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OFFICE OF THE PRESIDENT

KANTOOR VAN DIE PRESIDENT

No. 1039. 14 August 1998

No. 1039. 14 Augustus 1998

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

Hierby word bekend gemaak dat die President sy goedkeuring geheg het aan die onderstaande Wet wat hierby ter algemene inligting gepubliseer word:—

No. 35 of 1998: Companies Amendment Act, 1998.

No. 35 van 1998: Maatskappywysigingswet, 1998.

GENERAL EXPLANATORY NOTE:

[] Words in bold type in square brackets indicate omissions from existing enactments.

 Words underlined with a solid line indicate insertions in existing enactments.

ACT

To amend the Companies Act, 1973, so as to further define certain words used in the Act; to further provide for the reservation and registration of a translation of a company name and the substitution of the memorandum of association of a company with a translation thereof; to require that stamp duty be paid in certain circumstances where preference shares are redeemed; to further regulate the indemnification and warranty furnished for the transfer of securities of any company; to redefine offers of shares not being offers to the public; to increase the additional fees payable in the event of a company having failed to hold its annual general meeting within the prescribed time limits; to provide that the disposal of the undertaking or greater part of the assets of a company shall be an affected transaction regulated by the Securities Regulation Panel; to allow a company to insure itself against liability; to extend the powers of an inspector in relation to an investigation into the affairs of a company; to provide for the appointment of an acting executive director of the Securities Regulation Panel; to provide anew for the composition of the Securities Regulation Panel; to enable the Securities Regulation Panel to require from a person to lodge any book, document or other object necessary for an investigation with the Panel; to further provide for the signing of summonses; to provide anew for the circumstances under which certain information may be disclosed; to provide anew for the limitation of liability of the Securities Regulation Panel, its members, employees and representatives in the performance of their functions; and to further regulate and prescribe penalties for offences; and to provide for matters connected therewith.

(English text signed by the President.)
(Assented to 7 August 1998.)

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

Amendment of section 1 of Act 61 of 1973, as amended by section 1 of Act 76 of 1974, section 1 of Act 64 of 1977, section 26 of Proclamation 234 of 1978, section 1 of Act 84 of 1980, section 1 of Act 83 of 1981, section 1 of Act 29 of 1982, section 1 of Act 31 of 1986 and section 1 of Act 82 of 1992 5

1. Section 1 of the Companies Act, 1973 (hereinafter referred to as the principal Act), is hereby amended—

(a) by the substitution in subsection (1) for the definition of “external company” of the following definition: 10

“ ‘external company’ means a company or other association of persons, incorporated outside the Republic, the memorandum of which was lodged with the Registrar under the repealed Act, or which, since the commencement of this Act, has established a place of business in the Republic and for purposes of this definition establishing a place of business shall include the acquisition of immovable property;” and 15

(b) by the insertion in subsection (3) after paragraph (c) of the following paragraph: 20

“(cA) For the purposes of this subsection ‘hold’ or any derivative thereof refers to the registered or beneficial holder (direct or indirect) of shares conferring a right to vote.”

Amendment of section 42 of Act 61 of 1973, as amended by section 6 of Act 83 of 1981

2. Section 42 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection: 25

“(1) [The] Subject to the provisions of section 41, the Registrar [may] shall, on written application on the prescribed form and on payment of the prescribed fee, reserve a name (approved by [him] the Registrar) or literal translation into [the] not more than one other official language of the Republic of a name of a company or a shortened form of the name or name so translated of a company, pending the registration of a memorandum or a change of name by that company or the registration of another form of the name or translated name.” 30

Amendment of section 43 of Act 61 of 1973, as amended by section 2 of Act 84 of 1980, section 7 of Act 83 of 1981 and section 3 of Act 63 of 1988

3. Section 43 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection: 35

“(1) The memorandum of any company to be incorporated may contain a literal translation into [the] not more than one other official language of the Republic of the company’s name and one shortened form of that name or the name so translated (hereinafter in this Chapter referred to as the translated name), and any company may, on the prescribed form and on payment of the prescribed fee, apply to the Registrar for the registration of such translated name and shortened form of its name or translated name, if in each case the translated name and shortened form of the name or translated name concerned is not in the opinion of the Registrar undesirable.” 40 45

Amendment of section 50 of Act 61 of 1973, as amended by section 12 of Act 83 of 1981 and section 1 of Act 29 of 1985

4. Section 50 of the principal Act is hereby amended by the substitution for subsection (2) of the following subsection:

“(2) If a translated name of a company has been registered, the use of that translated name, and if the name of a company consists of or contains words in one of the official languages of the Republic, the use of a name consisting of or containing a literal translation of such words into [the] not more than one other official language, shall be deemed to be sufficient compliance with the requirements of this section.” 50 55

Substitution of section 57 of Act 61 of 1973

5. The following section is hereby substituted for section 57 of the principal Act:

“Substitution of memorandum in other language

57. A company may, by special resolution, substitute for its existing memorandum in [either] any of the official languages of the Republic, a translation thereof in [the other] another official language: Provided that the memorandum in the original language shall be decisive in the construction of the memorandum so substituted therefor.”

Amendment of section 98 of Act 61 of 1973, as amended by section 4 of Act 64 of 1977 and section 15 of Act 69 of 1989

6. Section 98 of the principal Act is hereby amended by the addition to subsection (2) of the following proviso:

“Provided that, where new shares are issued before the redemption of the old shares, the new shares shall not for purposes of any law relating to stamp duty be deemed to have been issued in pursuance of this subsection, unless the old shares are redeemed within thirty days after the issue of the new shares.”

Substitution of section 138 of Act 61 of 1973

7. The following section is hereby substituted for section 138 of the principal Act:

“Warranty and indemnity by persons lodging documents of transfer

138. [Any] (1) Subject to the provisions of subsection (2), any person who, for the purposes of the transfer of any security of any company, as principal or agent, lodges with that company any document relating to that transfer, shall be deemed thereby to warrant that such document, excluding a certificate of ownership or any other document evidencing title to such security, is genuine and that he or she, or when he or she is acting as agent, his or her principal jointly and severally with him or her, indemnifies the said company against any claim made upon it and against any loss or damage suffered by it arising out of a transfer registered by the company of the security referred to in such document.

(2) The indemnification contemplated in subsection (1) shall not apply where it is proved by the person who lodged the documents concerned that he or she acted in good faith and that the company acted negligently in registering the transfer of the securities referred to in those documents: Provided that if the Court holds that the loss or damage contemplated in subsection (1) is caused partly by the negligence of such company and partly by the negligence of such person the damage recoverable in respect thereof shall be reduced by the Court to such extent as the Court may deem just and equitable having regard to the degree in which the company or such person, as the case may be, was negligent in relation to the damage.”

Substitution of section 144 of Act 61 of 1973, as amended by section 8 of Act 111 of 1976 and section 7 of Act 64 of 1977

8. The following section is hereby substituted for section 144 of the principal Act:

“Offers not being offers to the public

144. An offer of shares in relation to an offer for subscription for or sale of any shares, shall not be construed as an offer to the public—
(a) if the offer is made to—

- (i) a bank registered or provisionally registered in terms of the Banks Act, 1990 (Act No. 94 of 1990); or
- (ii) a mutual bank registered or provisionally registered in terms of the Mutual Banks Act, 1993 (Act No. 124 of 1993); or
- (iii) an insurer registered or provisionally registered in terms of the Insurance Act, 1943 (Act No. 27 of 1943), which is acting as principal, and also to a wholly owned subsidiary of such bank, mutual bank or insurer when it acts as agent in the capacity of authorised portfolio manager for a pension fund registered in terms of the Pension Funds Act, 1956 (Act No. 24 of 1956), or for a unit trust scheme managed by the said wholly owned subsidiary which is registered as a management company in terms of the Unit Trusts Control Act, 1981 (Act No. 54 of 1981);
- (b) if the offer for subscription is of such a nature that the total acquisition cost of the shares for a single addressee acting as principal is at least R100 000 or such higher amount as the Minister may, by notice in the *Gazette*, determine in order to counter the effect of inflation;
- (c) if it is a single once-off offer for subscription and the offer is accepted by a maximum of fifty persons acting as principals: Provided that—
- (i) the aggregate subscription price (including any premium) of the shares so issued does not exceed R100 000 or such higher amount as the Minister may, by notice in the *Gazette*, determine in order to counter the effect of inflation;
- (ii) the issue of the shares shall be finalised within six months from the date the offer was first made;
- (iii) the offer shall be in writing;
- (iv) particulars of the offer shall be lodged in the prescribed manner with the Registrar for registration prior to the offer being made; and
- (v) the offer shall not be accompanied by or made by means of an advertisement and no selling expenses shall be incurred in connection with the offer;
- (d) if it is a non-renounceable offer for the subscription of shares and the offer is made only to existing shareholders or debenture holders of that company;
- (e) if it is a rights offer; or
- (f) if the offer is made to any director or officer of the company, or any close relative of such director or officer: Provided that the original offer shall for purposes of this Chapter be an offer to the public if the offer is renounceable in favour of a person who is not a director or officer of the company or close relative of such director or officer.”

Amendment of section 179 of Act 61 of 1973, as amended by section 16 of Act 64 of 1977, section 11 of Act 29 of 1982, section 9 of Act 70 of 1984 and section 48 of Act 88 of 1996

9. Section 179 of the principal Act is hereby amended by the substitution for subsection (6) of the following subsection:

“(6) A company which has failed to hold its annual general meeting within the time or extended time prescribed by subsection (1) or (3), or as directed by the Registrar under subsection (4), shall further be liable to pay to the Registrar additional fees of [one] fifty rand for every day during which the default continues but not exceeding a maximum of [twenty] one thousand rand.”

Amendment of section 228 of Act 61 of 1973

10. Section 228 of the principal Act is hereby amended by the addition of the following subsection:

“(3) The requirements contained in this section in respect of transactions falling within the provisions of subsection (1), shall be in addition to any other requirements, including the limitation of voting rights, relating to such transactions that may be imposed by the Securities Regulation Panel in terms of section 440C or in terms of any other law.” 5

Amendment of section 234 of Act 61 of 1973

11. Section 234 of the principal Act is hereby amended by the insertion after subsection (3) of the following subsection: 10

“(3A) For the purposes of subsection (3) ‘firm’ means a corporation as defined in section 1 of the Close Corporations Act, 1984 (Act No. 69 of 1984), or any other body corporate, association, syndicate, partnership or trust that has as its object the acquisition of gain.” 15

Amendment of section 247 of Act 61 of 1973

12. Section 247 of the principal Act is hereby amended by the addition to subsection (1) of the following proviso:

“Provided that this subsection shall not be applicable to insurance taken out and kept by the company as indemnification against any liability of any director or officer towards the company in respect of any negligence, default, breach of duty or breach of trust.” 20

Amendment of section 259 of Act 61 of 1973, as substituted by section 23 of Act 64 of 1977

13. Section 259 of the principal Act is hereby amended by the addition of the following subsection, the existing section becoming subsection (1): 25

“(2) For the purposes of subsection (1) the inspector may, with the approval of the Minister, also investigate the affairs of any individual, trust, partnership, close corporation or body corporate in which the directors or members of the company contemplated in that subsection have or had any interest in or association with and shall also report on the affairs of such individual, trust, partnership, close corporation or body corporate so far as the results of his or her investigation are relevant to the investigation of the affairs of the said company.” 30

Amendment of section 440A of Act 61 of 1973, as inserted by section 4 of Act 78 of 1989 and amended by section 1 of Act 69 of 1990 35

14. Section 440A of the principal Act is hereby amended—

(a) by the addition at the end of paragraph (b) of the definition of “affected transaction” in subsection (1) of the word “or”, and the addition of the following paragraph:

“(c) is a disposal as contemplated in section 228;”; 40

(b) by the substitution in subsection (1) for the definition of “control” of the following definition:

“control” means, subject to subsection 2(b), a holding or aggregate holdings of shares or other securities in a company entitling the holder thereof to exercise, or cause to be exercised, directly or indirectly, the specified percentage or more of the voting rights at meetings of that company or any company controlled by it, irrespective of whether such holding or holdings confer de facto control;”; and 45

(c) by the substitution in subsection (1) for the definition of “executive director” of the following definition: 50

“‘executive director’, means the executive director or acting executive director of the panel appointed in terms of section 440B(11);”.

Amendment of section 440B of Act 61 of 1973, as inserted by section 4 of Act 78 of 1989

15. Section 440B of the principal Act is hereby amended—

- (a) by the substitution for subsection (2) of the following subsection: 5
 “(2) [The] Subject to the provisions of subsection (6), the members of the panel shall be appointed by the Minister and shall consist of—
 (a) the [chairman] chairperson;
 (b) the Registrar or his or her nominee;
 (c) the [chairman] chairperson of the Competition Board established by section 3 of the Maintenance and Promotion of Competition Act, 1979 (Act No. 96 of 1979), or his or her nominee;
 (d) [such persons as are nominated by the bodies, associations and institutions referred to in subsection (3)] three persons each nominated by the Johannesburg Stock Exchange and the Council of South African Banks; and 10
 (e) [any person co-opted in terms of subsection (6)] one person nominated by each of such bodies, associations and institutions, limited to a maximum of fifteen such bodies, associations and institutions, which—
 (i) the Minister in consultation with the panel, has determined as being sufficiently representative of the relevant interests in the regulation of securities; and 20
 (ii) have been designated by the Minister by notice in the Gazette.”;
- (b) by the deletion of subsection (3); 25
- (c) by the substitution for subsection (4) of the following subsection:
 “(4) The [chairman] chairperson, who need not be one of the nominated members, shall be designated by the members of the panel nominated in terms of paragraph (e) of subsection [(3)](2).”;
- (d) by the substitution for subsection (6) of the following subsection: 30
 “(6) The panel shall be entitled, from time to time, to co-opt [not more than four persons as] additional members.”;
- (e) by the substitution in subsection (7) for the words preceding the proviso of the following words:
 “Every member of the panel shall hold office for a period of not less than three and not more than five years, as the Minister may determine.”;
- (f) by the substitution for subsection (8) of the following subsection:
 “(8) If, during [such five-year] the period contemplated in subsection (7), a member of the panel nominated pursuant to the provisions of subsection [(3)] (2), dies, becomes incapacitated, resigns, or becomes 40
 disqualified from being appointed or acting as a director of a company in terms of section 218, or ceases for any other reason to be a member of the panel, the vacancy arising in this manner may be filled for the unexpired period of such member’s term of office by a person nominated by the body, association or institution of which the member who ceases to be on 45
 the panel was a nominee.”; and
- (g) by the substitution for subsection (11) of the following subsection:
 “(11) The panel shall appoint an executive director to hold office for such period and on such conditions as the panel may determine and the panel may likewise appoint an acting executive director when the office of executive director is vacant or when the executive director is absent or for any reason unable to perform his or her functions.” 50

Amendment of section 440D of Act 61 of 1973, as inserted by section 4 of Act 78 of 1989

16. Section 440D of the principal Act is hereby amended— 55

- (a) by the substitution for paragraph (a) of subsection (1) of the following paragraph:
 “(a) summon any person who is believed to be able to furnish any information on the subject of an investigation or to have in his or her

possession or under his or her control any book, document or other object which has any bearing upon that subject, to lodge such book, document or other object with the executive director within the period specified in the summons, or to appear before the panel or a committee thereof at a time and place specified in the summons, to 5
 be interrogated or to produce such book, document or other object; and”;

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

“(2) A summons for the attendance of any person before the panel or a committee thereof or for the production to the panel or a committee thereof of any book, document or other object shall be in the form prescribed by the panel, shall be signed by [the chairman] any member of the panel, by the executive director or by the chairperson of a committee and shall be served in the manner so prescribed.” 10

Amendment of section 440I, as inserted by section 4 of Act 78 of 1989 15

17. Section 440I of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection:

“(1) No person shall disclose any information acquired by him or her in the exercise of his or her powers or the performance of his or her duties in terms of this Chapter and relating to the business or affairs of any other person, except— 20
 (a) for the purposes of exercising his or her powers or performing his or her duties in terms of this Act;
 (b) for the purposes of legal proceedings under this Act;
 (c) when required to do so by any court or under any law;
 (d) when co-operating with another body performing substantially the same functions as the panel, or any other body controlled by the aforementioned body, for the purpose of obtaining or furnishing any information relevant to any aspect of the functions of the panel or such body.” 25

Substitution of section 440J of Act 61 of 1973, as inserted by section 4 of Act 78 of 1989 and substituted by section 5 of Act 69 of 1990 30

18. The following section is hereby substituted for section 440J of the principal Act:

“Limitation of liability

440J. The panel or any member thereof, any committee of the panel or member of such committee, or any employee or representative of the panel, shall not be liable for any loss sustained by or damage caused to any person as a result of anything done or omitted by the said panel, committee, member, employee or representative in the *bona fide* or negligent, but not grossly negligent, exercise of any power or carrying out of any duty or performance of any function under or in terms of this Act or the rules.” 35

Amendment of section 441 of Act 61 of 1973, as substituted by section 5 of Act 78 of 1989, and amended by section 7 of Act 69 of 1990 and section 14 of Act 82 of 1992 40

19. Section 441 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection:

“(1) Any company, director, officer or person convicted of any offence referred to in any of the undermentioned sections shall be liable to be sentenced, in the case of an offence referred to— 45
 (a) in section 440F(1), to a fine [not exceeding R500 000] or to imprisonment for a period not exceeding 10 years or to both such fine and imprisonment;

- (b) in section 132, to a fine **[not exceeding R40 000]** or to imprisonment for a period not exceeding 10 years or to both such fine and such imprisonment;
- (c) in section 440G(2) or 440I(2), to a fine **[not exceeding R20 000]** or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment; 5
- (d) in section 37, 143, 145, 145A, 146, 146A, 147(2)(a), 148, 149, 153(4), 156, 162, 169, 218, 219, 255, 256(5), 260, 284, 424 or 440D(3) or (4), to a fine **[not exceeding R8 000]** or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment;
- (e) in section 15A, 38, 141, 153(3), 165, 222, 226, 234, 237, 238, 249(1), 250, 251 or 275, to a fine **[not exceeding R4 000]** or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment; 10
- (f) in section 90, 286, 288, 297, 298, 299, 302, 308, 312(5), 363, 363A, 365, 414, 418(5) or 421, to a fine **[not exceeding R2 000]** or to imprisonment for a period not exceeding six months or to both such fine and such imprisonment; 15
- (g) in section 242 or 287, to a fine **[not exceeding R1 000]** or to imprisonment not exceeding a period of three months or to both such fine and such imprisonment;
- (h) in section 168, 185, 256(6), 312(4), or 331(1), to a fine **[not exceeding R4 000]**; 20
- (i) in section 81, 93, 164, 166, 170, 207, 211(7), 239, 291 or 295, to a fine **[not exceeding R2 000]**;
- (j) in section 112, 113, 131 or 179, to a fine **[not exceeding R800]**;
- (k) in section 49, 50, 67, 68, 147(2)(b), 181, 186, 189, 192, 206, 313 or 333(2), to a fine **[not exceeding R400]**; 25
- (l) in section 204 or 245, to a fine **[not exceeding R400]** for every meeting in respect of which the contravention has taken place;
- (m) in section 171, 200(5) or 311, to a fine **[not exceeding R200]**;
- (n) in section 215, to a fine **[not exceeding R2 000]** and an additional fine **[not exceeding R40]** for every day during which the contravention continues; 30
- (o) in section 172, to a fine **[not exceeding R400]** for every day during which the contravention continues;
- (p) in section 46, 51, 58, 80, 96, 98, 102, 139, 200(6), 213, 253, 269, 271, 309, 356 or 357, to a fine **[not exceeding R40]** for every day during which the contravention continues; 35
- (q) in section 211(6), 216(5), 252 or 276(5), to a fine **[of R20]** for every day during which the contravention continues.”

Substitution of word

20. The principal Act is hereby amended by the substitution for the word “chairman”, wherever it occurs in sections 440A(1), 440B(5), (10) and (12) and 440D(1) and (3), of the word “chairperson”. 40

Transitional provision

21. The members of the Securities Regulation Panel (established by section 440B(1) of the principal Act), who held office immediately prior to the commencement of this Act, shall continue in office until the date immediately prior to the first meeting of the panel as constituted in terms of section 440B(2) of the principal Act as amended by section 15. 45

Short title

22. This Act shall be called the Companies Amendment Act, 1998.