Chapter 4 - Corporate Governance and Financial Accountability

Part A - Shareholders

77. Shareholder right to be represented by proxy

(1) A shareholder or an agent of the shareholder may appoint one or more proxies, to participate in, and vote at, a meeting of shareholders, or to act by written consent in lieu of a meeting of shareholders.

(2) A proxy appointment must be in writing or recorded by electronic communication, and must be signed by the shareholder, and is valid for -

(a) one year after the date on which it was signed; or

(b) any longer or shorter period expressly set out in the appointment.

(3) An appointment of proxy may be delivered to the proxy, or to any other person authorised to receive the appointment on behalf of the proxy.

(4) A company's Memorandum of Incorporation may require an 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 delivered to the company or to any other person on behalf of the company, before a meeting at which the appointment may be exercised, but no such requirement may demand delivery more than forty-eight hours before such a meeting.

(5) If a company issues an invitation to shareholders to appoint one or more persons as a proxy, or supplies a form of instrument for appointing a proxy -

(a) the invitation must be sent to every shareholder who is entitled to notice of the meeting at which the proxy is intended to be exercised;

(b) the invitation, or form of instrument supplied by the company for the purpose of appointing a proxy, must -

(i) bear a reasonably prominent summary of the rights established by this section;

(ii) contain adequate blank space, immediately preceding the name or names of any person or persons named in it, to enable a shareholder to write in the name and, if so desired, an alternative name of a proxy chosen by the shareholder; and

(iii) provide adequate space for the shareholder to indicate whether the appointed 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; and

(c) the company must not require that the proxy appointment be made irrevocable.

(6) The provisions of subsection (5) (b) do not apply if the company merely supplies a generally available standard form of proxy appointment on request by a shareholder.

(7) Irrespective of the form of instrument used to appoint a proxy -

(a) the appointment is revocable unless the proxy appointment expressly states otherwise; and

(b) if the appointment is revocable, a shareholder may revoke the proxy appointment by -

(i) cancelling it in writing; or

(ii) making a later inconsistent appointment of a proxy.

(8) If a shareholder does not instruct the appointed proxy to vote in favour of or against any resolution or resolutions, or to abstain from voting, the proxy is entitled to vote independently.

78. Record date for determining shareholder rights

(1) The board of a company may set a record date for the purpose of determining the shareholders entitled to –

(a) receive a notice of a meeting of shareholders;

(b) participate in and vote at a meeting of shareholders or to assent to any matter by written consent or electronic communication;

(c) receive a distribution; or

(d) be allotted other rights.

(2) A record date determined by the board in terms of subsection (1) may not be –

(a) earlier than the date on which the record date is determined; or

(b) more than 90 days before the date on which the action, for which the record date is being set, is scheduled to occur.

79. Shareholder meetings

(1) A closely held company, or a not for profit company that does not qualify as a public interest company, must hold meetings of shareholders as required by the company's Memorandum of Incorporation.

(2) A public interest company must hold at least one regularly scheduled meeting of shareholders each year, at a date, time and place determined by the board, but no more than 18 months may elapse between any two such meetings.

(3) Any failure to hold a meeting as required by subsection (2) does not affect the existence of a company, or the validity of any action by the company.

(4) A meeting convened in terms of subsection (2) must, at a minimum, transact the following business:

(a) Election of directors

(b) Approval of financial statements

(c) Receipt of remuneration committee report

(d) Appointment of auditors

(5) Unless its Memorandum of Incorporation provides otherwise, every meeting of shareholders of -

(a) a company, other than a public interest company, must be held at a location in the Republic that is reasonably accessible to the shareholders, unless –

(i) the Memorandum of Incorporation permits the company to hold a meeting outside the Republic; or

(ii) the shareholders unanimously agree to holding a meeting outside the Republic; or

(b) a public interest company -

(i) may be held at any place determined by the board; and

(ii) irrespective whether it is held in the Republic or elsewhere, must be reasonably accessible within the Republic for electronic participation by shareholders in the manner contemplated in section 81 (2).

(6) The board of a company, or any other person specified in the company's Memorandum of Incorporation or rules, –

(a) may call a special meeting of shareholders at any time; and

(b) subject to subsection (8), must call a special meeting of shareholders if one or more written and signed demands for such a meeting are delivered to the company; and -

(i) each such demand describes the specific purpose for which the meeting is proposed; and

(ii) in aggregate, demands for substantially the same purpose are made and signed by the holders, as of the same time specified in each of the demands, of at least 25% of the shares entitled to be voted in respect of the matter proposed to be considered at the meeting; and

(iii) a holder may revoke a demand at any time before notice of the special meeting has been sent to the shareholders.

(7) A company's Memorandum of Incorporation may permit a lower percentage than that set out in subsection (6)(b)(ii).

(8) A company, or any shareholder of the company, may apply to the court for an order setting aside a demand made in terms of subsection (6)(b) on the grounds that the demand is frivolous, calls for a meeting for no other purpose than to re-consider a matter that has already been decided by the shareholders, or is otherwise vexatious.

(9) If a company is unable to convene a meeting as required in terms of this section because it has no directors, or because all of its directors are incapacitated -

(a) any other person authorised by the company's Memorandum of Incorporation may convene the meeting; or

(b) if no person has been authorised as contemplated in paragraph (a), the Court, on a request by any shareholder, may order that a shareholders meeting be convened on a date, and subject to any terms, that the Court considers appropriate in the circumstances.

(10) If a company fails to convene a meeting for any reason other than as contemplated in subsection (9) –

(a) within the time required by subsection (2);

(b) at a time required in accordance with its Memorandum of Incorporation; or

(c) when required by shareholders in terms of subsection (6)(b)

a shareholder of the company may apply to the Court for an order requiring the company to convene a meeting on a date, and subject to any terms, that the Court considers appropriate in the circumstances.

80. Notice of meetings

(1) Except to the extent provided otherwise by a company's Memorandum of Incorporation, the company must ensure that notice of each meeting of shareholders is delivered to all of the shareholders in the manner and form prescribed by this Act at least -

(a) 5 business days before the meeting is to begin, in the case of a closely held company, if all the shares of that company are owned by persons who are related or inter-related;

(b) 10 business days before the meeting is to begin in the case of a closely held company not contemplated in paragraph (a); or

(c) 15 business days before the meeting is to begin in the case of a widely held company, or a not for profit company that has voting members.

(2) A notice of a meeting of shareholders -

(a) may be in writing or electronic form, unless the company's Memorandum of Incorporation or rules provide otherwise; and

(b) must include at least –

(i) the date, time and place for the meeting; and

(ii) the general purpose of the meeting, and any specific purpose contemplated in section 79 (6)(b), if applicable; and

(c) must bear a reasonably prominent statement that -

(i) a shareholder entitled to attend and vote at the meeting is entitled to appoint one or more proxies to attend and participate in the meeting in the place of the shareholder;

(ii) a proxy need not also be a shareholder of the company; and

(iii) section 81 (1) requires that meeting participants provide satisfactory identification.

(3) If all of the holders of shares entitled to be voted in respect of each item on the agenda of a shareholders meeting -

(a) acknowledge actual receipt of the notice;

(b) are present at the meeting; or

(c) waive notice of the meeting

the meeting may proceed even if the company failed to give the required notice of that meeting, or there was a defect in the giving of the notice.

(4) An immaterial error in the form or manner of giving notice of a meeting does not invalidate any action taken at the meeting.

(5) A shareholder who is present at a meeting is deemed to have -

(a) acknowledged receipt of notice of the meeting; and

(b) waived any right based on an actual or alleged defect in the notice of the meeting.

81. Meeting conduct, quorum and adjournment

(1) Before any person may participate in a meeting of shareholders, that person's –

(a) identity must be verified; and

(b) right to participate, either as a shareholder, or as a proxy for a shareholder, must be verified

in any manner required by the rules of the company, if any, or to the reasonable satisfaction of the person presiding at the meeting.

(2) Except to the extent that this Act or a company's Memorandum of Incorporation provides otherwise -

(a) a meeting of shareholders may be conducted entirely by electronic communication; or

(b) if a meeting is being held in person, one or more shareholders, or proxies for shareholders, may participate in that meeting by electronic communication

so long as the electronic communication employed ordinarily enables all persons participating in that meeting to simultaneously communicate with each other and participate effectively in the meeting.

(3) Except to the extent that the a company's Memorandum of Incorporation for a smaller or larger number –

(a) a meeting of shareholders may not begin until holders of at least 25% of the shares entitled to be voted in respect of at least one matter to be decided at the meeting are present at the meeting; and

(b) a matter to be decided at the meeting may not begin to be debated unless holders of at least 25% of the shares entitled to be voted on that matter are present at the meeting at the time the matter is called on the agenda.

(4) After a quorum has been established for a meeting, or for a matter to be considered at a meeting, the meeting may continue, or the matter may be considered, so long as the holder of at least one share entitled to be voted is present at the meeting.

(5) A meeting of shareholders, or the consideration of any matter being debated at the meeting, may be adjourned from time to time without further notice, subject to subsection (7), on a motion approved by the holders of a majority of the shares –

(a) entitled to be voted on at least one matter at that meeting, or on the matter under debate, as the case may be; and

(b) the holders of which are present at the meeting at the time.

(6) An adjournment of a meeting, or of consideration of a matter being debated at the meeting -

(a) may be either -

(i) to a fixed time and place; or

(ii) until further notice

as agreed at the meeting; and

(b) requires that a further notice be given to shareholders only if the meeting determined that the adjournment was "until further notice", as contemplated in sub-paragraph (a)(ii).

(7) A meeting may not be adjourned to a time more than 120 business days, or other period set out in the Memorandum of Incorporation, after the record date determined in accordance with section 78.

82. Shareholder resolutions

(1) Every resolution adopted at a meeting of shareholders is either a special resolution, or an ordinary resolution.

(2) A proposed resolution must be -

(a) expressed with sufficient clarity and specificity; and

(b) accompanied by sufficient information or explanatory material

to enable a reasonably alert shareholder who is entitled to vote on the resolution to determine whether to participate in the meeting and to seek to influence the outcome of the vote on the resolution.

(3) A shareholder who believes that the requirements of subsection (2) have not been satisfied may apply to the Court, at any time more than 4 business days before the start of the meeting at which the resolution will be considered, for an order requiring

the company, or the sponsor of the proposed resolution, to take appropriate steps to satisfy those requirements.

(4) Once it has been adopted, a resolution may not be challenged or impugned by any person in any forum on the grounds that subsection (2) was contravened.

(5) Except to the extent that this Act provides otherwise –

(a) for a special resolution to be approved, it must be supported by the holders of at least 75% of the shares voted on the resolution, subject to subsection (6)(a); and

(b) for an ordinary resolution to be approved, it must be supported by the holders of at least a majority of the shares voted on the resolution, subject to subsection (6)(b).

(6) A company's Memorandum of Incorporation may –

(a) permit a smaller percentage of shares, subject to a minimum of 65%, to be voted in support of a special resolution, for it to be adopted; or

(b) require a larger percentage of shares, subject to a maximum of 60%, to be voted in support of an ordinary resolution, for it to be adopted.

(7) A special resolution is required to

(a) amend the company's Memorandum of Incorporation;

(b) approve the voluntary winding up of the company; or

(c) approve any other proposal as required by this Act or a company's Memorandum of Incorporation.

(8) In respect of any vote on a resolution in terms of this Act,–

(a) an abstention or other failure by a person present at a meeting to exercise a voting right is deemed to be an affirmative waiver of that voting right at the time; and

(b) a voting right that is not exercised as contemplated in paragraph (a) must not be counted in determining the number or percentage of shares voted, or entitled to be voted, on the resolution.

83. Shareholders acting other than at a meeting

(1) A resolution that could be voted on at a meeting of a company's shareholders may instead be adopted by written consent given in person, or by electronic communication, if –

(a) the company's Memorandum of Incorporation so permits; and

(b) the consent is given by the holders of at least the minimum number of shares that would have been required to adopt that resolution if –

(i) it had been voted on at a meeting; and

(ii) all of the holders of shares entitled to be voted on the matter had been present at that meeting.

(2) A resolution adopted in the manner contemplated in this section is of the same effect as if it had been approved by voting at a meeting.

(3) Within 5 business days after adopting a resolution in terms of this section, the company must deliver a statement describing the resolution to every holder of shares that would have been entitled to be voted on that resolution if it had been voted on at the meeting.

Part B – Board and Directors

84. Board and directors

(1) Every company must have a board of directors, comprising -

(a) in the case of a not for profit company that is not a public interest company, at least three directors;

(b) in the case of a closely held company that is not a public interest company, at least one director; or

(c) in the case of a public interest company, at least four directors.

(2) A company's Memorandum of Incorporation may provide for a higher minimum number of directors than required by subsection (1).

(3) The business and affairs of a company must be managed by or under the direction of its board, which has the authority to exercise all of the powers and perform any of the functions of the company, except to the extent that this Act or the company's Memorandum of Incorporation provides otherwise.

85. Board meetings

(1) A director authorized by the board of a company -

(a) may call a meeting of the board at any time; and –

(b) must call such a meeting if at least two of the directors, or 25% of the directors if that is more than 2, require it.

(2) A company's Memorandum of Incorporation may require a higher, or permit a lower, number or percentage than those set out in subsection (1)(b).

(3) Except to the extent that this Act or a company's Memorandum of Incorporation provides otherwise –

(a) a meeting of the board may be conducted by electronic communication; or

(b) one or more directors may participate in a meeting by electronic communication,

so long as the electronic communication facility employed ordinarily enables all persons participating in that meeting to simultaneously communicate with each other and participate effectively in the meeting.

(4) The board of a company may determine the form and time for giving notice of its meetings, but –

(a) such a determination must comply with any requirements set out in the Memorandum of Incorporation, or rules, of the company; and

(b) no meeting of a board may be convened without notice to all of the directors, subject to subsection (5).

(5) Except to the extent that this Act or the company's Memorandum of Incorporation provides otherwise –

(a) if all of the directors of the company -

(i) acknowledge actual receipt of the notice;

(ii) are present in person or by electronic communication; or

(iii) waive notice of the meeting,

the meeting may proceed even if the company failed to give the required notice of that meeting, or there was a defect in the giving of the notice;

(b) a majority of the directors must be present, in person or by electronic communication, before a vote may be called at a meeting of the directors;

(c) each director has one vote on a matter before the board; and

(d) a majority of the votes cast on a resolution is sufficient to approve that resolution.

86. Directors acting other than at a meeting

(1) Unless a company's Memorandum of Incorporation provides otherwise, a decision that could be voted on at a meeting of the board of that company may instead be adopted by unanimous written consent of the directors, given in person, or by electronic communication.

(2) A decision made in the manner contemplated in this section is of the same effect as if it had been approved by voting at a meeting.

87. Board committees

(1) The board of a company may -

(a) appoint any number of committees of directors; and

(b) delegate to any committee any of the authority of the board, subject to any limitation set out in the company's Memorandum of Incorporation.

(2) Subject to the company's Memorandum of Incorporation and the resolution establishing a committee, the committee has the full authority of the board in respect of a matter referred to it.

(3) The creation of a committee, delegation of any power to a committee, or action taken by a committee, does not alone satisfy or constitute compliance by a director with the required duty of a director to the company, as set out in section 91.

88. Election and removal of directors

(1) The directors of a company are elected by the holders of shares entitled to be voted in such an election, subject only to section 90 (3).

(2) Unless the company's Memorandum of Incorporation provides otherwise, in any election of directors –

(a) the election is to be conducted as a series of votes, each of which is on the candidacy of a single individual to fill a single vacancy, with the series of votes continuing until all vacancies on the board at that time have been filled; and

(b) in each vote to fill a vacancy –

(i) each share entitled to vote may be cast once; and

(ii) the vacancy is filled only if a majority of the votes cast support the candidate.

(3) The election of a person as director is a nullity if, at the time of the election, that person is disqualified in terms of section 89.

(4) Unless a company's Memorandum of Incorporation provides otherwise, the terms of directors of a widely held company must be arranged so that, as nearly as possible, the terms of one-third of the directors expire each year.

(5) Despite anything to the contrary in a company's Memorandum of Incorporation, or any agreement between a company and a director, or between any shareholders and a director, a director may be removed by a special resolution at a meeting of holders of the shares entitled to be voted in an election of directors, if the director –

(a) has received -

(i) notice of the meeting and the resolution, at least equivalent to that which a shareholder is entitled to receive, irrespective whether or not the director is a shareholder of the company; and

(ii) a statement setting out reasons for the resolution, with sufficient specificity to reasonably permit the director to prepare and present a response; and

(b) has been given a reasonable opportunity to make a presentation to the meeting before the resolution is put to a vote.

(6) Subsection (5) -

(a) is in addition to -

(i) the right, in terms of section 90 (2), of a company's board to determine whether a director is disqualified, and any right of a director to apply to a court for an order reviewing such a determination; and –

(ii) the right, in terms of section 163, to apply to a court for an order declaring a director delinquent, or placing a director on probation; and

(b) does not deprive a person removed from office as a director in terms of this section of any right that person may have at common law or otherwise to apply to a court for damages or other compensation for –

(i) loss of office as a director; or

(ii) loss of any other office as a consequence of being removed as a director.

89. Disqualified person may not act as director

(1) A person who is disqualified, as set out in this section, must not -

(a) be appointed or elected as a director of a company, or consent to such an election or appointment;

(b) make, or participate in making any decision that affects the whole, or a substantial part, of a company's business;

(c) exercise the capacity to affect significantly a company's financial standing;

(d) communicate advice, instructions or wishes to the directors of a company, other than in the proper performance of the person's role as a professional advisor to the company in terms of a business relationship with the company, if the person –

(i) knows that the directors are accustomed to act in accordance with the person's advice, instructions or wishes; or

(ii) intends that the directors will act in accordance with the person's advice, instructions or wishes; or

(e) act in the capacity of a director of a company in any other manner.

(2) A company must not knowingly permit a disqualified person to serve as a director.

(3) A person who becomes disqualified while serving as a director of a company, ceases to be a director immediately, subject only to section 90 (2).

(4) A person who has been placed under probation as a director by a court in terms of section 163 must not serve as a director except to the extent permitted by the order of probation.

(5) A person is disqualified as a director of any company if the person –

(a) is a juristic person;

(b) has not consented to be a director of that company;

(c) is an unemancipated minor, or other person under a legal disability;

(d) does not reside in the Republic, unless the company has more than one director and at least one of the other directors resides in the Republic, subject to subsection (6);

(e) is disqualified by, or does not satisfy any qualification set out in, the company's Memorandum of Incorporation;

(f) a court has prohibited that person to be a director, or declared the person to be a delinquent director in terms of section 163;

(g) the person is prohibited in terms of any public regulation to be a director of the company; or

(h) subject to subsections (8) to (10) –

(i) is an unrehabilitated insolvent;

(ii) has been removed from an office of trust, on the grounds of misconduct;

(iii) has been convicted, in the Republic or elsewhere, and imprisoned without the option of a fine, or fined more than the prescribed amount, for theft, fraud, forgery, perjury, or an offence -

(aa) involving fraud, misrepresentation or dishonesty;

(bb) in connection with the promotion, formation or management of a company, or in connection with any act referred to in subsection (1) (b)(c) or (e); or

(cc) under this Act, FICA, Security Services Act, 2004 (Act No. 36 of 2004), Prevention of Corruption Act, 1958 (Act No. 6 of 1958), Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004 (Act No. 12 of 2004).

(6) A disqualification contemplated in subsection (5)(d) that would arise as a result of the vacating of office of director by a person who is resident in the Republic, takes effect 60 business days after that person vacated the office of director, unless, before that date, the vacancy is filled by another person who is resident in the Republic.

(7) The Memorandum of Incorporation of a company may impose -

(a) additional grounds of disqualification of directors; or

(b) minimum qualifications to be met by directors of that company.

(8) Despite being disqualified in terms of subsection (5)(d) or (h), a person may act as a director of a company if -

(a) it is a closely held company; and –

(b) all of the shares of that company are held by that disqualified person, or persons related to that disqualified person.

(9) A disqualification in terms of subsection (5)(h)(iii) ends -

(a) five years after the completion of the sentence imposed for the relevant offence; or

(b) at the end of a single extension of not more than 15 years, as determined by the Court, on application by the Commission before the expiry of the 5 year period contemplated in paragraph (a).

(10) A court may exempt a person from the application of any provision in subsection (5)(h).

90. Vacancies on the board

(1) A vacancy arises in the board of a company if, before the expiry of a director's term, the director resigns or dies, or –

(a) is removed in terms of section 88 (5);

(b) is declared delinquent by a court, or placed on probation under conditions that are inconsistent with continuing to be a director of the company, in terms of section 163; or

(c) otherwise becomes disqualified in terms of section 89.

(2) If a dispute arises as to whether a director has become disqualified in terms of section 89 –

(a) the board, other than the director concerned, may determine the matter by resolution;

(b) the director concerned, any other director, or any shareholder may apply to a court to review the determination of the board; and

(c) a vacancy does not arise until the later of -

(i) the expiry of the time for filing an application for review in terms of paragraph (b); or

(ii) the granting of an order by the court on such an application.

(3) If a vacancy arises in the board, the remaining members of the board may appoint a person to fill the vacancy and serve until the time that the vacating director's term would otherwise have ended.

(4) If, as a result of a vacancy arising in the board, there are no remaining directors of a company, a shareholder may apply to the Court to convene a meeting of shareholders for the purpose of electing directors, on a date, and subject to any terms, that the Court considers appropriate in the circumstances

91. Standards of director's conduct

(1) Each director of a company, when acting in that capacity, or as a member of a committee of directors, or when gathering information or similarly preparing to act in either of those capacities, is subject to –

(a) a duty to exercise the degree of care, skill and diligence that would be exercised by a reasonably diligent individual who had both -

(i) the general knowledge, skill and experience that may reasonably be expected of an individual carrying out the same functions as are carried out by that director in relation to the company; and

(ii) the general knowledge, skill and experience of that director; and

(b) a second, fiduciary, duty to act honestly and in good faith, and in a manner the director reasonably believes to be in the best interests of, and for the benefit of, the company.

(2) A director's judgement that an action or decision is in the best interest of, or for the benefit of, the company is reasonable if –

(a) the director –

(i) has taken reasonably diligent steps to become informed about the subject matter of the judgement, having regard to subsections (4) and (5); and

(ii) does not have a personal financial interest in the subject matter of the judgement; and

(b) it is a judgement that a reasonable individual in a similar position could hold in comparable circumstances.

(3) In addition to the general duty of care, and fiduciary duty, of each director as set out in subsection (1)(a) and (b), respectively, a director must -

(a) comply with this Act and the company's Memorandum of Incorporation; and

(b) communicate to the board at the earliest practicable opportunity any material information that comes to the director's attention, unless the director –

(i) reasonably believes that the information is generally available to the public, or known to the other directors; or

(ii) is bound not to disclose that information by a legal or ethical obligation of confidentiality.

(4) In discharging any board or committee duty, a director is entitled to rely on –

(a) the performance by any of the persons -

(i) referred to in subsection (5); or

(ii) to whom the board may have delegated, formally or informally by course of conduct, the authority or duty to perform one or more of the board's functions that are delegable under applicable law; and

(b) any information, opinions, reports or statements, including financial statements and other financial data, prepared or presented by any of the persons specified in subsection (5).

(5) To the extent contemplated in subsection (4), a director is entitled to rely on -

(a) one or more employees of the company whom the director reasonably believes to be reliable and competent in the functions performed or the information, opinions, reports or statements provided;

(b) legal counsel, accountants, or other persons retained by the company as to matters involving skills or expertise the director reasonably believes are matters –

(i) within the particular person's professional or expert competence; or

(ii) as to which the particular person merits confidence; or

(c) a committee of the board of which the director is not a member, unless the director has reason to believe that the actions of the committee do not merit confidence.

(6) The provisions of this section are in addition to, and not in substitution for, any duties of the director of a company under the common law.

92. Director's use of information and conflicting interests

(1) A director must not, directly or indirectly, use that position to -

(a) make a secret profit or otherwise gain an advantage for the director or someone else; or

(b) cause detriment to the company.

(2) An individual who, as a result of being or having been a director of a company, obtains any information must not use it improperly to –

(a) gain an advantage for the director or someone else, during or after the time that the individual is a director; or

(b) cause detriment to the company.

(3) A director must not improperly use that office to make, participate in the making of, influence or attempt to influence a decision on a matter in respect of which the director has a conflicting personal financial interest.

(4) If a director has a conflicting personal financial interest in respect of a matter to be discussed or voted on at a meeting of the board, the director -

(a) must declare the conflicting interest and its general nature at the meeting;

(b) must immediately leave the meeting or that part of the meeting during which the matter is to be discussed or voted on;

(c) must not take part in the discussion or vote on the matter or attempt to influence the discussion or vote on the matter before, during or after the meeting; and

(d) must not execute any document in relation to the matter unless specifically directed to do so by the board.

(5) In applying subsections (3) and (4) -

(a) neither subsection applies to any director, solely on the grounds that the director holds any security of the company;

(b) subsection (3) does not apply in respect of a company if -

(i) all of the shares of that company are held by one person, or by two or more persons who are all related or inter related;

(ii) the company has only one director; and

(iii) the director is a shareholder of the company; and

(c) subsection (4) does not apply in respect of a company that has only one director.

(6) A director who satisfies the requirements of subsection (4) must be regarded as having complied with subsections (1) and (3) with respect to the relevant matter,

irrespective whether the remaining members of the board approve or reject the matter that gave rise to the disclosure.

(7) A court, on application by any interested person, may declare valid a transaction or agreement that is approved by the board, despite the failure of a director to satisfy the requirements of subsection (4).

(8) A transaction -

(a) between the company on the one hand, and a director of the company, on the other; and

(b) in which the director has a personal financial interest,

other than a transaction contemplated in section 92A, is not void or voidable solely because of that interest, if the transaction was approved in a decision made in the manner contemplated in subsection (4), or has been ratified by an ordinary resolution of the shareholders.

92A Loans or other financial assistance to directors

(1) A company must not provide a loan to, secure a debt or obligation of, or otherwise provide direct or indirect financial assistance to, a director of the company, or of a related or inter-related company unless all the following conditions are satisfied -

(a) the company's Memorandum of Incorporation expressly permits giving such financial assistance, as contemplated in subsection (3)(a); or

(b) Irrespective of the status or category of company concerned, the board must be satisfied that –

(i) immediately after giving the financial assistance, the company would be in compliance with the solvency and liquidity test, and

(ii) the terms under which the assistance is proposed to be given are fair and reasonable to the company.

(c) Any conditions or restrictions respecting the granting of such assistance set out in the company's Memorandum of Incorporation, as contemplated in subsection (3)(b), must be satisfied.

(d) The financial assistance must be -

(i) pursuant to an employee share scheme that satisfies the requirements of section 62; or

(ii) pursuant to a special resolution of the shareholders, which approved such assistance for the specific recipient, or generally for a category of potential recipients, and the specific recipient falls within that category; or

(iii) in the case of a closely held company, pursuant to a specific authorization set out in the company's Memorandum of Incorporation.

(2) Subsection (1)(d) does not apply in respect of a company if -

(a) all of the shares of that company are held by one person, or by two or more persons who are all related or inter related; and

(b) every shareholder of the company is also a director of the company.

(3) A company's Memorandum of Incorporation may -

(a) specifically authorize any financial assistance contemplated in subsection (1); or

(b) impose additional conditions or requirements respecting the granting of any such assistance.

(4) A resolution by the board of a company to provide financial assistance contemplated in subsection (1), or an agreement with respect to the provision of any such assistance, is void to the extent that the provision of that assistance would be inconsistent with -

(a) this section; or

(b) a condition or requirement contemplated in subsection (3).

(5) Any director of a company who voted in favour of a resolution, or approved an agreement, that is void to any extent as contemplated in subsection (4) -

(a) is liable to compensate the company or any shareholder for any loss, damages or costs that the company or shareholder may have sustained or incurred in relation to the transaction, if proceedings to recover any such loss, damages or costs are commenced within two years after the issuance of the shares, securities or other rights; and

(b) may be held as responsible as the company, in terms of this Act, for the contravention.

93. Liability of directors and officers

(1) Subject to subsections (3) to (5), any provision of an agreement, Memorandum of Incorporation of, or resolution by, a company, whether express or implied, is void to the extent that it directly or indirectly purports to relieve a director of liability in terms of –

(a) subsection (2); or

(b) any law in respect of gross negligence, wilful misconduct or breach of trust.

(2) A director is liable to the company, and to any other person, for any loss arising as a consequence of that director having -

(a) signed, or consented to the publication of -

(i) a financial statement that was false or misleading in a material respect; or

(ii) a prospectus, or a written statement contemplated in section 66, that contained an "untrue statement" as defined and described in section 60

knowing that, or with reckless disregard as to whether, the statement was false, misleading or untrue, as the case may be; or

(b) knowingly been a party to -

(i) the reckless carrying on of the company's business; or

(ii) an act or omission by a company calculated to defraud a creditor, employee or security holder of the company, or with another fraudulent purpose.

(3) A company -

(a) may advance expenses to a director to defend litigation in any proceedings arising out of the director's service to the company;

(b) subject to paragraph (c), may directly or indirectly indemnify a director for -

(i) expenses contemplated in paragraph (a), irrespective whether it has advanced those expenses; or

(ii) any liability arising out of the director's service to the company;

(c) may not indemnify a director, as contemplated in paragraph (b) in respect of any actions for liability in terms of subsection (2), or for gross negligence, wilful misconduct or breach of trust, unless the proceedings exculpate the director or are abandoned before judgment; and

(d) may purchase insurance to protect the company, or the director, against liability, and expenses contemplated in this subsection.

(4) If, in any proceedings against a director, other than for gross negligence, wilful misconduct or breach of trust, it appears to the Court that -

(a) the director is or may be liable, but has acted honestly and reasonably; and

(b) having regard to all the circumstances of the case, including those connected with the appointment of the director, it would be fair to excuse the director,

the Court may relieve the person, either wholly or partly, from the liability on any terms as the Court considers just.

(5) A director who has reason to apprehend that a claim will be made alleging that the director is liable, other than for gross negligence, wilful misconduct or breach of trust, may apply to the Court for relief, and the Court may grant relief to the director on the same grounds as if the matter had come before the court in terms of subsection (4).

(6) The provisions of this section are in addition to any rule of the common law that is consistent with this section.

94. Register of directors, auditors and secretaries

(1) A company must keep a register of its directors, auditors and secretaries, unless the company is -

(a) a closely held company that is -

(i) not a public interest company; and

(ii) the shares of which are all owned by persons who are related or inter-related; or

(b) a not for profit company that is not a public interest company, and has no voting members.

(2) A register of directors, auditors and secretaries must include –

(a) in respect of all directors, their respective -

(i) full names, including any former names;

(ii) identity number or, if a director does not have an identity number, the director’s date of birth;

(iii) nationality, if the director is not South African;

(iv) occupation,

(v) date of their most recent election or appointment as director; and

(vi) name and registration number of every other company of which each such director is a director;

(b) in respect of every secretary that is a body corporate, its name, registration number, the address of its registered office and the date of its appointment;

(c) in respect of each auditor –

(i) the name and date of appointment of the auditor of the company; and

(ii) if a firm is appointed as auditor, the name of the individual specified in terms of section 100 (3);

(d) any changes in the particulars referred to in paragraphs (a) and (b), as they occur, with the date and nature of each such change.

(3) To protect personal privacy, the Minister, by notice in the Gazette, may exempt from the application of subsection (2)(a) categories of names as formerly used by any person before attaining majority, or by persons who have been adopted, married, divorced or widowed.

Part C – Financial Year, Records and Reporting

95. Financial year of company

(1) A company must have a financial year, ending on a date determined by the company.

(2) The first financial year of a company -

(a) begins on the date that the incorporation of the company is registered, as stated in its Registration Certificate; and

(b) ends on the date determined in terms of subsection (1), which may not be less than 3 nor more than 15 months after the date contemplated in paragraph (a).

(3) The second and each subsequent financial year of a company –

(a) begins when the preceding financial year ends; and

(b) ends on the date contemplated in subsection (1), unless that date has been changed as contemplated in subsection (4).

(4) A company may change its financial year end at any time, by filing a notice of that change with the Commission, but -

(a) it may not do so more than once during any financial year; and

(b) the date as changed may not result in a financial year ending less than 3 months, or more than 18 months, after the end of the preceding financial year.

(5) Despite subsection (3)(b), the financial year of a company that has changed the date contemplated in subsection (1), ends on the date as changed.

(6) The financial year of the company is its annual accounting period.

96. Accounting records and statements

(1) A company must keep accurate accounting records -

(a) in one of the official languages of the Republic;

(b) as necessary to present fairly the state of affairs and business of the company, and to explain the transactions and financial position of the business of the company;

(c) showing its assets, liabilities and equity, as well as its income and expenses, and any other prescribed information; and

(d) satisfying the prescribed standards as to form, content, record keeping procedures, accuracy, and audit and verification requirements.

(2) A company's accounting records must be kept at, or be accessible from, the registered office of the company.

(3) Accounting records for a group of related companies may be consolidated, but must comply with the prescribed requirements.

(4) The accounting records, and any financial statements based on those records, including any annual financial statements of a company required to be prepared in terms of section 97, must not be -

(a) incomplete in any material particular; or

(b) false or misleading in any material respect.

(5) Every -

(a) director of a company that has issued a financial statement that does not comply with subsection (4); and

(b) any person who was a party to the preparation, approval, publication, issue or supply of a financial statement that does not comply with subsection (4)(b), and who knew or reasonably ought to have suspected, that the statement contained false or misleading material,

may be held equally responsible with the company, in terms of this Act, for the contravention of subsection (4).

(6) For the purposes of subsection (5)(b), a person is a party to the preparation of a financial report 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 the 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.

(7) Subject to subsections (8) and (9), the Minister, after consulting the Financial Reporting Standards Council, may make regulations prescribing -

(a) financial record and report standards contemplated in this Part, which may establish different standards applicable to public interest, and non public interest, companies respectively; and

(b) qualifications, duties and requirements of auditors in terms of this Act.

(8) Any regulations contemplated in subsection (7)(a) -

(a) must promote sound and consistent accounting practices;

(b) must be consistent with -

(i) the International Financial Reporting Standards of the International Accounting Standasrds Board or its successor body; and

(ii) generally accepted accounting practices; and

(c) may prescribe different standards applicable to public interest companies, and non public interest companies, respectively, provided that any such different standards satisfy the requirements of paragraph (b).

(d) Any regulations contemplated in subsection (7)(b) must be consistent with the Auditing Professions Act, 2005 (Act No. 26 of 2005), and any regulations made in terms of that Act.

97. Annual financial statements

(1) Each year, within five months after the end of its financial year, a company must prepare annual financial statements in respect of that financial year, unless -

(a) all of the shares of the company are held by one person, or by two or more persons who are all related or inter related; and

(b) the company is not a holding company, or subsidiary, of a company that is itself required to prepare annual financial statements.

(2) The annual financial statements of a company must be in an official language, and must -

(a) comprise -

(i) a balance sheet, together with any relevant notes; and

(ii) an income statement or any similar financial statement as appropriate, together with any relevant notes;

(b) fairly present the state of affairs of the company as at the end of the financial year, and the results of its operations during that year, in manner that -

(i) conforms with financial reporting standards, as applicable to the company and its business; and

(ii) satisfies the prescribed standards as to form and content;

(c) agree with the company's accounting records, and be summarised in such a manner that a reasonably alert shareholder reading the statements can adequately ascertain the company's financial position; and

(d) contain an auditor's report, if -

(i) the company is required in terms of section 101(1) to appoint an auditor; or

(ii) the company has voluntarily retained an auditor to review and report on the annual financial statements.

(3) The annual financial statements of a company must -

(a) be approved by the board and signed by an authorised director; and

(b) presented to the first meeting of -

(i) shareholders after the statements have been approved by the board; or

(ii) members, in the case of a not for profit company that is required to prepare such statements in terms of this section; and

(4) Not less than 15 business days before the meeting at which the statements are to be presented in terms of subsection (3), a copy of the statements must be –

(a) delivered by mail, or electronic communication if approved by a particular recipient, to every shareholder; and

(b) filed with the Commission.

(5) Prescribed standards contemplated in subsection (2)(b) may be different for public interest and non-public interest companies, respectively.

98. Disclosure of directors' remuneration and benefits

(1) If a company is required to produce annual financial statements, those statements must contain particulars showing -

(a) the remuneration and benefits received by directors, and individuals holding any prescribed office in the company;

(b) the amount of the pensions paid to or receivable by current or past directors or individuals who hold or have held any prescribed office in the company;

(c) the amount of any compensation paid in respect of loss of office to current or past directors or individuals who hold or have held any prescribed office in the company; and

(d) details of service contracts of current directors and individuals who hold any prescribed office in the company.

(2) The information to be disclosed under subsection (1) must satisfy the prescribed standards, and must show the amount of any remuneration or benefits paid to or receivable by persons in respect of-

(a) services rendered as directors or office holders of the company;

(b) services rendered while being directors or office holders of the company-

(i) as directors or office holders 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.

(3) Prescribed standards contemplated in this section may be different for public interest and non-public interest companies, respectively.

99. Right to copies of financial statements and reports

(1) Any shareholder, or holder of debentures, of a company is entitled on demand to receive without charge one copy of the last annual financial statements, or group annual financial statements, provisional annual financial statements or interim report of the company.

(2) If a judgment creditor of a company has been informed, by a person whose duty it is to execute the judgment, that there appears to be insufficient disposable property to satisfy that judgment, the judgement creditor is entitled within 5 business days after making a demand, to receive without charge one copy of -

(a) the last annual financial statement of the company; or

(b) if the company is not required to produce an annual financial statement, the company's most recent periodic statement, which may not be dated more than 60 business days before the date on which it is provided to the creditor.

Part D – Financial Accountability

100. Audit committees

(1) In every financial year in which a company is a public interest company, its board must appoint an audit committee for the following financial year, unless

(a) the company is a subsidiary of another company, and the audit committee of its holding company will perform the functions required under this section on behalf of that subsidiary company;

(b) the company ceases to be a public interest company; or

(c) the company falls within a category of companies that has been exempted from the application of this section in terms of subsection (7).

(2) An audit committee must have at least two members, each of whom must -

(a) be a director of the company; and

(b) not be -

(i) involved in the day to day management of the business;

(ii) a full-time salaried employee of the company or its group, or have been such an employee at any time during the previous three financial years; or

(iii) related to an individual contemplated in sub-paragraph (i) or (ii); and

(c) act independently in the performance of the committee's functions.

(3) For purposes of subsection (2), a director acts independently if that director –

(a) expresses opinions, exercises judgment and make decisions impartially; and

(b) is not related to -

(i) the company or to any shareholder or other director of the company; or

(ii) a material supplier or customer of the company, such that a reasonable and informed third party would conclude in the circumstances that the integrity, impartiality or objectivity of that director is compromised by that relationship.

(4) An audit committee of a public interest company has the following duties with respect to the financial year for which it is appointed –

(a) to nominate, for appointment as auditor of the company under section 101, a registered auditor who, in the opinion of the audit committee, is independent of the company;

(b) to determine the fees to be paid to the auditor and the auditor's terms of engagement;

(c) to ensure that the appointment of the auditor complies with the provisions of this Act and any other legislation relating to the appointment of auditors;

(d) to determine, subject to the provisions of this Chapter, the nature and extent of any non-audit services that the auditor may provide to the company;

(e) to pre-approve any proposed contract with the auditor for the provision of non-audit services to the company;

(f) to insert into 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 or not the audit committee is satisfied that the auditor was independent of the company;

(g) to 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) to perform other functions determined by the board.

(5) Neither the appointment, nor the duties, of an audit committee reduce the functions and duties of the board or the directors, except with respect to the appointment, fees and terms of engagement of the auditor.

(6) A public interest company must pay all expenses reasonably incurred by its audit committee including, if the audit committee considers it appropriate, the fees of any consultant or specialist engaged by the audit committee to assist it in the performance of its duties.

(7) The Minister, by notice in the Gazette, may specify categories of companies that are exempt from the requirements of this section, only on the grounds that little or no benefit would result from the appointment of an audit committee in those companies.

101. Appointment and rotation of auditor

(1) Each year at its annual meeting, a public interest company company must appoint an auditor.

(2) A person or firm appointed as auditor must –

(a) be a registered auditor;

(b) in the case of a public interest company, be acceptable to its audit committee as being independent of the company; and

(c) must not be -

(i) a director, officer or employee of the company, or a person who was a director or officer of the company at any time during the relevant financial year ;

(ii) a director, officer or employee of a person performing secretarial work for the company;

(iii) a person who, alone or with a partner or employees, habitually or regularly performs the duties of secretary or bookkeeper of the company; or

(iv) related to a person contemplated in this paragraph.

(3) The appointment of a firm as auditor of a public interest company is valid only if -

(a) the appointment specifies, in addition to the name of the firm, the name of the individual member of the firm, who will undertake the audit; and

(b) that individual meets the requirements of subsection (2).

(4) If a company that is required to appoint an auditor does not do so when it registers the incorporation of the company, the directors of the company must appoint the first auditor of the company within 15 business days after the date of incorporation of the company.

(5) If the directors of a company fail to appoint an auditor of the company as provided in subsection (4), the Commissioner may apply to the Court for an order appointing the company's first auditor.

(6) The auditor of a company appointed under subsection (4) or (5) holds office until the conclusion of the first annual general meeting of the company.

(7) A retiring auditor may be automatically reappointed at an annual general meeting without any resolution being passed, unless -

(a) the retiring auditor is --

(i) no longer qualified for appointment; or

(ii) no longer willing to accept the appointment, and has so notified the company;

(iii) required to cease serving as auditor, in terms of subsection (10); or

(b) an audit committee appointed by the company in terms of this Act objects to the reappointment; or

(c) the company has notice of an intended resolution to appoint some other person or persons in place of the retiring auditor.

(8) If an annual general meeting of a company does not appoint or re-appoint an auditor -

(a) the directors must fill the vacancy in the office within 20 business days after the date of the meeting; and

(b) if the directors fail to appoint an auditor in terms of paragraph (a), the Commissioner may apply to the Court for an order appointing an auditor for the company.

(9) The company must promptly file a notice of the appointment or reappointment of its auditor.

(10) The same individual may not serve as the auditor or designated auditor of a public interest company for more than five consecutive financial years.

(11) If an individual has served as the auditor or designated auditor of a public interest 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.

(12) If a company has appointed two or more persons as joint auditors, the company must manage the rotation required by this section in such a manner that all of the joint auditors do not relinquish office in the same year.

(13) In considering whether, for the purposes of this section, a registered auditor is independent of a company, the audit committee must -

(a) ascertain that the auditor does not, except as auditor or in rendering services permitted under section 100 (4)(e), receive any direct or indirect 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 any professional or industry code

in relation to the company and any subsidiary or holding company or, if the company is a member of a group, any other member of the group.

(14) Nothing in this section precludes the appointment by a public interest company at its annual general meeting of an auditor other than one nominated by the audit committee, and if such an auditor is to be appointed -

(a) section 100 (4)(a) does not apply; and

(b) the appointment is not valid unless the audit committee is satisfied that the proposed auditor is independent of the company.

102. Rights, duties and functions of auditors

(1) The auditor of a company -

(a) has the right of access at all times to the accounting records and all books and documents of the company, and is entitled to require from the directors or officers of the company any information and explanations necessary for the performance of the auditor's duties;

(b) in the case of the auditor of a holding company, has the right of access to all current and former financial statements of any subsidiary of that holding company and is entitled to require from the directors or officers of the holding

company or subsidiary any information and explanations in connection with any such statements and in connection with the accounting records, books and documents of the subsidiary as necessary for the performance of the auditor's duties; and

(c) is entitled to –

(i) attend any general meeting of the company;

(ii) to receive all notices of and other communications relating to any general meeting which any member of the company is entitled to receive; and

(iii) to be heard at any general meeting on any part of the business of the meeting which concerns the auditors duties or functions.

(2) The auditor of a company must carry out the duties set out in this section, and any other prescribed duties and satisfy the prescribed requirements of the office of auditor, and in particular must -

(a) be satisfied that –

(i) proper accounting records as required by this Act have been kept by the company and that proper returns adequate for audit purposes have been received from branches not visited by the auditor;

(ii) 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;

(iii) a register of interests required by this Act has been kept and that the entries therein are in accord with the minutes of directors' meetings;

(iv) the company's annual financial statements are in agreement with its accounting records and returns;

(v) 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;

(b) examine and be satisfied as to the existence of any securities of the company;

(c) examine the annual financial statements and group annual financial statements to be laid before its annual general meeting;

(d) examine any of the accounting records of the company, and carry out any tests in respect of those records and any other auditing procedures the auditor considers necessary in order to be satisfied 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 generally accepted accounting practice applied on a basis consistent with that of the preceding year;

(e) obtain all the information and explanations which to the best of the auditor's knowledge and belief are necessary for the purposes of carrying out the auditor's duties;

(f) examine group annual financial statements, if applicable, and be satisfied that they comply with the requirements of this Act;

(g) report to the Commissioner in the prescribed manner if the auditor 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;

(h) to comply with any applicable requirements of the Auditing Professions Act, 2005 (Act No. 26 of 2005).

(3) After conducting an audit, the auditor must report to the shareholders of the company, stating –

(a) that the auditor has examined the annual financial statements and group annual financial statements; and

(b) whether those statements 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.

(4) If an auditor is unable to report without qualification that the financial statements meet the test referred to in subsection (3)(b), the auditor's report must include a statement to that effect, and set out the relevant facts or circumstances.

(5) The auditor's report under subsection (3) must be read out at the annual general meeting, unless all the members present agree to the contrary.

(6) An auditor appointed to a public interest company may not perform for that company any -

(a) book-keeping or accounting (as distinct from auditing) services, and to the extent that these would be subject to its own auditing, internal audit or tax advisory services; or

(b) any other services, as may be determined by the company's audit committee.

(7) Subsection (6) does not affect the power of an audit committee to limit further the services that an auditor of that company may perform.

(8) Not more than one month before a meeting at which the board of directors of a public interest company will vote to approve the financial statements of the company for any financial year, the designated auditor must attend a meeting of the board to consider matters that 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.

(9) At every annual general meeting of a public interest company at which the financial statements of the company for a financial year are to be considered, the auditor must attend and respond to the best of the auditor's ability to any question that is relevant to the audit of those financial statements.

(10) Subsection (9) applies equally in the case of a company that is not a public interest company, if the company has notice of a resolution requiring the presence of the

auditor at an annual general meeting of the company at which financial statements of the company for any financial year are to be considered.

(11) If the auditor is unable to attend a meeting as required by subsection (9) or subsection (10), the auditor must ensure that -

(a) another auditor with knowledge of the audit attends and carries out the duties of the designated auditor at the meeting; and

(b) 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.

103. Resignation of auditors and filling of casual vacancies

(1) An auditor may resign at any time by delivering a written notice in the prescribed form to the company and to the Commission, stating that the auditor has no reason to believe that, in the conduct of the affairs of the company, a reportable irregularity within the meaning of section 22 of the Auditing Professions Act, 2005 (Act No. 26 of 2005) has taken place or is taking place that has caused or is likely to cause financial loss to the company or to any of its shareholders or creditors, other than an irregularity, if any, that has been reported to the Commission.

(2) An auditor is not required to carry out a special audit before giving notice in terms of subsection (1).

(3) The resignation of an auditor is effective when the notice is filed.

(4) Subject to subsection (5), if a casual vacancy arises in the office of auditor of a company -

(a) during the tenure of its audit committee, the directors must propose to the audit committee a registered auditor to be appointed as the new auditor, within 15 business days after the vacancy occurs; and

(b) otherwise, the directors -

(i) must appoint a new auditor within 20 business days, if there is only one incumbent auditor of the company; and

(ii) may appoint a new auditor at any time, if there is more than one incumbent, but while any such vacancy continues, the surviving or continuing auditor may act as auditor of the company.

(5) Section 101(8)(b) applies to a failure by the directors to fill a vacancy contemplated in subsection (4)(b)(i).

(6) If, within 10 business days after making of a proposal to an audit committee under subsection (4), the audit committee does not give notice in writing to the directors rejecting the proposed auditor, the directors must either -

(a) appoint the auditor; or

(b) propose a different person to the committee.

(7) If a company appoints a firm as its auditor, any change in the composition of the members of that firm does not by itself create a casual vacancy in the office of auditor for that year, subject to subsection (8).

(8) 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 a change contemplated in subsection (7), that change constitutes the resignation of the firm as auditor of the company, giving rise to a casual vacancy.

Part E – Secretary for Widely Held Companies

104. Mandatory appointment of secretary

(1) A widely held company must appoint a person who is permanently resident in the Republic and who, in the opinion of the directors, has the requisite knowledge and experience, to be the company secretary.

(2) The provisions of section 89, other than section 89(5)(a), each read with the changes required by the context, apply to the appointment of a secretary.

(3) The first secretary of a widely held company may be appointed either by –

(a) an ordinary resolution of the shareholders; or

(b) the directors of the company.

(4) A casual vacancy in the office of secretary may be filled by the directors of the company within 90 days after vacancy arises.

(5) If the directors of a widely held company fail to appoint a secretary as required by this section, the Commissioner may apply to the Court for an order appointing a secretary for the company.

105. Body corporate or partnership may be appointed secretary

(1) A juristic person or partnership may be appointed to hold the office of secretary of a widely held company provided that at least one person in the employment of that juristic person or partnership complies with the requirements referred to in section 104.

(2) A change in the membership of a juristic person that holds office as secretary does not constitute a casual vacancy in the office of secretary, if the juristic continues to have at least one person in its employment who complies with the requirements referred to in section 104.

(3) A change in the composition of a partnership that holds office as secretary does not constitute a casual vacancy in the office of secretary if the new partnership continues to have as a partner or employee at least one person who complies with the requirements referred to in section 104.

(4) If at any time a juristic person or partnership that holds office as secretary no longer has a member, partner or employee who complies with the requirements referred to in section 104 –

(a) the juristic person or partnership must immediately so notify the directors of the company; and

(b) is deemed to have resigned as secretary.

106. Duties of secretary

(1) 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 this Act;

(d) certifying in the annual financial statements of the company that the company has filed required returns 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 this act, to every person who is entitled to it.

107. Name of secretary to be publicized

The first names or the initials, and the surname of the secretary of a widely held company must be stated on every trade catalogue, trade circular and business letter bearing the company's name.

108. Notice to be given of resignation or removal of secretary

(1) The company must notify the Commission within 21 days after a vacancy arises in the office of secretary.

(2) If the secretary is removed from office, the secretary may require the company to include a statement in its annual financial statements relating to that financial year, 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 must 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 that notice must include the statement referred to in subsection (2).

(4) The statement of the secretary referred to in subsection (2) must 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 must be included under a separate heading in the company's annual financial statements.

Chapter 5 –Takeovers, Offers and Fundamental Transactions

Part A – Authority of the Takeovers Regulation Panel and Takeovers Regulations

109. Application and definitions

(1) This chapter does not apply to -

(a) an affected transaction, or an agreement of any kind, irrespective whether that agreement contemplates or could result in an affected transaction, if the affected transaction or agreement is contemplated within, or is incidental to the implementation of, a business rescue plan approved in terms of Chapter 6; or

(b) an offer contemplated in section 156 (1)(b)(ii), or in a business rescue plan approved in terms of Chapter 6, or made incidental to the implementation of such a business rescue plan.

(2) In this Chapter and in the Takeover Regulations –

(a) "**affected transaction**" means –

(i) the acquisition of a beneficial interest in any shares of a widely held company if the acquisition would result in a person alone, or together with other related or inter-related persons or with persons acting in concert with the first person, being able to exercise 35% or more of the voting rights of that widely held company;

(ii) a mandatory offer contemplated in section 114, or a compulsory acquisition contemplated in section 115;

(iii) a transaction or series of transactions amounting to the disposal of substantially all of the assets or undertaking of a widely held company, as contemplated in section 116;

(iv) a merger or amalgamation involving at least one widely held company, as contemplated in section 117; or

(v) a scheme of arrangement between a widely held company and its shareholders, as contemplated in section 118;

(b) **"holder"** means a person who holds the beneficial interest in a security of a widely held company;

(c) **"offer"**, when used as a noun, means a proposal of any sort which, if accepted, would result in an affected transaction, but does not include such a proposal if it is exclusively between or among two or more persons who are related or inter-related; and

(d) **"offer period"** means the period from the time when an announcement is made of a proposed or possible offer until the first closing date or, if later, the date when the offer becomes or is declared unconditional as to acceptances or lapses.

110. Panel regulation of affected transactions

(1) The Takeover Regulation Panel may -

(a) regulate and approve any affected transaction or offer, in accordance with this Chapter and the Takeover Regulations;

(b) require the filing, for approval or otherwise, of any document with respect to an affected transaction or offer, if the document is required to be prepared in terms of this Chapter; and

(c) initiate or receive complaints, conduct investigations, and issue compliance notices, with respect to any affected transaction or offer, in accordance with Chapter 7, and the Takeover Regulations.

(2) A person -

(a) making an offer must comply with any reporting or approval requirements set out in this Chapter or the Takeover Regulations, except to the extent that the Panel has granted the person an exemption from any such requirement; and

(b) must not give effect to an affected transaction unless the Takeovers Regulation Panel has -

(i) approved the transaction; or

(ii) granted an exemption from approval of that transaction.

(3) The Takeover Regulation Panel may exempt a person from the application of any provision of -

(a) this Chapter, to the extent such an exemption is specifically provided for in the relevant provision; or

(b) the Takeover Regulations if -

(i) there is no reasonable potential for the affected transaction to prejudice the interests of any existing shareholder;

(ii) the cost of compliance is disproportionate relative to the value of the affected transaction; or

(iii) doing so is otherwise reasonable and justifiable in the circumstances having regard to the principles and purposes of this Part and the Takeover Regulations.

111. Takeover Regulations

The Minister, in consultation with the Takeover Regulation Panel, may prescribe regulations, to be known as the Takeover Regulations, which may provide for -

(a) compliance with and enforcement of –

(i) the provisions of this Chapter respecting affected transactions and offers; and

(ii) the Takeover Regulations;

(b) the administration, operation and procedures of the Takeover Regulation Panel;

(c) any other matters relating to the powers and functions of the Takeover Regulation Panel.

Part B – Regulation and Implementation of Certain Transactions

112. Restricted application of this Part

(1) Provisions of this Part not specifically mentioned in subsection (2) to (4) apply to all companies.

(2) Sections 113 to 115 apply only with respect to the shares of widely held companies.

(3) Sections 116, 117 (2) to (5), 118 (2) and (3) and 119 –

(a) apply with respect to all widely held companies;

(b) do not apply with respect to a closely held company if all of its shares are held by persons who are related or inter-related; and

(c) apply with respect to a closely held company not contemplated in paragraph (b) only if the Memorandum of Incorporation of the company expressly provides that this Part will apply to the company.

(4) Sections 116, 117 (2) to (5), and 119 apply with respect to a not for profit company if it is a public interest company.

113. Required disclosure concerning certain share transactions

(1) A person, two or more related or inter-related persons, or a combination of persons acting in concert, must notify a widely held company, in the prescribed manner, within three business days after -

(a) they directly or indirectly, individually or collectively, acquire a beneficial interest in sufficient shares of a class of shares issued by that company such that, as a result of the acquisition, they individually or collectively hold a beneficial interest in any particular multiple of 5% of the issued shares of that class; or

(b) they directly or indirectly, individually or collectively, dispose of a beneficial interest in sufficient shares of a class of shares issued by a widely held company such that, as a result of the disposition, they no longer individually or collectively hold a beneficial interest in a particular multiple of 5% of the issued shares of that class, as previously notified.

(2) A person who has made a statement to a company in terms of subsection (1) must issue an amended statement to the company within three business days of any material change affecting the original statement.

(3) A widely held company that has received a notice or statement in terms of this section must –

(a) file a copy with the Takeover Regulation Panel; and

(b) report the information to the holders of the relevant class of shares if the board considers the purchase or disposition to be material.

(4) For the purposes of this section –

(a) when determining the number of issued shares of a class, a person is entitled to rely on the mostly recently published statement by the company, unless that person knows or has reason to believe that the statement is inaccurate; and

(b) when determining the number of shares held by -

(i) a person or persons contemplated in subsection (1) -

(aa) all of the shares of which a person has a beneficial interest must be aggregated, irrespective of the nature of the person's beneficial interest of any of those shares; and

(bb) any shares that may be issued to the person if they exercised any options, conversion privileges or similar rights, are to be included; and

(ii) any other person, any shares that may be issued to that other person if they exercised any options, conversion privileges or similar rights, are to be excluded.

114. Mandatory offers

(1) This section applies if -

(a) a person acting alone has, or two or more related or inter-related persons, or two or more persons acting in concert, have, acquired or agreed to acquire a beneficial interest in shares of a widely held company; and

(b) as a result of that actual or agreed acquisition, together with any other shares of the company already held by that person, or those persons, they will be able to exercise 35% or more of the voting rights of that widely held company.

(2) Within one month after the date of an acquisition or agreement contemplated in subsection (1), the person or persons who acquired or agreed to acquire the beneficial interest in shares must give notice in the prescribed manner to the holders of the remaining shares of the widely held company, including in that notice –

(a) a statement that they are, or, as a result of the acquisition, will be, in a position to exercise 35% or more of the voting rights of that widely held company; and

(b) offering to acquire any remaining shares of the widely held company on the same terms that applied to the agreement or acquisition contemplated in subsection (1).

(3) Within three months after receiving a notice in terms of subsection (2), any holder of shares in the widely held company may require the person or person who gave the notice to acquire those shares on -

(a) the terms referred to in subsection (2)(b); or

(b) other terms as -

(i) agreed between the offeror and the share holder; or

(ii) ordered by a court on the application of either the offeror or the share holder.

115. Compulsory acquisitions and squeeze out

(1) If within four months after the date of an offer for the acquisition of any class of shares of a widely held company that offer has been accepted by the holders of at least 90% of that class of shares, other than any such shares held before the offer by the offeror, a related or inter-related person, or a nominee or subsidiary of the offeror or related or inter-related person, the offeror must, within one month, notify the holders of the remaining shares of the class that the offer has been accepted to that extent.

(2) Within three months after receiving a notice in terms of subsection (1), a person may demand that the offeror acquire all of the person's shares of the class concerned.

(3) At the time of giving notice in terms of subsection (1), or within a month after giving that notice, the offeror may notify the holders of the remaining shares of the class that the offeror desires to acquire all remaining shares of that class.

(4) Within six weeks after receiving a notice in terms of subsection (3), a person may apply to the court for an order -

(a) that the offeror is not entitled to acquire the applicant's shares of that class; or

(b) imposing conditions of acquisition different from those of the original offer.

(5) After receiving a demand in terms of subsection (2), or giving notice in terms of subsection (3), the offeror is entitled, and required, to acquire the shares concerned on the same terms that applied to shares whose holders accepted the original offer, subject only to an order of the court in terms of subsection (4).

(6) If an offer to acquire the shares of particular class has not been accepted to the extent contemplated in subsection (1), the offeror may apply to the Court for an order authorizing the offeror to give a notice contemplated in subsection (3).

(7) On an application in terms of subsection (6), the Court may make the order applied for, if –

(a) after making reasonable enquiries, the offeror has been unable to trace one or more of the persons holding shares to which the offer relates;

(b) by virtue of acceptances of the original offer, the shares that are the subject of the application, together with the shares held by the person or persons referred to in paragraph (a), amount to not less than the minimum specified in subsection (1);

(c) the consideration offered is fair and reasonable; and

(d) the Court is satisfied that it is just and equitable to make the order, having regard, in particular, to the number of holders of shares who have been traced but who have not accepted the offer.

(8) If an offeror has given notice in terms of subsection (2), and no order has been made in terms of subsection (4) -

(a) six weeks after the date on which the notice was given, or, if an application to the Court is then pending, after the application has been disposed of, the offeror must -

(i) transmit a copy of the notice to the company whose shares are the subject of the offer, together with an executed instrument of transfer, and

(ii) pay or transfer to that company the consideration representing the price payable by the offeror for the shares concerned, and,

(b) subject to the payment of prescribed fees or duties, the company must thereupon register the offeror as the holder of those shares.

(9) An instrument of transfer contemplated in subsection (7) is not required for any share for which a share warrant is for the time being outstanding.

(10) A company must deposit any consideration received under this section into a separate bank account with a banking institution registered under the Banks Act, 1990 (Act 94 of 1990) and those deposits must be held in trust by the company for the person entitled to the shares in respect of which the consideration was received.

(11) In this section any reference to a "holder of shares who has not accepted the offer" includes any holder who has failed or refused to transfer their shares to the offeror in accordance with the offer.

116. Proposals to dispose of substantially all assets or undertaking

(1) If a company anticipates entering into an agreement or series of agreements to dispose of substantially all of the assets or undertaking of that company, but has not done so, the board may submit a proposed resolution to be considered at a meeting of the shareholders in accordance with section 119, to authorize the making of such an agreement or series the agreements in advance.

(2) If a company has entered into an agreement or series of agreements to dispose of substantially all of the assets or undertaking of that company, without prior shareholder approval as contemplated in subsection (1), the board must submit a proposed resolution to authorize the agreement or series of agreements to be considered at a meeting of the shareholders in accordance with section 119.

(3) A notice of a meeting of shareholders contemplated in subsection (1) or (2) must -

(a) be delivered within the prescribed time, and in the prescribed manner and form to each shareholder of the company; and

(b) include or be accompanied by -

(i) a written summary, that satisfies the prescribed standards, of the transaction or series of transactions; and

(ii) the provisions of sections 119 and 165.

(4) A proposed resolution to authorize a contemplated agreement or series of agreements in advance, as contemplated in subsection (1) may provide that -

(a) the resolution is enabling but not binding upon the board; and

(b) at any time before entering into such an authorized agreement, the board may void the resolution, notwithstanding its approval by the shareholders.

(5) Any part of the undertaking or assets of a company to be disposed of in terms of a proposed transaction must be assigned its fair market value as at the date of the proposal.

117. Proposals for merger or amalgamation

(1) Subject to section 11 (4), two or more companies, including holding and subsidiary companies, may amalgamate or merge if, upon implementation of the amalgamation or merger, each amalgamated or merged company will satisfy the solvency and liquidity test.

(2) Two or more companies proposing to amalgamate or merge must enter into an agreement setting out the terms and means of effecting the amalgamation or merger and, in particular, setting out –

(a) in the case of an amalgamation, the proposed Memorandum of Incorporation of any new company to be formed by the amalgamation;

(b) the name and identity number of each proposed director of any proposed amalgamated or merged company;

(c) the manner in which the shares of each amalgamating or merging company are to be converted into shares or other securities of any proposed amalgamated or merged company, or exchanged for other property;

(d) if any shares of are not to be converted into securities of any proposed amalgamated or merged company, the consideration that the holders of those

shares are to receive in addition to or instead of securities of any proposed amalgamated or merged company;

(e) the manner of payment of any consideration instead of the issue of fractional shares of an amalgamated or merged company or of any other body corporate the securities of which are to be received in the amalgamation or merger;

(f) whether any rules made by any of the amalgamating or merging companies are to apply to any proposed amalgamated or merged company, and if so, which ones; and

(g) details of any arrangements necessary to complete the amalgamation or merger, and to provide for the subsequent management and operation of the proposed amalgamated or merged company.

(3) If shares of one of the amalgamating or merging companies are held by or on behalf of another of the amalgamating or merging companies, an agreement required by subsection (2) must provide for the cancellation of those shares when the amalgamation or merger becomes effective, without any repayment of capital in respect thereof, and no provision may be made in the agreement for the conversion of those shares into shares of an amalgamated or merged company.

(4) The board of each amalgamating or merging company -

(a) must consider whether, upon implementation of the agreement, each proposed amalgamated or merged company will satisfy the solvency and liquidity test; and

(b) if the board reasonably believes that each proposed amalgamated or merged company will satisfy the solvency and liquidity test, it may submit the agreement for consideration at a meeting of the shareholders of that company, in accordance with section 119.

(5) A notice of a meeting of shareholders contemplated in subsection (4)(b) must be sent to each shareholder of each amalgamating or merging company, and must include or be accompanied by a copy or summary of –

(a) the amalgamation or merger agreement; and

(b) the provisions of sections 119 and 165.

118. Proposals for scheme of arrangement

(1) Unless it is in liquidation or in the course of business rescue proceedings, a company may propose and, subject to approval in terms of this Chapter, implement any arrangement between the company and its shareholders, or any class of them, including but not limited to, a reorganization of the share capital of the company by way of, among other things -

(a) a consolidation of shares of different classes;

(b) a division of shares into different classes;

(c) an expropriation of shares from shareholders;

(d) a share exchange;

(e) a share re-purchase; or

(f) a combination of the methods contemplated in this subsection.

(2) The proponent of an arrangement contemplated in subsection (1) must retain an independent expert, who meets the following requirements, to compile a report as required by subsection (3):

(a) The person to be retained must be -

(i) qualified, and have the experience necessary, to understand the type of arrangement proposed, evaluate its consequences, and assess the impact of the arrangement on the value of shares and its effect on the rights and interests of a shareholder or creditor of the company; and

(ii) able to express opinions, exercise judgment and make decisions impartially.

(b) The person to be retained must not –

(i) have any other relationship with the company or with a proponent of the arrangement, such as would lead a reasonable and informed third party to conclude that the integrity, impartiality or objectivity of that person is compromised by that relationship;

(ii) be a full-time employee or a former full-time employee of the company within the past two years;

(iii) be the company's current auditor;

(iv) currently be, or have been within the past year, a legal, professional or other advisor of the company; or

(v) be related to a person contemplated in this paragraph.

(3) The person retained in terms of subsection (2) must prepare, and distribute to all shareholders of the company, a report concerning the proposed arrangement, which must –

(a) state all information relevant to the value of the shares affected by the proposed arrangement;

(b) identify every type and class of shareholder affected by the proposed arrangement;

(c) describe the effects that the proposed arrangement will have on the rights and interests of the persons mentioned in paragraph (b), and evaluate any adverse effects against –

(i) the compensation that any of those persons will receive in terms of the arrangement; and

(ii) the likely effect of the arrangement on the business and prospects of the company;

(d) state any material interest of any director of the company, or trustee for debenture holders, whether as shareholder or in any other capacity, and state the effect of the arrangement on those interests and persons; and

(e) include a copy of sections 119 and 165.

119. Required approval for transactions contemplated in this Part

(1) Despite section 82, and any provision of a company's Memorandum of Incorporation, or any resolution adopted by its board or shareholders, to the contrary, a company may not take any steps–

(a) to give effect to an agreement or series of agreements to dispose of substantially all of the assets or undertaking of the company;

(b) to implement a merger or an amalgamation; or

(c) to implement a scheme of arrangement

unless it has been approved in terms of this section.

(2) A proposed transaction contemplated in subsection (1) must be approved -

(a) by the shareholders of the company, only by a resolution –

(i) adopted at a meeting called for that purpose, at which the holders of at least 25% of the shares entitled to be voted were present; and

(ii) supported by the holders of at least a majority of the shares voted, as determined in accordance with subsection (4); and

(b) by the shareholders of the company's holding company, if any, if the transaction by the first company substantially constitutes a parallel transaction by the holding company;

(c) by the court, in the circumstances and manner contemplated in subsections (3) to (6); and

(d) by the Takeover Regulation Panel, if it is an affected transaction.

(3) Despite a resolution having been adopted as contemplated in subsections (2) (a) or (b), a company may not proceed to implement that resolution without the approval of a court if –

(a) the holders of at least 15% of the shares that were voted on that resolution -

(i) voted against its adoption; and

(ii) unanimously require the company to seek court approval; or

(b) the court, on an application by any shareholder who voted against adoption of the resolution, grants that shareholder leave to apply to the court for a review of the transaction.

(4) If a resolution requires approval by a court as contemplated in terms of subsection (3)(a), the company must either -

(a) apply to the court for approval, and bear the costs of that application; or

(b) treat the resolution as a nullity.

(5) On an application contemplated in subsection (3)(b), the court may grant leave only if it is satisfied that the applicant -

(a) is acting in good faith;

(b) appears prepared to sustain the proceedings; and

(c) has alleged facts which, if true, would support an order in terms of subsection (6).

(6) On reviewing a resolution in terms of subsection (4) or after granting leave in terms of subsection (5), the court may set aside the resolution only if -

(a) the resolution is manifestly unfair to any class of shareholders; or

(b) the vote was tainted by conflict of interest, inadequate disclosure, failure to comply with the Act, the Memorandum of Incorporation or any applicable rules of the company, or other significant and material procedural irregularity.

(7) If a resolution adopted in terms of subsection (2) (a) or (b), as the case may be, was supported by the holders of -

(a) less than 75% of the shares entitled to be voted, as determined in accordance with subsection (8), a shareholder who, having given the company notice of dissent, voted against the resolution is entitled to seek relief in terms of section 165; or

(b) at least 75% of the shares entitled to be voted, as determined in accordance with subsection (8), no shareholder is entitled to seek relief in terms of section 165, irrespective whether they gave the company notice of dissent or voted against the resolution.

(8) For the purposes of calculating the percentage of shares voted in support of a resolution, any voting shares controlled by an acquiring party, or a person acting in concert with an acquiring party, must not be included in determining either -

(a) the number of shares entitled to be voted; or

(b) the number of shares voted in support of the resolution.

120. Implementation of amalgamation or merger

(1) After a resolution approving an amalgamation or merger has been adopted by each company that is party to the agreement, a Notice of Amalgamation or Merger may be filed with the Commissioner, together with -

(a) in the case of an amalgamation, the Memorandum of Incorporation of any newly amalgamated company, if that company would be required to file its Memorandum of Incorporation in terms of section 15; and

(b) a statement that -

(i) there are reasonable grounds for believing that no creditor of any of the amalgamating or merging companies will be prejudiced by the amalgamation or merger; and

(ii) adequate notice has been given to all known creditors of each amalgamating or merging company, and no creditor has objected to the amalgamation or merger otherwise than on grounds that are frivolous or vexatious; and

(c) confirmation that the merger or amalgamation has been approved–

(i) by the Court or the Takeover Regulation Panel, or both, to the extent required in terms of this Chapter; and

(ii) in terms of the Competition Act, 1998 (Act No. 89 of 1998), if so required by that Act.

(2) For the purposes of subsection (1), adequate notice to creditors will have been given if a notice in writing has been sent to each known creditor stating that the company intends to amalgamate or merge with one or more specified companies in accordance with this Act and that a creditor of the company may object to the amalgamation or merger within thirty days from the date of the notice.

(3) After receiving a Notice of Amalgamation or Merger, the Commissioner must -

(a) in the case of an amalgamation, issue a certificate of incorporation for the newly amalgamated company; and

(b) de-register each of the amalgamating or merging companies, other than any surviving company, in the case of a merger.

(4) A merger or amalgamation –

(a) takes effect in accordance with, and subject to any conditions set out in the merger or amalgamation agreement;

(b) does not affect any -

(i) existing liability of a party to the agreement to prosecution;

(ii) civil, criminal or administrative action or proceeding pending by or against an amalgamating or merging company, and any such proceeding may be continued to be prosecuted by or against the newly amalgamated, or surviving merged, company; or

(iii) a conviction against, or ruling, order or judgment in favour of or against, an amalgamating or merged company, and any such ruling, order or judgement may be enforced by or against the newly amalgamated, or surviving merged, company.

(5) When a merger or amalgamation agreement takes effect –

(a) the property of each amalgamating or merging company becomes property of the newly amalgamated, or surviving merged, company; and

(b) each newly amalgamated, or surviving merged, company is liable for all of the obligations of every amalgamating or merged company

subject to any provision of the agreement to the contrary.

(6) If a transaction contemplated in this Part has been approved, any person to whom assets are, or an undertaking is, to be transferred, may apply to the Court for an order to effect -

(a) the transfer of the whole or any part of the undertaking, assets and liabilities of a company contemplated in that transaction;

(b) the allotment and appropriation of any shares or similar interests to be allotted or appropriated as a consequence of the transaction;

(c) the transfer of shares from one person to another;

(d) the continuation by or against a company of any legal proceedings pending by or against another company;

(e) incidental, consequential and supplemental matters that are necessary for the effectiveness and completion of the transaction; or

(f) the dissolution, without winding up, of a company, as contemplated in the transaction.

Part C – Conduct of Bids and Offers

121. Application and Interpretation of this Part

(1) This Part applies only in respect of a widely held company.

(2) A person granted an option to acquire shares with a voting right in a widely held company is presumed to be acting in concert with the grantor of the option, unless the voting rights are in the grantor.

(3) A presumption under subsection (2) may be rebutted by evidence to the contrary.

122. Secrecy of offers and announcements

(1) A person contemplating making an offer must take all reasonable steps to ensure that secrecy is observed until a firm intention to make the offer has been announced.

(2) All persons privy to confidential information, price-sensitive or otherwise, concerning an offer or contemplated offer must treat that information as secret.

(3) No one may issue a news release relating to an announcement or offer, under embargo until a future time, unless the Panel has approved the release in advance.

123. Announcement and making of offer

(1) A cautionary announcement that satisfies the prescribed requirements must be made if, while an offer is under discussion, —

(a) the offeree company becomes the subject of rumour and speculation; or

(b) there is an abnormal movement in the price of the offeree company's securities or in the volume of its shares traded on a stock exchange; or

(c) negotiations or discussions are about to be extended to include more than a very restricted number of persons, apart from those in the companies concerned who need to know and their immediate advisers.

(2) An offeror must not take any action that, in terms of subsection (3), would require making an announcement of a firm intention to make an offer unless the offeror and its financial adviser have proper grounds for believing that the offeror is and will continue to be able to implement the offer.

(3) An offeror must announce a firm intention to make an offer -

(a) when the board of the offeree company has been notified in writing by a serious source of that firm intention, irrespective of the attitude of the offeree board to the offer; or

(b) upon an acquisition of shares that gives rise to an obligation to make an offer under section 114.

(4) An announcement of a firm intention to make an offer –

(a) must not be delayed while full information is being obtained; and

(b) must satisfy the prescribed requirements for such an announcement.

(5) If, after making an announcement of a firm intention to make an offer, additional relevant information becomes available, that information can be the subject of a supplementary announcement.

(6) If an announcement has been made of a firm intention to make an offer, the offeror must proceed with the offer unless -

(a) the posting of the offer is subject to the prior fulfilment of a previously disclosed specific condition and that condition has not been fulfilled; or

(b) the Panel grants the offeror an exemption to this subsection.

(7) When an offer is to be made, it must be put forward to the board of the offeree company, or to its authorised advisers.

(8) If the offer, or an approach with a view to an offer being made, is made by a person other than the ultimate offeror or potential offeror, the identity of the ultimate offeror or potential offeror must be disclosed when the offer is put forward.

(9) If a company has more than one class of shares as its capital -

(a) separate offers must be made for each class for which an offer is to be made; and

(b) a comparable offer must be made for each class, irrespective whether it carries voting rights.

(10) Classes of non-equity securities need not be the subject of an offer, except in the circumstances referred to in section 114 (1).

124. Conditional offers

(1) An offer must not be subject to conditions that depend solely on any subjective judgment by the directors of the offeror, or the fulfilment of which is in their hands, unless the Panel grants the offeror an exemption from this subsection.

(2) An offer for non-voting shares must not be made conditional on any particular level of acceptances in respect of that class unless the offer for the voting shares is also conditional on the success of the offer for the non-voting shares.

125. Public disclosure of dealings during an offer period

(1) An offeror or offeree company, or any concert party, that deals for on its own account or on account of a client, in relevant shares of the offeror or offeree company during an offer period must promptly disclose those dealings -

(a) in a press release;

(b) to the Panel, which may publicise the disclosure in whatever manner it considers appropriate; and

(c) in the case of a listed company, to the relevant exchange in the manner required by that exchange for immediate public release.

(2) If a person contemplated in subsection (1) deals in relevant shares for the account of clients, the names of those clients are not required be disclosed.

126. Prohibited dealings before and during an offer

(1) During an offer, or when one is reasonably in contemplation, an offeror or a person acting in concert with that offeror, must not -

(a) make any arrangements with holders of the relevant shares;

(b) deal in, or enter into arrangements to deal in, shares of the offeree company; or

(c) enter into arrangements which involve acceptance of an offer

if there are favourable conditions attached that are not being extended to all holders of the relevant shares, unless the Panel grants that person an exemption from this subsection.

(2) During an offer, an offeror or a person acting in concert with that offeror must not –

(a) sell any shares in the offeree company, unless –

(i) the Panel has consented in advance to that sale; and

(ii) the person selling those shares has given at least 24 hours public notice that sales of that type might be made, in the manner and form required by section 125 (1), read with the changes required by the context; or

(b) purchase any shares after making an announcement contemplated in paragraph (a)(ii).

(3) The Panel must not give its consent in terms of subsection (2)(a)(i) for a sale arising from a mandatory offer under Section 114.

(4) Sales below the value of the offer will not be permitted.

127. Fair dealing in acquisitions

(1) Subject to subsection (2), if an offeror or any person acting in concert with it has acquired relevant shares in the offeree company during the three month period immediately before the start of the offer period, the offer to the holders of relevant shares of the same class must be on terms similar to the most favourable of those acquisitions.

(2) The Panel may –

(a) exempt a person from the application of subsection (1); or

(b) extend the period of three months contemplated in subsection (1).

(3) If, after the commencement of the offer period and before the offer closes for acceptance, an offeror or any person acting in concert with it purchases relevant shares in the offeree company at above the then current offer price, that person must -

(a) increase its offer for the relevant shares to not less than the highest price paid for any such newly acquired shares; and

(b) promptly make an announcement, stating –

(i) the number of newly acquired shares, and the price paid for them; and

(ii) that a revised offer will be made in accordance with this subsection.

128. Restrictions on frustrating action

(1) If the board of a company believes that a bona fide offer might be imminent, or has received such an offer, the board may not -

(a) take any action in relation to the affairs of the company that could effectively result in -

(i) a bona fide offer being frustrated; or

(ii) the holders of relevant shares being denied an opportunity to decide on its merits;

(b) issue any authorised but unissued shares;

(c) issue or grant options in respect of any unissued shares;

(d) create or issue, or permit the creation or issue of, any shares carrying rights of conversion into or subscription for other shares;

(e) sell, dispose of or acquire, or agree to sell, dispose of or acquire, assets of a material amount;

(f) enter into contracts otherwise than in the ordinary course of business; or

(g) pay any dividend that is abnormal as to timing and amount;

without the approval of the holders of relevant shares, or in terms of a pre-existing obligation or contract entered into before the time contemplated in this subsection.

(2) If a company believes that it is subject to a pre-existing obligation contemplated in subsection (1), it may apply to the Court for consent to proceed without shareholder approval.

129. Restrictions following offers

(1) If an offer has been announced or posted, but has not become or been declared unconditional, and has subsequently been withdrawn or lapsed, for a period of 12 months after the date on which the offer was withdrawn or lapsed, the offeror, any person who acted in concert with the offeror in the course of the original offer, or any person who is subsequently acting in concert with any of them, must not -

(a) make an offer for the relevant shares of the offeree company; or

(b) acquire any shares of the offeree company, if as a result of that acquisition, either the offeror or that person would be required to make a mandatory offer in terms of section 114.

(2) Subsection (1) applies equally to a partial offer that could result in a holding of not less than the specified percentage and not more than 50% of the voting rights of the offeree company whether or not the offer has become or been declared unconditional, but the period of 12 months runs from that date on which that offer became or was declared to be unconditional.

Chapter 6 - Business Rescue

Part A – Business Rescue Proceedings

130. Definitions applicable only to this Chapter

(1) In this Chapter –

(a) "**affected person**", in relation to a company, means -

(i) a shareholder or creditor of the company;

(ii) any registered trade union representing employees of the company; and

(iii) if any of the employees of the company are not represented by a registered trade union, each of those employees or their respective representatives;

(b) "**business rescue**" means proceedings to facilitate the rehabilitation by its management of a company that is insolvent, or may imminently become insolvent, by providing for –

(i) the temporary supervision of the management of the affairs, business and property of the company;

(ii) a temporary moratorium on the rights of claimants against the company or in respect of property in its possession; and

(iii) the development and implementation, if approved, of a plan to rescue the company by re-structuring its affairs, business, property, debt and other liabilities, and equity

in a manner that maximises the likelihood of the company continuing in existence on a solvent basis or, if it is not possible for the company to so continue in existence, results in a better return for the company's creditors or