

REPUBLIC OF SOUTH AFRICA

**PORTFOLIO COMMITTEE AMENDMENTS
TO
COMPANIES AMENDMENT
BILL**

[B 40—2010]

*(As proposed by the Portfolio Committee on Trade and Industry)
(National Assembly)*

[B 40A—2010]

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PROPOSED FURTHER AMENDMENTS

adopted by Committee on 10/3/11

CLAUSE 2

1. On page 9, from line 20, to omit paragraph (a) and to substitute:

"(a) the assets of the company [or, if the company is a member of a group of companies, the aggregate assets of the company], as fairly valued, equal or exceed the liabilities of the company [or, if the company is a member of a group of companies, the aggregate liabilities of the company], as fairly valued; and

CLAUSE 118

2. On page 51, to omit lines 38 to 41, and to substitute:

"(1) Any matter [filed with] pending before the Registrar under the [Companies Act, 1973 (Act No. 61 of 1973) previous Act, or a provision of the Close Corporations Act, (Act No. 69 of 1984), amended by this Act, before the effective date and not fully addressed at that time, must be concluded by the Registrar in terms of [that] such Act, despite its repeal or amendment."

AMENDMENTS PROPOSED TO
COMPANIES AMENDMENT BILL
[B 40—2010]

CLAUSE 1

1. On page 5, in line 38, to omit “at fair market value” and to substitute “fairly valued”.
2. On page 5, in line 40, to omit “at fair market value” and to substitute “fairly valued”.
3. On page 5, from line 50, to omit paragraph (*d*).
4. On page 6, from line 31, to omit paragraph (*j*).
5. On page 7, from line 25, to omit paragraph (*t*).
6. On page 7, in line 43, to omit “item 4 of Schedule 2” and to substitute “Schedule 1”.
7. On page 7, from line 46 until line 63 and on page 8 lines 1 and 2 to omit paragraph (*w*) and to substitute:

“(ii) a pre-existing company was structured and governed before the later of the—

 - (aa) (i) **[the]** effective date; or
 - [(bb)] (ii) [the]** date it was converted to a company in terms of Schedule 2;
8. On page 8, in line 47, to omit “notes, bonds,”.
9. On page 8, in line 49, to omit “for the purpose of raising capital”.

CLAUSE 2

1. On page 9, from line 18, to omit paragraph (*a*).

CLAUSE 3

1. On page 9, after line 39, to insert:

“(a) by the substitution in subsection (4)(b)(i) for items (*ff*) and (*gg*) of the following items respectively:

 - (*ff*) Securities Services Act, 2004 (Act No. 36 of 2004);
 - [or]**
 - (*gg*) Banks Act [,];”;

(b) by the addition in subparagraph (i) of paragraph (b) of subsection (4) of the following items:

“(*hh*) Local Government: Municipal Finance Management Act, 2003 (Act No. 56 of 2003); or

(ii) Section 8 of the National Payment System Act, 1998 (Act No. 78 of 1998).”.

CLAUSE 6

1. On page 11, from line 58, to omit paragraph (f).

CLAUSE 7

1. On page 12, to omit lines 17 and 18, and to substitute:

“(b) by the substitution in paragraph (a) of subsection (3) for the words preceding subparagraph (i) of the following words:”
2. On page 12, to omit lines 20 and 21 and to substitute:

“(c) by the substitution in paragraph (b) of subsection (3) for the words preceding subparagraph (i) of the following word: ”

CLAUSE 8

1. On page 13, in line 61, to omit “body corporate” and to substitute “juristic person”.

CLAUSE 9

1. On page 14, from line 18, to omit paragraph (c).
2. On page 14, to omit lines 30 and 31, and to substitute:

“by the substitution in paragraph (b) of subsection (3) for the words preceding subparagraph (i) of the following words:”
3. On page 14, to omit lines 33 and 34, and to substitute: by the substitution in paragraph (b) of subsection 3 for the words preceding subparagraph 1 of the following words: “ ”

CLAUSE 10

1. On page 14, after line 41, to insert:

“(b) by the substitution in subsection (2)(a) for subparagraphs (i) and (ii) of the following subparagraphs respectively:

 - (i) dealing with a matter that this Act does not address; **[or]**
 - (ii) altering the effect of any alterable provision of this Act; or”;

(c) by the insertion in paragraph (a) of subsection (2) of the following subparagraph:

“(iii) imposing on the company a higher standard, greater restriction, longer period of time or any similarly more onerous requirement, than would otherwise apply to the company in terms of an unalterable provision of this Act;”
2. On page 14, from line 44, to omit paragraph (b) and to substitute:

“(b) contain any **[special]** restrictive conditions applicable to the company, and any requirement for the amendment of any such condition in addition to the requirements set out in section 16; **[or]** ”.

3. On page 14, after line 48, to insert:
 - “(e) by the substitution in subsection (2) for paragraph (c) of the following paragraph:
 - (c) prohibit the amendment of any particular provision of the Memorandum of Incorporation[.] ; or”;
 - (f) by the insertion in subsection (2) of the following paragraph after paragraph (c):
 - (d) not include any provision that negates, restricts, limits, qualifies, extends or otherwise alters the substance or effect of an unalterable provision of this Act, except to the extent contemplated in paragraph (a)(iii).”.

NEW CLAUSE

1. That the following be a new Clause:

Amendment of section 22 of Act 71 of 2008

14. Section 22 of the principal Act is hereby amended by the substitution for subsection (1), (2) and (3) of the following subsections respectively:

- “(1) A company must not [—
- (a) carry on its business recklessly, with gross negligence, with intent to defraud any person or for any fraudulent purpose [;
 - or**
 - (b) **trade under insolvent circumstances**].

(2) If the Commission has reasonable grounds to believe that a company is engaging in conduct prohibited by subsection (1), or is trading under insolvent circumstances, the Commission may issue a notice to the company to show cause why the company should be permitted to continue carrying on its business, or to trade, as the case may be.

(3) If a company to whom a notice has been issued in terms of subsection (2) fails within 20 business days to satisfy the Commission that it is not engaging in conduct prohibited by subsection (1), or that it is able to pay its debts as it becomes due and payable in the normal course of business, the Commission may issue a compliance notice to the company requiring it to cease carrying on its business or trading, as the case may be.”.

CLAUSE 16

1. On page 18, in line 37, after “inspect” to insert “or copy”.
2. On page 18, in line 54, to omit “and” and to substitute “or”.
3. On page 18, after line 56, to insert:

“(5) Where a company receives a request in terms of subsection (4)(b) it must within 14 business days comply with the request by providing the opportunity to inspect or copy the register concerned to the person making such request.”.
4. On page 18, in line 57 and line 58 to omit “subsection (5), (6), (7) and (8)” and to substitute “subsection (6), (7), (8) and (9).”

CLAUSE 18

1. On page 19, in line 21, after “standards” to insert “for public companies”.

CLAUSE 19

1. On page 20, from line 2, to omit subsection (2A) and to substitute with following:

“(2A) If, with respect to a particular company, every person who is a holder of, or has a beneficial interest in, any securities issued by that company is also a director of the company, that company is exempt from the requirements in this section to have its annual financial statements audited or independently reviewed, but this exemption—

- (a) does not apply to the company if it falls into a class of company that is required to have its annual financial statements audited in terms of the regulations contemplated in subsection (7)(a); and
- (b) does not relieve the company of any requirement to have its financial statements audited or reviewed in terms of another law, or in terms of any agreement to which the company is a party.”

2. On page 20, after line 18, to insert:

“(g) by the substitution for paragraph (b) of subsection (7) of the following paragraph:

- (b) the manner, form and procedures for the conduct of an independent review under [other than an audit, as contemplated in] subsection (2)(b)(ii)(bb), as well as the professional qualifications, if any, and duties of persons who may conduct such reviews and the accreditation of professions whose members may conduct such reviews.”.

NEW CLAUSE

1. That the following be a new Clause:

Amendment of section 31 of Act 71 of 2008

21. Section 31 of the principal Act is hereby amended by the insertion, after subsection (3) of the following subsection:

“(4) It is an offence for a company to—

- (a) fail to accommodate any reasonable request for access, or to unreasonably refuse access, to any record that a person has a right to inspect or copy in terms of this section; or
- (b) otherwise impede, interfere with, or attempt to frustrate the reasonable exercise by any person of the rights set out in this section.”.

CLAUSE 20

1. On page 20, in line 24, to omit “subsection” and to substitute “subsections”.
2. On page 20, in line 25, after “(6)”, to insert “and (7)”.

CLAUSE 23

1. On page 20, from line 49, to omit subsection (9) and to substitute:

- “(9) A person—
- (a) acquires the rights associated with any particular securities of a company—
- (i) when that person’s name is entered in the company’s certificated securities register; or
- (ii) as determined in accordance with rules of the Central Securities Depository, in the case of uncertificated securities; and
- (b) ceases to have the rights associated with any particular securities of a company—
- (i) when the transfer to another person, re-acquisition by the company, or surrender to the company has been entered in the company’s certificated securities register; or
- (ii) as determined in accordance with the rules of the Central Securities Depository, in the case of uncertificated securities.”.

NEW CLAUSE

1. That the following be a new Clause:

Amendment of section 39 of Act 71 of 2008

27. Section 39 of the principal Act is hereby amended by the substitution for subsection (4) of the following subsection:

- “(4) Except to the extent that a private or personal liability company’s Memorandum of Incorporation provides otherwise—
- (a) in exercising a right in terms of subsection (2), a shareholder may subscribe for fewer shares than the shareholder would be entitled to subscribe for under that subsection; and
- (b) shares not subscribed for by a shareholder within the reasonable time contemplated, in subsection (2), may be offered to other persons to the extent permitted by the Memorandum of Incorporation.”.

CLAUSE 29

1. On page 22, after line 7, to insert:

- “(a) by the substitution for subsection (1) of the following subsection:
- “(1) **[The] This section does not apply to—**
- (a) the making of a demand, tendering of shares and payment by a company to a shareholder in terms of a shareholder’s appraisal rights set out in section 164 [do not constitute an acquisition of its shares by the company within the meaning of this section]; or
- (b) the redemption by the company of any redeemable securities in accordance with the terms and conditions of those securities.”

CLAUSE 37

1. On page 24, after line 33, to insert:
 - “(c) by the substitution in subsection (3)(d) for subparagraph (i) of the following subparagraph:
 - “(i) **[a summarised form of]** the financial statements to be presented or a summarised form thereof; and”

CLAUSE 40

1. On page 26, from line 46, to omit paragraphs (e) to (i) and to substitute:
 - “(e) approve an issue of shares or securities as contemplated in section 41(3);
 - (f) authorise the board to grant financial assistance in the circumstances contemplated in section 44(3)(a)(ii) or 45(3)(a)(ii);
 - (g) approve a decision of the board for re-acquisition of shares in the circumstances contemplated in section 48(8);
 - (h) authorise the basis for compensation to directors of a profit company, as required by section 66(9);
 - (i) approve the voluntary winding up of the company, as contemplated in section 80(1);
 - (j) approve the winding up of a company in the circumstances contemplated in section 81(1);
 - (k) approve an application to transfer the registration of the company to a foreign jurisdiction as contemplated in section 82(5);
 - (l) approve any proposed fundamental transaction, to the extent required by Part A of Chapter 5; or
 - (m) revoke a resolution contemplated in section 164(9)(c).”.

CLAUSE 41

1. On page 27, after line 10, to insert:
 - “(c) by the insertion after subsection 11 of the following subsection:
 - (12) Save as otherwise provided elsewhere in this Act or in the company’s Memorandum of Incorporation, any particular director may be appointed to more than one committee of the company, and when calculating the minimum number of directors required for a company in terms of subsections (2) and (3) any such director who has been appointed to more than one committee must be counted only once.”.

CLAUSE 43

1. On page 27, from line 39, to omit paragraph (b) and to substitute:
 - “(b) by the insertion after subsection (11) of the following subsections:
 - (11A) The Registrar of the Court must, upon—
 - (a) the issue of a sequestration order;
 - (b) the issue of an order for the removal of a person from any office of trust on the grounds of misconduct involving dishonesty; or
 - (c) a conviction for an offence referred in subsection (8)(b)(iv),

send a copy of the relevant order or particulars of the conviction, as the case may be, to the Commission.

(11B) The Registrar of the Court must notify each company which has as a director to whom the order or conviction relates, of the order or conviction.”; and

(c) the deletion of subsection (12).”.

CLAUSE 47

1. On page 30, in line 9, to omit “in terms of any national legislation” and to substitute:

[in terms of any national legislation] , unless the conviction was based on absolute liability”.

CLAUSE 48

1. On page 30, after line 37, to insert:
 - “(c) by the substitution in subsection (3)(b) for subparagraph (i) of the following subparagraph:
 - (i) has determined in the prescribed manner that the company appears to have been inactive for at least seven years, and no person has demonstrated a reasonable interest in, or reason for, **[it’s] its** continued existence; or”.

CLAUSE 50

1. On page 31, in line 14, after “year”, to insert:

“: Provided that the provisions of Parts B and D of this Chapter will not apply to any such company;”

CLAUSE 54

1. On page 32, after line 23, to insert:
 - “(b) by the substitution in subsection (7) for paragraph (i) of the following paragraph;
 - “(i) to perform such other oversight functions as may be determined by the board **[including the development and implementation of a policy and plan for a systematic, disciplined approach to evaluate and improve the effectiveness of risk management, control, and governance processes within the company].**”

NEW CLAUSE

1. That the following be a new Clause:

Amendment of section 99 of Act 71 of 2008

61. Section 99 of the principal Act is hereby amended by the substitution in subsection (1) for paragraph (b) of the following paragraph:

“(b) in the case of a foreign company, a copy of its Memorandum of Incorporation or comparable governing document, and a list of the names and addresses of its directors, has been filed within 90 business days before the offer to the public is made.”.

CLAUSE 65

1. On page 35, in line 31, to omit “given its fair market value” and to substitute “fairly valued”.

CLAUSE 73

1. On page 38, from line 36, to omit paragraph (b).

CLAUSE 75

1. On page 39, in line 6, to omit “reacquires” and to substitute “re-acquires”.

CLAUSE 80

1. On page 40, after line 34, to insert:
 - “(b) by the substitution in subsection (1) for paragraphs (d) and (e) of the following paragraphs respectively:
 - “(d) criminal proceedings against the company or any of its directors or officers; **[or]**
 - (e) proceedings concerning any property or right over which the company exercises the powers of a trustee; or”; and
 - (c) by the insertion in subsection (1) of the following paragraph:
 - “(f) proceedings by a regulatory authority in the execution of its duties after written notification to the business rescue practitioner.”

CLAUSE 83

1. On page 41, after line 6, to insert:
 - “(a) by the insertion in paragraph (a) of subsection (1) after the word ‘proceedings’ where it first appears, of a “,”.
2. On page 41, in line 21, to omit “agreement to which the company is a party” and to substitute “obligation of the company contemplated in paragraph 2(a)”.
3. On page 41, in line 27, to omit “applies” and to substitute “would have applied had the company been liquidated”.
4. On page 41, from line 28, to omit paragraph (b) and to insert:
 - “(b) a court may not cancel any provision of—
 - (i) an employment contract, except as contemplated in subsection (1); or
 - (ii) an agreement to which sections 35(A) or 35(B) of the Insolvency Act, 1936 (Act No. 24 of 1936), would have applied had the company been liquidated.”.

CLAUSE 84

1. On page 41, from line 40, to omit paragraph (a) and to substitute:
 - “(a) is a member in good standing of—
 - (i) a legal, accounting or business management profession accredited by the Commission [subject to regulation by a regulatory authority]; or
 - (ii) has been [prescribed] licensed as such by the [Minister] Commission in terms of subsection (2);

NEW CLAUSE

1. That the following be a new Clause:

Amendment of section 140 of Act 71 of 2008

90. Section 140 of the principal Act is hereby amended by the insertion after subsection (1) of the following subsection:

“(1A) The practitioner must, as soon as practicable after appointment, inform all relevant regulatory authorities having authority in respect of the activities of the company, of the fact that the company has been placed under business rescue proceedings and of his or her appointment.”

NEW CLAUSE

1. That the following be a new Clause:

Amendment of section 141 of Act 71 of 2008

91. Section 141 of the principal Act is hereby amended by the substitution in subsection (2)(c) for subparagraph (i) of the following subparagraph:

“(i) voidable transactions, or the failure by the company or any director to perform any material obligation relating to the company, the practitioner must [direct the management to] take any necessary steps to rectify the matter and may direct the management to take appropriate steps;”

CLAUSE 86

1. On page 42, after line 39, to insert:
 - “(b) by the substitution for subsection (4) of the following subsection:
 - “(4) No person is entitled, as against the practitioner of a company, to retain possession of any books or records of the company, or to claim or enforce a lien over any such books or records, unless such books or records are in the lawful possession of such person and he or she has made copies available to the practitioner or has afforded the practitioner a reasonable opportunity to inspect the books or records concerned.”

CLAUSE 87

1. On page 42, in line 43, to omit “egregiously” and to substitute “[egregiously]”.

CLAUSE 92

1. On page 43, after line 47, to insert:
 - “(b) by the substitution in subsection (3) for paragraph (a) of the following paragraph:
 - (a) it is made in good faith to the Commission, the Companies Tribunal, the Panel, a regulatory authority, an exchange, a legal adviser, a director, prescribed officer, company secretary, auditor, a person performing the function of internal audit, board or committee of the company concerned; and”

NEW CLAUSE

1. That the following be a new clause:

Amendment of section 169 of Act 71 of 2008

107. Section 169 of the principal Act is hereby amended by the substitution for paragraph (b) of subsection (1) of the following paragraph:

“(b) if they think it expedient as a means of resolving the matter, refer the complainant to the Companies Tribunal, or to an accredited entity, as defined in section 166(3), with a recommendation that the complainant seek to resolve the matter with the assistance of that agency or person; or”

CLAUSE 105

1. On page 47, after line 51, to insert:
 - “(b) by the insertion after subsection (6) of the following subsection:
 - “(7) The chairperson and each other member of the Tribunal serves for a term of five years and may, subject to subsection(2)(b), be reappointed for a second term.”.

CLAUSE 109

1. On page 49, from line 3, to omit paragraph (i).

CLAUSE 112

1. On page 49, from line 24, to omit “business” and to insert “company”.

CLAUSE 113

Clause rejected.

NEW CLAUSE

1. That the following be new clauses:

Amendment of section 218 of Act 71 of 2008

120. Section 218 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection:

“(1) **[Nothing]** Subject to any provision in this Act specifically declaring void an agreement, resolution or provision of an agreement, Memorandum of Incorporation, or rules of a company, nothing in this Act renders void [an] any other agreement, resolution or provision of an agreement, [resolution,] Memorandum of Incorporation or rules of a company that is prohibited, [void,] voidable or that may be declared unlawful in terms of this Act, unless a court [declares] has made a declaration to that effect regarding that agreement, resolution or provision [to be void].”

Amendment of section 225 of Act 71 of 2008

121. Section 225 of the principal Act is hereby substituted for the following section:

(1) This Act is called the Companies Act, 2008, and, subject to subsection (2), comes into operation on a date fixed by the President by proclamation in the *Gazette*, **which may not be earlier than one year following the date on which the President assented to this Act**].

(2) Section 11(1)(a)(ii) and (iii) shall come into operation three years from the date of commencement of this Act.”.

CLAUSE 118

1. On page 51, after line 33, to insert:

“(7) If, immediately before the general effective date, a particular pre-existing company has passed its financial year end but has not completed the requirements in terms of the previous Act for publishing, audit and approval of its annual financial statements for that financial year—

- (a) the provisions of the previous Act continue to apply with respect to the publishing, audit and approval of those statements; and
- (b) the provisions of this Act will apply to each subsequent financial year end and annual financial statements of that company.”.

2. On page 52, from line 22, to omit paragraphs (a) and (b) and to substitute:

“(a) by the substitution for sub-item (3) of the following sub-item:

“(3) The Minister, in consultation with the member of Cabinet responsible for national financial matters, must make regulations, to take effect as of the general effective date, providing for the optional conversion and transitional status [and conversion] of any nominal or par value shares, [treasury shares] and capital accounts of a pre-existing company, but any such regulations must [—(a)] preserve the rights of shareholders associated with such shares, as at the effective date, to the extent doing so is compatible with the purposes of this item[; or (b) provide for the company to compensate its shareholders for the loss of any such rights].; and

3. On page 52, after line 30, to insert:
 - “(a) by substitution in sub-item (1) for the expression “preexisting” of the expression “pre-existing”;
4. On page 52, after line 38, to insert:
 - (d) by the addition after sub-item (10) of the following sub-item:
“(11) The five consecutive financial years contemplated in section 92(1) must be calculated from the date of commencement of this Act.”.

LONG TITLE

1. On page 2, after the seventh line, to insert **“to further provide for companies trading under insolvent circumstances; to extend the grounds for disqualification as a director; to provide for the terms of office of members of the Companies Tribunal;”**.

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