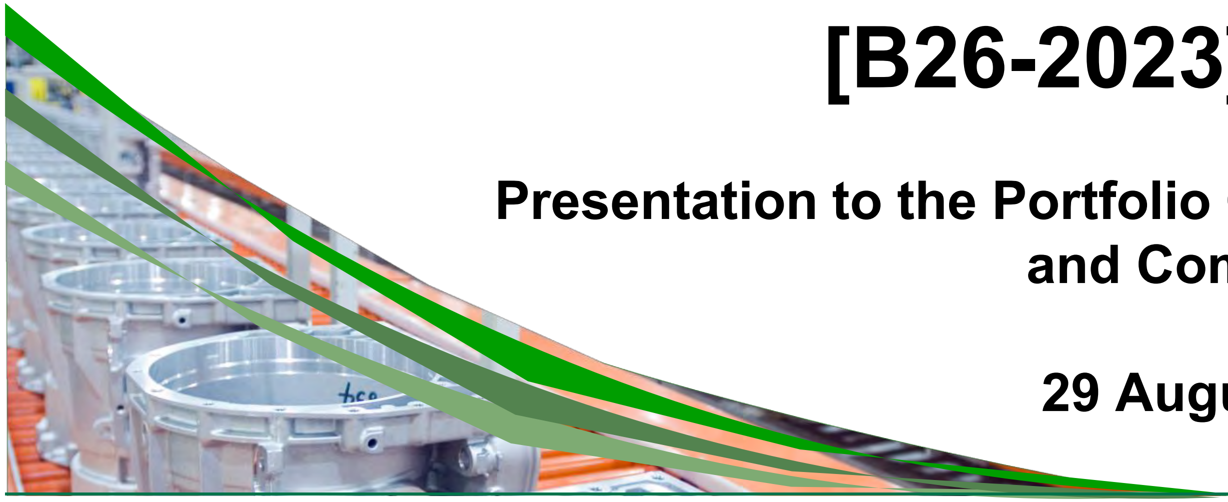
COMPANIES AMENDMENT BILL 2023 [B27-2023] and COMPANIES SECOND AMENDMENT BILL 2023 [B26-2023]



Presentation to the Portfolio Committee on Trade, Industry and Competition

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PART ONE – A GENERAL INTRODUCTION TO THE COMPANIES AMENDMENT BILL 2023

CONTEXT OF PROPOSALS

- In 2004, SA undertook a comprehensive review of company law. In 2011, the Companies Act, 2008 (Act No. 71 of 2008) came into effect. It repealed the Companies Act, 1973.
- The new Act introduced significant changes by providing inter alia for
  - business rescue,
  - simplification of registration,
  - social and ethics committees for public companies,
  - corporate governance including financial accountability, and
  - provisions relating to shareholder activism.
- The Act provides for the establishment of institutions, such as the
  - Companies and Intellectual Property Commission ("the Commission"),
  - Companies Tribunal ("the Tribunal"),
  - Specialist Committee on Company Law,
  - Financial Reporting Standards Council, and
  - Takeover Regulation Panel.

REVIEW OF ACT IN 2018

- The Act was subject to review after five years of implementation. The dtic undertook a review of aspects of the Companies Act in order to identify changes needed to keep up with the current trends and to remedy some anomalies and eliminate certain deficiencies in the Act as discovered with implementation.
- The Ministry drew on the expertise of the Specialist Committee on Company Law ("SCCL") which was established in 2011 in terms of section 191 of the Act to advise the Minister on any matter relating to companies law or policy. The SCCL has met regularly since its original appointment and proposed various amendments.
- The original Bill was published in the Government Gazette for public comment on 21 September 2018, followed by extensive public engagement between Government and a number of interested persons and organisations.

Submissions received in 2018 included the following: The Specialist Committee on Company Law; the South African Institute of Chartered Accountants; the Banking Association of South Africa; the South African Institute of Professional Accountants; the South African Property Owners Association; Strate; the Johannesburg Stock Exchange; the Institute of Directors in Southern Africa; the Independent Regulatory Board for Auditors; Amabhungane; the B-BBEE Commission; the Companies and Intellectual Property Commission; the Companies Tribunal; the Takeover Regulation Panel; the Association of Black Securities and Investment Professionals; and Who Owns Whom (Pty) Ltd.

REVIEW CONTINUED IN 2019-2021

- The draft Bill was then sent to Nedlac for comments, a process that was interrupted by Covid-19.
- The Bill was with Nedlac for two years, and 11 meetings were held.
- Following the conclusion of engagement at Nedlac, the draft Bill was published for comment a second time, on October 2021.
- Subsequent to the publication, **the dtic** received 78 submissions from stakeholders in different sectors within the South African corporate law environment. They were reviewed and considered and the Bill was revised in this current Bill.
- There were also more than 900 email submissions simply indicating support or no support submitted by members of the public without comments.

Submissions received in 2021 included Steyn Capital Management, Fluxmans, Quantum Foods, Amabhungane, Afriforum, Cliffe Dekker Hofmeyer, South African Reward Association, Altimax, Coronation, Sasol, Corruption Watch, Old Mutual, Mineral Council of SA, Pike Law, Chartered Governance institute of South Africa, Allan Gray, Association of Black Security Investors and Practitioners (ABSIP), Financial Intelligence Center (FIC), International Corruption Network, Vodacom, Bizamour Practice Risk Management, Association of Certified Risk Examiners, Association of Certified Fraud Examiners, Outsurance, Sakeliga, Banking Association of South Africa (BASA), Telkom, Bowmans, Business Unity South Africa, Black Management Forum, National Treasury, Catalytic Strategy Women Constituency Leadership, Werksmans, Multichoice, Cosatu, Fedusa, NUM, Nehawu, Saccawu, SASBO Finance Union, SA Venture Capital and Private Equity Association (SAVCA), Clyde and Company, amongst others.

CORE POLICY OBJECTIVES OF 2023 BILL

The original published Bill of 2021 addressed **three** prime categories of policy objectives

1. The ease of doing business.
2. The achievement of equity between directors and senior management on the one hand, and shareholders and workers on the other hand as well as addressing public concerns regarding high levels of inequalities in society.
3. The efforts to counter money laundering and terrorism and promote transparency about share ownership.

The following slides will briefly expand on these.

CORE POLICY OBJECTIVES OF 2023 BILL

1. The ease of doing business

- Company law should be clear, user friendly, consistent with well-established principles and not be over-burdensome on business.
- This is important to attract investors and for the efficient and effective conduct of the domestic economy and job creation.
- Many of the amendments are technical and based on submissions from stakeholder and are designed to ease the doing of business through providing legal certainty where these do not currently apply, providing greater flexibility to companies in certain circumstances, or removing unnecessary provisions in the Act.
- Many of the amendments set out in the Bill addresses these areas.

CORE POLICY OBJECTIVES OF 2023 BILL

2. The achievement of equity between directors and senior management on the one hand, and shareholders and workers on the other hand as well as addressing public concerns regarding high levels of inequalities in society.

- Certain of the proposed amendments are designed to achieve better disclosure of senior executive remuneration and the reasonableness of the remuneration.
- These issues are addressed primarily in the proposed requirements of the Remuneration Report. These are issues which have raised similar concerns in other leading jurisdictions.
- The provisions relating to transparency on the pay gap and the reasonableness of remuneration provide an objective benchmark which will assist the public dialogue on this topic.
- The Bill proposes that a remuneration report be presented annually to shareholders, containing among others, improved disclosure requirements for senior company officials as well as the the remuneration ratios between the top earners of a company and the bottom earners.

CORE POLICY OBJECTIVES OF 2023 BILL

3. Measures to counter money laundering/terrorism and promote share ownership transparency

- This was also intended to address matters relating to grey-listing and South Africa's rating in the Mutual Evaluation Assessment of the country's anti-money laundering and combating the financing of terrorism pointed to weaknesses in determining the true owner of shares in companies.
- To address this, the original Bill proposed amendments relating to disclosure of ultimate beneficial ownership in the shares of a company.
- In 2022, a General Laws Amendment Act was approved by Parliament to amend inter alia the Companies Act, that addressed many of the provisions of the original Companies Amendment Bill.
- On 24 May 2023 the Minister published regulations to bring into effect the new provisions in the Act relating to beneficial interests in shares. Regulation 30(9) and (10) provide access to the public to the annual returns filed with the Commission that now include a copy of the securities register as required in terms of section 50 of the Act.
- The current Bill focuses on the remaining gaps relating to transparency, through facilitating public access to specified information.

SUMMARY: AN OVERVIEW OF DEVELOPMENTS SINCE 2021

Since the public consultation process of 2021, the following has taken place:

- The General Laws Amendment Act, as indicated earlier, was published and the original bill was amended to reflect those changes, relating to beneficial ownership.
- The original Bill was amended to the Companies Amendment Bill, 2023, taking into account a number of public representation; and
- A new Bill was developed, namely a Companies Second Amendment Bill, 2023. This Bill arises from a separate process, namely the findings of the Judicial Commission into State Capture (Zondo Commission), and the background thereto as well as the details of the proposed changes will be covered in a later part of this presentation.

PART TWO –COMPANIES AMENDMENT BILL 2023 – A REVIEW OF THE AMENDMENTS PROPOSED.

1. AMENDMENT OF SECTION 1

PROBLEM

There are certain terms used in the text of the Act. They are not defined in the “definition section”.

The reference in the current definition of “securities” to other instruments” has given rise to uncertainty

SOLUTION

The required definitions are proposed to be inserted.

The term “other instruments” in the definition of “securities” are proposed to be deleted.

EFFECT

There will be an alignment between terms used in the text and the definition section. The uncertainty in the definition of securities will have been remedied. This is intended to improve the ease of doing business.

2. AMENDMENT OF SECTION 16

PROBLEM

Uncertainty exists as to the effective date of amendments to a company's Memorandum of Incorporation.

SOLUTION

It is proposed that section 16 be amended by providing that a Notice of Amendment of a company's Memorandum of Incorporation will take effect ten business days after the receipt of the Notice of Amendment to the Memorandum of Incorporation, if the Commission after the expiry of the ten business days, has not endorsed the Notice of Amendment or has failed to deliver a rejection of the Notice of Amendment to the company with reasons, or a later date as set out in the Notice of Amendment.

EFFECT

There will be certainty as to the effective date of an amendment to a company's Memorandum of Incorporation. This improves the ease of doing business and will avoid uncertainty and unnecessary litigation.

3. AMENDMENT OF SECTION 25

PROBLEM

The Notice which a company is required to file in terms of section 25(2) should be published by the Commission. There is no such requirement at present.

SOLUTION

The section should be amended to require the Notice filed by the company to be published by the Commission as prescribed.

EFFECT

The amendment will provide clarity in respect of the publication of a notice by the Commission. This provides for better law and improves the ease of doing business.

4. AMENDMENT OF SECTION 26

PROBLEM

The documents to which access must be given does not include the new register of the disclosure of beneficial interest of the company. This limits transparency on true ownership of shares in a company. However, in making such provision, the law should not however be framed too widely, but should be limited to larger, publicly-listed companies.

SOLUTION

Provision should be made for the register of the disclosure of beneficial interests to be included in the documents to which there is a right of access in terms of section 26(1).

The right of inspection of documents of companies should not apply to private companies, personal liability companies and non-profit companies whose public interest score falls below the prescribed threshold.

EFFECT

The effect of the amendment is to promote greater transparency and access to information. The register of disclosure of beneficial interests in a company falls within the documents in respect of which there is a right of access in terms of section 26(1). The legislation will however exclude certain types of companies and not make the law burdensome.

Technical note: public interest score

The Companies Amendment Act (2008) and its regulations provide for certain requirements set out in the Act, to only apply to certain types of companies, where there would be a public expectation of coverage. This means that a number of provisions would not apply to smaller or medium-sized firms.

To identify such companies, a ‘public interest score’ is provided for.

Regulation 26(2), a public interest score is calculated as the sum of the following:

a) A number of points equal to the average number of employees of the company
b) One point for each R1 million in third party liability of the company
c) One point for every R1m in annual turnover of a company and
d) One point for each individual known to have a beneficial interest in a company (applicable to for-profit companies) or or to be a member of a company or a member of an association that is a member of a company (for non-profit companies).

Companies with a score above the threshold set out in the regulations, will have certain of the obligations set out in the Bill, being applicable to them.

The public interest score is relevant per the regulations to sections 27, 30, 43, 127 and 128 and where there is reference to it in the Bill.

5. AMENDMENT OF SECTION 30

PROBLEM

There is no obligation to name the director or prescribed officer who receives remuneration and benefits. This limits the necessary transparency that is required about remuneration of the top officials of a company. However, in providing for this, the proposed remuneration report referred to in the new section 30A may be interpreted as being subject to an audit. This is not intended and is too onerous.

SOLUTION

The disclosure in the financial statements of remuneration and benefits received by a director or prescribed officer should as part of the disclosure require that the relevant director or prescribed officer must be named.

It should be specifically stated that the remuneration report contemplated in the new section 30A shall not be made subject to audit.

EFFECT

The effect of the proposal is to promote transparency in the remuneration of top officials of a company, a matter that the shareholders and in the instance of some types of companies, members of the public has a legitimate interest. At the same time, to avoid onerous requirements, the remuneration report will not be subject to audit.

6. AMENDMENT OF SECTION 30A

PROBLEM

As set out in the second policy pillar on which the Bill is based, the current Act is deficient in not achieving equity as between directors and senior management on the one hand and shareholders and workers on the other hand. In particular, there is inadequate provision for the disclosure of senior executive remuneration and the reasonableness of the remuneration . There is also a lack of transparency on the pay gap and the reasonableness of the remuneration to provide an objective benchmark which will assist the public dialogue on this topic.

SOLUTION

The introduction of a new section in the Act to address the deficiencies set out above. The nature and content of these requirements are extensive. Also provision is made for procedures to regulate the required shareholder approvals of remuneration policies. In addition provision is made for the consequences of a failure to obtain the required approvals.

EFFECT

There will be a new statutory requirement for public companies and state-owned companies to produce the remuneration policy for directors and prescribed officers for approval by ordinary resolution at the annual general meeting. Provision is also made for the consequences of the failure to obtain the required approvals.

Information note: remuneration report

There has been significant public interest in matters of remuneration policies and practices in companies.

The Bill, in section 30, provides that where remuneration and benefits are received by company directors or prescribed officers, such directors or prescribed officers must be named in the annual financial statements.

This is, however, limited to companies that are required in terms of the Act to have their annual financial statements audited, ie that are above the threshold applicable in terms of public interest scores.

The Bill further proposes the insertion of a new section 30A, obliging public companies and state-owned companies to prepare and present a directors' remuneration report for approval by the shareholders of the company. This section prescribes the format and content of the report, its presentation to shareholders at an annual general meeting and the consequences following the failure of the report to obtain the required shareholder approval.

Information note: remuneration report

A remuneration policy report should be presented at an AGM for approval by ordinary resolution. Once approved, such policy would only have to be presented every three years or whenever material changes are made thereafter. Should a remuneration policy not be approved, it must be presented at the next AGM, until approval is obtained. Changes to the policy may only be implemented once shareholders approve it.

Companies will now also be required to publish details of their highest paid employee, their lowest paid employee, their average remuneration, their median remuneration and the gap between the top 5% highest paid and the bottom 5% lowest paid employees.

The proposals for greater transparency and for publication of the pay gap are also in line with a number of private and other initiatives across the world. It is noted that the King IV Report on Corporate Governance for South Africa states that "the remuneration of executive management should be fair and responsible in the context of overall employee remuneration. It should be disclosed how this has been addressed. This acknowledges the need to address the gap between the remuneration of executives and those at the lower end of the pay scale".

7. AMENDMENT OF SECTION 33

PROBLEM

Every company must currently file an annual return with the Commission accompanied by a copy of its latest financial statements. This requirement is burdensome for small companies.

SOLUTION

The requirement to file a copy of its latest annual financial statements, approved by the board, with the annual return shall only apply to public companies, state-owned companies or any other profit or non-profit company whose public interest score exceeds the limit set out in section 30(2) or the regulations as contemplated in section 30(7). This should reduce the burden on small companies.

EFFECT

The Companies Act will be less onerous in respect of small companies, and cut red-tape, as the obligation to file with the annual return a copy of the annual financial statements shall not apply to companies whose public interest score is lower that the limit set out in section 30(2) as read with the regulations as contemplated in section 30(7).

8. AMENDMENT OF SECTION 38A

PROBLEM

There is no provision in the Act which empowers a Court to validate the creation, allotment or issue of shares which would otherwise be invalid, even where there are good reasons for doing so. For example, if shares were issued but certain technical requirements were not followed, a company is required to cancel the shares, which can be very disruptive in the market, with little gain to corporate governance of the interests of shareholders and society.

SOLUTION

To empower a Court to validate the creation, allotment or issue of shares which would otherwise be invalid, upon application to the Court by a company or any person who holds an interest in the company.

EFFECT

The effect of the amendment is that where good reason exists for the courts to validate an otherwise invalid action relating to shares, they will have the power to do so. The Court may issue any such order subject to the conditions as it may impose. This will improve the ease of doing business.

9. AMENDMENT OF SECTION 40

PROBLEM

Section 40 of the Act prohibits the issuing of partly paid shares as a protection for stakeholders in the company. The references in section 40 to a trust and trust agreement are erroneous insofar as they could introduce principles of trust laws and thus could give rise to the misapplication or principles not applicable to the context of section 40.

SOLUTION

The solution is to replace references to a third party with a references to a stakeholder and the reference to a trust to be replaced with a reference to a stakeholder agreement.

EFFECT

The effect of the amendment is that the arrangements referred to in section 40(5) will be governed by principles of stakeholder arrangements and not principles of trust law. This is a more flexible arrangement than what would apply under trust law, hence simplifying the conduct of business.

10. AMENDMENT OF SECTION 45

PROBLEM

Section 45 prohibits the giving of financial assistance by a company to its holding company, its fellow subsidiaries and its own subsidiaries. The latter, i.e. financial assistance to its own subsidiaries is erroneous and is creating unnecessary compliance burdens in practice. The protections provided by this prohibition are not applicable to the giving of financial assistance by a company to its own subsidiary.

SOLUTION

The amendment proposes the deletion of the prohibition against the giving of financial assistance by a company to its own subsidiary.

EFFECT

Companies will not be prohibited from giving financial assistance to their own subsidiaries. The effect is that it will ease the doing of business by eliminating an unnecessary provision that did not provide any protection but in practice cause serious compliance burdens.

11. AMENDMENT OF SECTION 48

PROBLEM

The provisions of Section 48(8)(b) which refer to SECTIONS 114 and 115, make the act of a share buy-back subject to the complexities that only apply to fundamental transactions, which are the disposal by a company of its major asset, the entering into of a statutory merger, and a scheme of arrangement. This gives rise to difficult issues of interpretation and compliance. In addition they are not consistent with the pattern of the protections to companies and shareholders in the act.

SOLUTION

The solution is to require a special resolution of shareholders for the purpose of approving share buy backs by companies other than where a company does a pro rata buy back from all of its shareholders or does a buy back on a recognised exchange. The remaining provisions of Section 48 will remain intact, Section 115 will continue to apply to fundamental transactions which are the disposal by a company of its major asset, the entering into of a statutory merger, and a scheme of arrangement.

EFFECT

We are advised that the amendments will be in line with corresponding provisions in developed countries. The effect of the proposed amendment is to remove unnecessary provisions, align SA law with other jurisdictions and make the conduct of business easier.

12. AMENDMENT OF SECTION 61

PROBLEM

There is no provision in sub section 61(8) of the Act requiring the presentation at an annual general meeting of a Social and Ethics Committee report and a Remuneration report. Also, there is no provision for a Social and Ethics Committee to be appointed at the annual general meeting.

SOLUTION

The proposal is that Companies be required at annual general meetings to present a Social and Ethics Committee Report and a Remuneration Report. In addition companies must be obliged to appoint a Social and Ethics Committee at the annual general meeting.

EFFECT

The effect of the amendment is that Social and Ethics Committees, introduced in the 2008 Act, will now be given more weight and responsibility, with a degree of independence from the Board, unlike other normal Board committees. This will assist in ensuring that companies give due weight to social and ethical matters in the conduct of their business.

13. AMENDMENT OF SECTION 72

PROBLEM

Since the original enactment of the Act in 2008, extensive developments in conventional wisdom has occurred in relation to environment issues, the role of the company in society and issues of governance. Indeed, even the purpose of the company has now come under sharp focus.

Fortunately, the foundation for these issues was laid in section 72 of the Act at the time of its enactment. However, the developments since then indicate that there are certain gaps which require to be filled. In addition, the operation of section 72 in practice has manifested certain administrative and procedural deficiencies.

SOLUTION

The enactment of amendments to section 72 to remedy the gaps and procedural deficiencies which currently exist.

EFFECT

The administrative and procedural changes will make the workings of the social and ethics committee more efficient and fit for purpose.

Information note: social and ethics committees

The Companies Act, 2008 took a significant step in the shift from a shareholder model of companies to a stakeholder model, providing inter alia for specified roles for trade unions; and the establishment of Social and Ethics Committees in companies.

The Bill takes this further forward by setting out a number of the modalities and practical arrangements for such Committees. These include among others, the composition of the social and ethics committee, filling of vacancies, timing of the appointment and provisions for exemptions. It also provides for the presentation and approval of the Social and Ethics Committee report at AGMs of companies and consequences for non-approval of the Report of the Committee.

14. AMENDMENT OF SECTION 90

PROBLEM

There is no provision as to when the appointment of an auditor must take place. Furthermore, the cooling-off period of 5 years which must lapse before an auditor can be appointed to a company if it has had certain involvement with the company, is deemed to be too long by many corporates.

SOLUTION

The proposal is that the appointment of an auditor should take place annually at a shareholders meeting.

The cooling-off period of 5 years currently contained in the Act should be reduced to 2 years.

EFFECT

The effect of the amendment is to introduce greater clarity that the appointment of auditors must take place annually at shareholder meetings. The reduction in the cooling-off period will enable companies to utilise the limited pool of audit firms with the required international and other technical expertise, more effectively.

15. AMENDMENT OF SECTION 95

PROBLEM

The purchase of shares is not competent in the case of an Employee Share Scheme which at present requires either an issue of shares or the grant of options of shares. The present requirement is unduly restrictive and present problems in practice.

SOLUTION

The requirements of an Employee Share Scheme should permit the issue or purchase of shares in the company.

EFFECT

The requirements of an employee share scheme should permit the acquisition of shares by means of the issue or purchase of shares in the company. This is intended to support the further growth and utilization of employee share ownership scheme.

16. AMENDMENT OF SECTION 118

PROBLEM

The Take Over Regulation Panel has jurisdiction over public companies, state-owned companies and certain categories of private companies. The requirements of those categories are not achieving any benefit of protecting shareholders and they are unnecessarily burdensome in practice.

SOLUTION

It is proposed that the category of private companies over which the Take Over Regulation Panel has jurisdiction should be limited to private companies that have 10 or more shareholders with direct or indirect shareholding in the company and the company must exceed the financial threshold of annual turnover or asset value which shall be determined by the Minister in consultation with the Take-Over Regulation Panel. This is more sensible and brings within the jurisdiction of the Take-Over Regulation Panel the right categories of private companies.

EFFECT

The effect of the amendment is to make the regulatory environment easier for smaller and medium-sized business, and for businesses with a limited number of shareholders, and reduce the administrative load on the Take-Over Regulation Panel.

17. AMENDMENT OF SECTION 135

PROBLEM

When a company is in business rescue, and the landlord has paid the company's share of rates, taxes, electricity and water bills (to say a municipality or public utility) during the business rescue proceedings, such a landlord cannot recover the money from the tenant in business rescue because of the statutory moratorium and the landlord is placed in a disadvantageous financial position, potentially resulting in the cutting off of the basic services.

SOLUTION

The landlord of a tenant in business rescue who pays the liabilities to public entities should be regarded as a provider of post-commencement financing with the appropriate ranking of preferences arising therefrom.

EFFECT

The effect of the amendment is to enable landlords to continue to ensure that rates and taxes, electricity and water, sanitation and sewer charges are paid, the services retained and the landlord reimbursed through the appropriate ranking of preferences arising from its status as post-commencement financing.

18. AMENDMENT OF SECTION 160

PROBLEM

There is no date when the Companies Tribunal issues an administrative order for the company to comply with, before the applicant can approach the Commission to change its name.

SOLUTION

The Companies Tribunal must stipulate the date of the administrative order for the company to comply with before the applicant can approach the Commission to change its name.

EFFECT

The effect of the change is to provide for legal clarity, which improves the ease of doing business.

19. AMENDMENT OF SECTION 166

PROBLEM

There is no provision for a dispute to be referred to arbitration if the mediation or conciliation process of the Act have failed.

SOLUTION

Provision should be made that if the Companies Tribunal has issued a certificate stating that the mediation or conciliation process has failed, an affected person may refer the matter for arbitration to the Companies Tribunal.

EFFECT

The amendment provides legal clarity and enables the Companies Tribunal to have a seamless process that includes conciliation and arbitration. This is in line with more modern systems of dispute-resolution.

20. AMENDMENT TO SECTION 167

PROBLEM

There are obsolete provisions in section 167, being a reference to an entity accredited in terms of section 166.

SOLUTION

The proposal is for the references in section 167 to an entity accredited in terms of section 166 to be deleted.

EFFECT

The deletion of obsolete provisions improves the legislation.

21. AMENDMENT TO SECTION 194

PROBLEM

The legislation does not permit the Chairperson of the Companies Tribunal authority to appoint a Chief Operations Officer. Also, there is insufficient provision for certain administrative and operational authority relating to the Companies Tribunal.

SOLUTION

The granting of authority to the Chairperson of the Companies Tribunal to appoint a Chief Operating Officer in conferring certain responsibilities. In addition, the proposal is to make provision for certain operations affecting the Companies Tribunal.

EFFECT

There will be an enhancement of the administrative and operational issues relating to the Companies Tribunal including the granting of authority to the Chairperson of the Companies Tribunal to appoint a Chief Operating Officer.

22. AMENDMENT TO SECTION 195

PROBLEM

The omission to grant authority to the Companies Tribunal to conciliate, mediate, arbitrate or adjudicate on any administrative matters affecting any person in terms of this Act as may be referred to the Companies Tribunal in the prescribed manner by the B-BBEE Commission in terms of the Act.

SOLUTION

The proposal is that the Companies Tribunal have the power to conciliate, mediate, arbitrate or adjudicate on any administrative matters affecting any person in terms of this Act as may be referred to the Companies Tribunal in the prescribed manner by the B-BBEE Commissioner in terms of the Act

EFFECT

The effect of the amendment is to enable the B-BBEE Commission to refer complaints of companies not following the governance procedures in the Companies Act, to the detriment of BEE shareholders. Examples of these may include not keeping proper company records to prevent B-BBEE shareholders from understanding company affairs; excluding minority B-BBEE shareholders from company affairs (including from shareholder decisions); falsifying company records or diverting economic benefits of a company to the non-B-BBEE shareholders through contractual or other arrangements.

23. AMENDMENT TO SECTION 204

PROBLEM

The omission of empowering the Financing Reporting Standards Council to issue financial reporting pronouncements in relation to international reporting standards which require adaptation for local purposes.

SOLUTION

The proposal is to give the power to the Financial Reporting Standards Council to make financial reporting pronouncements from time to time in relation to international reporting which require adaptation for local circumstances.

EFFECT

This will assist to customize the reporting standards to the needs of the local economy and to SA regulatory requirements, for example on tax regulations and BEE transactions.

PART THREE – COMPANIES *SECOND* AMENDMENT BILL – A REVIEW OF THE AMENDMENTS PROPOSED.

CORE POLICY OBJECTIVES OF 2023 BILL

- The Zondo Commission of Enquiry into State Capture (“**Zondo Commission**”) made a recommendation to amend the Companies Act, 2008 (Act No. 71 of 2008) (the “**Companies Act**”), to extend the time bar which is contained in sections 162(2) and 162(3) of the Companies Act
- Section 162 of the Companies Act makes provision for an application to a Court for an order declaring a person delinquent or under probation.

TECHNICAL NOTE: DELINQUENCY

What is a "delinquent director"?

Section 162 of the Companies Act 71 of 2008 (Companies Act) deals with the topic of delinquency and states that a court must declare a director to be delinquent where they have failed to discharge their duties in terms of the Companies Act, provided they are currently, or were a director in the 24 months preceding the application.

On what grounds can a person be declared a "delinquent director"?

Section 162(5) of the Companies Act contains a number of grounds on which a person may be declared a delinquent director. These include among others that a person, while a director:

- grossly abused the position of director;
- took personal advantage of information of an opportunity to gain an advantage for another person (other than the company on whose board the director serves) or to knowingly cause harm to the company or a subsidiary of the company;
- intentionally, or by gross negligence, inflicted harm upon the company or a subsidiary of the company; or
- acted in a manner that amounted to gross negligence, wilful misconduct or breach of trust in relation to the performance of the director's functions within, and duties to, the company.

TECHNICAL NOTE: DELINQUENCY

What are the implications of being declared a “delinquent director”?

The implications of being declared delinquent are serious. A declaration of delinquency in terms of Section 162(6) –

- subsection 5(a) or (b) is unconditional and will subsist for the lifetime of the director concerned.
- Subsection 5(c) to (f) –
    i) May be made subject to any conditions the court considers appropriate, including a limitation of the declaration to one or more categories of companies ; and
    ii) Lasts for seven years from the date of the order, or such longer period as determined by the court at the time of making the declaration.

The Court may change this order after three years and place the director under probation in terms of section 162(11)(a).

Directors declared delinquent are listed as such on the CIPC record which allows registered customers to search an individual’s directorship history prior to being considered for appointment on the board of a company.

In addition, the court may grant appropriate relief to the companies involved, who may consequently claim damages from a director for losses incurred as a result of their conduct.

CORE POLICY OBJECTIVES OF 2023 BILL

- An application for delinquency may be brought if the person concerned is a director of that company, or within the 24 months immediately preceding the application, was a director of that company.
- The Zondo Commission made a recommendation in respect of two specific companies and certain persons connected with those companies that section 162 of the Companies Act be amended so as to ensure that the application for a declaration of delinquency may be brought even after the two years on good cause shown.
- Whilst the aforesaid recommendations of the Zondo Commission were limited to specific cases, it is considered to be in the public interest that any amendments to the Companies Act to extend the time bar set out in sections 162(2) and 162(3) should be of wider application and should apply generally.

CORE POLICY OBJECTIVES OF 2023 BILL

- Research undertaken indicates that a number of jurisdictions have different time bars for applications for declarations of delinquency. It appears from such research that the corresponding provisions in New Zealand's Companies Act have the longest time bar, being five years.
- The time bar in applications for declarations of delinquency must be balanced and fair to both the applicant and defendant, having regard to the implications of lapse of time, reduced memories, and inability to find relevant records.
- It is proposed that the period of five years is appropriate.
- In certain circumstances even the time bar of five years may be insufficient and the Court should be empowered on good cause shown to extend that time period in a specific case. Furthermore, when good cause is shown to the Court to extend the time bar such power of the Court should include the right to extend the time period even in respect of any of the circumstances mentioned in section 162 of the Companies Act which may have occurred in the period before the extension. In exercising its powers in this regard the Court will take into account the interests of justice and fairness.

CORE POLICY OBJECTIVES OF 2023 BILL

- The proposed legislation should be expressed to be retrospective. Thus, the legislation should state that the court on good cause shown may extend the time bar even though the conduct in question was committed during the period before the extension.

- Although not the subject of a recommendation of the Zondo Commission, it appears on reflection that the time bar in section 77(7) of the Companies Act also requires amendment. Section 77 deals with the liability of directors and prescribed officers for breaching their fiduciary duties and duties of care, skill and diligence as well as certain statutory duties. It provides that "*Proceedings to recover any loss, damages or costs for which a person is or may be held liable in terms of this section may not be commenced more than three years after the act or omission that give rise to that liability*."

- Whilst the period of three years in section 77 of the Companies Act conforms with international best practice, it is considered appropriate that the Court should also be empowered, on good cause shown, to extend the time bar of three years, on the basis that such extended period may also cover acts or omissions that occurred during the period before the extension

AMENDMENT OF SECTION 77(7)

PROBLEM

Section 77(7) contains a time bar of three years within which an action against a director to recover loss, damages or costs for a breach of fiduciary duties or duties of care, skill and diligence must be brought. This period may in certain circumstances be too short.

SOLUTION

The action referred to in section 77(7) must be capable of extension by a Court on good cause shown, including having retrospective effect

EFFECT

The effect of the amendment is to provide for actions to be taken against directors even after they are no longer directors, nor have been directors for the a three-year period preceding the action. By giving the power to a court to make the decision, it provides for the interests of justice to be paramount and not be unnecessarily restricted by the current time-bar. The merits of its application in any given instance will be determined by a competent court.

AMENDMENT OF SECTION 162(2) AND (3)

PROBLEM

An action to declare a director delinquent is time barred after 24 months. This period may in certain circumstances be too short particularly in cases of delinquency committed during state capture.

SOLUTION

The period of 24 months must be extended to 60 months and furthermore the Court be given power on good cause shown to extend the period further and with retrospective effect.

EFFECT

It will be permissible to bring actions to declare directors delinquent up to 60 months after ceasing to be a director and even longer if a Court so orders on good shown including with retrospective effect. By giving the power to a court to make the decision, it provides for the interests of justice to be paramount and not be unnecessarily restricted by the current time-bar. The merits of its application in any given instance will be determined by a competent court.

THANK YOU