

REPUBLIC OF SOUTH AFRICA

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COMPANIES AMENDMENT BILL, 2010

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(MINISTER OF TRADE AND INDUSTRY)

[B ##—2010]



REPUBLIEK VAN SUID-AFRIKA

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(MINISTER VAN HANDEL EN NYWERHEID)

[W ##—2010]

19 JULY 2010 FINAL TEXT

GENERAL EXPLANATORY NOTE

[] Words in bold type in square brackets indicate deletions from the principal Act

5 _____ Words underlined with a solid line indicate insertions into the principal Act

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Notes to this Draft

This draft proposes amendments to the Companies Act, 2008 to—

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- (a) better provide for the administration of the principal Act, and in particular to establish a proper foundation for certain necessary regulations;
- (b) continue the mechanisms established under section 335 of the Companies Act, 1973 to allow for the transfer of registration of foreign companies to the jurisdiction of the Republic;
- 10 (c) address significant errors, infelicities and ambiguities that could result in misapplication of the principal Act in a manner contrary to its underlying policy; and
- (d) correct various numbering, spelling, punctuation, reference, alignment and typographical errors in the text.

A Table of Changes is appended to the end of this Bill, setting out a complete list of all provisions of the Companies Act, 2008 affected by amendments proposed in this Bill.

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Part 6 – Amendments affecting Chapter 6 of the Principal Act**76. Amendment of Title of Part A of Chapter Six of Act 71 of 2008**

Chapter 6 of the principal Act is hereby amended by the substitution immediately after the Title of the Chapter, for the Part heading, of the following:

“Part A”

77. Amendment of section 128 of Act 71 of 2008

Section 128 of the principal Act is hereby amended by—

- (a) the substitution in subsection (1)(f)(i), for the expression “[**fall**] due”, of the expression “become due”; and
- (b) the substitution, for subsection (2), of the following:

“(2) For the purpose of subsection (1)[**(f)**](g), an employee of a company is not related to that company solely as a result of being a member of a trade union that holds [**shares**] securities of that company.”

78. Amendment of section 129 of Act 71 of 2008

Section 129 of the principal Act is hereby amended by the substitution, for subsection (7), of the following:

“(7) If the board of a company has reasonable grounds to believe that the company is financially distressed, but the board has not adopted a resolution contemplated in this section, the board must deliver a written notice to each affected person, setting out the criteria referred to in section 128 (1)[**(e)**](f) that are applicable to the company, and its reasons for not adopting a resolution contemplated in this section.”

79. Amendment of section 132 of Act 71 of 2008

Section 132 of the principal Act is hereby amended by the substitution in subsection (1)(b), for the expression “[a] person”, of the expression “an affected person”.

80. Amendment of section 134 of Act 71 of 2008

5 Section 134 of the principal Act is hereby amended by the insertion, immediately after the section number, of the following: “(1)”.

81. Amendment of section 135 of Act 71 of 2008

Section 135 of the principal Act is hereby amended by the substitution in subsection (3), for the opening phrase, of the following:

10 “(3) After payment of the practitioner’s remuneration and [~~costs~~]expenses referred to in section 143, and other claims arising out of the costs of the business rescue proceedings, all claims contemplated—”

82. Amendment of section 136 of Act 71 of 2008

Section 136 of the principal Act is hereby amended by—

15 (a) the substitution, for subsection (2), of the following:

“(2) Subject to subsection (2A), [~~sections 35A and 35B of the Insolvency Act, 1936 (Act No. 24 of 1936)]and despite any provision of an agreement to the contrary, during business rescue proceedings, the practitioner may—[cancel or]~~

20 (a) entirely, partially or conditionally~~[cancel or]~~suspend, for the duration of the business rescue proceedings,~~[entirely, partially or conditionally]~~any obligation of the company that—

(i) arises under~~[any provision of]~~ an agreement to which the company [~~is~~]was a party at the commencement of the business

rescue [period] proceedings[, other than an agreement of employment]; and

(ii) would otherwise become due during those proceedings; or

(b) apply urgently to a court to entirely, partially or conditionally cancel, on any terms that are just and reasonable in the circumstances, any agreement to which the company is a party.”

(b) the insertion, immediately after subsection (2), of the following:

“(2A) When acting in terms of subsection (2)—

(a) a business rescue practitioner must not suspend any provision of—

(i) an employment contract; or

(ii) an agreement to which section 35A or 35B of the Insolvency Act, 1936 (Act No. 24 of 1936) applies;

(b) a court may not cancel any provision of an employment contract, except as contemplated in subsection (1); and

(c) if a business practitioner suspends a provision of an agreement relating to security granted by the company, that provision nevertheless continues to apply for the purposes of section 134, with respect to any proposed disposal of property by the company.”

83. Substitution for section 138 of Act 71 of 2008

The principal Act is hereby amended by the substitution, for section 138, of the following:

“Qualifications of practitioners

“138. (1) A person may be appointed as the business rescue practitioner of a company only if the person—

(a) is a member in good standing of—

(i) a legal, accounting or business management profession that is subject to regulation by a regulatory authority; or

(ii) has been [prescribed] licensed as such by the [Minister] Commission in terms of subsection (2);

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(b) is not subject to an order of probation in terms of section 162 (7);

(c) would not be disqualified from acting as a director of the company in terms of section 69 (8);

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(d) does not have any other relationship with the company 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; and

(e) is not related to a person who has a relationship contemplated in paragraph (d).

“(2) For the purposes of subsection (1)(a)(ii), [The Minister] the Commission may [designate one] license any qualified person [or association within the Republic to regulate the practice of persons] to practice as a practitioner[s] in terms of this [Act] Chapter, and may suspend or withdraw any such licence in the prescribed manner. [if that person or association—]—

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[(a) is committed to achieving the purposes of this Chapter;

(b) functions predominantly to promote sound principles and good practice of business turnaround or rescue; and]

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(c) has sufficient human, financial and operational resources, and adequate administrative procedures and safeguards, to enable it to function efficiently and to effectively carry out its functions in terms of this Chapter, or presents to the Minister a credible plan to acquire or develop those resources.]

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“(3) The Minister may make regulations prescribing—

(a) **[impose reasonable conditions upon a person or association designated by the Minister in terms of subsection (2), with respect to the carrying out of its functions and powers in terms of this Chapter; and]**standards and procedures to be followed by the Commission in carrying out its licencing functions and powers in terms of this section; and

(b) **[make regulationsprescribing]**minimum qualifications for a person to practice as a business rescue practitioner, including different minimum qualifications for different categories of companies. [—

[(i) minimum qualifications for admission of a person to the practice of a business rescue practitioner; and

[(ii) procedures to be followed by a person or association designated by the Minister in terms of subsection (2) in carrying out its functions and powers in terms of this Chapter.]”

84. Amendment of section 139 of Act 71 of 2008

Section 139 of the principal Act is hereby amended by the substitution in subsection (2), for paragraph (a), of the following:

“(a) **[I]**incompetence or failure to perform the duties of a business rescue practitioner of the particular company;”

85. Amendment of section 142 of Act 71 of 2008

Section 142 of the principal Act is hereby amended by—

(a) the substitution in subsection (3), for paragraph (a), of the following:

“(a) **[A]**any material transactions **[involved]**involving the company or the assets of the company, and occurring within 12 months immediately before the business rescue proceedings began;”

(b) the substitution in subsection (3), for paragraph (b), of the following:

“(b) any court, arbitration or administrative proceedings, including pending enforcement proceedings, involving the company;”

86. Amendment of section 143 of Act 71 of 2008

Section 143 of the principal Act is hereby amended by the substitution in subsection (4), for paragraph (b), of the following:

“(b) **[that]** the remuneration provided for in the agreement is egregiously unreasonable having regard to the financial circumstances of the company.”

87. Amendment of section 144 of Act 71 of 2008

Section 144 of the principal Act is hereby amended by—

(a) the substitution in subsection (3), for paragraph (a), of the following:

“(a) notice, which must be given in the prescribed manner and form to employees at their workplace, and served at the head office of the relevant trade union, of each court proceeding, decision, meeting or other relevant event concerning the business rescue proceedings **[and such notice must be given to employees at their workplace and served at the head office of the relevant trade union];**”

(b) the substitution in subsection (3), for paragraph (f), of the following:

“(f) vote with creditors on a motion to approve a proposed business plan, to the extent that the employee is a creditor, as contemplated in subsection [(1)](2);
and”

88. Amendment of section 151 of Act 71 of 2008

Section 151 of the principal Act is hereby amended by the substitution, for subsection (1), of the following:

“(1) Within 10 business days after publishing a business rescue plan in terms of section 150,**[T]**the practitioner must convene and preside over a meeting of creditors and any

other holders of a voting interest, called for the purpose of considering the **[proposed rescue] plan [within 10 business days after the publication of that plan in terms of section 150].**”

89. Amendment of section 152 of Act 71 of 2008

5 Section 152 of the principal Act is hereby amended by—

(a) the substitution in subsection (1), for paragraph (a), of the following:

“(a) introduce the proposed business plan for consideration by the creditors[,] and, if applicable, by the shareholders;”

(b) the substitution in subsection (6), for paragraph (b), of the following:

10 “(b) if the business rescue plan was approved by the shareholders of the company, as contemplated in subsection (3)(c), the practitioner may amend the company’s Memorandum of Incorporation to authorise, and determine the preferences, rights, limitations and other terms of, any securities that are not otherwise authorised, but are contemplated to be issued in terms of the
15 business rescue plan, despite any provision of section 16, 36 or 37 to the contrary.”

90. Amendment of section 153 of Act 71 of 2008

Section 153 of the principal Act is hereby amended by the insertion, immediately after subsection (6), of the following:

20 (7) On an application contemplated in subsection (1)(a)(ii), or (1)(b)(i)(bb), a court may order that the vote on a business rescue plan be set aside if the court is satisfied that it is reasonable and just to do so, having regard to—

(a) the interests represented by the person or persons who voted against the proposed business rescue plan;

25 (b) the provision, if any, made in the proposed business rescue plan with respect to the interests of that person or those persons; and

- (c) a fair and reasonable estimate of the return to that person, or those persons, if the company were to be liquidated.”

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