

MEMBERS' CIRCULAR

LEGAL UPDATE

SA CORPORATE LAWS AMENDMENT ACT, 2006

The long-awaited amendments came into operation on 14 December 2007 when they were published in Government Gazette 30594 of 14 December 2007.

The amendments will be discussed in detail in forthcoming Technical Newsletters. In the interim, members should be aware of the most important aspects of the amendments.

PUBLIC INTEREST COMPANIES AND LIMITED INTEREST COMPANIES

Section 1 of the Companies Act was amended by the insertion of a new subsection (6)(a) in which a Public Interest Company is defined as follows:

- “(6) (a) A company is a public interest company if—
- (i) its articles provide for an unrestricted transfer of its shares;
 - (ii) it is permitted by its articles to offer shares to the public;
 - (iii) it decides by special resolution to be a public interest company; or
 - (iv) it is a subsidiary of a company described in subparagraph (i), (ii) or (iii).
- (b) A company with two or more types or classes of shares is a public interest company if its articles provide for the unrestricted transfer of shares in one or more of these types or classes.
- (c) For the purposes of this subsection—
- (i) a transfer of shares is unrestricted if it is not subject to an effective right of pre-emption;
 - (ii) an effective right of pre-emption is a right of pre-emption which operates in favour of all shareholders of the company and upon every proposed sale of shares to a person who is not a shareholder of the company.
- (d) A company is a limited interest company if it is not a public interest company.
- (e) An effective right of pre-emption contained in the articles of a limited interest company shall be deemed also to operate, with the necessary changes, upon—
- (i) the disposal of a beneficial interest in a share of the company; and
 - (ii) an offer by the company of shares created in terms of section 75(1) to any person who is not a shareholder of the company.
- (f) For the purposes of paragraph (e)(i), ‘beneficial interest’ shall be as defined in subsection 140A(1), except that it shall apply in relation to a share rather than to a security.

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

Based on this amendment, most Private companies will now be Limited Interest Companies and Listed Public Companies will in all probability be Public Interest Companies. Unlisted Public Companies will be classified either as Private or Public Interest Companies, depending on the individual company's share transfer arrangements.

It is incumbent on all office bearers to apply their minds to this matter as the correct classification is of paramount importance, particularly regarding financial reporting.

It is to be noted that the new classification does completely not do away with the old. For the purposes of the unamended parts of the Act, the distinction between public and private companies remains as before.

ASSISTANCE TO ACQUIRE SHARES

Section 38 of the Companies Act has been amended by the insertion of new subsections (2A) and (2B). The complete Section 38 now reads as follows:

- “38 No financial assistance to purchase shares of company or holding company
- (1) No company shall give, whether directly or indirectly, and whether by means of a loan, guarantee, the provision of security or otherwise, any financial assistance for the purpose of or in connection with a purchase or subscription made or to be made by any person of or for any shares of the company, or where the company is a subsidiary company, of its holding company.
- (2) The provisions of subsection (1) shall not be construed as prohibiting-
- (a) the lending of money in the ordinary course of its business by a company whose main business is the lending of money; or
- (b) the provision by a company, in accordance with any scheme for the time being in force, of money for the subscription for or purchase of shares of the company or its holding company by trustees to be held by or for the benefit of employees of the company, including any director holding a salaried employment or office in the company; or
- (c) the making by a company of loans to persons, other than directors, bona fide in the employment of the company with a view to enabling those persons to purchase or subscribe for shares of the company or its holding company to be held by themselves as owners; or
- (d) the provision of financial assistance for the acquisition of shares in a company by the company or its subsidiary in accordance with the provisions of section 85 for the acquisition of such shares.
- (2A) Subsection (1) does not prohibit a company from giving financial assistance for the purchase of or subscription for shares of that company or its holding company, if-

- (a) the company's board is satisfied that-
 - (i) subsequent to the transaction, the consolidated assets of the company fairly valued will be more than its consolidated liabilities; and
 - (ii) subsequent to providing the assistance. and for the duration of the transaction, the company will be able to pay its debts as they become due in the ordinary course of business; and
 - (b) the terms upon which the assistance is to be given is sanctioned by a special resolution of its members.
- (2B) For the purposes of paragraph (2A)(a), the directors must account for any contingent liabilities which may arise to the company, including any contingent liability which may result from giving the assistance.
- (3)
- (a) Any company which contravenes the provisions of this section, and every director or officer of such company, shall be guilty of an offence.
 - (b) For the purpose of this subsection "director", in relation to a company, includes any person who at the time of the alleged contravention was a director of the company.
- (4) It shall be a defence in any proceedings under this section against any director or officer of a company if it is proved that the accused was not a party to the contravention.”

This amendment authorises companies to give assistance in order to acquire its shares provided the Board is satisfied that the assets of the company will exceed its liabilities after the transaction. The directors must, in this enquiry, account for any contingent liabilities which may arise.

The Board must also be satisfied that the company will be able to pay its debts after the assistance is given and the assistance to be given has to be authorised by the General Meeting by way of a Special Resolution.

(Note the different roles and responsibilities of the Board, directors and General Meeting.)

These amendments favour the solvency test over the preservation of capital and will facilitate BBEE.

PROSPECTUS

Section 148 of the Companies Act was replaced with a new Section 148 and a new Section 148A was inserted. These Sections now read as follows:

“148 Matters to be stated in prospectus

- (1) A prospectus must adhere to the specifications of Schedule 3 and contain all information that an investor may reasonably require to assess—
 - (a) a company in which a right or interest is to be acquired, its assets and liabilities, financial position, profits and losses, cash flow and prospects; and
 - (b) the shares and the rights attached to them.

- (2) As long as an offer remains open, any person responsible for information in the prospectus must, when that person becomes aware of it—
 - (a) correct any error;
 - (b) report on any new matter; and
 - (c) report on any change of a matter included in the prospectus, if these are relevant or material in terms of Schedule 3.
- (3) A correction or report in terms of subsection (2) must be registered as a supplement to the prospectus, simultaneously published to known recipients of the prospectus and included in future distributions of the prospectus.
- (4) Subject to section 148A, any person who knowingly is a party to the issue of a prospectus in contravention of this section shall be guilty of an offence.”.

148A Permission to omit information

- (1) The Registrar may, on application, allow information required under section 148 to be omitted from the prospectus, if the Registrar is satisfied that—
 - (a) publication of the information would be unnecessarily burdensome for the applicant, seriously detrimental to a company mentioned in section 148(1)(a) or against the public interest; and (b) users will not be unduly prejudiced by the omission.
- (2) An application under subsection (1) shall be in writing and accompanied by the prescribed fee.”.

ANNUAL RETURN INFORMATION

Subsection 173(4) was inserted and makes provision for the information contained in the most recent Annual Return to be regarded as the latest disclosed information “in the absence of any subsequent compliance with any relevant disclosure requirement...”

AUDIT COMMITTEES FOR PUBLIC INTEREST COMPANIES

Sections 269A and 269B were inserted and read as follows:

“269A. Audit committees for public interest companies

- (1) In every financial year in which a company is a widely held company, its board of directors shall appoint an audit committee for the following financial year.
- (2) Subsection (1) shall not apply to a company-
 - (a) if the audit committee of a holding company will perform the functions required under section 270A(1) on behalf of that company;
 - (b) if the company ceases to be a public interest company in the manner contemplated in section 1(7);

- (c) if the company belongs to a category of companies specified by the Minister under section 269B.
- (3) An audit committee must have at least two members and consist only of non-executive directors of the company who must act independently.
- (4) For the purposes of this Chapter-
 - (a) "financial year" shall be construed in accordance with section 285;
 - (b) a director is a non-executive director of a company if the director-
 - (i) is not involved in the day to day management of the business and has not in the past three financial years been a full-time salaried employee of the company or its group;
 - (ii) is not a member of the immediate family of an individual mentioned in subparagraph (i);
 - (b) a director acts independently if that director-
 - (i) expresses opinions, exercises judgment and makes decisions impartially;
 - (ii) is not related to the company or to any shareholder, supplier, customer or other director of the company in a way that would lead a reasonable and informed third party to conclude that the integrity, impartiality or objectivity of that director is compromised by that relationship."

The new Subsection 269B authorises the Minister to exempt certain categories of companies from appointing an audit committee.

The new Section 270A determines that the Audit Committees of Public Interest Companies must, i.a, nominate the auditor, determine his fees, ensure that the appointment complies with the legislation, authorize non-audit services and pre-approve any contract with the auditor for the provision of non-audit services. The auditor may, in any event, not perform bookkeeping or accounting services which would be subject to its own auditing service (Section 275A. (1)).

The Board's functions, however, only diminishes in respect of the appointment, fees and terms of engagement of the auditor.

The auditor of a Public Interest Company must meet with the Audit committee before the Annual Financial Statements are approved by the board and attend Annual Meetings in order to respond to questions regarding the audit.

AUDITORS

Subsections 269(6) and (7) were inserted into the Act and read as follows:

- “(6) No person or firm may be appointed as auditor of a company unless that person or firm is a registered auditor.
- (7) In this Chapter "registered auditor", "firm" and "Regulatory Board" have the same meanings as in the Auditing Profession Act, 2005 (Act No. 26 of 2005).”.

In terms of the amended Section 215(2), the name of the individual auditor needs to be entered into the Register. See also Section 274(1) in terms of which a change in the composition of an Auditor's firm may lead to an automatic vacancy.

The same individual may not serve as auditor for a Public Interest Company for more than five years (Section 274A(1)).

Subsections 270(2)(d) and (e) were inserted. The auditor will no longer be deemed to be re-appointed at the Annual General Meeting if the Audit committee objects to the re-appointment, or if Section 274A(1) supra, applies.

These amendments will ensure greater auditor independence and envisages the rotation of auditors for Public Interest Companies.

DISPOSAL OF UNDERTAKING OR GREATER PART OF ASSETS OF COMPANY

Section 228 was amended to read as follows:

“228. Disposal of undertaking or greater part of assets of company

- (1) Notwithstanding anything contained in its memorandum or articles, the directors of a company shall not have the power, save by a special resolution of its members, to dispose of-
 - (a) the whole or the greater part of the undertaking of the company;
 - or
 - (b) the whole or the greater part of the assets of the company.
- (2) If in relation to the consolidated financial statements of a holding company, a disposal by any of its subsidiaries would constitute a disposal by the holding company In terms of subsection (1)(a) or (b), such disposal requires a special resolution of the shareholders or the holding company.
- (3) A special resolution of a company shall not be effective in approving a disposal described in subsection (1) or (2) unless it authorizes or ratifies in terms the specific transaction.
- (4) An undertaking or assets of a company, and the part to be disposed of, shall be calculated for purposes of subsections (1) and (2) according to the fair value of the undertaking or assets as described in financial reporting standards.
- (5) Subsections (1) to (4) shall not apply to a disposal between a wholly owned subsidiary and its holding company, or between two wholly owned subsidiaries of the same holding company.

FINANCIAL STATEMENTS

The new Sec 285A sets out the requirements for the financial statements.

Public Interest Companies must comply with financial reporting standards, the relevant provisions of Schedule 4 (as amended) and fairly represent the financial position of the company.

Limited Interest Companies must comply with the accounting framework of financial reporting standards, the relevant provisions of Schedule 4 (as amended) and fairly represent the position of the company.

All companies must state whether the statements were prepared in accordance with the Act prior to the amendments or the financial reporting standards.

Section 286 was amended to require a balance sheet, income statement and additional components required in terms of financial reporting standards, a summary of significant accounting policies and other explanatory notes, a directors' report and an auditor's report.

Any person who is a party to the preparation, approval, publication, issue or supply of a false or misleading financial report, is guilty of an offence (Section 287A).

Transitional arrangements are made in the amended Schedule 4. Companies may delay compliance until the financial year following upon the coming into effect of the amendments.

FINANCIAL REPORTING STANDARDS

Chapter XVB was inserted into the Act and establishes the Financial Reporting Standards Council.

The functions of the Council are to establish financial reporting standards for public interest companies and develop standards for limited interest companies.

Financial reporting standards for public interest companies shall accord with the International Financial Reporting Standards of the International Accounting Standards Board.

Financial Standards for limited Interest Companies shall be developed in consultation with representatives of limited interest companies.

The new Chapter also establishes a Financial Reporting Investigations Panel. The Panel's objective is to promote the reliability of financial reports by investigating alleged non-compliance with financial reporting standards and recommending appropriate measures for rectification or restitution.