

Please note that most Acts are published in English and another South African official language. Currently we only have capacity to publish the English versions. This means that this document will only contain even numbered pages as the other language is printed on uneven numbered pages.



# Government Gazette

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## THE PRESIDENCY

No. 370

26 April 2011

It is hereby notified that the President has assented to the following Act, which is hereby published for general information:—

**No. 3 of 2011: Companies Amendment Act, 2011**



**AIDS HELPLINE: 0800-123-22 Prevention is the cure**

a general offer, if the offer succeeds to the extent contemplated above].”.

#### Amendment of Title of Part A of Chapter 6 of Act 71 of 2008

80. Chapter 6 of the principal Act is hereby amended by the substitution after the Title of the Chapter, for the Part heading, of the following heading: 5

“**Part A**”.

#### Amendment of section 128 of Act 71 of 2008

81. Section 128 of the principal Act is hereby amended—

(a) by the substitution in subsection (1)(f) for subparagraph (i) of the following subparagraph: 10

“(i) it appears to be reasonably unlikely that the company will be able to pay all of its debts as they **[fall]** become due and payable within the immediately ensuing six months; or”; and

(b) by the substitution for subsection (2) of the following subsection:

“(2) For the purpose of subsection (1)~~(f)~~(g), an employee of a 15 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.”.

#### Amendment of section 129 of Act 71 of 2008

82. Section 129 of the principal Act is hereby amended by the substitution for subsection (7) of the following subsection: 20

“(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 25 contemplated in this section.”.

#### Amendment of section 132 of Act 71 of 2008

83. Section 132 of the principal Act is hereby amended—

(a) by the substitution in subsection (1)(b) for paragraph (b) of the following paragraph: 30

“(b) **[a]** an affected person applies to the court for an order placing the company under supervision in terms of section 131(1); or”; and

(b) by the substitution in subsection (1) for paragraph (c) of the following paragraph:

“(c) a court makes an order placing a company under supervision during the course of liquidation proceedings, or proceedings to enforce a security interest, as contemplated in section 131(7) [a court makes an order placing a company under supervision].” 35

#### Amendment of section 133 of Act 71 of 2008

84. Section 133 of the principal Act is hereby amended— 40

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

“(c) as a set-off against any claim made by the company in any legal proceedings, irrespective of whether those proceedings commenced before or after the business rescue proceedings began;” 45

(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 50 company exercises the powers of a trustee; or”; and

- (c) by the insertion in subsection (1) of the following paragraph after paragraph (e):  
“(f) proceedings by a regulatory authority in the execution of its duties after written notification to the business rescue practitioner.”.

**Amendment of section 134 of Act 71 of 2008**

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85. Section 134 of the principal Act is hereby amended—

- (a) by the insertion after the section number of the following number:

“(1)”; and

- (b) by the substitution of paragraph (c) of the following paragraph:

“(c) despite any provision of an agreement to the contrary, no person may exercise any right in respect of any property in the lawful possession of the company, irrespective of whether the property is owned by the company, except to the extent that the practitioner consents in writing.”.

**Amendment of section 135 of Act 71 of 2008**

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86. Section 135 of the principal Act is hereby amended—

- (a) by the substitution in subsection (3) for the words preceding paragraph (a) of the following words:

“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—”;  
 and

- (b) by the substitution in subsection (3)(a) for subparagraph (i) of the following subparagraph:

“(i) all claims contemplated in subsection (2), irrespective of whether or not they are secured; and”.

**Amendment of section 136 of Act 71 of 2008**

87. Section 136 of the principal Act is hereby amended—

- (a) by the insertion in paragraph (a) of subsection (1) after the word “proceedings” where it first appears, of a “;”;

- (b) by the substitution for subsection (2) of the following subsection:

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

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

(i) arises under an agreement to which the company [is] was a party at the commencement of the business rescue [period, other than an agreement of employment] proceedings; 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 obligation of the company contemplated in paragraph (a).”; and

- (c) by the insertion after subsection (2) of the following subsection:

“(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), would have applied had the company 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 section 35A or 35B of the Insolvency Act, (Act No. 24 of 1936), would have applied had the company been liquidated; 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 purpose of section 134, with respect to any proposed disposal of property by the company.”

#### Substitution for section 138 of Act 71 of 2008

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

#### “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 a legal, accounting or business management profession accredited by the Commission [subject to regulation by a regulatory authority];
  - (b) has been [prescribed] licensed as such by the [Minister] Commission in terms of subsection (2);
  - ~~[(b)]~~ (c) is not subject to an order of probation in terms of section 162(7);
  - ~~[(c)]~~ (d) would not be disqualified from acting as a director of the company in terms of section 69(8);
  - ~~[(d)]~~ (e) 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)]~~ (f) is not related to a person who has a relationship contemplated in paragraph (d).
- (2) ~~[The Minister]~~ For the purposes of subsection (1)(a)(ii), the Commission may [designate one] license any qualified person [or association within the Republic to regulate the practice of persons as] to practice [practitioners] in terms of this [Act] Chapter and may suspend or withdraw any such licence in the prescribed manner, [if that person or association—
- (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
  - (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].
- (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 regulations prescribing—] 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].”** 5

#### **Amendment of section 139 of Act 71 of 2008**

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

- “(a) Incompetence or failure to perform the duties of a business rescue practitioner of the particular company;” 10

#### **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.” 15

#### **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: 20

- “(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.**” 25

#### **Amendment of section 142 of Act 71 of 2008**

**92.** Section 142 of the principal Act is hereby amended—

- (a) by the substitution in subsection (3) for paragraphs (a) and (b) of the following paragraphs:

“(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; 30

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

- (b) by the substitution for subsection (4) of the following subsection: 35

“(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.” 40

**Amendment of section 143 of Act 71 of 2008**

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

“(b) [that] the remuneration provided for in the agreement is [egregiously] unreasonable having regard to the financial circumstances of the company.” 5

**Amendment of section 144 of Act 71 of 2008**

94. Section 144 of the principal Act is hereby amended—

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

“(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];” and 10 15

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

“(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” 20

**Amendment of section 151 of Act 71 of 2008**

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

“(1) [The] Within 10 business days after publishing a business rescue plan in terms of section 150, 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].” 25

**Amendment of section 152 of Act 71 of 2008**

96. Section 152 of the principal Act is hereby amended— 30

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

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

(b) by the substitution in subsection (6) for paragraph (b) of the following subsection: 35

“(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 business rescue plan, despite any provision of section 16, 36 or 37 to the contrary.” 40

**Amendment of section 153 of Act 71 of 2008**

97. Section 153 of the principal Act is hereby amended by the insertion after subsection (6) of the following subsection: 45

“(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; 50

- (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.”.

#### Amendment of section 159 of Act 71 of 2008

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98. Section 159 of the principal Act is hereby amended—

- (a) by the substitution in subsection (1) for paragraph (b) of the following paragraph:
- “(b) that Act applies to a disclosure contemplated in this section by an employee, as defined in that Act, irrespective of whether that Act would otherwise apply to that disclosure.”;
- (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”;
- (c) by the substitution in subsection (3)(b) for the words preceding paragraph (i) of the following words:
- “the person making the disclosure reasonably believed at the time of the disclosure that the information showed or tended to show that a company or external company, or a director or prescribed officer of a company acting in that capacity, **[has] had—**”;
- (d) by the substitution in subsection (3)(b) for subparagraphs (ii) and (iii) of the following subparagraphs:
- “(ii) failed or **[is] was** failing to comply with any statutory obligation to which the company **[is] was** subject;
- (iii) engaged in conduct that **[has] had** endangered, or **[is] was** likely to endanger, the health or safety of any individual, or had harmed or was likely to harm [damage] the environment;”;
- (e) by the substitution in subsection (5) for paragraph (b) of the following paragraph:
- “(b) directly or indirectly makes an express or implied threat, whether conditional or unconditional, to cause any detriment to the first person or to another person, and—
- (i) intends the first person to fear that the threat will be carried out; or
- (ii) is reckless as to causing the first person to fear that the threat will be carried out, **[irrespective of whether the first person actually feared that the threat would be carried out.]** irrespective of whether the first person actually fears or feared that the threat will or would be carried out.”;
- (f) by the substitution in subsection (7) for the words preceding paragraph (a) of the following words:
- “A public company **[and] or** a state-owned company must directly or indirectly—”.

#### Amendment of section 160 of Act 71 of 2008

99. Section 160 of the principal Act is hereby amended—

- (a) by the substitution for subsection (1) of the following subsection:
- “(1) A person to whom a notice is delivered in terms of **[section 12(3) or section 14(3),]** this Act with respect to an application for reservation of a name, registration of a defensive name, application to transfer the reservation of a name or the registration of a defensive name, or the registration of a company’s name, or any other person with an interest in the name of a company, may apply to the Companies Tribunal in the prescribed manner and form for a determination whether the name, or the reservation, registration or use of the name, or the transfer of any such