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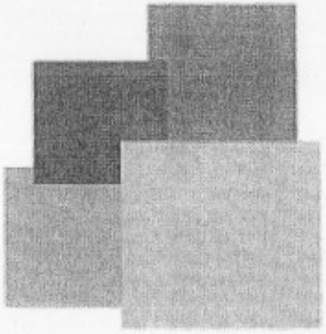

THE BANKING ASSOCIATION SOUTH AFRICA

The Companies Amendment Bill

Presentation to the Portfolio Committee
on Trade and Industry
30 November 2010

Ref No 78753

Introduction

- The Banking Association appreciates the opportunity afforded to it to comment on the Companies Amendment Bill
- We believe the amendments serve to modernise company law in our country and also keep up to international best practice
- We also take this opportunity to acknowledge the robust engagement allowed by dti and the Minister of Trade and Industry on this bill. The engagement has enabled The Banking Association, through BUSA and with BLSA, to suggest changes, many of which have been incorporated into the bill
- However, a few substantive and technical changes do, in our view still need attention, and we will deal with these today
- We also believe the changes we propose will contribute to the smooth implementation of the Act

Amendment to Section 11 of Act 71 of 2008

- Section 11 – Criteria for names of Companies
  - in the Companies Act No 71 of 2008, section 11 states:

(1) Subject to subsections (2) and (3), a company name–

(a) may comprise words in any language, irrespective of whether or not the words are commonly used or contrived for the purpose, together with–

(i) any letters, numbers or punctuation marks;

(ii) any of the following symbols: +, &, #, %, =;

(iii) any other symbol permitted by the regulations made in terms of subsection (4); or

(iv) round brackets used in pairs to isolate any other part of the name,

alone or in any combination

Amendment to Section 11 of Act 71 of 2008

- Section 11 – Criteria for names of Companies (Continued)

the Companies Amendment Bill hereby wishes to amend section 11 as follows:

- section 11 of the principal Act is hereby amended-

(a) by the substitution in paragraph *(a)* of subsection (1) for the words preceding subparagraph (i) of the following words:

"may comprise one or more words in any language, irrespective of whether **[or not]** the word or words are commonly used or contrived for the purpose, together with-";

(b)by the substitution in subsection (1) for subparagraph (ii) of the following subparagraph:

"(ii) any of the following symbols: +, &, #, @, %, =;";

The Issue

- Problem with practical implementation of section 11(1)
  - The banking and national payments systems operate through a platform of inter-connected information technology systems that receive, store, and process information; open, operate and close secure bank accounts
  - These systems are not programmed to capture symbols such as those listed in Section 11 because symbols in a computer software programme are recognised as further computer programme instructions as opposed to data to be captured
  - The effect of this technical reality is that the information technology systems of the banks, and their customers for that matter, are currently not able to capture, store, or process the names of companies which contain symbols
  - Critical to the operation of any business is the opening of a bank account. The inclusion of symbols in a company's name will therefore serve as a limitation to the opening of a bank account for and transacting with that company, at the present time

The Issue (Continued)

- From a technical perspective, punctuation marks and special characters have specific meanings in programming languages and data description. The use of these marks and symbols will cause the computer programmes to malfunction resulting in failed transactions
- This problem extends to the following activities: opening a bank account; printing of cheque books; payment of cheques; and issuing of debit and credit cards
- The functioning of the entire economy depends upon the efficiency and security of the national payments system. Without significant and costly changes to the information technology systems of all participants in the national payments system, the use of symbols and punctuation marks in company names will generate considerable risk of failed and/or fraudulent transactions within that system
- If companies have the right to register names with punctuation marks or special characters which cannot be accommodated by the banking system then such a right can be said to be in conflict with other legislation, such as FICA. Further, refusing to open an account for a company with symbols in its name could result in the banks being open to charges of unfair discrimination and the risk of litigation

The Issue (Continued)

- Furthermore, given the inter-connectedness between participants within the national payments system, it is insufficient for only one or a few of them to implement a solution, as no solution will work until it has been implemented across the entire economy. Other companies will be similarly affected by this practical difficulty, including retailers, cellular telephone companies, airlines, the Johannesburg Securities Exchange, STRATE, and also government agencies such as SARS, the Deeds Registry, the Unemployment Insurance Fund, and CIPRO itself, who have to register these symbols
- Another technical problem is caused by the proposed right of companies to register names in any language. The term "any language" can be interpreted to include languages beyond the official languages of South Africa such as Chinese, Arabic or Hindi, which we believe was not the intent of the legislation

Proposal

- Thus, it is proposed that serious consideration is given to amending Section 11(1) of the Companies Act as follows :(bold brackets indicate a deletion and underlined words indicate an insertion)
  - Criteria for names and companies

(1) Subject to subsection (2) and (3), a company name–

(a) May comprise words in any <u>official</u> language, irrespective of whether or not the words are commonly used or contrived for the purpose, together with-

i. Any letters or numbers **[or punctuation marks];**
[any of the following symbols: +, &, #, %, =;]

ii. <u>any other symbol permitted by the regulations made in terms of subsection (4);</u>

(b) <u>any company name may not comprise any marks, punctuation marks or symbols: +, &, #, %, =, -, ;</u>

We also propose the deletion of subsection 4(a) of the proposed amendment

Amendment to Section 22 of Act 71 of 2008

- The Companies Act, No 71 of 2008, "The Act", provides that companies may not trade under insolvent circumstances
- A company can be required to cease trading if it trades under insolvent circumstances
- Currently the commercial reality is that the majority of companies trade under technically insolvent circumstances (i.e. liabilities exceed assets) but are commercially solvent – co-funded by shareholder loans
- If the Act is not amended, 80% of companies that are currently technically insolvent, but commercially solvent may have to cease trading

Proposal

- Subsection 22(1)(b) of the 2008 Act be deleted in its entirety

Alternatively:

- The Companies Amendment Bill should provide clarity by defining insolvency for the purposes of interpreting subsection 22(1)(b) to mean commercial insolvency, i.e. whether or not a company has liquid assets or reliable assets available to meet its liabilities
- We believe this would reflect the intent of the legislation

Amendment to Section 136(2) of the Companies Act, Act 71 of 2008

- The Banking Association welcomes and appreciates the proposed amendments to section 136(2)
- We are particularly thankful to the representatives of the dti and the Minister in addressing the serious concerns that the banking industry had with the original wording in the Act
- However, to provide clarity and to give full intent to the spirit of the amendment and avoid ambiguity, we propose that the wording be further amended for the following reasons:
  - South African banks typically source the funds they need to make loans into the South African economy in the form of capital from shareholders, deposits from customers and loans from other financial institutions
  - Banks also lend money to each other, and buy and sell financial products from and to one another to spread risk and enhance returns

Amendment to Section 136(2) of the Companies Act, Act 71 of 2008 (Continued)

- This results in most South African banks having simultaneous claims upon each other and cross-border loans from international institutions
- The regulations under the Banks Act require banks to hold a minimum amount of share capital relative to their liabilities to ensure the stability of the banking sector
- Where a bank simultaneously owes and is owed money by another bank or similar counterparty, the said regulations allow the bank concerned to use its net exposure to that bank or counterparty in calculating the minimum regulatory capital to be held, provided that those exposures can be netted (i.e. set-off) against one another even in the event of insolvency
- Separately, banks that trade financial instruments with one another typically require assurance that their claims against one another can be legally netted or set-off and that security in the form of cash collateral or similar to be provided by the debtor bank to the creditor bank will be returned against payment of the debt

Amendment to Section 136(2) of the Companies Act, Act 71 of 2008 (Continued)

- Debtor banks are, understandably, reluctant to provide such security where it could become tied up in the insolvency of the creditor bank, and will usually decline to conduct such trade in jurisdictions where netting or set-off of the debtor bank's debt against its claim for return of the security is not assured by law
- The proposed amendment whereby a Court may on application by a business rescue practitioner cancel any agreement will, we submit, negate the certainty that sections 35A and 35B of the Insolvency Act introduced, which, as currently proposed, assures creditors of South African banks that netting or set-off will apply, until a Court might order otherwise
- This will, we believe, prevent lawyers from opining (as they are required to do) that cross-border loans will be enforced according to their terms and from opining that claims and counterclaims will be offset against each other even in insolvency

Amendment to Section 136(2) of the Companies Act, Act 71 of 2008 (Continued)

- If this occurs, the cost to South African borrowers of raising funds in international markets will substantially increase, existing international borrowings will become repayable immediately or be substantially re-priced upwards and the banking industry will be forced to raise considerably more regulatory capital than is currently required
- This could result in it becoming more difficult and more expensive for South African companies to finance their business operations, expansion, and investment plans, impacting borrowing costs, economic growth, employment and development
- We are convinced the legislators did not have the intention of this potential result through the amendment

Proposal

- In order to provide greater certainty and avoid ambiguity, we propose the following deletions (in brackets) and the following additions underlined

"(2A) When acting in terms of subsection (2)-

(a) a business rescue practitioner may not suspend any provision of:

(i) an employment contract; or

(ii) an agreement to which section 35A or 35B of the Insolvency Act, (Act No. 24 [or] of 1936) [applies] would have applied had the entity been liquidated;

(b) a court may not cancel any provision of –

(i) an employment contract, except as contemplated in subsection (1);

(ii) an agreement to which sections 35A and 35B of the Insolvency Act, (Act No. 24 of 1936) would have applied had there been a liquidation;

(iii) an agreement or an agreement whereby security has been granted by the company or over the assets of the company"

Commencement date and transitional arrangements

- The new Companies Act is an important piece of legislation and will impact significantly on the South African economy
- The banking industry believes that it is important that all critical stakeholders in the economy are thoroughly prepared to implement the new requirements arising from this legislation
- The banking industry fully supported the decision of the Minister of Trade and Industry to announce a delay in the commencement of the new Companies Act to 1 April 2011
- However, consideration of the current timeframes and Parliament's timetable in finalising the Amendment Bill, plus finalisation of the Regulations thereafter would indicate that a further extension might be necessary to allow both government, (including CIPRO), and companies across the economy to complete their preparations to implement the new law

Proposal

- The Portfolio Committee may wish to consider providing for a phased or staggered commencement of the Companies Act in a similar manner to the provisions of the Consumer Protection Act i.e. Item 2 of Schedule 2 in the Consumer Protection Act
- Certain sections of the Act could become effective earlier than the rest of the Act, such as the sections dealing with regulatory agencies and the administration of the Act

Thank you