

(3) The persons to whom this section applies are—

- (a) officers of a company (subject however to section 197 (“Liability of directors and prescribed officers”) or members of the private business corporation;
- (b) directors, managers and other officers of a foreign company;
- (c) persons appointed by a company or foreign company as its auditors.

#### **60 Direct actions by members**

(1) A member of a private business corporation or a company may bring an action in court in such person’s own name against any manager, officer or director referred to in section 54 or 55 to enforce, or recover damages caused to him or her caused by violation of a duty incumbent upon any such manager, officer or director under this Act or any other law including laws against fraud or misappropriation.

(2) An action under subsection (1) may be brought by one person in the person’s own name or by two or more persons in their names acting together.

#### **61 Derivative actions by members on entity’s behalf**

(1) A member or shareholder of a company or private business corporation may bring an action in court in such person’s name and on the company’s behalf against any manager, officer or director referred to in sections 54 or 55 to enforce, or to recover from that manager, officer or director damages caused to the company by violation of, duties owed by that manager, officer or director to the company under this Act or any other law including laws against fraud or misappropriation.

(2) Such an action may be brought by one person in the person’s own name and on the company’s or corporation’s behalf or by two or more persons in their names acting together on the company’s or corporation’s behalf.

(3) An action may be brought under this section only in cases in which:

- (a) damage or a breach of duty to the company itself is claimed; and
- (b) the plaintiff was a member or shareholder at the time of the acts which are complained of, or acquired that status as a result of a transfer of that person’s interest or shares from a person who had that status at that time; and
- (c) the plaintiff holds interests or shares representing at least ten *per centum* of the private business corporation or company’s voting power (which in the case of a private company or public company shall mean ten *per centum* votes of the ordinary shares), and where two or more plaintiffs bring the action together the holdings of all of them shall be counted for this purpose; and
- (d) the plaintiff has previously requested the manager or controlling members of the private business corporation or board of company in writing to rectify the acts which are complained of, and that request was refused or not responded to within thirty days (but the court on good cause shown to it may dispense with this requirement).

(4) Any complaint under this section shall include a copy of the request referred to in subsection (3) and details of all other efforts to have the private business corporation or company itself bring the complaint, or shall state in detail why such a request would not succeed.

(5) A complaint under this section may not be discontinued or settled between the plaintiff and the defendant without the court’s approval given after full disclosure of the details of the proposed discontinuance or settlement.

(6) All damages received in a derivative case shall be the property of the company or corporation except that the plaintiffs who prevailed shall be paid their reasonable expenses, including legal fees, from the moneys paid by the defendants.

(7) The amount of such expenses under subsection (6) must be approved by the court.

## **62 Court remedies in deadlock, fraud, oppression and other situations; piercing the corporate veil**

(1) In a legal action by a member of a private business corporation or a company the court may order one or more of the remedies listed in subsections (2) and (3) of this section if it is established that—

- (a) the managers or directors, or the member, of the entity are deadlocked, whether because of even division in their number or another reason, and irreparable injury to the entity is likely to be caused to the entity's business or the business can no longer be conducted to the members' advantage, or
- (b) the managers, directors or any other persons in control of the entity have acted illegally, fraudulently or oppressively toward the petitioning member.

(2) In an action under subsection (1) the court shall have the power to order one or more of the following remedies or similar remedies—

- (a) dissolution or liquidation of the entity, but if the court finds that the grounds stated in subsection (1) are curable, it may order a reasonable time period for cure;
- (b) the performance, variance or setting aside of any transaction or other action of the entity or its members, managers or directors;
- (c) the cancellation or amendment of a provision of the entity's constitutive documents;
- (d) the removal of any manager, director or officer, or the appointment of any person as a manager, director or officer;
- (e) an investigation of the financial effects of any matter in dispute, which may include a forensic audit;
- (f) the appointment of one or more inspectors to investigate the acts complained of or of a custodian to manage the business of the company or corporation for a term and under conditions determined by the court;
- (g) the submission of the dispute to mediation or other non-binding alternative dispute resolution;
- (h) the payment of dividends or other distributions;
- (i) the award of damages to any aggrieved party;
- (j) the purchase by the company or corporation or another member or shareholder of all of the interests or shares of the petitioning member or shareholder for their fair value as determined by the court.

(3) If the court finds that—

- (a) the juristic form of the private business corporation or company has been abused by the board, or a manager, director or officer or any one or more members of the company or private business corporation, for their own or some other person's advantage; or
- (b) any acts done or omitted to be done by or on behalf of the private business corporation or company constitutes an unconscionable abuse of the juristic person of the private business corporation or the company;

the court may declare the entity not to be a juristic person with respect to the said abuses, acts or omissions and impute those abuses, acts or omissions to the persons responsible for them in their personal capacities.

### 63 Security for costs

Where a company or foreign company or a private business corporation is plaintiff or applicant in any legal proceedings, the court may at any stage, on sufficient proof that there is reason to believe that the company, foreign company or private business corporation will be unable to pay the costs of the defendant or respondent if successful in his or her defence, require sufficient security to be given for those costs and may stay all proceedings till the security is given.

### 64 Service of documents

(1) Without derogation from section 40 of the Interpretation Act [*Chapter 1:01*] but subject to subsection (2), any notice, order or other document which by this Act is required or permitted to be served upon or delivered or sent to a business or other entity may be served, delivered or sent—

- (a) by leaving it at, or sending it by prepaid registered post to—
  - (i) the entity's registered office, in the case of a company or private business corporation; or
  - (ii) any place of business established by the entity in Zimbabwe, in the case of a foreign company; or
  - (iii) the entity's head office or principal place of business in Zimbabwe, in the case of a voluntary association;
 or
- (b) in the case of an electronic notice, order or document, by sending it to—
  - (i) the entity's electronic mail address, website, portal or other interactive electronic link whose particulars were notified to the Registrar in terms of section 31 ("Postal address electronic mail address and registered office")<sup>(3)</sup> operated or used by the entity; or
  - (ii) an electronic mail address, website, portal or other interactive electronic link operated or used by the entity's legal practitioner in Zimbabwe;

Provided that in either case the electronic communication shall be authenticated by the sender's electronic signature.

(2) Where—

- (a) any provision of this Act prescribes the manner in which a notice, order or other document is to be served, delivered or sent, the document shall be served, delivered or sent in that manner unless it is impossible to do so, in which event subsection (1) shall apply;
- (b) the High Court has directed the manner in which a notice, order or other document is to be served, delivered or sent, the document shall be served, delivered or sent in that manner.

### 65 Allegations of voidness, impropriety, etc. by registered business entities

(1) If a registered business entity—

- (a) enters into any agreement or makes any resolution in respect of which it is alleged that such agreement or resolution or any provision of it is prohibited, void or voidable under this Act; or
- (b) does anything in the purported exercise of any power under its constitutive documents, which power or exercise is alleged to be prohibited, void or voidable under this Act;

such agreement, resolution, provision of such agreement or resolution, power or exercise of such power shall not be considered to be prohibited, void or voidable under this Act unless a court declares the same to be prohibited, void or voidable as the case may be, or

the agreement, resolution, provision, power or exercise in question has been adjudged to be prohibited or void by the issuance of a civil penalty order in relation thereto.

(2) Any person who contravenes any provision of this Act is liable to any other person for any loss or damage suffered by that person as a result of that contravention.

(3) The provisions of this section do not affect the right to any remedy that a person may otherwise have.

*Subpart D: Indemnification and insurance*

**66 Indemnification and insurance of persons referred to in sections 54, 55 and 57**

(1) A registered business entity may indemnify a person referred to in section 54 or 55 against expenses (including legal practitioner's fees) incurred by the person in a proceeding—

- (a) to which the person was a party because he or she was a person referred to in those sections, and
- (b) in which the person was wholly successful in the defence of the proceeding, whether on the merits, on procedural grounds, or otherwise.

(2) A registered business entity may indemnify a person referred to in section 54 or 55 against—

- (a) liability incurred to any person other than the entity (and other than in the right of the entity under section 60) in a proceeding to which the person was a party because he was a person referred to in section 54 or 55; or
- (b) expenses (including legal practitioner's fees) incurred by the person in defending or settling any claim in the proceeding relating to any such liability;

if such liability was not criminal liability, was not liability for a breach of a duty stated in sections 54, 55 or 57, and was not liability for conduct for which the person was adjudged liable on the basis of receiving a financial benefit to which he or she was not entitled, whether or not involving action in the person's official capacity.

(3) A registered business entity may purchase insurance to protect a person referred to in sections 54, 55 or 57 against liability asserted against or incurred by the person in the capacity referred to in this section, whether or not the entity would have power to indemnify the person against the same liability under subsections (1) or (2) of this section.

(4) This section is additional to, and do not derogate from, section 74 ("Indemnity and civil and criminal liability of officers and auditors of companies and members of PBCs").

PART V

OFFENCES AND DEFAULTS COMMON TO REGISTERED BUSINESS ENTITIES

**67 Penalties for false statements and oaths**

(1) If any person in any statement, return, report, certificate, statement of financial position or other document required by or for the purpose of any provisions of this Act makes a statement false in any material particular, knowing it to be false, he or she shall be guilty of an offence and liable to a fine not exceeding level seven or to imprisonment for a period not exceeding one year, or to both such fine and such imprisonment.

(2) If any person, on examination on oath authorised under this Act, or in any affidavit or deposition in or about any matter arising under this Act, wilfully and corruptly gives false evidence he or she shall be guilty of an offence and liable to the

a fine not exceeding level seven or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment.

(3) Every officer or auditor of a company or foreign company, or accounting officer or controlling member of a private business corporation or any other person employed generally or engaged for some special work or service by the company, foreign company or private business corporation who makes, circulates or publishes or concurs in making, circulating or publishing any certificate, written statement, report or account in relation to any property or affair of the company, foreign company or private business corporation which is false in any material particular, shall, subject to subsection (4), be guilty of an offence and liable to a fine not exceeding level eleven or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment.

(4) In any prosecution under subsection (3) it shall be a defence if it is proved that the person charged had, after reasonable investigation, reasonable ground to believe and did believe that the statement, report or account was true and that there was no omission to state any material fact necessary to make the statement as set out not misleading.

### **68 Fraudulent, reckless or grossly negligent conduct of business**

(1) A creditor, member, judicial manager or liquidator of a company or private business corporation may, in an action instituted in the High Court, seek a declaration in terms of subsection (3).

(2) The High Court may, in the course of any ongoing criminal or civil proceedings before it in connection with a company or private business corporation, on its own motion or on the application of the Master of the High Court or of any creditor, member, judicial manager or liquidator of the company or private business corporation, make a declaration in terms of subsection (3).

(3) If it appears to a court that any business of a company or private business corporation was or is being carried on—

- (a) recklessly; or
- (b) with gross negligence; or
- (c) with intent to defraud any person or for any fraudulent purpose;

the court may declare that —

- (d) any of the past or present directors of the company or any other persons who were knowingly parties to the carrying on of the business in such manner or in such circumstances; or
- (e) any person who was knowingly a party to the carrying on of business of the private business corporation in such manner or in such circumstances;

(hereinafter called an “impugned person”) shall be personally responsible, without limitation of liability, for all or any of the debts or other liabilities of the company or private business corporation as the court may direct, and the court may give such further orders as it considers proper for the purpose of giving effect to the declaration and enforcing the liability, including an order under subsection (4).

(4) In particular the court may, subject to the prior rights of other creditors of the impugned person, make his or her declared liability a charge on any debt or obligation due from the company or private business corporation to the impugned person or on any mortgage or charge or any interest in any mortgage or charge on any assets of the company or private business corporation held by or vested in the impugned person or in any company, private business corporation or person on his or her behalf, or in any person claiming as assignee from or through the impugned person, company, private business corporation or person, and may from time to time make such further order as may be necessary for the purpose of enforcing any charge imposed under this subsection.

For the purposes of this subsection, the expression “assignee” includes any person to whom, or in whose favour, by the directions of the impugned person, the debt, obligation, mortgage or charge or interest therein was created, issued or transferred but does not include an assignee for valuable consideration given in good faith and without notice of any of the matters on the ground of which the declaration is made.

(5) On the production to the Registrar by any member or creditor of a company or private business corporation of proof satisfactory to the Registrar that a director of the company or controlling member of the private business corporation is carrying on its business in the manner or in the circumstances specified in subsection (3)(a) or (b), the Registrar may (unless an action is earlier instituted or taken under subsection (1) or (2)) serve upon the director or the controlling member a category 2 civil penalty order in which the remediation clause (instead of the cumulative penalty) shall require the controlling member to take the remedial action specified in the order within a specified period.

(6) Any person who is knowingly a party to the carrying on of business in the manner or in the circumstances specified in subsection (1)(c) shall be guilty of an offence and liable to a fine not exceeding level six or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment.

(7) If it appears in the course of an investigation under Part II of this Chapter that any past or present officer or member of a company or private business corporation has been guilty of an offence under subsection (6) or other offence for which he or she is criminally responsible under this Act or the Criminal Law Code, the Registrar or inspector shall cause all the facts known to him or her which appear to constitute the offence to be laid before the Prosecutor-General.

## **69 Fraudulent, reckless or wilful failure of financial accounting; falsification of records**

(1) Without derogating from section 68 (“Fraudulent, reckless or grossly negligent conduct of business”), any—

- (a) director of a company who fraudulently, recklessly or wilfully fails to take all reasonable steps to secure compliance by the company with the requirements of section 182 (“Keeping of financial records”), 183 (“Statement of financial position and statement of comprehensive income and financial year of holding company and subsidiary”), 184 (“General provisions as to contents and form of financial statements”), 186 (“Obligation to lay group accounts before holding company”) or 189 (“Directors report to be attached to statement of financial position”), or has by his or her own wilful act been the cause of any default by the company thereunder, he or she shall in respect of each default be guilty of an offence and liable to a fine not exceeding level twelve, or to imprisonment for all defaults for a period not exceeding twelve months or to both such fine and such imprisonment:

Provided that—

- (i) it shall be a defence in any proceedings against a director under this paragraph for the director to prove, on a balance of probabilities, that he or she had reasonable grounds to believe, and did believe, that a competent and reliable person was charged with the duty of seeing that the requirements of this section were complied with and was in a position to discharge that duty;
- (ii) if the court accepts the defence proffered under paragraph (i), it may direct the Registrar to serve upon the director the civil penalty order referred to in section 182(5), 183(5), 184(6) or 189(3), as the case may be;
- (b) controlling member of a private business corporation who fraudulently, recklessly or wilfully fails to take all reasonable steps to secure compliance

by the private business corporation with the requirements of section 271 (“Financial records”), 273 (“Annual financial statements”) or 274 (“Examination of financial statements and reports thereon”), or has by his or her own wilful act been the cause of default by the private business corporation in complying with any of those requirements, he or she shall, in respect of each default, be guilty of an offence and liable to a fine not exceeding level six or to imprisonment for all defaults for a period not exceeding six months, or to both such fine and such imprisonment:

Provided that—

- (i) it shall be a defence for him or her to prove on a balance of probabilities that he or she believed on reasonable grounds that a competent and reliable person was charged with the duty of seeing that the requirements of this section were complied with and that such person was in a position to discharge that duty and that he or she had no reason to believe that such person had in any way failed to discharge that duty;
- (ii) if the court accepts the defence proffered under paragraph (i), it may direct the Registrar to serve upon the member the civil penalty order referred to in section 271(7), 273(4) or 274(4).

(2) Any person who conceals, destroys, mutilates, falsifies or makes or is privy to the making of any false entry in or, with intent to defraud or deceive, makes or is privy to the making of any erasure in any register, records, including any minutes, records, security, account or document of any company or foreign company or private business corporation shall, unless he or she satisfies the court in each case that he or she had no intention to defraud or deceive, be guilty of an offence and liable to a fine not exceeding level eleven or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment.

## **70 Power to restrain fraudulent persons from managing companies or controlling PBCs**

(1) Where—

- (a) a person is convicted before the High Court of any offence in connection with the promotion, formation or management of a company or private business corporation; or
- (b) in the course of the winding up or judicial management of a company it appears that a person—
  - (i) has been guilty of any offence for which he or she is liable, whether he or she has been convicted or not, under section 68; or
  - (ii) has otherwise been guilty, while an officer of the company or accounting officer or controlling member of a private business corporation, of any fraud in relation to the company or of any breach of his or her duty to the company or private business corporation;

the court may on application make an order that that person shall not, without the leave of the court, be a director of or in any way, whether directly or indirectly, be concerned or take part in the management of any company, foreign company or private business corporation for such period as may be specified in the order.

(2) A person intending to apply for the making of an order under this section shall give not less than ten days’ notice of his or her intention to the person against whom the order is sought and on the hearing of the application the last-mentioned person may appear and himself or herself give evidence or call witnesses.

(3) An application for the making of an order under this section may be made by the Master or by the liquidator or judicial manager of the company or by any person who is or has been a member or creditor of the company; and on the hearing of any application for an order under this section by the Master of the High Court or the liquidator or judicial manager or of any application for leave under this section by a person against whom an order has been made on the application of the Master or the liquidator or judicial manager, the Master or liquidator or judicial manager, as the case may be, may appear and call the attention of the court to any matters which seem to him or her to be relevant and shall do so if summoned by the court and may himself or herself give evidence and call witnesses.

(4) An order may be made by virtue of subsection (1)(b)(ii) notwithstanding that the person concerned may be criminally liable in respect of the matters on the ground of which the order is to be made and for the purposes of the said subparagraph (ii) the expression “officer” shall include any person in accordance with whose directions or instructions the directors of the company have been accustomed to act.

(5) If any person contravenes an order made under this section, he or she shall, be liable to a fine not exceeding level ten or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment.

## **71 Unlawful personation and misrepresentation in relation to shares and interests**

(1) If any person falsely and deceitfully personates any owner of any share or interest in any company or of any interest in a private business corporation and thereby obtains or endeavours to obtain any such share or interest or receives or endeavours to receive any money due to any such owner as if the impersonator were the true and lawful owner, he or she shall be guilty of an offence and liable to a fine not exceeding level 12 or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment.

(3) If a member of—

- (a) a company makes use of a certificate of any share, debenture or debenture stock delivered to him or her or another person in terms of section 153 (“Evidence of title to shares”); or
- (b) a private business corporation makes use of a certificate issued to him or her or another person in terms of section 257 (“Certificate of members interest”);

at a time when he or she knows it does not reflect the existence or true extent of his or her current interest in the company, to obtain any benefits or advantage for himself or herself or the private business corporation, he or she shall be guilty of an offence and liable to a fine not exceeding level 14 or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment.

## **72 Obligations to maintain and file beneficial ownership information**

(1) Every company shall maintain an accurate and up-to-date register of the beneficial owner or owners of the company, to be known as the register of beneficial owners which register shall—

- (a) be kept, within Zimbabwe, and at the same office at which the register of members is kept; and
- (b) with respect to each director, record his or her first name and surname, any former first name and surname, an identification reference number appearing in his or her identity document, his or her full residential or



business address and postal address and his or her nationality, as well as the nature and extent of his or her beneficial ownership in the company.

(2) Every company shall file with the Registrar, in prescribed form, accurate and up-to-date beneficial ownership information referred to in this section and shall within seven days of any change file updates as and when there is any material change to the information.

(3) Beneficial ownership information held and maintained in terms of this section, either by the company or by the Registrar, shall be made available for inspection by the Financial Intelligence Unit or by a law enforcement agency referred to in section 2 of the Money Laundering and Proceeds of Crime Act [*Chapter 9:24*].

(4) The company shall appoint a person, resident in Zimbabwe, who shall be responsible for keeping custody of the register of beneficial owners and who shall be authorised to make the information available to the Financial Intelligence Unit or law enforcement authorities, upon request.

(5) The names and sufficient contact details of the person referred to in subsection (4) shall be recorded in the form filed by the company with the Registrar in terms of subsection (2).

(6) Beneficial ownership and other company information held by the Registrar, shall be public information and shall be available for inspection, whether electronically or physically—

- (a) by members of the public (subject to section 73 (10)); and
- (b) by a financial institution or a designated non-financial business or profession referred to in section 2 and section 13, respectively, of the Money Laundering and Proceeds of Crime Act [*Chapter 9:24*].

(7) The Registrar or the Financial Intelligence Unit may each, on its own behalf or on behalf of a law enforcement agency, seek beneficial ownership or other company information from their foreign counterparts, in respect of any company, and, likewise, may provide beneficial ownership or other company information to their foreign counterparts.

(8) The Registrar and the Financial Intelligence Unit and any competent authority which, through them, requests beneficial ownership and other company information from other countries, shall monitor the quality of the assistance given by the foreign authorities and shall keep records of such requests and responses.

(9) The company or its administrators, liquidators or other persons involved in the dissolution of the company, shall maintain beneficial ownership information records for a period of at least five years after the date on which the company is dissolved or otherwise ceases to exist.

(10) Any person who fails to comply with the requirements of subsection (1), (2), (3), (4), (5) or (9) shall be guilty of an offence and be liable to a fine not exceeding level 14 or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment.

### **73 Prohibition of concealment of beneficial ownership**

(1) Subject to subsection (2), no company or private business corporation shall—

- (a) allot or issue any of its shares to, or register any of its shares in the name of, or issue a certificate of member's interest to (as the case may be), any person other than the intended beneficial owner (that is to say, the person who, even if it is purported that the ownership of the share or interest belongs to someone else (in this section referred to as the "nominee"), enjoys the dividend and other benefit of the share or interest, whether that benefit is a present or a future one, or is vested or contingent); or

- (b) transfer any of its shares or interests in the name of a person other than the beneficial owner.

(2) Subsection (1) shall not affect the allotment or issue, or the registration of the transfer, of shares or interests in a company or private business corporation in the name of—

- (a) a nominee if he or she is the nominee of a beneficial owner who (whether alone or together with any “associate” as defined in section 3 (“When persons deemed to be associates and when persons deemed to control companies”)) holds less than twenty *per centum* of the shares or interests in the company or private business corporation; or
- (b) a manager or trustee of a collective investment scheme registered in terms of the Collective Investment Schemes Act [Chapter 24:19]; or
- (c) an executor of a deceased estate, a trustee of an insolvent estate or the liquidator of a company in liquidation; or
- (d) a curator or guardian of a person under a disability; or
- (e) a holder of a licence issued in terms of Part V of the Securities and Exchange Act [Chapter 24:25]; or
- (f) a central securities depository established in terms of Part IX of the Securities and Exchange Act [Chapter 24:25]; or
- (g) such other persons as may be prescribed.

(3) Without derogating from section 235 (“Disclosure of potential control acquisition”), a company or private business corporation may, and if so directed by the Registrar shall, request any person to whom it is about to allot, issue or transfer any of its shares or interests to furnish it with such information as the company or private business corporation may require to enable it to comply with subsection (1), and if the person fails or refuses within a reasonable time to comply with the request the company or private business corporation shall not allot, issue or transfer the shares or interest to him or her.

(4) If a company or private business corporation has reason to believe that any of its shares or interests are held by a nominee, the company or private business corporation may request the alleged nominee to provide it with such information as will identify the beneficial owner and additionally, or alternatively, the capacity in which the alleged nominee holds the shares or interests, and the alleged nominee shall without delay comply with the request.

In addition, for so long as a shareholder of a company or holder of an interest in a private business corporation fails or refuses to comply with a request in terms of this subsection, he or she shall not, either personally or by proxy, cast a vote attached to the share or interest nor receive a dividend payable on the share or interest.

(5) Where a share or interest in a company or private business corporation has been allotted, issued or transferred to a nominee, or registered in a nominee’s name, in contravention of subsection (1), then—

- (a) no nominee shall, either personally or by proxy, cast a vote attached to the share or interest nor shall any person receive a dividend payable on the share or interest; and
- (b) the Registrar may (unless the company has earlier taken the action referred to in subsection (4)) serve a category 2 civil penalty order upon the alleged nominee, in which—
  - (i) the remediation clause shall require the nominee to divest himself or herself of the share or interest within a specified period; and

- (ii) it is declared that the failure or refusal of the nominee to divest himself or herself of a share or interest within the specified period will result in every share or interest concerned becoming *bona vacantia* and vesting in the State, which may thereafter dispose of it.

(6) The validity of any resolution adopted by a company or private business corporation shall not be affected by a vote cast in contravention of subsection (4) or (5) (a), if the resolution was adopted by the requisite majority of votes which were validly cast.

(7) A dividend referred to in subsection (4) or (5)(b)(i) shall accrue to the company or private business corporation concerned.

(8) Before requiring an alleged nominee to divest himself or herself of a share or interest in terms of subsection (5)(b)(i), the Registrar shall, for the purposes of section 296 (“Additional due process requirements before service of certain civil penalty orders”) (1), also inform—

- (a) the person from whom the alleged nominee acquired the share or interest, if that person is readily identifiable; and
- (b) the company or private business corporation concerned;

of his or her reasons for requiring the alleged nominee to do so, and shall give all those persons an adequate opportunity to make representations in the matter.

(9) With reference to subsection (2)(a) the nominee of a beneficial owner shall disclose the name and relevant particulars of the beneficial owner to the company or private business cooperation together with a written request that such beneficial owner and particulars not appear on the face of the shares or in the share certificate in the certificate of interest or in the register of shareholders or interest holders. Whereupon such company or private business cooperation shall comply with such request but keep a separate register containing the names and relevant particulars of beneficial owners in question in accordance with section 72.

(10) The name and relevant particulars of the beneficial owners referred to in subsection (9) shall not be disclosed except with the consent of the nominee or by virtue of an order of a court of competent jurisdiction.

(11) Any company or private business cooperation that fails to keep the register of names and particulars of a beneficial owner referred to in subsection (9) shall be liable to a category 4 civil penalty order at the instance of the Registrar.

(12) An agreement under section 299 may give standing to a foreign company registry to apply to a domestic court for an order referred to in subsection (10).

(13) Every company or private business cooperation shall nominate a director or an officer who shall be responsible for maintaining the registers for beneficial owners, failure to comply with such shall render the company or private business cooperation concerned liable to a category 4 civil penalty.

#### **74 Indemnity and civil and criminal liability of officers and auditors of companies and members of PBCs**

(1) Subject to subsections (1) and (2), and unless otherwise provided in this Act or in the articles of the company or by-laws of the private business corporation, or in any contract with a company or private business corporation or otherwise, every director, managing director, agent, auditor, secretary and other officer for the time being of a company or member for the time being of the private business corporation,

shall be entitled to an indemnity from the company or private business corporation for payments made and personal liabilities incurred by him or her—

- (a) in the ordinary and proper conduct of the affairs of the company or private business corporation; and
- (b) in or about anything necessarily done for the preservation of the undertaking or property of the company or private business corporation.

(2) Subject to this section, any provisions, whether contained in the articles of a company or by-laws of the private business corporation, or in any contract with a company or private business corporation or otherwise, for exempting any officer of the company or member of the corporation or any person employed by the company or corporation as auditor from, or indemnifying him or her against, any liability which by law would otherwise attach to him or her in respect of any negligence, default, breach of duty or breach of trust of which he or she may be guilty in relation to the company or private business corporation shall be void.

(3) In particular, no officer of a company or member of a private business corporation who is personally liable for a civil penalty shall be indemnified by the company or corporation against such liability, and any provisions, whether contained in the articles of a company or by-laws of the private business corporation, or in any contract with a company or corporation or otherwise, for exempting or indemnifying such officer shall be void.

(4) A company or private business corporation that contravenes subsection (2) or (3) and every officer, auditor or member who is party to the payment or receipt of any indemnity in contravention of those subsections shall be guilty of an offence and liable to a fine not exceeding level fourteen or to imprisonment for a period not exceeding two years or to both such fine and imprisonment, and the court imposing such fine or imprisonment or both may suspend the whole or any part of such fine or imprisonment or both conditionally upon the company or private business corporation recovering, or the officer, auditor or member in default reimbursing the company or private business corporation for, the full value of the indemnity.

(5) Despite subsections (2) and (3) a company or private business corporation may indemnify any such officer auditor or members against any liability incurred by him or her in defending any proceedings, whether civil or criminal, in which judgment is given in his or her favour or in which he or she is acquitted or in connection with any application under section 59 (“Power of court to grant relief to defendants or potential defendants in certain cases”) in which relief is granted to him or her by the court.

### CHAPTER III

#### COMPANIES

#### PART I

#### INTRODUCTION

##### *Sub-Part A: Incorporation of companies and matters incidental thereto*

### **75 Prohibition of association or partnership exceeding twenty persons**

(1) No company, association, syndicate or partnership consisting of more than twenty persons shall be formed in Zimbabwe for the purpose of carrying on any business that has for its object the acquisition of gain by the company, association, syndicate or partnership, or by the individual members thereof, unless it is registered as a company under this Part or as a private business corporation under Part I of Chapter IV, or is formed in pursuance of some other law:

Provided that an association, syndicate or partnership which—

- (a) consists solely of persons who are members of a designated profession or calling; and
- (b) is formed for the purposes of practising or carrying on in Zimbabwe that designated profession or calling;

may consist of more than twenty persons.

(2) For the purposes of this section “designated profession or calling” means—

- (a) legal practitioners registered under the Legal Practitioners Act [*Chapter 27:07*]
- (b) public accountants and auditors registered under the Public Accountants and Auditors Act [*Chapter 27:12*];
- (c) architects registered under the Architects Act [*Chapter 27:01*];
- (d) quantity surveyors registered under the Quantity Surveyors Act [*Chapter 27:13*];
- (e) medical practitioners registered under the Health Professions Act [*Chapter 27:19*];
- (f) any other profession or calling which is controlled and regulated by a council or other body established by or under any Act in force in Zimbabwe, and which is declared by the Minister by notice in the *Gazette* to be a designated profession or calling for the purposes of this proviso.

## 76 Mode of forming company

Any one or more persons associated for any lawful purpose may, by subscribing their names to a memorandum of association and otherwise complying with the requirements of this Act in respect of registration, form an incorporated company whether—

- (a) a company having the liability of its members limited by the memorandum to the amount, if any, unpaid on the shares respectively held by them, in this Act termed a company limited by shares; or
- (b) if a licence is granted in terms of section 82 (“Power to dispense with “Limited” in certain cases”), a company having no share capital but having the liability of its members limited by the memorandum to such amount as the members may respectively thereby undertake to contribute to the assets of the company in the event of its being wound up, in this Act termed a company limited by guarantee.

## 77 Memorandum of company

(1) In the case of a company limited—

- (a) by shares, the memorandum shall be in the English language, or subject to subsection (6) in an officially recognised language and must state—
  - (i) the name of the company which shall, unless a licence has been granted under section 82 (“Power to dispense with “Limited” in certain cases”), have “Limited” as the last word and shall also have included therein—
    - A. in the case of a private company, the term “(Private)” as the penultimate word;
    - B. in the case of a co-operative company, the word “Co-operative” or the abbreviation “Co-op”;

- (ii) the objects of the company, if the promoter wishes to specify them;
  - (iii) that the liability of the members is limited;
  - (iv) the number of shares with which the company proposes to be registered;
- (b) by guarantee, the memorandum shall be in the English language or any other prescribed language and must state—
- (i) the name of the company;
  - (ii) the objects of the company;
  - (iii) that the liability of the members is limited;
  - (iv) that each member undertakes to contribute to the assets of the company in the event of its being wound up while he or she is a member or within one year after he or she ceases to be a member for payment of the debts and liabilities of the company contracted before he or she ceases to be a member and of the costs, charges and expenses of the winding up and for the adjustment of the rights of the contributories among themselves such amount as may be required, not exceeding a specified amount.

(2) No subscriber to the memorandum of a company limited by shares may take less than one share.

(3) Each subscriber to the memorandum of a company limited by shares must state in words opposite to his or her name the number of shares he or she takes:

Provided that where the subscriber is—

- (a) a company, association, syndicate or other corporate body, a director of the company or the authorised representative of any other corporate body; or
- (b) a partnership, one of the partners; or
- (c) a minor, the guardian;

as the case may be, shall indicate in their handwriting (or by affixing their digital signature thereto) the number of shares taken.

(4) A public company which converts itself into a private company in terms of section 86 (“Statement in lieu of prospectus on ceasing to be private company”) (3) shall, within one month after the conversion, insert the term “(Private)” before the word “Limited” in the name.

(5) The insertion of the term “(Private)” in the name of the company in compliance with subsection (4) shall not be regarded as a change of name for the purpose of section 26 (“Change of name”)(1).

(6) If the memorandum is submitted in an officially recognised language such memorandum must be accompanied by a translation of the same in English authenticated by a person who in the opinion of the Registrar is competent to translate such language into English.

## **78 Signing of memorandum**

The memorandum shall be printed and shall be signed and dated, in the presence of at least one attesting witness, by each subscriber and opposite every such signature of a subscriber or a witness there shall be typed his or her full name, occupation, and full residential or business address:

Provided that where the subscriber is—

- (a) a company, association, syndicate or other corporate body, a director of the company or the authorised representative of any other corporate body; or
- (b) a partnership, one of the partners; or
- (c) a minor, the guardian;
- (d) a person with a disability impairing his or her ability to sign, his or her representative;

as the case may be, shall sign the memorandum.

## 79 Alteration of memorandum

(1) A company may not alter the conditions contained in its memorandum except in the cases and in the mode and to the extent for which express provision is made in this Act.

(2) A company may by special resolution—

- (a) subject to the Insolvency Act, alter any condition contained in its memorandum which could lawfully have been contained in articles of association:

Provided that this paragraph shall not apply where the memorandum itself provides for or prohibits the alteration of all or any of the said conditions, and shall not authorise any variation or abrogation of the special rights of any class of members;

- (b) alter its memorandum with respect to the objects of the company:

Provided that, if the name of the company describes the main objects of that company and such objects are to be altered so that the name of the company would no longer describe its main objects, the memorandum shall not be so altered unless the name of the company is changed accordingly in terms of section 26 (“Change of name”).

(3) Notwithstanding subsection (2), if an application (hereafter called a “cancellation application”) is made to the court in accordance with this section for an alteration in terms of subsection (2)(a) or (b) to be cancelled, the alteration shall not have effect except in so far as it is confirmed by the court.

(4) A cancellation application may be made—

- (a) by the holders of not less in the aggregate than five *per centum* in nominal value of the company’s issued share capital or any class thereof; or
- (b) by a group of shareholders referred to in section 80 (“Group voting on amendments to memorandum”):

Provided that a cancellation application shall not be made by any person who, or group of shareholders referred to in section 80 that, has consented to or voted in favour of the alteration.

(5) A cancellation application shall be made within one month after the date on which the resolution altering the condition contained in the memorandum or the company’s objects, as the case may be, was passed, and may be made on behalf of the persons entitled to make the application by such one or more of their number as they may appoint in writing for the purpose.

(6) On being seized of a cancellation application the court may make an order confirming the alteration either wholly or in part and on such terms and conditions as it thinks fit, and may, if it thinks fit, adjourn the proceedings in order that an arrangement may be made to the satisfaction of the court for the purchase of the interests of dissentient

members, and may give such directions and make such orders as it may think expedient for facilitating or carrying into effect any such arrangement:

Provided that no part of the capital of the company shall be expended in any such purchase.

(7) In the case of a company which is, by virtue of a licence from the Minister, exempt from the obligation to use the word "Limited" as part of its name, a resolution altering the company's objects shall require the same notice to the Minister as to members of the company, and where such a company alters its objects the Minister, unless he or she sees fit to revoke the licence, may vary the licence by making it subject to such conditions and regulations as he or she thinks fit, in place of or in addition to the conditions and regulations, if any, to which the licence was formerly subject.

(8) Where a company passes a resolution altering its objects—

- (a) if no application is made with respect thereto under this section, it shall within one month from the end of the period for making such an application deliver to the Registrar a copy of its memorandum as altered; and
- (b) if such an application is made, it shall—
  - (i) forthwith give notice of that fact to the Registrar; and
  - (ii) within one month from the date of any order cancelling or confirming the alteration, deliver to the Registrar a certified copy of its memorandum as altered.

Provided that the court may by order at any time extend the time for the delivery of documents to the Registrar under this paragraph for such period as the court may think proper.

(9) If a company makes default in giving notice or delivering any document to the Registrar as required by subsection (8), the Registrar may issue a category 3 civil penalty order upon the defaulting company.

(10) The validity of an alteration of a company's memorandum with respect to the objects of the company shall not be questioned on the ground that it was not authorised by subsection (2) except in proceedings taken for the purpose, whether under this section or otherwise, before the expiration of one month after the date of the resolution in that behalf; and where any such proceedings are taken otherwise than under this section, subsections (8) and (9) shall apply in relation thereto as if they had been taken under this section and as if an order declaring the alteration invalid were an order cancelling it and as if an order dismissing the proceedings were an order confirming the alteration.

## **80 Group voting on amendments to memorandum**

The holders of any type or class of shares shall be entitled to vote as a group on an amendment to the memorandum of association (that is to say, a majority of the votes of the group on the question whether to amend the memorandum shall be deemed to be the totality of the votes of the group) if the memorandum of association so provides or if the change would—

- (a) increase or decrease the number of authorised shares of such group;
- (b) change any of the rights or preferences of the shares of such group;
- (c) create a right of the holders of any other shares to exchange or convert their shares into shares of the type or class held by such group;
- (d) change the shares held by such group into a different number of shares or into shares of another type or class; or



- (e) create a new type or class of shares having rights or preferences superior or substantially equal to those of such group, or increase the rights and preferences of any type or class of shares having rights and preferences substantially equal to or superior to those of such group, or increase the rights and preferences of any type or class of shares having rights and preferences subordinate to those of such group if such increase would then make them substantially equal or superior to those of such group; or
- (f) limit or deny the existing pre-emptive rights of the shares of such group; or
- (g) cancel or otherwise affect accumulated dividends on the shares of such group; or
- (h) limit or deny the voting rights of such group; or
- (i) otherwise change the rights or preferences of the shares held by such group so as to affect them adversely.

### **81 Articles of association and alteration thereof**

(1) Articles of association signed by the subscribers to the memorandum of a company and prescribing its internal rules may be registered with such memorandum.

(2) Articles of association may adopt all or any of the internal rules contained in Table A (for public companies), B (private companies limited by shares) or C (private companies limited by guarantee) in the Sixth Schedule ("Model Articles and By-Laws").

(3) In the case of—

- (a) a public company, if articles of association are not registered with the memorandum of association, or if articles of association are registered in so far as the articles do not exclude or modify the internal rules contained in Table A, those internal rules shall, so far as applicable, be the internal rules of the company in the same manner and to the same extent as if they were contained in duly registered articles;
- (b) a private company, if articles of association are not registered with the memorandum of association, or if articles of association are registered in so far as the articles do not exclude or modify the internal rules contained in Table B, those internal rules shall, so far as applicable, be the internal rules of the company in the same manner and to the same extent as if they were contained in duly registered articles;
- (c) a company limited by guarantee, if articles of association are not registered with the memorandum of association, or if articles of association are registered in so far as the articles do not exclude or modify the internal rules contained in Table C, those internal rules shall, so far as applicable, be the internal rules of the company in the same manner and to the same extent as if they were contained in duly registered articles;

(4) Any provision contained in a company's articles shall be void in so far as it would have the effect either—

- (a) of excluding the right to demand a poll at a general meeting on any question other than the election of the chairperson of the meeting or the adjournment of the meeting; or
- (b) of making ineffective a demand for a poll on any such question which is made—
  - (i) by not less than five members having the right to vote at the meeting; or
  - (ii) by a member or members representing not less than one-tenth of the total voting rights of all the members having the right to vote at the meeting; or

- (iii) by a member or members holding shares in the company conferring a right to vote at the meeting, being shares on which an aggregate sum has been paid up equal to not less than one-tenth of the total sum paid up on all the shares conferring that right.

(5) The articles shall be in English or any other officially recognised language and shall be signed and dated by each subscriber to the memorandum in the presence of at least one attesting witness and opposite every such signature of a subscriber or a witness there shall be written in legible characters his or her full name, occupation and full residential or business address:

Provided that, if any other official language is used for the articles, the articles shall be accompanied by a translation of the same in English, authenticated by a person who in the opinion of the Registrar is competent to translate such language into English.

(6) Subject to the conditions contained in its memorandum, a company may by special resolution alter or add to its articles and any alteration or addition so made in the articles shall be as valid as if originally contained therein, and be subject in like manner to alteration by special resolution.

## **82 Power to dispense with “Limited” in certain cases**

(1) Where the Minister is satisfied that an association exists for any lawful purpose, the pursuit of which is calculated to be in the interests of the public, or any section of the public, and intends to apply its profits, if any, or other income in promoting its objects, and to prohibit the payment of any dividend to its members, and that it is desirable that such association should be incorporated, the Minister may, if the association submits to him or her a memorandum complying with section 74 (“Indemnity and civil and criminal liability of officers and auditors of companies and members of private business corporations”), by licence signed by him or her, directing that the association be registered as a company without the addition of the word “Limited” to its name, and the association may thereupon be registered accordingly.

(2) The association, upon such registration, shall enjoy all the privileges of a company and be subject to all the obligations thereof, except those of using the word “Limited” as any part of its name and of complying with sections 115 (“Prohibition of allotment unless minimum subscription received”), 116 (“Prohibition of allotment in certain cases unless statement in lieu of prospectus delivered to Registrar”), 121 (“Register and return as to allotments”), 158 (“Restrictions on commencement of business”), 165 (“Annual return to be made by company”), 166 (“Statutory meeting and statutory report”), 170 (“Right to receive copy of statement of financial position and auditor’s report”) and 199 (“Restrictions on appointment or advertisement of director; share qualifications of directors”)

(3) Subject to subsection (4), a licence under this section may at any time be revoked by the Minister and upon revocation the Registrar shall enter the word “Limited” at the end of the name of the association upon the register, and the association shall thereupon cease to enjoy the exemptions and privileges granted by this section.

(4) Before a licence is so revoked the Minister shall give to the association notice in writing of his or her intention, and shall afford it an opportunity to submit in writing arguments in opposition to revocation.

(5) Any application to the court to review the Minister’s decision in terms of subsection (3) must be made no later than thirty days after the company in question receiving notice of the Minister’s decision to that effect.

(6) Whenever it is proved to the satisfaction of the Minister that the objects of a company are those defined in subsection (1) and objects incidental or conducive

thereto, and that by its constitution the company is required to apply its profits, if any, or other income in promoting its objects and is prohibited from paying any dividend to its members, the Minister may by licence authorise the company to change its name by special resolution by the omission therefrom of the word “Limited”, and as from the date of the receipt of the certificate of the Registrar recording the registration of such special resolution passed pursuant to such licence the company shall be deemed to be a company licensed under this section.

(7) Section 26 (“Change of name”) shall apply to a change of name under this section.

(8) A licence by the Minister under this section may be granted on such conditions and subject to such regulations as he or she may think fit, and those conditions and regulations shall be binding upon the association or company and shall, if the Minister so directs, be inserted in the memorandum and articles, or in one of those documents.

(9) No alteration of the memorandum or articles of association in respect of which a licence under this section is in force shall take effect until such alteration is approved by the Minister, and if the Minister approves the alteration he or she may vary the licence by making it subject to such conditions and regulations as he or she thinks fit, *in lieu* of or in addition to the conditions and regulations, if any, to which the licence was formerly subject.

#### *Sub-Part B: Membership of company*

### **83 Membership of company; personal liability where business carried on with no members**

(1) Section 20 (“Effect of registration of constitutive documents and limitation of liability of members of companies and private business corporations”) (3)(a) describes how membership in a company is commenced, evidenced and terminated.

(2) If a company has no members and carries on business for more than six months without members, any person who knowingly causes it to do so shall be liable, jointly and severally with the company, for all debts incurred by it after the six months have elapsed.

### **84 Membership of holding company**

(1) Except as provided under this section—

- (a) a body corporate cannot be a member of a company that is its holding company, and
- (b) any allotment or transfer of shares in a company to its subsidiary is void.

(2) Subject to subsection (3), subsection (1) shall apply in relation to a nominee for a body corporate which is a subsidiary, as if references in subsections (1) to such a body corporate included references to a nominee for it.

(3) The prohibition in subsection (1) does not apply where the subsidiary is concerned only—

- (a) as personal representative; or
- (b) as trustee;

unless, in the latter case, the holding company or a subsidiary of it is beneficially interested under the trust.

(4) For the purpose of ascertaining whether the holding company or a subsidiary is so interested, there shall be disregarded—

- (a) any interest held only by way of security for the purposes of a transaction entered into by the holding company or subsidiary in the ordinary course of a business that includes the lending of money;
- (b) any interest within—
  - (i) subsection (5) (a) (interests to be disregarded: residual interest under pension scheme or employees' share scheme); or
  - (ii) subsection (5)(b) (interests to be disregarded: employer's rights of recovery under pension scheme or employees' share scheme);
- (c) any rights that the company or subsidiary has in its capacity as trustee, including in particular—
  - (i) any right to recover its expenses or be remunerated out of the trust property; and
  - (ii) any right to be indemnified out of the trust property for any liability incurred by reason of any act or omission in the performance of its duties as trustee.

(5) Where shares in a company are held on trust for the purposes of a pension scheme or employees' share scheme, there shall be disregarded for the purposes of subsection (3) any—

- (a) residual interest that has not vested in possession; or
- (b) charge or lien on, or set-off against, any benefit or other right or interest under the scheme for the purpose of enabling the employer or former employer of a member of the scheme to obtain the discharge of a monetary obligation due to him or her from the member.

(6) In subsections (4) and (5)—

“employee” shall be read as if a director of a company were employed by it;

“employees' share scheme” means an “approved employee share ownership scheme or trust” as defined in section 2 of the Income Tax Act [*Chapter 23:06*] or an employee share ownership scheme or trust as defined in the Indigenisation and Economic Empowerment Act [*Chapter 14:33*] (No. 14 of 2007);

“pension scheme” means a scheme for the provision of benefits consisting of or including relevant benefits for or in respect of employees or former employees;

“relevant benefits” means any pension, lump sum, gratuity or other like benefit given or to be given on retirement or on death or in anticipation of retirement or, in connection with past service, after retirement or death;

“residual interest” means a right of the company or subsidiary (“the residual beneficiary”) to receive any of the trust property in the event of—

- (a) all the liabilities arising under the scheme having been satisfied or provided for; or
- (b) the residual beneficiary ceasing to participate in the scheme; or
- (c) the trust property at any time exceeding what is necessary for satisfying the liabilities arising or expected to arise under the scheme;

“vest in possession”, in relation to a residual interest, means—

- (a) in a case within paragraph (a) of the definition of “residual interest”, the occurrence of the event mentioned there (whether or not the amount of the property receivable pursuant to the right is ascertained);

- (b) in a case within paragraph (b) or (c) of the definition of “residual interest”, when the residual beneficiary becomes entitled to require the trustee to transfer to him or her any of the property receivable pursuant to the right.

(7) In subsection (6), in the definition of “residual interest”—

- (a) the reference to a right includes a right dependent on the exercise of a discretion vested by the scheme in the trustee or another person, and
- (b) the reference to liabilities arising under a scheme includes liabilities that have resulted, or may result, from the exercise of any such discretion.

*Sub-Part C: Private companies*

**85 Definition of private company and consequences of default in complying with conditions for private company**

(1) In this Act—

“private company” means a company other than a co-operative company, which by its articles—

- (a) restricts the right to transfer its shares; and
- (b) limits the number of its members to fifty, not including persons who are in the employment of the company and persons who, having been formerly in the employment of the company, were while in that employment and have continued, after the termination of that employment, to be members of the company; and
- (c) prohibits any invitation to the public to subscribe for any shares or debentures of the company.

(2) Where two or more persons hold one or more shares in a company jointly they shall, for the purposes of this section, be treated as a single member.

(3) With the sanction of a special resolution and subject to confirmation by the High Court, a public company may convert itself into a private company.

(4) If a company registered as a private company—

- (a) knowingly permits its membership to exceed fifty members (other than members who are its employees or former employees as contemplated in paragraph (b) of the definition of the “private company”) it shall be guilty of an offence and liable to a fine not exceeding level two for every day during which it is in contravention of this paragraph; or
- (b) invites members of the public to subscribe for its shares or debentures, the provisions of sections 108 (“Civil liability for misstatements in prospectus”) and 111 (“Document containing offer of shares or debentures for sale to be deemed to be prospectus”) to 114 (“Restrictions on offering shares for subscription or sale”) shall apply to it as if it was a public company, without affecting the liability of the private company under subsection (5).

(5) If it comes to the notice of the Registrar that a company is in default of subsection (4)(a) or (b) or has not complied with the restriction referred to in paragraph (a) of the definition of “private company” in subsection (1) then, independently of a prosecution, if any, for an offence under subsection (4)(a) or (b), the Registrar may serve a category 1 civil penalty order upon the defaulting company.

**86 Statement in lieu of prospectus on ceasing to be private company**

(1) If a company, being a private company, alters its articles in such manner that they no longer include the provisions which, under section 85 (“Definition of private company and consequences of default in complying with conditions for private company”), are required to be included in the articles of a company in order to constitute it a private company, the company shall, as on the date of the alteration, cease to be a private company and shall, within a period of one month after the said date, remove the term “(Private)” from its name and deliver to the Registrar for registration a statement in lieu of prospectus in the form and containing the particulars set out in Part I of the Second Schedule and, in the cases mentioned in Part II of that Schedule, setting out the reports specified therein, and the said Parts I and II shall have effect subject to the provisions contained in Part III of that Schedule:

Provided that a statement in lieu of prospectus need not be delivered if within the said period a prospectus relating to the company which complies with the Eighth Schedule is issued and is lodged with the Registrar as required by section 106 (“Registration of prospectus”).

(2) Every statement in lieu of prospectus delivered under subsection (1) shall, where the persons making any such report as aforesaid have made therein or have, without giving the reasons, indicated therein any such adjustments as are mentioned in paragraph 5 in Part III of the said Schedule, have endorsed thereon or attached thereto a written statement signed by those persons setting out the adjustments and giving reasons therefor.

(3) If a company is in default of subsection (1), the Registrar may serve a category 1 civil penalty order upon the defaulting company.

(4) Section 115 (“Prohibition of allotment in certain cases unless statement in lieu of prospectus delivered to Registrar”) (5) and (6) shall apply, with such changes as may be necessary, to every statement in lieu of prospectus lodged under this section as they apply to a statement in lieu of prospectus lodged under that section.

(5) The removal of the term “(Private)” from the name of a company in compliance with subsection (1) shall not be regarded as a change of name for the purposes of section 26 (“Change of name”)(1).

*Sub-Part D: Co-operative companies***87 Definition of co-operative company and consequences of default in complying with conditions for co-operative company**

(1) A co-operative company is a company, other than a private company, which—

- (a) in its memorandum states that its main object is one or other or both of the following—
  - (i) the provision for its members of a service facilitating the production or marketing of agricultural produce or livestock;
  - (ii) the sale of goods to its members;and
- (b) by its articles—
  - (i) restricts the right to transfer its shares; and
  - (ii) provides that its ordinary shares shall be of one class only; and

- (iii) subject to section 89 (“Voting rights of members of the co-operative company”), fixes a limit to the number of shares which may be held by any one member; and
- (iv) regulates the voting rights of its members in accordance with section 89; and
- (v) limits the dividend which may be paid on its shares to a rate not exceeding ten *per centum per annum* on the amounts paid up thereon; and
- (vi) provides for the distribution of a part or the whole of its profits amongst its members on the basis of certain or all of their business transactions with the company.

(2) With the sanction of a special resolution and subject to confirmation by the court, a public company, which is not a co-operative company, may convert itself into a co-operative company.

(3) For the purposes of subsection (1)(a) —

“member”, in relation to a co-operative company, includes any person who is a member of a co-operative company which is a member of the first-mentioned co-operative company.

(4) Where the memorandum and articles of a company include the provisions which under subsection (1) are required to be included in the memorandum and articles of a company in order to constitute it a co-operative company but default is made in complying with any of those provisions the company shall cease to be entitled to the privileges and exemptions conferred on co-operative companies by this Act and the provisions thereof shall in all respects apply to the company as if it were not a co-operative company.

(5) If it comes to the notice of the Registrar that a company is in default of subsection (4), the Registrar may serve a category 1 civil penalty order upon the defaulting company:

Provided that the Registrar, on being satisfied that the failure to comply with the conditions was accidental or due to inadvertence or to some other sufficient cause, may waive the civil penalty and relieve the company from the consequences referred to in subsection (4).

(6) If no civil penalty order has been served in relation to the foregoing default, or, having been served, it is appealed in terms of section 296 (“Additional due process requirements before service of certain civil penalty orders”)(3), the court, on being satisfied that the failure to comply with the conditions was accidental or due to inadvertence or to some other sufficient cause, or that on other grounds it is just and equitable to grant relief, may, on the application of the company or any other person interested and on such terms and conditions as seem to the court just and expedient, order that the company be relieved from such consequences as aforesaid.

## **88 Co-operative company to maintain reserve fund**

(1) Every co-operative company shall maintain a reserve fund which may be used for any purpose for which the share capital of the co-operative company may be used but which shall not be available for distribution to members except in the event of the winding-up of the co-operative company.

(2) The articles of the co-operative company shall provide for the creation and operation of its reserve fund and for the method of determining the amount to be appropriated thereto from the annual surplus of the co-operative company.

## 89 Voting rights of members of co-operative company

(1) Subject to subsection (2), every member of a co-operative company shall have at least one vote in respect of the conduct of the affairs of the co-operative company but, save in the case where the membership of the co-operative company is less than one hundred members or is restricted solely to other co-operative companies, no member may exercise more than one *per centum* of the total votes in respect of the conduct of the affairs of the co-operative company which are accorded to all the members thereof:

Provided that—

- (i) the articles of a co-operative company may provide that votes shall be accorded to the members thereof in relation to their shareholding in the co-operative company or their transactions with the co-operative company during a specified period or to both such factors but in no case shall a member be entitled to be accorded more than six votes in respect of either such factor or twelve votes in respect of both;
- (ii) if a co-operative company forms a subsidiary co-operative company or acquires another co-operative company as its subsidiary, the first-mentioned co-operative company shall be entitled to exercise in respect of the conduct of the affairs of the subsidiary such number or percentage of the total votes accorded to all members of the subsidiary which does not exceed such number or percentage as may be prescribed;
- (iii) in the case of a co-operative company, where the membership is less than one hundred members and is not restricted solely to other co-operative companies, no member thereof shall have more than one vote in the conduct of the affairs of the co-operative company unless provision has been made in the articles of the co-operative company as envisaged by proviso (i).

(2) The holder of a preference share in a co-operative company shall have no vote in respect of the conduct of the affairs of the co-operative company:

Provided that the articles of the co-operative company may provide that such a holder may have a vote, subject to subsection (1), in respect of matters affecting the rights of any such holder of any such preference shares or the dissolution of the co-operative company.

## 90 Application of surplus assets on liquidation of co-operative company

If in any winding up of a co-operative company after the application of the assets thereof in terms of Part XV (“Costs of liquidation and application of Free Residue”) of the Insolvency Act [*Chapter 6:07*], there remains any surplus of assets the liquidator shall distribute such surplus, including the capital reserve and any other reserves of the co-operative company, in the following order—

- (a) amongst the holders of the preference shares of the co-operative company which are preferent as to capital, if any, in repayment of the amounts paid up by them on such preference shares;
- (b) amongst the holders of shares of the co-operative company, not referred to in paragraph (a), in repayment of the amounts paid up by them on such shares;
- (c) if the articles of the co-operative company so provide, in payment to the holders of the preference shares of the co-operative company, if any, of a dividend, which shall not in any case exceed a rate of ten *per centum per annum* on the amounts paid up thereon, for any period for which no disposal of profits was made;



- (d) if the articles of the co-operative company so provide, in payment to the holders of the ordinary shares of the co-operative company of a dividend, which shall not in any case exceed a rate of ten *per centum per annum* on the amounts paid up thereon, for any period for which no disposal of profits was made;
- (e) any remaining surplus shall be paid to existing members in proportion to the number of ordinary shares in the co-operative company held by each of them multiplied by the number of completed months which has elapsed since—
  - (i) the date of the issue of such shares; or
  - (ii) the date of registration of such shares in the name of the present holders;

whichever of such cases may be provided for in relation to any particular circumstances in the articles of the co-operative:

Provided that, where there are different amounts paid up on the shares in question, the proportion payable shall be adjusted accordingly.

## 91 Special method for reduction of share capital

Notwithstanding, but without derogation from, this Act a share in a co-operative company may be cancelled and the amount paid up thereon refunded in such circumstances relating to the termination of membership or otherwise as are authorised in its articles:

Provided that no such cancellation of a share or refund of the amount paid up thereon shall—

- (a) affect the liability of a contributory on insolvency, that is to say, every person liable to contribute to the assets of a company in the event of its being wound up (and, for the purposes of all proceedings for determining and all proceedings prior to the final determination of the persons who are to be deemed contributories, includes any person alleged to be a contributory);
- (b) be made unless there is appropriated from the free reserves, surplus or profit of the co-operative company and added to its capital reserve an amount equal to the nominal value of such cancelled share.

## 92 Disposal of produce of members to or through co-operative company

(1) A co-operative company which has as one of its objects the disposal of any produce or livestock of its members may provide in its articles or may otherwise contract with its members—

- (a) that no member shall dispose of any such produce or livestock or any part of such produce or livestock by sale or barter other than by sale to or through the co-operative company;
- (b) that any member who contravenes any such articles or commits a breach of any such contract shall pay to the co-operative company as liquidated damages a sum ascertained or assessed in such manner as is provided in the articles or contract.

(2) Whenever any produce or livestock or any part thereof is delivered to a co-operative company by a member thereof in accordance with its articles or a contract referred to in subsection (1) for the purpose of disposal to or through the co-operative company or its agents, whether statutory bodies or otherwise, no creditor of the member delivering the same may attach or charge such produce or livestock or part thereof or the proceeds of the sale thereof that remain under the control of the co-operative company.

**93 Shares or interest of members: charge and set-off, and immunity from attachment or sale in execution**

(1) A co-operative company shall have a charge upon the shares, interest in the capital and deposits of a member, past member or deceased member and upon any dividend, bonus or profits payable to a member, past member or estate of a deceased member in respect of any debt due to the co-operative company from such member, past member or estate and may set-off any sum credited or payable to a member, past member or estate of a deceased member in or towards payment of any such debt.

(2) Subject to subsection (1), the share or interest of a member in the capital of a co-operative company shall not be liable to attachment or sale under an order of any court in respect of any debt or liability incurred by such member:

Provided that nothing contained in this subsection shall prohibit the cancellation of the share or the transfer or sale of the share or interest of a member in accordance with the articles of such co-operative company.

**94 Company ceasing to be co-operative company**

(1) If a company being a co-operative company alters its memorandum or articles in such a manner that they no longer include the provisions which, under section 85 (“Definition of co-operative company and consequences of default in complying with conditions for co-operative company”) are required to be included in the memorandum and articles of a company in order to constitute it a co-operative company, the co-operative company shall as on the date of the alteration cease to be a co-operative company and shall within a period of one month after the said date remove the term “Co-operative” or any contraction or imitation thereof from its name.

(2) The removal of the term “Co-operative” or any contraction or imitation thereof from the name of a company in terms of subsection (1) shall not be regarded as a change of name for the purposes of section 26 (“Change of name”) (1).

(3) If it comes to the notice of the Registrar that a company is in default of subsection (1), the Registrar may serve a category 1 civil penalty order upon the defaulting company.

**PART II****SHARE CAPITAL AND DEBENTURES***Sub-Part A: General nature of share capital of companies***95 Legal nature of shares and requirement to have shareholders**

(1) A share issued by a company is movable property and transferable in any manner provided for by the articles of the company or recognised by this Act or any other law.

(2) Subject to section 304 (“Transitional provisions in relation to par value shares, treasury shares, capital accounts and share certificates”), a share does not have a nominal or par value.

(3) A company may not issue shares to itself as provided in section 128 (“Power of company to purchase own shares”).

(4) An authorised share of a company has no rights associated with it until it has been issued.

(5) Shares of a company that have been issued and subsequently—

- (a) acquired by that company, as contemplated in section 129 (“Authority required by company to purchase its own shares”); or
- (b) surrendered to that company in the exercise of appraisal rights in terms of section 233 (“Dissenting shareholders’ appraisal rights”);

have the same status as treasury shares, that is to say, shares that have been authorised but not issued.

(6) Despite the repeal of the Companies Act [*Chapter 24:03*], a share issued by a pre-existing company, and held by a shareholder immediately before the effective date, continues to have all of the rights associated with it immediately before the effective date, irrespective of whether those rights existed in terms of the company’s memorandum or articles, or in terms of that Act, subject only to—

- (a) amendments to that company’s memorandum or articles after the effective date; and
- (b) the operation of subsection (5); and
- (c) the regulations contemplated in section 303 (“Repeals, re-registration of companies and PBCs, general transitional provisions and savings”) (30).

## 96 Authorisation for shares

(1) A company’s memorandum—

- (a) must set out the classes of shares, and the number of shares of each class, that the company is authorised to issue; and
- (b) must set out, with respect to each class of shares—
  - (i) a distinguishing designation for that class; and
  - (ii) the preferences, rights, limitations and other terms associated with that class, subject to paragraph (d);and
- (c) may authorise a stated number of unclassified shares, which are subject to classification by the board of directors in accordance with subsection (3)(c); and
- (d) may set out a class of shares—
  - (i) without specifying the associated preferences, rights, limitations or other terms of that class; or
  - (ii) for which the board of directors must determine the associated preferences, rights, limitations or other terms; or
  - (iii) which must not be issued until the board directors has determined the associated preferences, rights, limitations or other terms, as contemplated in subparagraph (ii).

(2) The authorisation and classification of shares, the numbers of authorised shares of each class, and the preferences, rights, limitations and other terms associated with each class of shares, as set out in a company’s memorandum, may be changed only by—

- (a) an amendment of the memorandum by special resolution of the shareholders; or
- (b) the board directors, in the manner contemplated in subsection (3), except to the extent that the memorandum provides otherwise.

(3) Except to the extent that a company’s memorandum provides otherwise, the company’s board may—

- (a) increase or decrease the number of authorised shares of any class of shares on a *pro rata* basis to the shareholders of one or more classes of those shares, by the use of any one or more of the following expedients—
- (i) consolidate and divide all or any part of its share capital into shares of larger amount than its existing shares;
  - (ii) convert all or any of its paid-up shares into stock and reconvert such stock into paid-up shares of any denomination;
  - (iii) subdivide its shares, or any of them, into shares of smaller amount than is fixed by the memorandum, so, however, that in the subdivision the proportion between the amount paid and the amount, if any, unpaid on each reduced share shall be the same as it was in the case of the share from which the reduced share is derived;
  - (iv) cancel shares which at the time of the passing of the resolution in that behalf have not been taken or agreed to be taken by any person and diminish the amount of its share capital by the amount of the shares so cancelled;
- or
- (b) reclassify any classified shares that have been authorised but not issued;
- or
- (c) classify any unclassified shares that have been authorised as contemplated in subsection (1)(c), but are not issued; or
- (d) determine the preferences, rights, limitations or other terms of shares in a class contemplated in subsection (1)(d).

(4) If the board of directors acts pursuant to its authority contemplated in subsection (3), the company must file a notice of amendment of its memorandum, setting out the changes effected by the board of directors.

### **97 Preferences, rights, limitations and other share terms**

(1) All of the shares of any particular class authorised by a company have preferences, rights, limitations and other terms that are identical to those of other shares of the same class, except to the extent that the company's memorandum provides otherwise.

(2) Each issued share of a company, regardless of its class, has associated with it one general voting right, except to the extent provided otherwise by—

- (a) this Act; or
- (b) the preferences, rights, limitations and other terms determined by or in terms of the company's memorandum in accordance with section 96 ("Authorisation for shares").

(3) Despite anything to the contrary in a company's memorandum—

- (a) every share issued by that company has associated with it an irrevocable right of the shareholder to vote on any proposal to amend the preferences, rights, limitations and other terms associated with that share; and
- (b) a company must always have ordinary shares and in addition to any class of share as may be prescribed in the company's constitutive documents.

(4) If a company's memorandum has established more than one class of shares the memorandum, in setting out the preferences, rights, limitations and other terms of those classes of shares, must provide that—

- (a) for each particular matter that may be submitted for a decision to shareholders of the company, at least one class of the company's shares has voting rights that may be exercised on that matter; and
- (b) the holders of at least one class of the company's shares, irrespective of whether it is the same as any class contemplated in paragraph (a), are entitled to receive the net assets of the company upon its liquidation.

(5) Subject to this Act or any other enactment a company's memorandum may establish, for any particular class of shares, preferences, rights, limitations or other terms that—

- (a) bestow special, conditional or limited voting rights; or
- (b) provide for shares of that class to be redeemable, subject to the requirements of section 129 (" Authority required by company to purchase its own shares"), or convertible, as specified in the memorandum—
  - (i) at the option of the company, the shareholder, or another person at any time, or upon the occurrence of any specified contingency; or
  - (ii) for cash, indebtedness, securities or other property; or
  - (iii) at prices and in amounts specified, or fixed in accordance with a formula determined by the board; or
  - (iv) subject to any other terms set out in the company's memorandum;or
- (c) entitle the shareholders to distributions calculated in any manner, including dividends that may be cumulative, non-cumulative, or partially cumulative; or
- (d) provide for shares of that class to have preference over any other class of shares with respect to distributions, or rights upon the final liquidation of the company.

(6) The memorandum of a company may provide for preferences, rights, limitations or other terms of any class of shares of that company to vary in response to any objectively ascertainable external fact or facts.

(7) For the purpose of subsection (6)—

- (a) "external fact or facts" includes the occurrence of any event, a variation in any fact, benchmark or other point of reference, a determination or action by the company, its board, or any other person, an agreement to which the company is a party, or any other document; and
- (b) the manner in which a fact affects the preferences, rights, limitations or other terms of shares must be expressly determined by or in terms of the company's memorandum, in accordance with section 96 (" Authorisation for shares").

(8) If the memorandum of a company has been amended to materially and adversely alter the preferences, rights, limitations or other terms of a class of shares, any holder of those shares is entitled to seek relief in terms of section 233 (" Dissenting shareholders and appraisal rights") if that shareholder—

- (a) notified the company in advance of the intention to oppose the resolution to amend the memorandum; and
- (b) was present at the meeting, and voted against that resolution.

## 98 Issuing shares

(1) The board of directors may resolve to issue shares of the company at any time, but only within the classes, and to the extent, that the shares have been authorised by or in terms of the company's memorandum, in accordance with section 96 ("Authorisation of shares").

(2) If a company issues shares—

- (a) that have not been authorised in accordance with section 96; or
- (b) in excess of the number of authorised shares of any particular class;

the issuance of those shares may be retroactively authorised in accordance with section 96.

(3) If a resolution seeking to retroactively authorise an issue of shares, as contemplated in subsection (2), is not adopted when it is put to a vote—

- (a) the share issue is a nullity to the extent that it exceeds any authorisation; and
- (b) the company must return to any person the fair value of the consideration received by the company in respect of that share issue to the extent that it is nullified, together with interest in accordance with the Prescribed Rate of Interest Act [*Chapter 8:10*], from the date on which the consideration for the shares was received by the company, until the date on which the company complies with this paragraph; and
- (c) any certificate evidencing a share so issued and nullified, and any entry in the shareholders' register in respect of such an issue, is void; and
- (d) a director of the company is liable to the extent set out in section 197 ("Liability of directors and prescribed officers") (3)(e)(i) if the director—
  - (i) was present at a meeting when the board approved the issue of any unauthorised shares, or participated in the making of such a decision in terms of section 196 ("Directors acting other than at meeting"); and
  - (ii) failed to vote against the issue of those shares, despite knowing that the shares had not been authorised in accordance with section 96.

## 99 Subscription for additional shares in private companies

(1) This section—

- (a) does not apply to a public company or State-owned company, except to the extent that the company's memorandum provides otherwise; and
- (b) applies to a private company with respect to any issue of its shares, other than—
  - (i) shares issued—
    - A. in terms of options or conversion rights; or
    - B. as contemplated in section 100 ("Consideration for shares") (5) to (7); or
  - (ii) capitalisation shares issued as contemplated in section 137 ("Capitalisation shares").

(2) If a private company proposes to issue any shares, other than as contemplated in subsection (1)(b), each shareholder of that private company has a right, before any other person who is not a shareholder of that company, to be offered and, within a reasonable time to subscribe for, a percentage of the shares to be issued equal to the voting power of that shareholder's general voting rights immediately before the offer was made.

(3) A private company's memorandum may limit, negate, restrict or place conditions upon the right set out in subsection (2), with respect to any or all classes of shares of that company.

(4) Except to the extent that a private company's memorandum provides otherwise—

- (a) in exercising a right in terms of subsection (2), a shareholder may subscribe fewer shares than the shareholder would be entitled to subscribe under that subsection; and
- (b) shares not subscribed by a shareholder within the reasonable time contemplated in subsection (2), may be offered to other persons to the extent permitted by the memorandum.

### 100 Consideration for shares

(1) The board of directors may issue authorised shares only—

- (a) for adequate consideration to the company, as determined by the board of directors; or
- (b) in terms of conversion rights associated with previously issued shares or debentures of the company; or
- (c) as a capitalisation share as contemplated in section 137 ("Capitalisation shares").

(2) Before a company issues any particular shares, the board must determine the consideration for which, and the terms on which, those shares will be issued.

(3) The consideration referred to in subsection (2) may be in money, in other tangible or intangible property, other rights having monetary value, a binding obligation to pay money, or services previously performed:

Provided that the value of any non-monetary consideration shall be verified by the opinion of an independent expert, which opinion has been made available to all existing members before any shares are issued for such non-monetary consideration and shall, in addition, be approved by all such existing members.

(4) A determination by the board of directors in terms of subsection (2) as to the adequacy of consideration for any shares may not be challenged on any basis other than in terms of section 195 ("Directors and their functions and responsibilities").

(5) Subject to subsections (6) to (8), when a company has received the consideration approved by its board of directors for the issuance of any shares—

- (a) those shares are fully paid; and
- (b) the company must issue those shares and cause the name of the holder to be entered on the company's shareholders' register in accordance with section 159 ("Register and index of members and use of register as presumptive proof of membership").

(6) If the consideration for any shares that are issued or to be issued is in the form of an instrument that is not negotiable by the company at the time the shares are to be issued, or is in the form of an agreement for future services, future benefits or future payment by the subscribing party—

- (a) the consideration for those shares is regarded as having been received by the company at any time only to the extent—
  - (i) that the instrument is negotiable by the company; or

- (ii) that the subscribing party to the agreement has fulfilled its obligations in terms of the agreement;
- and
- (b) upon receiving the instrument or entering into the agreement, the company must—
  - (i) issue the shares immediately; and
  - (ii) cause the issued shares to be transferred to a third party, to be held in trust and later transferred to the subscribing party in accordance with a trust agreement.
- (7) Except to the extent that a trust agreement contemplated in subsection (6) (b) provides otherwise—
  - (a) voting rights, and appraisal rights set out in section 233 (“Dissenting shareholders appraisal rights”), associated with shares that have been issued but are held in trust may not be exercised; and
  - (b) any rights of first refusal associated with shares that have been issued but are held in trust may be exercised only to the extent that the instrument has become negotiable by the company or the subscribing party has fulfilled its obligations under the agreement; and
  - (c) any distribution with respect to shares that have been issued but are held in trust—
    - (i) must be paid or credited by the company to the subscribing party to the extent that the instrument has become negotiable by the company or the subscribing party has fulfilled its obligations under the agreement; and
    - (ii) may be credited against the remaining value at that time of any services still to be performed by the subscribing party, any future payment remaining due, or the benefits still to be received by the company;
- and
- (d) shares that have been issued but are held in trust—
  - (i) may not be transferred by or at the direction of the subscribing party unless the company has expressly consented to the transfer in advance; and
  - (ii) may be transferred to the subscribing party on a quarterly basis, to the extent that the instrument has become negotiable by the company or the subscribing party has fulfilled its obligations under the agreement; and
  - (iii) must be transferred to the subscribing party when the instrument has become negotiable by the company, or upon satisfaction of all of the subscribing party’s obligations in terms of the agreement; and
  - (iv) to the extent that the instrument is dishonoured after becoming negotiable, or that the subscribing party has failed to fulfil its obligations under the agreement, must be returned to the company and cancelled, on demand by the company.
- (8) A company may not make a demand contemplated in subsection (7)(d)(iv) unless—
  - (a) a negotiable instrument is dishonoured after becoming negotiable by the company; or
  - (b) in the case of an agreement, the subscribing party has failed to fulfil any obligation in terms of the agreement for a period of at least forty (40) business days after the date on which the obligation was due to be fulfilled.



### 101 Options for subscription for shares or debentures

(1) A company may issue options for the allotment or subscription of authorised shares or debentures of the company if so authorised by its articles, but such issuance must comply with this section.

(2) The board of a company must determine the consideration or other benefit for which, and the terms upon which—

- (a) any options are issued; and
- (b) the related shares or debentures are to be issued.

(3) A decision by the board that the company may issue—

- (a) any options, constitutes also the decision of the board to issue any authorized shares or debentures for which the options may be exercised; or
- (b) any shares or debentures convertible into shares of any class, constitutes also the decision of the board to issue the authorized shares into which the first mentioned shares or debentures may be converted.

(4) A director of a company is liable to the extent set out in section 197 (“Liability of directors and prescribed officers”)(3)(e)(iii) if the director—

- (a) was present at a meeting when the board approved the granting of an option or a right as contemplated in this section, or participated in the making of such a decision in terms of section 196 (“Directors acting other than at meeting”); and
- (b) failed to vote against the granting of the option or right, despite knowing that any shares—
  - (i) for which the options could be exercised; or
  - (ii) into which any securities could be converted,had not been authorised in terms of section 96 (“Authorisation for shares”).

### 102 Solvency and liquidity test

(1) For any purpose of this Act, a company satisfies the solvency and liquidity test at a particular time if, considering all reasonably foreseeable financial circumstances of the company at that time—

- (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
- (b) it appears that the company will be able to pay its debts as they become due in the ordinary course of business for a period of—
  - (i) twelve (12) months after the date on which the test is applied; or
  - (ii) in the case of a distribution contemplated in paragraph (a) of the definition of ‘distribution’ in section 2 (“Interpretation”), twelve (12) months following that distribution.

(2) For the purposes contemplated in subsection (1)—

- (a) any financial information to be considered concerning the company must be based on—
  - (i) financial records that satisfy the requirements of section 182 (“Keeping of financial records”) and

- (ii) financial statements that satisfy the requirements of section 184 (“General provisions as to contents and form of financial statements”);
- and
- (b) subject to paragraph (c), the board of directors or any other person applying the solvency and liquidity test to a company—
  - (i) must consider a fair valuation of the company’s assets and liabilities, including any reasonably foreseeable contingent assets and liabilities, irrespective of whether or not arising as a result of the proposed distribution, or otherwise; and
  - (ii) may consider any other valuation of the company’s assets and liabilities that is reasonable in the circumstances;
- and
- (c) unless the memorandum of the company provides otherwise, a person applying the test in respect of a distribution contemplated in paragraph (a) of the definition of ‘distribution’ in section 2 (“Interpretation”) is not to regard as a liability any amount that would be required (if the company were to be liquidated at the time of the distribution) to satisfy the preferential rights upon liquidation of shareholders whose preferential rights upon liquidation are superior to the preferential rights upon liquidation of those receiving the distribution.

*Sub-Part B: Prospectus*

### 103 Dating of prospectus

A prospectus issued by or on behalf of a company or in relation to an intended company shall be dated and that date shall, unless the contrary is proved, be taken as the date of publication of the prospectus.

### 104 Matters to be stated and reports to be set out in prospectus

(1) Every prospectus issued by or on behalf of a company or on behalf of any person who is or has been engaged or interested in the formation of the company shall be in the English language or any other officially recognised language (subject to the requirement of an authenticated translation in English as provided in section 9 (“Form of registers and other documents”)(3)) and must state the matters specified in Parts I and II of the Eighth Schedule (“Matters to be specified in prospectus and reports to be set out therein”) and set out—

- (a) the reports specified in Part II of that Schedule, and the said Parts I and II shall have effect subject to the provisions contained in Part III of that Schedule;
- (b) the report of any expert who is mentioned in the prospectus or an abstract from such report certified by the expert as truly conveying the substance of his or her report and of his or her opinions and conclusions.

(2) A condition requiring or binding an applicant for shares in or debentures of a company to waive compliance with any requirement of this section, or purporting to affect him or her with notice of any contract, document or matter not specifically referred to in the prospectus, shall be void.

(3) It shall not be lawful to issue, distribute or deliver or cause to be issued, distributed or delivered any form of application for shares in or debentures of a company unless the form is issued with and attached to a prospectus which complies with the requirements of this section:

Provided that this subsection shall not apply if it is shown that the form of application was issued either —

- (a) in connection with a *bona fide* invitation to a person to enter into an underwriting agreement with respect to the shares or debentures; or

(b) in relation to shares or debentures which were not offered to the public.

(4) If it comes to the notice of the Registrar that any person is in default of subsection (3), the Registrar may serve upon him or her a category 1 civil penalty order.

(5) In the event of non-compliance with or contravention of any of the requirements of this section, a director or other person responsible for the prospectus shall not incur any liability by reason of the non-compliance or contravention if—

- (a) as regards any matter not disclosed, he or she proves that he or she was not cognisant thereof; or
- (b) he or she proves that the non-compliance or contravention arose from an honest mistake of fact on his or her part; or
- (c) the non-compliance or contravention was in respect of matters which in the opinion of the court dealing with the case were immaterial or was otherwise such as ought, in the opinion of that court, having regard to all the circumstances of the case, reasonably to be excused:

Provided that, in the event of failure to include in a prospectus a statement with respect to the matters specified in paragraph 15 of the Eighth Schedule, no director or other person shall incur any liability in respect of the failure unless it be proved that he or she had knowledge of the matters not disclosed.

(6) Any person who becomes a director of a company after the issue of any prospectus by or on behalf of that company and prior to the first general meeting of the company at which directors are elected or appointed shall be deemed to be a person responsible for the prospectus and to have incurred liability in the same manner as a director or a proposed director who has signed the prospectus or on whose behalf the prospectus was signed by an agent.

(7) This section shall not apply to—

- (a) the issue to existing members or debenture holders of a company of a prospectus or form of application relating to shares in or debentures of the company, whether an applicant for shares or debentures will or will not have the right to renounce in favour of other persons; or
- (b) the issue of a prospectus or form of application relating to shares or debentures which are or are to be in all respects uniform with shares or debentures previously issued and for the time being dealt in or quoted on a securities exchange registered under the Securities and Exchange Act [*Chapter 24:25*] or on a stock exchange of good repute outside Zimbabwe;

but, subject as aforesaid, this section shall apply to a prospectus or a form of application whether issued on or with reference to the formation of a company or subsequently.

(8) Nothing in this section shall limit or diminish any liability which any person may incur under the common law or this Act apart from this section.

(9) Every newspaper or other advertisement whatsoever offering or calling attention to an offer or intended offer of shares in or debentures of a company to the public for subscription or purchase shall be deemed to be a prospectus issued by the person responsible for publishing or disseminating the advertisement (and all enactments and rules of law as to the contents of prospectuses and as to liability in respect of statements in and omissions from prospectuses or otherwise relating to prospectuses shall apply and have effect accordingly), unless it contains a statement as to the places at and times during which copies of the prospectuses may be obtained and no more than the following—

- (a) the number and description of the shares or debentures concerned;
- (b) the name and date of registration of the company;
- (c) the general nature of the main business or proposed main business of the company;
- (d) the names of the directors or proposed directors.

(10) No statement that or to the effect that the advertisement is not a prospectus shall avail to prevent the operation of this subsection.

### **105 Expert's consent to issue of prospectus containing statement by him or her**

(1) A prospectus inviting persons to subscribe for shares in or debentures of a company and including a statement purporting to be made by an expert shall not be issued unless—

- (a) he or she has given and has not, before delivery of a copy of the prospectus for registration, withdrawn his or her written consent to the issue thereof with the statement included in the form and context in which it is included; and
- (b) a statement that he or she has given and has not withdrawn his or her consent as aforesaid appears in the prospectus.

(2) If any prospectus is issued in contravention of subsection (1), the company and every person who is knowingly a party to the issue thereof shall be guilty of an offence and liable, in the case of the company, to a fine not exceeding level 14 and, in the case of any such person, to a fine not exceeding level 14 or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment.

(3) In addition, the Registrar may serve upon a company in contravention of subsection (1), a category 1 civil penalty order.

### **106 Registration of prospectus**

(1) No prospectus shall be issued by or on behalf of a company or in relation to an intended company unless, on or before the date of its publication, a copy thereof has been filed with and registered by the Registrar. Such copy shall be signed by every person who is named therein as a director or proposed director of the company, or by his or her agent authorised in writing, and shall have endorsed thereon or attached thereto—

- (a) any consent to the issue of the prospectus required by section 105 ("Expert's consent to issue of prospectus containing statement by him or her") from any person as an expert; and
- (b) in the case of a prospectus issued generally, also—
  - (i) a copy of any contract required by paragraph 14 of the Eighth Schedule to be stated in the prospectus or, in the case of a contract not reduced to writing, a memorandum giving full particulars thereof; and
  - (ii) where the persons making any report required by Part II of that Schedule have made therein, or have, without giving the reasons, indicated therein any such adjustments as are mentioned in paragraph 26 of that Schedule, a written statement signed by those persons setting out the adjustments and giving the reasons therefor;

the references of paragraph (b)(i) to the copy of a contract required thereby to be endorsed on or attached to a copy of the prospectus shall, in the case of a contract wholly or partly in a foreign language, be taken

as references to a copy of a certified translation of the contract or a copy embodying a certified translation of the parts in a foreign language, as the case may be.

(2) Every prospectus shall, on the face of it—

- (a) specify the date of its registration under subsection (1); and
- (b) specify or refer to statements included in the prospectus which specify any documents required by this section to be endorsed on or attached to the copy so delivered.

(3) The Registrar shall not register a prospectus unless it is dated and the copy thereof signed in manner required by this section and unless it has endorsed thereon or attached thereto the documents, if any, specified as aforesaid.

(4) If a prospectus states that the whole or portion of the share capital or debentures offered for subscription has been underwritten the prospectus shall not be registered until there is lodged with the Registrar the documents required by section 110 (“Underwriting contract and affidavit to be delivered to Registrar”).

(5) The Registrar shall not register any prospectus which names any person as the auditor, legal practitioner, banker or broker of the company or proposed company unless it is accompanied by the consent in writing of the person so named to act in the capacity stated, but such person shall not be deemed thereby to have authorised the issue of the prospectus.

(6) No prospectus shall be issued more than three months after the date of its registration by the Registrar and if a prospectus is so issued it shall be deemed to be a prospectus a copy of which has not been registered.

### **107 Non-registration of prospectus; unapproved alteration of terms mentioned in prospectus or in statement in lieu of prospectus**

(1) If it comes to the notice of the Registrar that a prospectus is issued—

- (a) without a copy thereof being filed with and registered by the Registrar under section 106 (“Registration of prospectus”); or
- (b) without the copy so filed and registered having endorsed thereon or attached thereto the required documents as required by section 106;

the Registrar may serve upon the defaulting company and every person who is knowingly a party to the issue of the prospectus in contravention of this section a category 3 civil penalty order.

(2) A company not being a private company shall not previously to the statutory meeting vary in any material respect the terms of a contract referred to in the prospectus, or statement in lieu of prospectus, except subject to the approval of the statutory meeting.

(3) If it comes to the notice of the Registrar that default has been made in complying with subsection (2), the Registrar may serve upon the defaulting company a category 1 civil penalty order.

### **108 Civil liability for misstatements in prospectus**

(1) Subject to this section, where a prospectus invites persons to subscribe for shares in or debentures of a company, the following persons shall be liable to pay compensation to all persons who subscribe for any shares or debentures on the faith of the prospectus for the loss or damage they may have sustained by reason of any untrue statement included therein, that is to say—

- (a) every person who is a director of the company at the time of the issue of the prospectus; and
- (b) every person who has in writing authorised himself or herself to be named and is named in the prospectus as a director or as having agreed to become a director, either immediately or after an interval of time; and
- (c) every person being a promoter of the company; and
- (d) every person who has authorised the issue of the prospectus:

Provided that—

- (i) where, under section 105 (“Expert’s consent to issue of prospectus containing statement by him or her”), the consent of a person is required to the issue of a prospectus and he or she has given that consent, he or she shall not by reason of his or her having given it be liable under this subsection as a person who has authorised the issue of the prospectus except in respect of an untrue statement purporting to be made by him or her as an expert;
  - (ii) no person whose ordinary business or part of whose ordinary business it is to do secretarial or administrative work, shall be liable under this subsection as a person who has authorised the issue of the prospectus by reason only that he or she is employed by the company to perform on its behalf the secretarial and administrative work of the issue of shares or debentures to which the prospectus relates and is named in the prospectus as secretary or manager for the issue.
- (2) No person shall be liable under subsection (1) if he or she proves—
- (a) that, having consented to become a director of the company, he or she withdrew his or her consent in writing before the issue of the prospectus and that it was issued without his or her authority or consent; or
  - (b) that the prospectus was issued without his or her knowledge or consent and that, on becoming aware of its issue, he or she forthwith gave reasonable public notice that it was issued without his or her knowledge or consent; or
  - (c) that, after the issue of the prospectus and before allotment thereunder, he or she, on becoming aware of the untrue statement, made an immediate written withdrawal of his or her consent thereto and gave reasonable public notice of such withdrawal and of the reason therefor; or
  - (d) that—
    - (i) as regards every untrue statement, not purporting to be made on the authority of an expert or of a public official document or statement, he or she had reasonable grounds to believe and did up to the time of the allotment of the shares or debentures, as the case may be, believe that the statement was true; and
    - (ii) as regards every untrue statement purporting to be a statement by an expert or contained in what purports to be a copy of or extract from a report or valuation of an expert, it fairly represented the statement, or was a correct and fair copy of or extract from the report or valuation, and he or she had reasonable grounds to believe and did up to the time of the issue of the prospectus believe that the person making the statement was competent to make it and had given the consent required by section 104 (“Matters to be stated and reports to be set out in prospectus”) to the issue of the prospectus and had not withdrawn that consent before delivery of a copy of the prospectus for registration or, to the defendant’s knowledge, before allotment thereunder; and

- (iii) as regards every untrue statement purporting to be a statement made by an official person or contained in what purports to be a copy of or extract from a public official document, it was a correct and fair representation of the statement or copy of or extract from the document:

Provided that this subsection shall not apply in the case of a person liable, by reason of his or her having given a consent required of him or her by section 105, as a person who has authorised the issue of the prospectus in respect of an untrue statement purporting to be made by him or her as an expert.

(3) A person who apart from this subsection would under subsection (1) be liable, by reason of his or her having given the consent required of him or her by section 105, as a person who has authorised the issue of a prospectus in respect of an untrue statement purporting to be made by him or her as an expert shall not be so liable if he or she proves—

- (a) that, having given his or her consent under section 105 to the issue of the prospectus, he or she withdrew it in writing before delivery of a copy of the prospectus for registration; or
- (b) that, after delivery of a copy of the prospectus for registration and before allotment thereunder, he or she, on becoming aware of the untrue statement, made an immediate written withdrawal of his or her consent and gave reasonable public notice of such withdrawal and of the reason therefor; or
- (c) that he or she was competent to make the statement and that he or she had reasonable ground to believe and did up to the time of the allotment of the shares or debentures, as the case may be, believe that the statement was true.

(4) Where—

- (a) the prospectus contains the name of a person as a director of the company, or as having agreed to become a director thereof, and he or she has not consented in writing to become a director or has in writing withdrawn his or her consent before the issue of the prospectus and has not authorised or consented to the issue thereof; or
- (b) the consent of a person is required under section 105 to the issue of the prospectus and he or she either has not given that consent or has withdrawn it before the issue of the prospectus;

the directors of the company, except any without whose knowledge or consent the prospectus was issued, and any other person who authorised the issue thereof shall be liable, jointly and severally, to indemnify the person named as aforesaid or whose consent was required as aforesaid, as the case may be, against all damages, costs and expenses to which he or she may be made liable by reason of his or her name having been inserted in the prospectus or of the inclusion therein of a statement purporting to be made by him or her as an expert, as the case may be, or in defending himself or herself against any action or legal proceeding brought against him or her in respect thereof:

Provided that a person shall not be deemed for the purposes of this subsection to have authorised the issue of a prospectus by reason only of his or her having given the consent required by section 107 (“Non-registration of prospectus; unapproved alteration of terms mentioned in prospectus or in statement in lieu of prospectus”) to the inclusion therein of a statement purporting to be made by him or her as an expert.

### **109 Criminal liability for misstatements in prospectus**

(1) Where a prospectus includes any untrue statement, any person who authorised the issue of the prospectus shall be guilty of an offence and liable to a fine

not exceeding level fourteen or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment unless he or she proves either that the statement was immaterial or that he or she had reasonable grounds to believe and did, up to the time of the issue of the prospectus, believe that the statement was true.

(2) A person shall not be deemed for the purposes of subsection (1) to have authorised the issue of a prospectus by reason only of his or her having given the consent required by section 105 (“Expert consent to issue of prospectus containing statement by him or her”) to the inclusion therein of a statement purporting to be made by him or her as an expert.

### **110 Underwriting contract and affidavit to be delivered to Registrar**

(1) If the whole or portion of the share capital or debentures of a company being offered for subscription has been or is being underwritten, the company shall deliver to the Registrar, not later than the date of the proposed offer of shares or debentures, a copy of the underwriting contract and an affidavit sworn by the person named as underwriter or, if such underwriter be a company, by two directors of such company, stating that to the best of the deponent’s knowledge and belief the underwriter is and will be in a position to carry out his or her obligations even if no shares or debentures, as the case may be, are applied for.

(2) The underwriter shall furnish the company within seven days of a written request by the company with the affidavit required by subsection (1).

(3) If the underwriter fails to comply with subsection (2), he or she shall be in default and liable to a category 3 civil penalty order.

(4) In the event of any underwriter, if such an affidavit is sworn, being unable, when duly called upon, to carry out his or her obligations under the underwriting contract, the affidavit shall be deemed to have been sworn without reasonable ground for belief that the person named as underwriter was or would be in a position to carry out his obligations under that contract; and the person swearing such affidavit, unless he or she proves that he or she did so believe and had reasonable ground for the belief, shall be guilty of an offence and liable to a fine not exceeding level seven or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment.

### **111 Document containing offer of shares or debentures for sale to be deemed to be prospectus**

(1) Where a company allots or agrees to allot any shares in or debentures of the company with a view to all or any of those shares or debentures being offered for sale to the public, any document by which the offer for sale to the public is made shall for all purposes be deemed to be a prospectus issued by the company, and this Act shall apply and have effect accordingly, as if the shares or debentures had been offered to the public for subscription and as if persons accepting the offer in respect of any shares or debentures were subscribers for those shares or debentures, but without prejudice to the liability, if any, of the persons by whom the offer is made, in respect of misstatements contained in the document or otherwise in respect thereof.

(2) In this Act, it shall, unless the contrary is proved, be evidence that an allotment of, or an agreement to allot shares or debentures was made with a view to the shares or debentures being offered for sale to the public if it is shown—

- (a) that an offer of the shares or debentures or of any of them for sale to the public was made within six months after the allotment or agreement to allot; or



- (b) that at the date when the offer was made the whole consideration to be received by the company in respect of the shares or debentures had not been so received.

(3) Section 104 (“Matters to be stated and reports to be set out in prospectus”) as applied by this section shall have effect as if it required a prospectus to state, in addition to the matters required by that section to be stated in a prospectus—

- (a) the net amount of the consideration received or to be received by the company in respect of the shares or debentures to which the offer relates; and
- (b) the place and time at which the contract under which the said shares or debentures have been or are to be allotted may be inspected;

and section 106 (“Registration of prospectus”) as applied by this section shall have effect as though the persons making the offer were persons named in a prospectus as directors of a company.

(4) Where an offer to which this section relates is made by a company or a partnership it shall be sufficient if the document aforesaid is signed on behalf of the company or partnership by two directors of the company or not less than half of the partners, as the case may be, and any such director or partner may sign by his or her agent authorised in writing.

## **112 Interpretation of provisions relating to prospectus**

In this Act—

- (a) a statement included in a prospectus shall be deemed to be untrue if it is misleading in the form and context in which it is included;
- (b) a statement shall be deemed to be included in a prospectus if it is contained therein or in any report or memorandum appearing on the face thereof or by reference incorporated therein or issued therewith;
- (c) if any matter which ought, under sections 104 (“Matters to be stated and reports to be set out in prospectus”), 106 (“Registration of prospectus”) and the Eighth Schedule (“Matters to be specified in prospectus and reports to be set out therein”) or under section 111 (“Document containing offer of shares or debentures for sale to be deemed to be prospectus”)(3), to be inserted in a prospectus is omitted therefrom and if such omission is calculated to mislead then the prospectus shall be deemed, in respect of such omission, to be a prospectus in which an untrue statement is included.

## **113 Construction of references to offering shares or debentures to public**

(1) Any reference in this Act to offering shares or debentures to the public shall, subject to any provision to the contrary contained therein, be construed as including a reference to offering them to any section of the public, whether selected as members or debenture holders of the company concerned or as clients of the person issuing the prospectus or in any other manner, and references in this Act or in a company’s articles to invitations to the public to subscribe for shares or debentures shall, subject as aforesaid, be similarly construed.

(2) Subsection (1) shall not be taken as requiring any offer or invitation to be treated as made to the public if it can properly be regarded, in all the circumstances, as not being calculated to result, directly or indirectly, in the shares or debentures becoming available for subscription or purchase by persons other than those receiving the offer or invitation, or otherwise as being a domestic concern of the persons making and receiving it, and in particular—

- (a) a provision in a company's articles prohibiting invitations to the public to subscribe for shares or debentures shall not be taken as prohibiting the making to members or debenture holders of an invitation which can properly be regarded as aforesaid; and
- (b) provisions of this Act relating to private companies shall be construed accordingly.

#### 114 Restrictions on offering shares for subscription or sale

(1) It shall not be lawful for any person to engage in the door-to-door solicitation of members of the public at their homes or in offices, shops or business premises, to subscribe for shares or debentures (however, the solicitation at the office or business premises of any person whose ordinary business or part of whose ordinary business it is to deal in shares or debentures, whether as principal or agent, is permitted)

(2) No person shall either verbally or in writing, including any newspaper advertisement—

- (a) make an offer of shares for sale to the public or any member of the public; or
- (b) invite offers from the public or any member of the public to purchase any shares;

and no person shall issue, distribute or publish any material which in its form and context is calculated to be understood as an offer or invitation as aforesaid unless the offer, invitation or material is accompanied either by a prospectus complying with this Act or by a written statement containing the particulars required by this section to be included therein.

(3) The said statement shall be dated and signed by the person or persons making the offer or invitation or issuing, distributing or publishing the said material and, if such person is a company, by every director thereof:

Provided that this subsection shall not apply—

- (a) if the shares to which the offer or invitation or material relates are shares which are quoted on, or in respect of which permission to deal has been granted by, a securities exchange registered under the Securities and Exchange Act [*Chapter 24:25*] or a stock exchange of good repute outside Zimbabwe, and the person making the offer or invitation or publishing the material so states in writing specifying the stock exchange; or
- (b) if the shares in question are shares which a company has allotted or agreed to allot with a view to their being offered for sale to the public; or
- (c) if the offer or invitation is made or the material is published only to persons whose ordinary business or part of whose ordinary business it is to deal in shares or debentures whether as principals or agents; or
- (d) to an offer for sale to the public of or an invitation to the public to tender for unquoted shares made in the course of winding up a company in liquidation or in a deceased, insolvent or assigned estate or in an estate held under curatorship or in execution of a judgment of any competent court; or
- (e) to an offer or invitation made in respect of unquoted shares by a person who is at the time of the offer or invitation the *bona fide* registered beneficial owner of them.

(4) The said statement shall contain particulars with respect to the following matters—

- (a) whether the person making the offer is acting as principal or agent, and if as agent the name of his or her principal and an address in Zimbabwe where that principal can be served with process and the nature and extent of the remuneration received or receivable by the agent for his or her services;
- (b) the date on which and the country in which the company was incorporated and the address of its registered or principal office in Zimbabwe or, if none, the address of its principal office outside Zimbabwe;
- (c) the authorised share capital of the company and the amount thereof which has been issued, the classes into which it is divided and the rights of each class of members in respect of capital, dividends and voting and the number and amount of shares issued for cash and the number and amount thereof issued for a consideration other than cash, giving the dates on which and the prices at which or the consideration for which such shares were issued;
- (d) the dividends, if any, paid by the company on each class of shares during each of the five financial years immediately preceding the offer or such lesser period as the company may have operated and, with respect to the rates of such dividends, particulars of each such class of shares on which such dividends have been paid, and if no dividend has been paid in respect of shares of any particular class during any of those years, a statement to that effect;
- (e) the total amount of any debentures issued by the company and outstanding at the date of the statement, together with the rate of interest payable thereon;
- (f) the names and addresses of the directors of the company;
- (g) whether or not the shares offered are fully paid up and, if not, to what extent they are paid up;
- (h) whether or not the shares are quoted on, or permission to deal therein has been granted by, a securities exchange registered under the Securities and Exchange Act [*Chapter 24:25*] or any stock exchange outside Zimbabwe, and, if so, which, and, if not, a statement that they are not so quoted or that no such permission has been granted;
- (i) if the offer relates to units, particulars of the names and addresses of the persons in whom the shares represented by the units are vested, the date of and the parties to any document defining the terms on which those shares are held and an address in Zimbabwe where that document or a copy thereof can be inspected;
- (j) particulars of the dates on which and the prices at which the shares offered were—
  - (i) originally issued by the company; and
  - (ii) acquired by the person making the offer, or by his or her principal, giving the reasons for any difference between such prices and the prices at which the shares are being offered.

In this subsection the expression “company” means the company by which shares to which a statement relates were or are to be issued.

(5) If any person contravenes this section he or she shall be guilty of an offence and liable to a fine not exceeding level ten or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment.

(6) If a person convicted of an offence under this section is a company, whether a company within the meaning of this Act or not, every director of the company shall be guilty of the like offence and subject to the like penalties unless he or she proves that the act constituting the offence took place without his or her knowledge or consent.

(7) In this section, unless the context otherwise requires, the expression “offer” includes an invitation to make an offer, the expression “shares” means the shares of a company, whether a company within the meaning of this Act or not, and includes debentures and units, and the expression “unit” means any right or interest, by whatever name called, in a share, and for the purposes of this section a person shall not, in relation to a company, be regarded as not being a member of the public by reason only that he or she is a holder of shares in the company or a purchaser of goods from the company.

(8) If any person is convicted of having made an offer in contravention of this section the court before which he or she is convicted may order that any contract made as a result of the offer shall be void and, where it makes any such order, may give such consequential directions as it thinks proper for the repayment of any money or the retransfer of any shares.

#### *Sub-Part C: Allotment*

### **115 Prohibition of allotment unless minimum subscription received**

(1) No allotment shall be made of any share capital of a company offered to the public for subscription unless the amount stated in the prospectus as the minimum amount which, in the opinion of the directors, must be raised by the issue of share capital in order to provide for the matters specified in paragraph 4 of the Eighth Schedule (“Matters to be specified in prospectus and reports to be set out therein”) has been subscribed, and the sum payable on application for the amount so stated has been paid to and received by the company. For the purposes of this subsection an amount stated in any cheque or undertaking to pay through a bank or other intermediary received by the company in payment shall be deemed not to have been paid to and received by the company—

- (a) until the amount of any such cheque or undertaking has been credited to the account of the company with its bankers;
- (b) if the company has at any time delivered to the payer and has not been repaid the amount or value of any money, bill, promissory note, cheque or undertaking to pay through a bank or other intermediary or other valuable consideration otherwise than in discharge of a debt *bona fide* due by the company to such payer, then to the extent of the amount or value of such money, bill, promissory note, any cheque or undertaking to pay through a bank or other intermediary or other valuable consideration.

(2) The amount so stated in the prospectus shall be reckoned exclusively of any amount payable otherwise than in cash and is in this Act referred to as “the minimum subscription”.

(3) The amount payable on application on each share shall be the same in respect of all shares of the same class in any one issue and shall not be less than ten *per centum* of the nominal amount of the share.

(4) The amount paid on application shall be set apart by the directors in a separate bank account and shall not be available for the purposes of the company or for the satisfaction of its debts until the minimum subscription has been made up.

(5) If the conditions aforesaid have not been complied with on the expiration of sixty days after the first issue of the prospectus, all money received from applicants

for shares shall forthwith be repaid to them without interest and, if any such money is not so repaid within seventy days after the issue of the prospectus the directors of the company shall be in default and liable to a category 3 civil penalty.

(6) Any condition requiring or binding any applicant for shares to waive compliance with any requirements of this section shall be void.

### **116 Prohibition of allotment in certain cases unless statement in lieu of prospectus delivered to Registrar**

(1) This section shall not apply to a private company.

(2) A company which does not issue a prospectus on or with reference to its formation, or which has issued such a prospectus but has not proceeded to allot any of the shares offered to the public for subscription, shall not allot any of its shares or debentures unless at least three days before the first allotment of either shares or debentures there has been delivered to the Registrar for registration a statement in lieu of prospectus signed by every person who is named therein as a director or a proposed director of the company or by his or her agent authorised in writing, in the form and containing the particulars set out in Part I of the Third Schedule ("Form of statement in lieu of prospectus to be delivered to registrar by a company which does not issue prospectus or which does not go to allotment on a prospectus issued and reports to be set out therein") and, in the cases mentioned in Part II of that Schedule, setting out the reports specified therein, and the said Parts I and II shall have effect subject to Part III of that Schedule.

(3) Every statement in lieu of prospectus delivered under subsection (2) shall, where the persons making any such report as aforesaid have made therein or have, without giving the reasons, indicated therein any such adjustments as are mentioned in paragraph 5 of the Third Schedule, have endorsed thereon or attached thereto a written statement signed by those persons setting out the adjustments and giving the reasons therefor.

(4) If a company contravenes subsection (2) or (3) the company and every director of the company who knowingly and wilfully authorises or permits the contravention shall be in default and liable a category 3 civil penalty order.

(5) Where a statement in lieu of prospectus delivered to the Registrar under subsection (2) includes any untrue statement, any person who authorised the delivery of the statement in lieu of prospectus for registration shall be guilty of an offence and liable to a fine not exceeding level twelve or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment, unless he or she proves either that the untrue statement was immaterial or that he or she had reasonable grounds to believe and did up to the time of the delivery for registration of the statement in lieu of prospectus believe that the untrue statement was true.

(6) For the purposes of this section—

- (a) a statement included in a statement in lieu of prospectus shall be deemed to be untrue if it is misleading in the form and context in which it is included; and
- (b) a statement shall be deemed to be included in a statement in lieu of prospectus if it is contained therein or in any report or memorandum appearing on the face thereof or by reference incorporated therein; and
- (c) if any matter which ought, under the provisions of the Third Schedule, to be inserted in a statement in lieu of prospectus is omitted therefrom and if such omission is calculated to mislead then the statement in lieu of prospectus shall be deemed, in respect of such omission, to be a statement in lieu of prospectus in which an untrue statement is included.

### 117 Effect of irregular allotment

(1) An allotment made by a company in contravention of section 115 (“Prohibition of allotment unless minimum subscription received”) or 116 (“Prohibition of allotment in certain cases unless statement in lieu of prospectus delivered to Registrar”) shall be voidable at the instance of a person who makes application to a court within one month after the holding of the statutory meeting and not later; or in any case, where the company is not required to hold a statutory meeting, or where the allotment is made after the holding of the statutory meeting, within one month after the date of the allotment, and not later, and shall be so voidable notwithstanding that the company is in course of being wound up.

(2) If any director of a company knowingly contravenes, or permits or authorises the contravention of section 115 or 116 he or she shall be liable to compensate the company and the allottee, respectively, for any loss, damages or costs which the company or the allottee may have sustained or incurred thereby:

Provided that proceedings to recover any such loss, damages or costs shall not be commenced after the expiration of two years from the date of the allotment.

### 118 Allotment voidable if application form not attached to prospectus

Where an application form is required by section 104 (“Matters to be stated and reports to be set out in prospectus”) to be attached to a prospectus, every allotment of shares or debentures made otherwise than in pursuance of an application form which was attached to a prospectus as required by section 104(3) shall be voidable at the instance of the allottee who makes application to a court within one month after allotment, unless it is shown that the allottee at the time of his or her application was in fact possessed of a copy of the prospectus or was aware of its contents.

### 119 Application for and allotment of shares

(1) No allotment shall be made of any shares in or debentures of a company in pursuance of a prospectus issued generally and no proceedings shall be taken on applications made in pursuance of a prospectus so issued, until the beginning of the third day after that on which the prospectus is first so issued or such later time, if any, as may be specified in the prospectus.

The beginning of the said third day or such later time as aforesaid is in this Act referred to as “the time of the opening of the subscription lists”.

(2) In subsection (1) the reference to the day on which the prospectus is first issued generally shall be construed as referring to the day on which it is first issued as a newspaper advertisement:

Provided that, if it is not so issued as a newspaper advertisement before the third day after that on which it is first so issued in any other manner, the said reference shall be construed as referring to the day on which it is first so issued in any manner.

(3) The validity of an allotment shall not be affected by any contravention of the foregoing provisions of this section but, in the event of any such contravention, the company and every officer of the company who is knowingly a party to the default shall be in default and liable to a category 1 civil penalty order.

(4) In the application of this section to a prospectus offering shares or debentures for sale, the foregoing subsections shall have effect with the substitution of references to sale for references to allotment, and with the substitution for the reference to the company and every officer of the company who is knowingly a party to the default of a reference to any person by or through whom the offer is made and who knowingly and wilfully authorises or permits the contravention.

(5) An application for shares in or debentures of a company which is made in pursuance of a prospectus issued generally shall not be revocable until after the expiration of the third day after the time of the opening of the subscription lists, or the giving before the expiration of the said third day, by some person responsible under section 108 (“Civil liability for misstatements in prospectus”) for the prospectus, of a public notice having the effect under that section of excluding or limiting the responsibility of the person giving it.

(6) In reckoning for the purposes of this section and of section 120 (“Allotment of shares and debentures to be dealt in on stock exchange”) the third day after another day, any intervening day which is a Saturday or Sunday or which is a public holiday in Zimbabwe shall be disregarded and if the third day, as so reckoned, is itself a Saturday or Sunday or a public holiday there shall for the said purposes be substituted the first day thereafter which is none of them.

### **120 Allotment of shares and debentures to be dealt in on stock exchange**

(1) Where a prospectus, whether issued generally or not, states that application has been or will be made for permission for the shares or debentures offered thereby to be dealt in on any local stock exchange, any allotment made on an application in pursuance of the prospectus shall, whenever made, be void if the permission has not been applied for before the third day after the first issue of the prospectus or if the permission has been refused before the expiration of twenty-one days from the date of the closing of the subscription lists or such longer period not exceeding forty-two days as may, within the said twenty-one days, be notified to the applicant for permission by or on behalf of the stock exchange.

(2) Where the permission has not been applied for as aforesaid, or has been refused as aforesaid, the company shall forthwith repay without interest all money received from applicants in pursuance of the prospectus, and, if any such money is not repaid within eight days after the company becomes liable to repay it, the directors of the company shall be jointly and severally liable to repay that money with interest at the rate prescribed in the Prescribed Rate of Interest Act [*Chapter 8:10*] from the expiration of the eighth day:

Provided that a director shall not be liable if he or she proves that the default in the repayment of the money was not due to any misconduct or negligence on his or her part.

(3) All money received as aforesaid shall be kept in a separate bank account and shall not be available for the purposes of the company or for the satisfaction of its debts so long as the company may become liable to repay it under subsection (2) and, if default is made in complying with this subsection, the company and every officer of the company who is in default shall be guilty of an offence and—

- (a) in the case of a company, liable to a fine not exceeding level ten; or
- (b) in the case of an officer, liable to a fine not exceeding level ten or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment.

(4) Any conditions requiring or binding any applicant for shares or debentures to waive compliance with any requirement of this section shall be void.

(5) For the purposes of this section, permission shall not be deemed to be refused if it is intimated that the application for it, though not at present granted, will be given further consideration.

(6) This section shall have effect—

- (a) in relation to any shares or debentures agreed to be taken by a person underwriting an offer thereof by a prospectus as if he or she had applied therefor in pursuance of the prospectus; and
- (b) in relation to a prospectus offering shares for sale with the following modifications, that is to say—
  - (i) references to sale shall be substituted for references to allotment; and
  - (ii) the persons by whom the offer is made, and not the company, shall be liable under subsection (2) to repay money received from applicants, and references to the company's liability under that subsection shall be construed accordingly; and
  - (iii) for the reference in subsection (3) to the company and every officer of the company who is in default there shall be substituted a reference to any person by or through whom the offer is made and who knowingly and wilfully authorises or permits the default.

### **121 Register and return as to allotments**

(1) Every company shall keep a register of allotments at its registered office.

(2) A company, whenever it makes any allotment of its shares, shall, within one month thereafter, lodge with the Registrar—

- (a) a return of the allotments, stating the number and nominal amount of the shares comprised in the allotment, the names and addresses of the allottees and the amount, if any, paid or due and payable on each share; and
- (b) in the case of shares allotted as fully or partly paid up otherwise than in cash, a contract in writing and signed by the parties thereto, constituting the title of the allottee to the allotment, together with any contract of sale or for services or other consideration in respect of which that allotment was made, and a return stating the number and nominal amount of shares so allotted, the extent to which they are to be treated as paid up and the consideration for which they have been allotted:

Provided that it shall not be necessary for a return referred to in paragraph (a) to state the names and addresses of the allottees in the case of an allotment of a class which has been prescribed as being one in relation to which the names and addresses of the allottees shall not be stated in the return.

(3) Where a contract such as is referred to in subsection (2)(b) has not been reduced to writing, the company shall, within one month after the allotment of its shares, lodge with the Registrar such particulars of the contract as may be prescribed.

(4) If default is made in complying with the requirements of this section the company and every officer of the company who is knowingly a party to the default shall be liable to a category 3 civil penalty order:

Provided that in case of default in lodging with the Registrar within one month after the allotment any document required to be lodged by this section, the company, or any person liable for the default, may request the Registrar to extend the time for the lodging of the documents for a specified period, and if the Registrar is satisfied that the omission to lodge the document was accidental or due to inadvertence, the Registrar may grant the request and waive the civil penalty.



*Sub-Part D: Commissions and discounts***122 Power to pay certain commissions and prohibition of payment of all other commissions, discounts**

(1) It shall be lawful for a company to pay a commission to any person in consideration of his or her subscribing or agreeing to subscribe, whether absolutely or conditionally, for any shares in the company, or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any shares in the company if—

- (a) the payment of the commission is authorised by the articles; and
- (b) the commission paid or agreed to be paid does not exceed five *per centum* of the price at which the shares are issued or the amount or rate authorised by the articles, whichever is the less; and
- (c) the amount or rate *per centum* of the commission paid or agreed to be paid is—
  - (i) in the case of shares offered to the public for subscription, disclosed in the prospectus; or
  - (ii) in the case of shares not offered to the public for subscription, disclosed in the statement in lieu of prospectus or in a statement in the prescribed form signed in like manner as a statement in lieu of prospectus and delivered, before payment of the commission, to the Registrar for registration, and where a circular or notice, not being a prospectus, inviting subscription for the shares is issued, also disclosed in that circular or notice;

and

- (d) the number of shares which persons have agreed for a commission to subscribe absolutely is disclosed in the manner aforesaid.

(2) Save as aforesaid, no company shall apply any of its shares or capital money, either directly or indirectly, in payment of any commission, discount or allowance to any person in consideration of his or her subscribing or agreeing to subscribe, whether absolutely or conditionally, for any shares in the company, or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any shares in the company, whether the shares or money be so applied by being added to the purchase money of any property acquired by the company or to the contract price of any work to be executed for the company, or the money be paid out of the nominal purchase money or contract price, or otherwise.

(3) Nothing in this section shall affect the power of any company to pay such brokerage as it has heretofore been lawful for a company to pay.

(4) A vendor to, promoter of or other person who receives payment in money or shares from a company, shall have and shall be deemed always to have had power to apply any part of the money or shares so received in payment of any commission, the payment of which, if made directly by the company, would have been legal under this section.

(5) If default is made in complying with the provisions of this section relating to the delivery to the Registrar of the statement in the prescribed form the company and every officer of the company who is in default shall be liable to a category 1 civil penalty order.

**123 Financial assistance by company for purchase of its own or its holding company's shares**

(1) It shall not be lawful for a company to give, whether directly or indirectly, and whether by means of a loan, guarantee, the provision of security or otherwise, any

financial assistance for the purpose of or in connection with a purchase or subscription made or to be made by any person of or for any shares in the company or, where the company is a subsidiary company, in its holding company unless—

- (a) such assistance is given in accordance with a special resolution of the company; and
  - (b) immediately after such assistance is given, on a fair valuation the company's assets, excluding any asset resulting from the giving of the assistance, exceed its liabilities and it is able to pay its debts as they become due in ordinary course of its business.
- (2) If a company gives financial assistance in contravention of subsection (1)—
- (a) any transaction relating to such assistance and any transfer or allotment of shares arising therefrom may be set aside by the court at the suit of the company or its liquidator or any member or creditor of the company or of any party to the transaction; and
  - (b) whether or not the court makes an order in terms of paragraph (a), every officer of the company who made or took part in the decision that the company should enter into the transaction may be ordered by the court at the suit of the company or its liquidator or any member or creditor of the company or of any party to the transaction, to compensate the company and any other party to the transaction who entered into it in good faith for any loss resulting from the contravention of subsection (1):

Provided that no compensation for loss of anticipated profits shall be awarded to the company.

*Sub-Part E: Issue of shares at premium or discount and redeemable preference shares*

#### **124 Application of share premiums**

(1) If a company issues shares at a premium, whether for cash or otherwise, a sum equal to the aggregate amount or value of the premiums on those shares shall be transferred to an account called "the share premium account" and provisions of this Act relating to the reduction of a company's share capital shall apply, except as provided in this section, as if the share premium account were part of its paid-up share capital.

- (2) A company may apply its share premium account—
- (a) in paying up unissued shares to be allotted to its members, directors or employees, or to a trustee for such persons, as fully paid bonus shares; or
  - (b) in writing off—
    - (i) the company's preliminary expenses; or
    - (ii) the expenses of, or the commission paid or discount allowed on, any issue of shares or debentures of the company;
 or
  - (c) in providing for the premium payable, if any, on redemption of any redeemable preference shares or of any debentures of the company.

#### **125 Power to issue shares at a discount**

(1) Subject to this section, it shall be lawful for a company to issue at a discount shares in the company of a class already issued:

Provided that—