall be shown under separate headings.

*Investments*

- 26** (1) The company's investments shall be analysed between listed and unlisted investments.  
 (2) In respect of investments here shall be shown-
- (a) in respect of listed investments, the aggregate market value where it differs from the amount of the investments as stated; and
  - (b) in respect of unlisted investments, the aggregate of the directors' valuation of such investments.
- 27** There shall be shown the names of all companies (excluding subsidiary companies) in which the company has investments and in each case the number of shares and classes of shares so held in a listed investment or the percentage of the issued share capital and voting power held, if different, in a listed or unlisted investment: Provided that where there are more than five different listed or unlisted investments, the information may be included in a schedule or register and shall in that event state in a note to the balance sheet that the said schedule or register shall be open for inspection in terms of the provisions of section 113 of the Act.
- 28** Where the carrying amount of unlisted investments is arrived at by reference to a valuation there shall be stated-

- (a) the policy regarding the frequency of revaluations;
- (b) the basis of valuation; and
- (c) the date of the latest revaluation.

*Inventories*

- 29** (1) There shall be stated the amounts in respect of the following categories of inventories:
- (a) Raw materials (including component parts);
  - (b) finished goods;
  - (c) merchandise which may itself be shown under appropriate subheadings;
  - (d) consumable stores (including maintenance spares);
  - (e) work in progress (including standing crops); and
  - (f) contracts in progress.
- (2) There shall be stated for contracts in progress, whether profits or losses have been taken into account and, if so, on what basis.

[Para. 29 substituted by s. 55 (o) of Act 24 of 2006.]

PRELIMINARY EXPENSES, COMMISSIONS AND DISCOUNTS (para 30)

- 30** There shall be stated under separate subheadings so far as they are not written off-
- (a) the preliminary expenses;
  - (b) any expenses incurred in connection with any issue of shares or debentures;
  - (c) any sums paid by way of commission in respect of any shares or debentures; and
  - (d) any sums allowed by way of discount in respect of any issued shares and debentures.

OTHER (paras 31-33)

*Shares, convertible instruments or debentures held by subsidiary*

- 31** There shall be stated the percentage held, description and amount of shares, convertible instruments and debentures of the company held by its subsidiaries or their nominees, but excluding any such shares, convertible instruments or debentures in respect of which the subsidiary is concerned in a representative capacity or as a trustee under a trust in which neither the company nor any subsidiary thereof is beneficially interested otherwise than by way of security for the purposes of a transaction entered into by it in the ordinary course of business which includes the lending of money.

*Directors' authority to issue shares*

- 32** The amount of any share capital or the number of shares which the directors are authorised to issue, the terms of such authority and the period for which it was granted, shall be stated.

*Arrear dividends*

- 33** The amount of any arrears of cumulative dividends on each class of the company's shares and the period for which the dividends are in arrear shall be stated.

ENCUMBRANCES, CONTINGENCIES AND COMMITMENTS (paras 34-36)

*Encumbrances*

- 34** Particulars of any encumbrance on the assets of the company to secure the liabilities of any other person, including where practicable, the amount secured, shall be stated.

*Contingencies*

- 35** Particulars of any contingencies not already recognised in the financial statements shall be stated, including-
- (a) the nature of the contingency;
  - (b) the uncertain factors that may affect the future outcome; and
  - (c) the estimated amount and its effect, before and after taxation.

*Commitments*

- 36** Where practicable the aggregate amount or estimated amount of contracts for capital expenditure, not otherwise provided for and the aggregate amount or estimated amount of capital expenditure

authorised by the directors which has not been contracted for, shall be stated. There shall also be stated the source from which funds to meet such expenditure will be provided.

**LOANS AND SECURITY TO BE DISCLOSED BY SUBSIDIARY (para 37)**

**37** The following particulars in respect of any funds employed in a loan or security provided by a company shall, if the provisions of section 37 of the Act apply to such loan or security, be stated:

- (a) The name of the company or other body corporate to which the loan was directly or indirectly made, or in connection with an obligation of which security was directly or indirectly provided to another person;
- (b) the group relationship between the subsidiary and the company or other body corporate contemplated in subparagraph (a);
- (c) when funds of the subsidiary have been employed in a loan-
  - (i) the date of the loan;
  - (ii) the name of the intermediary concerned if the loan was made indirectly;
  - (iii) the amount of the loan outstanding at the end of the financial year;
  - (iv) the highest outstanding balance under the loan during the financial year;
  - (v) the rate at which interest was or is to be paid, the amount paid as interest, and any other consideration which was or is to be given by the borrowing company or other body corporate, in respect of all transactions transacted during the whole financial year;
  - (vi) the security, if any, obtained in respect of the loan, and if no security was obtained, a statement of that fact; and
  - (vii) the terms upon which the loan is being or is to be repaid, and, if such terms have not been complied with, the extent of such noncompliance:

Provided that, if more than one loan was made by the subsidiary to any particular company or other body corporate on identical terms, such loans may, for purposes of this paragraph, be combined;

- (d) when security has been provided by the subsidiary-
  - (i) the name of the person to whom the security was provided;
  - (ii) the nature of the security;
  - (iii) the date upon which the security was provided;
  - (iv) the amount for which the security was provided;
  - (v) the period for which the security will subsist or, if terminated, the date of such termination;
  - (vi) the obligation in connection with which security was provided;
  - (vii) the consideration, if any, which was or is to be received by the subsidiary for providing the security; and
  - (viii) the payments, if any, made by the subsidiary under or by virtue of its liability in terms of the security, and the amounts, if any, recovered thereafter under or by virtue of any right of recourse.

**FOREIGN CURRENCY DENOMINATED ITEMS (para 38)**

**38** There shall be stated the nature, the exchange rates used on conversion and amounts of uncovered foreign currency monetary items at the balance sheet date.

**RETIREMENT BENEFIT INFORMATION (paras 39-40)**

**39** There shall be stated sufficient information concerning retirement benefit plans to provide a broad understanding of the significance of retirement benefit costs in the accounting period and of actual and contingent liabilities and commitments at the accounting date.

**40** There shall be stated-

- (a) whether or not the retirement benefit plan is governed by the Pension Funds Act, 1956

- (Act 24 of 1956);
- (b) the nature of the retirement benefit plan whether it is a defined contribution plan or a defined benefit plan;
  - (c) any commitment of the company formal or otherwise, to meet unfunded benefits;
  - (d) an indication of the proportion of the company's employees covered by retirement benefit plans;
  - (e) the effective date of the most recent actuarial valuation;
  - (f) the opinion of the actuary as to whether or not the plan was in a sound financial position;
  - (g) any alteration as to the contribution rate recommended by the actuary specifying the nature, amount and duration of the alteration and whether or not the recommendation is being implemented; and
  - (h) the year of the next actuarial valuation.

### C. INCOME STATEMENT (paras 41-48)

- 41** Except in the case of the first income statement, the corresponding amounts for the immediately preceding financial year for all items shown in the income statement, shall be stated.
- 42** There shall be shown separately-
- (a) the amount of income from investments, distinguishing between listed and unlisted investments and between interest, dividends, and other specified income;
  - (b) the aggregate amount of income from subsidiaries, stating whether dividends, interest, fees or other specified income;
  - (c) the aggregate amount of the dividends declared and, if such dividends are provided partly or wholly from capital profits, a statement to that effect;  
[Sub-para. (c) substituted by s. 55 (p) of Act 24 of 2006.]
  - (d) the amount provided or paid for taxation (specifying, where material, the origin and different classes of taxes) in respect of the financial year concerned and the amount, if any, so provided or paid in respect of any other financial year;
  - (e) the amount provided for current and deferred taxation, significant adjustments to prior period provisions and adjustments to deferred taxation arising from changes in the standard tax rate;
  - (f) the amount of interest (or other consideration) on any loans, including debentures and bank overdrafts made to the company identifying the portion, if any, capitalised during the period;
  - (g) the amount of interest on share capital paid out of capital during the financial period concerned and the rate of such interest;
  - (h) the respective amounts paid as remuneration for managerial, technical, administrative or secretarial services, however described, other than to the *bona fide* employees of the company;
  - (i) the amount paid to the auditors;
  - (j) the amounts respectively set aside for redemption of shares and of loans;
  - (k) the amount transferred or proposed to be transferred to or from reserves;
  - (l) earnings per share and dividends per share in respect of listed companies for each class of equity shares;
  - (m) profits or losses on share transactions;
  - (n) the aggregate amount of profits and losses on the realisation, scrapping or other disposal of non-trading, fixed and other non-current assets;
  - (o) the amount charged to income by way of provisions (other than provisions for diminution in values of current assets) specifying the nature of each provision or the

- amount withdrawn from such provisions and not applied for the purpose thereof;
- (p) the amount of any credit or charge arising in consequence of an event in a preceding financial year;
- (q) the amount of foreign exchange gains and losses taken to the income statement which relate to foreign currency denominated items;  
[Sub-para. (q) substituted by s. 55 (p) of Act 24 of 2006.]
- (r) the amount of operating lease charges distinguishing between the major categories of assets held under operating lease;
- (s) items of income and expense which, in the accounting period, are material items and result from occurrences the underlying nature of which is typical of the ordinary trading or operating activities of the enterprise;  
[Sub-para. (s) substituted by s. 55 (p) of Act 24 of 2006.]
- (t) the profit or loss arising from the sale of an asset after adjustment for any difference between the sale price and fair value when there has been a sale and lease back transaction which gives rise to an operating lease; and
- (u) where group accounts are not presented, in respect of investments in associates, the dividend received, the investor's interest in the retained equity income or deficit and the investor's effective interest in prior period adjustments.  
[Sub-para. (u) substituted by s. 55 (p) of Act 24 of 2006.]

**43** There shall be stated the aggregate amount of turnover for the accounting period concerned and the basis upon which turnover has been determined.

**44** If provision for depreciation or for the diminution in value of fixed assets is made, by some method other than a depreciation charge or provision for diminution in value or is not provided for, the method by which it is provided for or the fact that it is not provided for, shall be stated.

**45** If no provision for taxation has been made, that fact and the reason therefor shall be stated.

**46** There shall be stated any material items and the amount of these items.

[Para. 46 substituted by s. 55 (q) of Act 24 of 2006.]

**47** There shall be stated sufficient information on forward exchange contracts entered into which do not relate to specific balance sheet items to enable an assessment to be made of the foreign currency exposure.

**48** There shall be stated-

- (a) the estimated tax effect of tax losses available for set off against future taxable income, before and after they have been applied to reduce deferred taxation; and
- (b) the total unprovided net timing differences separately stating those relating to the current year.

#### **D. STATEMENT OF CASH FLOW INFORMATION (paras 49-51)**

**49** Except in the case of the first statement of cash flow information, the corresponding amounts for the preceding period for all items shown in the statement of cash flow information shall be stated.

**50** Annual financial statements shall include a cash flow statement showing, where applicable, the following items:

- (a) Cash generated by operations;
- (b) investment income;
- (c) changes in the non cash components of working capital;
- (d) cash effects of finance costs and taxation;
- (e) cash effects of dividends paid;
- (f) cash effects of investing activities; and
- (g) cash effects of financing activities.

**51** A reconciliation shall be provided between operating income for the period as shown in the

income statement and cash generated by operations stating adjustment for non cash items included in income for the period.

**PART II**  
**GROUP ANNUAL FINANCIAL STATEMENTS (paras 52-65)**

*Preliminary*

- 52** The provisions contained in paragraphs 53 to 56 inclusive, shall apply to all forms of group annual financial statements and shall also apply in respect of the requirements of paragraphs 62 to 65, inclusive, in relation to subsidiaries not dealt with in group annual financial statements.
- 53** Any net income or loss arising from transactions within the group, in so far as this net income or loss may not have been realised or incurred in respect of a transaction with a person or company outside the group, shall be excluded in determining the total group net income or loss, or the interest of the holding company in the net income or loss of any subsidiary.
- 54** Intra-group balances shall be excluded in determining the total assets and liabilities of the group.
- 55** (1) Dividends declared by a subsidiary out of income accrued prior to the date on which the holding company acquired its interest(s) in the subsidiary, being pre-acquisition income so far as it is reasonably ascertainable, shall be shown separately unless-
- (a) such holding company is itself the subsidiary of another body corporate;
  - (b) the shares of the subsidiary were acquired from that other body corporate or a subsidiary of it; and
  - (c) the income out of which the dividend is declared accrued after the company became a subsidiary of that other body corporate or of a subsidiary of it.
- (2) For the purpose of establishing whether any income accrued prior to the acquisition of the shares of the subsidiary, the income or loss for any financial year of the subsidiary may, if it is not practicable to apportion it with reference to the facts, be treated as if it accrued from day to day during that year and be apportioned accordingly.
- 56** There shall be stated any qualifications contained in the report of the auditors of the subsidiaries on their annual financial statements and any note or saving contained in those financial statements to call attention to the matter which, apart from the note or saving, would properly have been referred to in such a qualification, note or saving, in so far as the matter which is the subject of the qualification is not covered by the holding company's own annual financial statements or the annual group financial statements.
- Group annual financial statements in the form of consolidated financial statements*
- 57** Subject to the provisions of paragraphs 58 to 60, inclusive, the consolidated financial statements shall combine the information contained in the separate financial statements of the holding company and of the subsidiaries dealt with in such consolidated financial statements, but with such adjustments as may be necessary fairly to present this state of affairs and the financial position as at the accounting date, and the results of operations during the accounting period of the group.
- 58** Subject as aforesaid, the consolidated financial statements shall, in giving the said information, comply, so far as practicable, with the requirements of this Act and this Schedule as if they were the financial statements of an actual company.
- 59** Section 297 of the Act (concerning the disclosure of directors' remuneration) shall not, by virtue of the requirements of paragraphs 57 to 58, apply for the purposes of consolidated financial statements.
- 60** In relation to any subsidiaries of the holding company not dealt with in the consolidated financial statements-
- (a) paragraph 18 (concerning indebtedness to companies in the group), paragraph 23 (concerning interests in subsidiaries), paragraph 24 (concerning indebtedness of the

holding company and fellow subsidiaries) and paragraph 31 (concerning shares, convertible instruments or debentures held by a subsidiary), shall apply for the purposes of such consolidated financial statements as if those statements were the statements of an actual company of which they were the subsidiaries; and

- (b) there shall be annexed the information required by paragraphs 62 to 65, inclusive, in respect of subsidiaries not dealt with in group annual financial statements.

*Group annual financial statements in a form other than consolidated financial statements*

**61** Where group annual financial statements are prepared in a form other than consolidated statements they shall, as far as practicable, present the same or equivalent information concerning the state of affairs and the financial position and results of operations of the group as would be contained in the consolidated financial statements, including the aggregate amounts of-

- (a) the excess (if any) of the cost of the shares of the subsidiaries in the group over the fair value of the identifiable net assets at the date of acquisition and the non-distributable reserve (if any) arising in consequence of the excess of the fair value of the identifiable assets at the date of acquisition over the cost of the shares of the subsidiaries: Provided that non-distributable reserves arising on the acquisition of shares in a subsidiary may be set off against any excess of cost of shares of other subsidiaries over the fair value of the identifiable net assets of such other subsidiaries;
- (b) the holding company's share of the post-acquisition non-distributable reserves of subsidiaries;
- (c) the net interest of outside shareholders, being shareholders other than the holding company and its subsidiaries or their nominees, in the subsidiaries in the group; and
- (d) the interest of the holding company, in so far as it has not been disclosed in such group annual financial statements, in-
- (i) the accumulated distributable reserves of subsidiaries for the period after the dates on which they respectively became subsidiaries to the preceding accounting date; and
- (ii) the net income of subsidiaries for the accounting period.

*Requirements in respect of subsidiaries not dealt with in group annual financial statements*

**62** Where a subsidiary is not dealt with in group annual financial statements in terms of section 291 of the Act and the interest in such subsidiary is material in relation to the financial position or the results of the holding company, there shall be included in the annual financial statements of the holding company the information required to be stated in terms of paragraphs 63 to 65 inclusive, and, if any such information is not obtainable, the reason therefor shall be stated: Provided that this paragraph shall not apply to a holding company which is a wholly owned subsidiary of another company.

**63** The reasons shall be stated why the subsidiaries or any of them are not dealt with in group annual financial statements.

**64** In regard to the shareholders' equity, liabilities and assets of the subsidiaries not dealt with in annual group financial statements there shall be stated the aggregate amounts of-

- (a) the cost of the holding company's investment in shares of subsidiaries;
- (b) the excess (if any) of the cost of the shares of the subsidiaries over the fair value of the identifiable net assets at the date of acquisition, and the non-distributable reserve (if any) arising in consequence of the excess of the fair value of the identifiable net assets at the date of acquisition over the cost of the shares of subsidiaries: Provided that non-distributable reserves arising on the acquisition of shares in a subsidiary may be set off against any excess of cost of shares of other subsidiaries over the fair value of the identifiable net assets of such other subsidiaries;

- (c) the holding company's share of the post-acquisition non-distributable reserves of subsidiaries;
  - (d) the interest of outside shareholders, being shareholders other than the holding company and its subsidiaries or their nominees, in the subsidiaries;
  - (e) long-term loans owing by companies in the group;
  - (f) fixed assets;
  - (g) net current assets;
  - (h) goodwill, if any, shown in the books of the subsidiaries in so far as it has not already been absorbed in the calculation referred to in paragraph (b); and
  - (i) separately stated assets not included in subparagraphs (f), (g) and (h).
- 65** In regard to net income or loss and distributable reserves of the subsidiaries not dealt with in group annual financial statements, there shall be stated the aggregate interest of the holding company in-
- (a) the accumulated distributable reserves of subsidiaries for the period from the dates on which they respectively became subsidiaries to the preceding accounting date;
  - (b) the net income and distributable reserves attributable to any shares of subsidiaries disposed of during the accounting period;
  - (c) the net income of subsidiaries for the accounting period;
  - (d) dividends paid or declared by subsidiaries during the accounting period; and
  - (e) the distributable reserves at the accounting date not dealt with in the annual financial statements of the holding company.

### **PART III**

### **DIRECTORS' REPORT (paras 66-72)**

#### ***Preliminary (para 66)***

- 66** (1) The directors' report shall deal in narrative form with all descriptive matters under appropriate headings and amounts or statistics shall be set out as far as practicable in tabular form.
- (2) Any matter not prescribed by this Schedule but which is material for the appreciation of the state of affairs of the company and its subsidiaries, if any, shall be dealt with in the directors' report under appropriate headings.
- (3) Where any amounts are stated, the corresponding amounts, if any, in respect of the immediately preceding accounting period shall be stated.

#### ***General review (para 67)***

**67** (a) [sic] The said report shall generally review the business and operations of the company during the accounting period and the results thereof and shall deal with every fact or circumstance material to the appreciation of the state of affairs and financial position of the company by its members including a statement of the estimated proportion of net income or loss attributable to the various classes of business of the company.

(2) The said report shall deal with any material fact or circumstance which has occurred between the accounting date and the date of the report.

#### ***Specific matters (para 68)***

- 68** Unless such information is already given in any document annexed to the annual financial statements, the said report shall state-
- (a) the nature of the business of the company and of its subsidiaries, if any, and any major change therein during the accounting period;
  - (b) in aggregate figures the amounts and particulars of any shares, convertible instruments and debentures issued during the accounting period and the purposes for an [sic] circumstances in which such shares, convertible instruments and debentures have been issued;

- (c) any major change in the nature of the fixed assets of the company and of its subsidiaries, if any, during the accounting period or any change in policy relating to the use of fixed assets;
- (d) the amount, if any, already paid or declared or proposed to be paid by way of dividends in respect of each class of shares;
- (e) the fact that the business of the company or any part thereof or of a subsidiary has been managed by a third person or a company in which a director has an interest, under any agreement during the accounting period (if it has been so managed) and the names of such third person or company and the director's interest in such company, if material;
- (f) the names of the directors and the secretary, the secretary's business and postal address, and any changes during the accounting period; and
- (g) the name of the company's holding company and its ultimate holding company, if any, and if any such holding company has been incorporated in a foreign country, the name of that country.

### **MATTERS TO BE STATED WHERE COMPANY IS A HOLDING COMPANY (paras 69-72)**

#### **A. GENERAL INFORMATION (para 69)**

- 69** If the company is at the accounting date a holding company and if it is not itself a wholly owned subsidiary, the directors' report shall in respect of each principal subsidiary state-
- (a) the name and, if incorporated in a foreign country, the name of that country;
  - (b) if any of the businesses, or part thereof, of any subsidiary controlled by the holding company, have been managed during the accounting period by any third person under an agreement, that fact and the name of such third person; and
  - (c) if the financial year of any subsidiary did not end with that of the company-
    - (i) the reasons for that fact; and
    - (ii) the accounting period of such subsidiary in respect of which the information has been included in the annual financial statements of the holding company.

#### **B. FINANCIAL INFORMATION IN RESPECT OF SUBSIDIARIES (paras 70-71)**

##### *Interest in each subsidiary*

- 70** In respect of each subsidiary and any company which was a subsidiary at the preceding accounting date but which is no longer a subsidiary at the accounting date to which the report refers, and where the interest of the subsidiary is material to the financial position or the results of the holding company, there shall be stated-
- (a) the amount of its issued capital of any class, the percentage thereof held by the holding company, either in its own name or through a nominee or a subsidiary, and any changes in such holdings during the accounting period; and
  - (b) the amount of the interest of the holding company consisting of shares in the subsidiary or amounts owing to the holding company (whether on account of loan or otherwise) distinguishing shares from indebtedness and any change in such interest during the accounting period.

##### *Net income of subsidiaries*

- 71** In so far as concerns the interest of the holding company in its subsidiaries, there shall be stated the aggregate amount of income after tax and the aggregate amount of the losses (after taking into account taxation, if any, paid by subsidiaries reporting losses).

#### **C. GENERAL REVIEW OF GROUP (para 72)**

- 72** The said report shall-
- (a) generally review the business and operations of the group during the accounting period and the results thereof and shall deal with every fact or circumstance material to the appreciation of the state of affairs and financial position of the group by the members of

- the holding company; and
- (b) deal with any material fact or circumstance which has occurred in the group between the accounting date and the date of the report.

#### **PART IV**

### **INTERIM REPORT AND PROVISIONAL ANNUAL FINANCIAL STATEMENTS (paras 73-79)**

#### ***Preliminary (para 73)***

- 73** (1) Where the information appearing in the interim report and the provisional annual financial statements are not audited, this fact shall be stated.
- (2) Where amounts are not available from the accounting records in respect of information to be shown in the interim report and the provisional annual financial statements, any such amount may be stated by way of estimate, provided the fact that it is an estimate is stated.

#### ***Interim report (para 74)***

- 74** (1) The interim report shall deal in narrative form with all descriptive matters under appropriate headings, and amounts or statistics shall be set out as far as practicable in tabular form.
- (2) Any matter not prescribed by Part IV of this Schedule but which is material to the appreciation of the financial position and the results of the operations during the interim accounting period of the company and its subsidiaries (if any) shall be dealt with in the interim report under appropriate headings, and in particular there shall be stated any material change, as compared with the book value, in the net realizable value or replacement value of any of the assets, of which the directors are aware.
- (3) Where any amounts are given, the corresponding amounts (if any) in respect of the immediately preceding corresponding interim period and the corresponding audited amounts (if any) in respect of the most recent completed financial period shall be stated.

#### ***Provisional annual financial statements (para 75)***

- 75** (1) Any matter not prescribed by Part IV of this Schedule but which is material to the appreciation of the financial position and results of the company and its subsidiaries (if any) shall be dealt with in the provisional annual financial statements under appropriate headings.
- (2) Where any amounts are given, the corresponding audited amounts (if any) in respect of the previous financial period shall be stated.

#### ***Minimum contents of interim reports and provisional annual financial statements (paras 76-79)***

- 76** The interim report and the provisional annual financial statements, shall consist of-
- (1) an income statement, which shall include at least the following items, where applicable:
- (a) Turnover;
  - (b) net income before interest paid and taxation;
  - (c) net interest paid;
  - (d) taxation;
  - (e) retained equity income from associates and non consolidated subsidiaries;
  - (f) net income attributable to ordinary shareholders;
  - (g) ordinary and preference dividends;
  - (h) earnings per share;
  - (i) dividends per share; and
  - (j) any other information that is material to the appreciation of the affairs of the company;
- (2) a balance sheet in summary form which shall include at least the following items, where applicable:
- (a) Total assets;
  - (b) shareholders' funds;
  - (c) non interest bearing debt;

- (d) interest bearing debt;
  - (e) net asset value per share;
  - (f) number of ordinary shares in issue; and
  - (g) any other information that is material to the appreciation of the affairs of the company.
- 77 The interim report and the provisional annual financial statements shall include sufficient information on the cash position of the company.
- 78 Any comments on any facts or circumstances relevant to the financial position of the company, and where applicable, of the group, which are necessary to appreciate better the information given, including information regarding contingencies, capital commitments, acquisitions and disposals of subsidiaries and changes in the relative holding in any subsidiary shall be stated.
- 79 The extent, if any, to which any change in the accounting policies applied has materially affected the report as compared with previous reports, shall be stated.

#### PART V

[Part V repealed by GN R2921 of 23 October 1992 as amended by GN R770 of 7 May 1993.]

#### Schedule 5 REPEAL OF LAWS

| Number and Year of Act | Title                                    | Extent of Repeal  |
|------------------------|--|-------------------|
| Act 46 of 1926         | Companies Act, 1926                      | The whole         |
| Act 11 of 1932         | Companies Act, 1926, Amendment Act, 1932 | The whole         |
| Act 23 of 1939         | Companies Amendment Act, 1939            | The whole         |
| Act 13 of 1942         | Companies Amendment Act, 1942            | The whole         |
| Act 16 of 1946         | Companies Amendment Act, 1946            | The whole         |
| Act 37 of 1950         | Companies Amendment Act, 1950            | The whole         |
| Act 67 of 1951         | Companies Amendment Act, 1951            | The whole         |
| Act 46 of 1952         | Companies Amendment Act, 1952            | The whole         |
| Act 18 of 1960         | Companies Amendment Act, 1960            | The whole         |
| Act 36 of 1961         | Companies Amendment Act, 1961            | The whole         |
| Act 69 of 1962         | Commonwealth Relations Act, 1962         | Sections 3, 4 & 5 |
| Act 14 of 1963         | Companies Amendment Act, 1963            | The whole         |
| Act 7 of 1964          | Companies Amendment Act, 1964            | The whole         |
| Act 18 of 1965         | Companies Amendment Act, 1965            | The whole         |
| Act 69 of 1965         | Securities Transfer Act, 1965            | The whole         |
| Act 94 of 1967         | Revenue Laws Amendment Act, 1967         | Section 1         |
| Act 97 of 1967         | Companies Amendment Act, 1967            | The whole         |
| Act 62 of 1968         | Companies Amendment Act, 1968            | The whole         |
| Act 90 of 1969         | Companies Amendment Act, 1969            | The whole         |

#### COMPANIES AMENDMENT ACT 76 OF 1974

[ASSENTED TO 11 NOVEMBER 1974]

[DATE OF COMMENCEMENT: 1 JANUARY 1974]

(Unless otherwise indicated)

*(English text signed by the State President)*

#### ACT

**To amend the Companies Act, 1973, so as to further define the expressions 'controlling company', 'holding company', 'subsidiary company' and 'wholly owned subsidiary'; to further regulate the lending of money by controlled companies; to further regulate a subsidiary's membership of its holding company; to further prescribe the registration fees and annual duties payable by companies; to further define the expression 'security'; to further regulate the transfer of listed securities; to regulate the publication of particulars of offers of shares and debentures to members of listed companies; to alter the requirements relating to certificates to commence business; to prescribe the quorum at a general meeting of a private company; to regulate changes in the financial year of a company; to further prescribe the requirements relating to group annual financial statements; to further prescribe the requirements relating to half-yearly**

**interim reports; and to further prescribe the requirements in respect of take-over offers; and to provide for incidental matters.**

**1** Amends section 1 of the Companies Act 61 of 1973, as follows: paragraph (a) substitutes in subsection (1) paragraph (a) of the definition of 'controlling company'; paragraph (b) substitutes in subsection (1) the definition of 'holding company'; paragraph (c) substitutes in subsection (1) the definition of 'subsidiary company' or 'subsidiary' for the definition of 'subsidiary company'; paragraph (d) substitutes in subsection (1) the definition of 'wholly owned subsidiary'; and paragraph (e) adds subsections (3), (4) and (5).

**2** Amends section 37 of the Companies Act 61 of 1973 by substituting subsection (1).

**3** Amends section 39 (3) of the Companies Act 61 of 1973 by substituting paragraph (a).

**4** Amends section 63 of the Companies Act 61 of 1973 by substituting subsection (2).

**5** Amends section 76 of the Companies Act 61 of 1973 by adding subsection (5).

[Date of commencement of s. 5: 20 November 1974.]

**6** Amends section 134 of the Companies Act 61 of 1973, as follows: paragraph (a) substitutes paragraph (c); and paragraph (b) deletes paragraph (e).

**7** Amends section 135 (1) of the Companies Act 61 of 1973 by substituting paragraph (b).

**8** Amends section 157 (1) of the Companies Act 61 of 1973 by adding paragraph (f).

**9** Amends section 172 of the Companies Act 61 of 1973 by adding subsection (8).

**10** Amends section 174 of the Companies Act 61 of 1973, as follows: paragraph (a) substitutes subsection (2); and paragraph (b) substitutes subsection (5).

**11** Amends section 190 of the Companies Act 61 of 1973 by substituting paragraph (b).

**12** Amends section 285 of the Companies Act 61 of 1973 by substituting subsection (2).

**13 and 14** Substitute respectively sections 288 and 290 of the Companies Act 61 of 1973.

**15** Amends section 291 of the Companies Act 61 of 1973 by substituting subsection (2).

**16** Repeals section 292 of the Companies Act 61 of 1973.

**17 and 18** Substitute respectively sections 293 and 294 of the Companies Act 61 of 1973.

**19** Amends section 295 of the Companies Act 61 of 1973 by substituting subsection (3).

**20** Substitutes section 298 of the Companies Act 61 of 1973.

**21** Amends section 300 of the Companies Act 61 of 1973, as follows: paragraph (a) substitutes paragraph (a); paragraph (b) substitutes paragraph (h); and paragraph (c) substitutes paragraph (i).

**22** Amends section 301 of the Companies Act 61 of 1973 by substituting subsection (1).

**23** Amends section 302 of the Companies Act 61 of 1973, as follows: paragraph (a) substitutes subsection (4) (a); paragraph (b) substitutes subsection (4) (b); and paragraph (c) inserts subsection (4A).

**24** Substitutes section 303 of the Companies Act 61 of 1973.

**25** Amends section 304 of the Companies Act 61 of 1973 by substituting subsection (1).

**26 and 27** Substitute respectively sections 305 and 306 of the Companies Act 61 of 1973.

**28** Amends section 307 of the Companies Act 61 of 1973 by substituting subsection (3).

**29** Amends section 309 of the Companies Act 61 of 1973 by substituting subsection (1).

**30** Amends section 314 (2) of the Companies Act 61 of 1973 by adding the proviso.

**31 Short title and date of commencement**

This Act shall be called the Companies Amendment Act, 1974, and the provisions thereof, except section 5, shall be deemed to have come into operation on 1 January 1974.

**COMPANIES AMENDMENT ACT 111 OF 1976**

[ASSENTED TO 5 JULY 1976]

[DATE OF COMMENCEMENT: 23 JULY 1976]

(Unless otherwise indicated)

*(English text signed by the State President)*

**ACT**

**To amend the Companies Act, 1973, so as to authorise the making of regulations providing for**

**the making and admissibility in evidence of certain copies of certain records; to render a change of name of a company immediately effective; to extend the powers of a company in relation to additions to or alterations of its objects and powers; to extend the powers of a company to convert shares of one class into shares of another class; to restrict the reduction of share capital where shares have been converted into redeemable preference shares; to dispense with the need for a prospectus for certain offers of shares by a listed company; to reduce the requirements relating to the contents of a prospectus for certain offers of shares by an unlisted company; to further regulate the publication of an advertisement relating to an offer of shares; to relieve a company of the obligation to lodge with its annual return a list of other directorships held by its directors; to exempt certain external companies from the payment of annual duty; to further regulate voting at meetings of a company; to further regulate the voting rights of the holders of preference shares; to further regulate the passing of a special resolution; to further regulate the making of loans to and the provision of security for a director or manager; to further regulate the resignation or removal of an auditor of a company; to further regulate the submission of group annual financial statements; to replace certain provisions relating to the disclosure of loans made to or security provided for a director or manager; to restrict the right of directors and former directors to vote in respect of the nomination of a liquidator; to limit to winding-up or judicial management the circumstances in which the court may inquire into and make orders in regard to the liability of delinquent directors and others; to permit a provisional judicial manager to call certain meetings of creditors; and to effect certain textual alterations; to make special provision in regard to annual financial statements prepared prior to 20 November 1974; and to provide for incidental matters.**

**1** Amends section 15 (1) of the Companies Act 61 of 1973, as follows: paragraph (a) inserts paragraphs (bA) and (bB); and paragraph (b) substitutes paragraph (c).

[Date of commencement of s. 1: 6 May 1977.]

**2** Amends section 38 (2) (c) of the Afrikaans text of the Companies Act 61 of 1973.

**3** Amends section 44 of the Companies Act 61 of 1973 by deleting subsection (5).

**4** Amends section 55 of the Companies Act 61 of 1973 by substituting subsection (1).

**5** Amends section 75 (1) of the Companies Act 61 of 1973, as follows: paragraph (a) substitutes the words preceding paragraph (a); and paragraph (b) adds paragraph (i).

[Date of commencement of s. 5: 1 January 1974.]

**6** Substitutes section 99 of the Companies Act 61 of 1973.

**7** Amends section 142 of the Companies Act 61 of 1973, as follows: paragraph (a) inserts the definition of 'company'; paragraph (b) inserts the definition of 'letter of allocation'; and paragraph (c) inserts the definition of 'rights offer'.

**8** Amends section 144 of the Companies Act 61 of 1973 by adding to paragraph (c) the word 'or', and by adding paragraph (d).

**9 and 10** Insert respectively sections 145A and 146A in the Companies Act 61 of 1973.

**11** Amends section 148 (1) of the Companies Act 61 of 1973 by substituting paragraph (b).

**12** Amends section 157 (1) of the Companies Act 61 of 1973, as follows: paragraph (a) substitutes paragraph (f); and paragraph (b) adds paragraph (g).

**13** Amends section 173 of the Companies Act 61 of 1973 by deleting subsection (8).

[Date of commencement of s. 13: 1 July 1975.]

**14** Amends section 175 of the Companies Act 61 of 1973 by substituting subsection (1).

[Date of commencement of s. 14: 1 January 1974.]

**15** Amends section 189 of the Companies Act 61 of 1973, as follows: paragraph (a) substitutes subsection (1); and paragraph (b) substitutes subsection (2) (a).

**16** Amends section 194 of the Companies Act 61 of 1973 by substituting subsections (1) and (2).

- 17** Amends section 197 of the Companies Act 61 of 1973 by substituting subsection (1).  
**18** Amends section 199 of the Companies Act 61 of 1973 by substituting subsection (1).  
**19** Substitutes section 226 of the Companies Act 61 of 1973.  
**20** Amends section 270 (2) of the Companies Act 61 of 1973 by substituting paragraph (c).  
**21 and 22** Substitute respectively sections 277 and 278 of the Companies Act 61 of 1973.  
**23** Amends section 280 of the Companies Act 61 of 1973 by substituting subsection (2) and (3).  
 [Date of commencement of s. 23: 22 October 1976.]  
**24** Amends section 288 of the Companies Act 61 of 1973 by substituting subsection (2).  
**25 and 26** Substitute respectively sections 295 and 296 of the Companies Act 61 of 1973.  
**27** Amends section 365 of the Companies Act 61 of 1973 by substituting subsection (2).  
**28** Amends section 423 of the Companies Act 61 of 1973 by substituting subsection (1).  
**29** Amends section 435 of the Companies Act 61 of 1973 by substituting subsection (2).  
**30** Amends section 441 (1) of the Companies Act 61 of 1973 by substituting paragraph (b).

**31 Savings**

A company which prior to 20 November 1974 duly complied with section 288 of the principal Act shall be deemed to have complied with that section as substituted by section 13 of the Companies Amendment Act, 1974 (Act 76 of 1974).

**32 Short title**

This Act shall be called the Companies Amendment Act, 1976.

<sup>i</sup>In terms of s. 68 (3) (a) of the Banks Act 94 of 1990 as substituted by the Banks Amendment Act 19 of 2003 sub-s. (4) shall be deemed to have been amended to read as follows: '(4) (a) Before an application for the winding-up of a company which is a bank is presented to the Court, a copy of the application and of every affidavit confirming the facts stated therein shall be lodged with the Registrar of Banks and with the Master, or if there is no Master at the seat of the Court, with an officer in the public service designated for that purpose by the Master by notice in the *Gazette*. (b) The Registrar of Banks or the Master or any such officer may report to the court any facts ascertained by such Registrar, Master or officer which appear to such Registrar, Master or officer to justify the Court in postponing the hearing or dismissing the application, and shall transmit a copy of that report to the applicant or the agent of such applicant and to the said company.'