

# Supplement No. 1 to Gazette No. 62 of 2nd September, 2011

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ACT NO. 18 OF 2011

**Companies Act, 2011**

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- ACT NO. 18 OF 2011

### **Companies Act 2011**

An Act to provide for standard and adaptable requirements for the incorporation, organisation, operation and liquidation of companies; to define the relationship between companies and their shareholders, directors and creditors; to encourage efficient and responsible management of companies; to protect shareholders and creditors against abuse of management power; to provide for registration of external companies in Lesotho; to set out responsibilities of the Registrar of Companies and to provide for incidental matters.

Enacted by the Parliament of Lesotho.

#### PART 1 - PRELIMINARY

##### **Short title and commencement**

1. This Act may be cited as the Companies Act, 2011, and shall come into operation on such a date as the Minister may, by notice published in the Gazette, appoint.

##### **Interpretation**

2. (1) In this Act, unless the context otherwise requires - “accounts”

means annual financial statements;

“annual meeting” means a meeting required to be held by virtue of section 49;

“assets” include property of any kind, movable and immovable or tangible or intangible the book value of which is certified by the directors at the latest practicable date before approval for a major transaction is sought;

“board” or “board of directors” means directors of a company whose number is not less than the required quorum acting together as a board of directors, and if the company has only one director, that director;

“class of shares” means shares having identical rights, privileges, limitations and conditions;

“company” means a body corporate incorporated or registered in accordance with this Act or the Companies Act 1967<sup>1</sup> which is limited by shares or with unlimited liability;

“court” in relation to a company means the High Court of Lesotho, and in relation to any offence against this Act, includes a subordinate Court having jurisdiction in respect of that offence;

“creditor” means a person who is owed money or an obligation by a company, and includes a person who, in a liquidation, would be entitled to claim that a debt is owing to that person by the company;

“current assets” means any asset that is expected to last or be in use for less than 12 months;

“debenture” means a promissory note or bond offered by a company to a creditor in exchange for a loan or any other benefit, the repayment of which is secured by the general creditworthiness of the company and not by any specific property;

“director” means a person occupying the position of a director of the company by whatever name called;

“existing company” means a body corporate registered under the Companies Act, 1967 or under any other law;

“external company” means a body corporate incorporated outside Lesotho;

“external register” means the register of external companies kept pursuant to section 91;

“financial year” in relation to a company, means a period of 12 months ending on 31st

March except that where a company is incorporated after 31st March of the relevant year, and the period ending on that date is less than 12 months, that lesser period shall be deemed to be a financial year;

“foreign language” means any language other than English or Sesotho;

“group accounts” means, in relation to a group of companies and a financial year -

- (a) a consolidated statement of the financial position of the group as at the end of the financial year;
- (b) where a member of the group trades for profit, a consolidated income statement for the group in respect of the relevant financial year;
- (c) where a member of the group does not trade for profit, a consolidated income and expenditure statement for the group in respect of the financial year; and
- (d) a consolidated statement of cash flows for the group in respect of the financial year at the end of the financial year, together with any notes or documents attached thereto giving information that relates to the statement of the financial position;

“indemnity” includes relief or excuse from liability, whether before or after the liability arises and “indemnify” has a corresponding meaning;

“interest group” in relation to any action or proposal affecting rights attached to shares, means a group of shareholders whose affected rights are identical;

“Lesotho Institute of Accountants” means the institute established by section 3 of the Accountants Act 1977 or any other institute established by law to regulate the profession of accountancy;

“major transaction” in relation to a company means -

- (a) the acquisition of, or an agreement to acquire, whether contingent or not, assets, excluding current assets, equivalent to 25 percent or more of the assets, excluding current assets, of the company before its acquisition; or

- (b) the disposition of, or an agreement to dispose of, whether contingent or not, assets, excluding current assets, equivalent to 25 percent or more of the assets, excluding current assets, of the company;

“Master” means the Master of the High Court of Lesotho or any person acting in that capacity;

“Minister” means the Minister responsible for trade and industry;

“officer” in relation to a company includes a director, manager, promoter or secretary;

“ordinary resolution” is a resolution that is approved by a simple majority of the votes of shareholders entitled to vote in person or by proxy and voting on the question;

“personal representative” in relation to an individual, means the executor, administrator or trustee of the estate of that individual;

“pre-emptive rights” means the rights conferred on shareholders under section 36;

“pre-incorporation contract” means -

- (a) a contract purporting to be made by a company before its incorporation; or
- (b) a contract made by a person on behalf of a company before and in contemplation of its incorporation;

“prescribed form” means a form prescribed by regulations made under this Act;

“private company” means a company which by its articles -

- (a) limits the number of its members between one and fifty, not including persons who are in the employment of the company, and persons who, having been formally 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;
- (b) restricts the right to transfer of its shares; and
- (c) prohibits any invitation to the public to subscribe for any shares or debentures of the company;

“promoter” means a person who applies for incorporation of a company in accordance with Part II;

“prospectus” means a notice, circular, advertisement or other printed or duplicated invitation offering to the public for subscription or purchase, any shares or debentures of a company;

“public company” means any other company that is not a private company;

“records” means the documents required to be kept by a company under section 84;

“registered office” in relation to a company, means the office referred to in section 82;

“Registrar” means the Registrar of Companies or a person acting in that capacity;

“related company” has the meaning set out in subsection (2)(b);

“relative” in relation to a person, means -

- (a) a parent, spouse, child, brother or sister of that person; or
- (b) a nominee or trustee for any of those persons;

“secretary” includes an official of a company performing the duties normally performed by a secretary of a company;

“share” means the interest of a shareholder in the company, measured by a sum of money for the purpose of liability and of interest;

“shareholder” means -

- (a) a person whose name is entered in the share register as the holder for the time being of one or more shares in the company;
- (b) a person named as a shareholder in an application for the registration of a company at the time of registration of the company;
- (c) a person who is entitled to have that person’s name entered in the share register under a merger proposal as a shareholder in

a merged company:

Provided that where 2 or more persons hold one or more shares in a company jointly, they shall, for the purposes of this Act be treated as a single shareholder;

“share register” means the share register required to be kept under section 29;

“solvency test” has the meaning set out in subsection (7);

“special meeting” means a meeting called out in accordance with section 50;

“special resolution” means a resolution that is approved by at least 75 per cent of the members entitled to vote in person or by proxy and voting on the question;

“subsidiary company” has the meaning set out in subsection (2)(a);

“surplus assets” means the assets of a company remaining after the payment of creditors’ claims following liquidation of the company and available for distribution in accordance with the articles of incorporation of the company and this Act;

“working day” means any day other than Saturday, Sunday or a gazetted public holiday.

(2) For the purposes of this Act, and subject to subsection (4) -

(a) a company is a subsidiary of another company if -

(i) that other company -

(i) controls the composition of the board of the company;

(ii) is in a position to control majority votes that can be exercised at a meeting of the company; or

(iii) holds more than half of the issued shares of the company carrying a right to vote;

(aa) the first mentioned company is a subsidiary of a company which is that other company’s subsidiary;

(b) a company is related to another company if -

(i) the other company is its holding company or

subsidiary;

- (ii) there is another company to which both companies are related by virtue of paragraph (a); or
- (iii) the business of the companies have been so carried on, that the separate business of each company, or a substantial part of it, is not readily identifiable.

(3) For the purposes of subsection (2), the composition of a company's board shall be deemed to be controlled by another company if that other company, by exercising a power exercisable by it, can appoint or remove all or a majority of the directors of the company, and for this purpose the other company shall be deemed to have power to make such an appointment if -

- (a) a person cannot be appointed as a director without the exercise by the other company of such a power in his or her favour; or
- (b) a person's appointment as a director of the company follows necessarily from the person being a director or other officer of the other company;
- (c) that company or its subsidiary hold directorship of the company.

(4) In determining whether a company is a subsidiary of another company

-

- (a) shares held or a power exercisable by that other company in a fiduciary capacity shall be treated as held or exercisable by it;
- (b) subject to paragraphs (c) and (d), shares held or a power exercisable -
  - (i) by a person as a nominee for that other company, except where that other company is concerned only in a fiduciary capacity; or
  - (ii) by a nominee for a subsidiary which is concerned only in a fiduciary capacity;

shall be treated as held or exercisable by that other company;

- (c) shares held or a power exercisable by a person under the provisions of debentures of the company or of a trust deed for securing an issue of debentures shall be disregarded; and
- (d) shares held or a power exercisable by, or by a nominee for that other company or its subsidiary not being held or exercisable in the manner described in paragraph (c) , shall not be treated as held or exercisable by that other company if the ordinary business of that other company or its subsidiary, includes the lending of money and the shares are held or power is exercisable by way of security only for the purpose of a transaction entered into in the ordinary course of that business.

(5) A company shall be deemed to be the wholly-owned subsidiary of another if it has no members except that other company and that other's wholly-owned subsidiaries and its or their nominees.

(6) A company shall be deemed to be another's holding company if that other company is its subsidiary.

(7) For the purposes of this Act, a company satisfies the solvency test if -

- (a) it is able to pay its debts as they become due in the normal course of business; and
- (b) the value of the company's assets is greater than the value of its liabilities, including contingent liabilities.

(8) In determining whether the value of a company's assets is greater than the value of its liabilities, including contingent liabilities, the directors shall have regard to the most recent financial accounts of the company prepared in accordance with this Act and the valuation of assets or estimates of liabilities that are reasonable in the circumstance and all other circumstances that the directors know or ought to know that affect, or may affect, the value of the company's assets and liabilities, including its contingent liabilities.

(9) In determining the value of a contingent liability, account may be taken of the likelihood of the contingency occurring and any claim the company is entitled to make and can reasonably expect to be met to reduce or extinguish the contingent liability.

### **Application and non-application of Act**

3. (1) This Act shall not apply to a co-operative society, trade union or friendly society or any other registered society unless the law governing societies, co-operative societies, trade unions or friendly societies provides otherwise.

(2) In this section, “society”, “co-operative society”, “trade union” or “friendly society” have the meaning given to them by the law governing societies, co-operative societies, trade unions or friendly societies in Lesotho.

(3) Where a company is subject to the provisions of any law which is specially applicable to such company due to its commercial activities or nature or objects, the provisions of this Act which would otherwise apply to such company shall not apply wherever those provisions would be inconsistent with any such law.

(4) This Act shall apply to every company which is incorporated as a company at the commencement of this Act.

## **PART II - REGISTRATION AND INCORPORATION OF COMPANIES**

### **Registration of existing companies**

4. (1) A company incorporated before the commencement of this Act shall be deemed to have been registered and incorporated under this Act.

(2) The provisions of this Act relating to the liquidation of companies shall not apply to an existing company if it has commenced to be liquidated under the Companies Act, 1967.

(3) Where the liquidation of an existing company has not commenced before this Act has come into operation, the provisions of this Act as to liquidation shall apply to the existing company whether registered under this Act or not.

### **Application for incorporation**

5. (1) A person may, either alone or with another, lodge, in the prescribed form, an application for incorporation of a company, with the Registrar.

(2) Despite anything contained in the customary or common law, a married person shall be entitled to act as a promoter of a company without his or her spouse's consent.

- (3) Application for incorporation shall -
  - (a) be in the form prescribed in the Schedule, Form 1; and
  - (b) be accompanied by consent forms as prescribed in the Schedule Form 8 for each director.
- (4) Application for incorporation may be submitted electronically.
- (5) Application for incorporation shall be as prescribed in Schedule, Form 1.

### **Articles of incorporation**

6. (1) A promoter may lodge with the Registrar for registration, articles of incorporation and the Registrar may allow the articles of incorporation to be submitted electronically.

(2) Articles of incorporation shall prescribe rules and regulations for the management and operations of the company and may adopt all or any of the model articles of incorporation developed by the Registrar under section 87(4).

(3) If no articles of incorporation are registered with the Registrar, the model articles of incorporations developed by the Registrar under section 87(4) shall apply.

(4) The articles of incorporation lodged for registration with the Registrar shall be signed by each promoter and shall, as nearly as possible be in the form similar to the model articles of incorporation developed by the Registrar under section 87(4).

(5) Where the application for incorporation is submitted electronically, the Registrar may require the promoter to indicate the means of authentication.

### **Certificate of incorporation and commencement of commercial activities**

7. (1) After receipt of a properly completed application for incorporation together with all supporting documents of the company, the Registrar shall -

- (a) register the particulars of the company; and
- (b) issue a certificate of incorporation.

(2) A certificate of incorporation of a company issued under this

section is conclusive evidence that -

- (a) all the requirements of this Act as to incorporation have been complied with; and
  - (b) the company has been duly incorporated under this Act with effect from the date of incorporation stated in the certificate;
  - (c) the company legally exists in Lesotho.
- (3) Upon its incorporation, it shall be lawful for a company to carry on general commercial activities in Lesotho subject to specific sector licensing requirements, if any.
- (4) The certificate of incorporation shall be as prescribed in the Schedule, Form 2.

#### **Dealings between a company and other persons**

8. (1) A person shall not be affected by, or deemed to have notice or knowledge of the contents of the articles of incorporation or any other document relating to a company merely because it is registered with the Registrar or is available for inspection at the registered office of the company.

- (2) A company shall not assert against a person dealing with the company that -
- (a) the articles of incorporation of the company have not been complied with;
  - (b) a person named as a director of the company is not a director of the company or has not been duly appointed or does not have authority to exercise a power, which a director of a company carrying on business of the kind usually has;
  - (c) a person held out by the company as a director, employee or agent of the company has not been duly appointed or does not have authority to exercise a power, which a director, employee, or agent of a company carrying on business of the kind usually has; or
  - (d) a document issued on behalf of a company by a director,

employee or agent of the company with actual or usual authority to issue the document is not valid,

unless the person has, or ought to have, by virtue of his or her relationship to the company, knowledge of the matters referred to in any of the paragraphs (a), (b) , (c) or (d).

(3) Subsection (2) shall apply even though a person of the kind referred to in paragraphs (b) to (d) acts fraudulently or forges a document that appears to have been signed on behalf of the company, unless the person dealing with the company has actual knowledge of the fraud or forgery.

### **Legal personality, capacity and powers of a company**

9. (1) A company shall, upon its incorporation, be a person in its own right, separate from its shareholders, and shall continue in existence until it is removed from the register of companies in accordance with this Act.

(2) Subject to this Act and its articles of incorporation, a company shall have the capacity, rights, powers and privileges of a natural person and may do anything which it is permitted or required to do by its articles of incorporation or under this Act, including -

- (a) the right to sue and be sued;
- (b) the power to make or amend by-laws not inconsistent with its articles of incorporation or this Act;
- (c) the right or power to acquire, hold, use or dispose of any interest in any property;
- (d) the right or power to acquire, hold, use or dispose of any shares or obligations of any other company;
- (e) the power to enter into contracts, incur liabilities, issue bonds and obligations and secure its obligations with its property;
- (f) the power to lend money and invest its funds; and
- (g) the power to elect directors and appoint employees and agents of the company to conduct its business and exercise its powers within or outside Lesotho.

(3) An act of a company shall not be invalid by reason that the act is contrary to its articles of incorporation or this Act.

(4) Subsection (3) does not limit the rights of shareholders to act against the company or against its directors to restrain the act.

### **Pre-incorporation contracts**

10. (1) Despite any legislation or rule of law, a pre-incorporation contract may be ratified within such period as shall be specified in the contract, or if no period is specified, within a reasonable time after the incorporation of the company in the name of which, or on behalf of which, it has been made.

(2) A pre-incorporation contract may be ratified by a company in the same manner as a contract may be entered into on behalf of a company.

(3) Despite any legislation or rule of law, unless a contrary intention is expressed, there is an implied warranty by the person who purports to make the pre-incorporation contract in the name or on behalf of the company -

- (a) that the company will be incorporated within such period as may be specified in the contract, or if no period is specified, within a reasonable time after the making of the contract; and
- (b) that the company will ratify the contract within such period as may be specified in the contract, or if no period is specified, within a reasonable time after the incorporation of the company.

(4) The amount of any damages recoverable in an action for breach of warranty implied by virtue of subsection (3) shall be the same as the amount of damages that would be recoverable in an action against the company for damages for breach by the company of the unperformed obligations under the contract if the contract had been ratified and cancelled.

(5) If, after its incorporation, a company does not ratify a preincorporation contract, a party to that contract may apply to Court for an order -

- (a) that directs a company to return property, whether movable or immovable, acquired under the contract to that party;
- (b) for any other relief in favour of that party in relation to that

property; or

(c) that validates the contract, whether in whole or in part.

(6) The Court may, if it considers it just and equitable to do so, make any order or grant any relief as it thinks fit and may do so whether or not an order has been made under subsection (4).

(7) In any proceedings against a company for breach of a preincorporation contract which has been ratified by the company, the Court shall, on the application of the company, a party to the proceedings or of its own motion, make such order for the payment of damages or other relief, as the Court considers just and equitable, in addition to or in substitution for any order which shall be made against the company, or a person by whom the contract was made.

(8) If a company, after its incorporation, enters into a contract on the same terms as, or in substitution for a pre-incorporation contract, not being a contract ratified by the company under this section, the liability of any person under subsection (3), including any liability under an order made by the Court for the payment of damages, shall be discharged.

### **Registration of external companies**

11. (1) An external company that, on or after the commencement of this Act, establishes a place of business within Lesotho shall apply for registration within ten days of establishing the place of business.

(2) An application for registration of an external company under this Part shall be lodged with the Registrar and shall be -

- (a) as prescribed in the Schedule, Form 3; and
- (b) signed by or on behalf of the external company.

(3) Without limiting subsection (2), the application shall -

- (a) state the name of the external company;
- (b) state the full names, nationality and residential addresses of the directors of the external company at the date of the application;

- (c) state the full address of the place of business of the external company in Lesotho;
- (d) have attached to it, evidence of incorporation of the external company and a copy of the instrument constituting or defining the articles of incorporation of the company, and if not in English, a translation of such documents certified in accordance with regulations made under this Act;
- (e) have attached to it, a notice from the Registrar approving the name of the external company; and
- (f) state the full name and address of one or more persons resident in Lesotho who are authorised to accept service in Lesotho of documents on behalf of the external company.

(4) Where the Registrar receives a properly completed application for registration of an external company, the Registrar shall immediately register it on the external register and shall issue a certificate of registration as prescribed in Schedule 1, Form 4.

### PART III - AMENDMENT OF ARTICLES OF INCORPORATION

#### **Amendment of articles of incorporation**

12. (1) A company may amend its articles of incorporation at any time, and the amendment shall state -

- (a) the name of the company;
- (b) the text of each adopted amendment and the date on which they were adopted;
- (c) provisions for implementing the amendment if the amendment is an exchange, reclassification or cancellation of issued shares; and
- (d) that the amendment was duly approved in accordance with the articles of incorporation and this Act.

(2) Where there is -

- (a) an amendment to the instrument constituting the articles of incorporation of an external company;
- (b) a change in the directors of an external company; or
- (c) a change in the persons authorised to accept service in Lesotho of documents on behalf of the external company;

the external company shall, within 20 working days of the change or amendment, notify the Registrar of such change or amendment as prescribed in the Schedule, Form 5 and Form 9 of the notification shall be accompanied by the approval referred to in subsection (1).

(3) An amendment to the articles of incorporation to remove cumulative voting shall be made by special resolution and an amendment to add a provision for cumulative voting shall be made by ordinary resolution.

(4) Where the amendment of the articles of incorporation include provisions which are required to constitute it as a private company and the amendment results in the company not meeting the requirement of a private company, the company shall cease to be entitled to the privileges and exceptions conferred on private companies by this Act and the provisions of this Act shall apply to the company as if it were not a private company.

#### **Procedure for amendment**

13. (1) If a company has not issued shares, its board of directors may adopt amendments to the company's articles of incorporation.

- (2) If a company has issued shares -
  - (a) the board of directors may recommend to the shareholders that they approve the amendment, unless there is a conflict of interest, in which case the board shall not make the recommendation to the shareholders; and
  - (b) the company shall notify each shareholder of the meeting of the shareholders at which the proposed amendment is to be discussed and shall provide a copy of the proposed amendment;
- (3) If a company has more than one class of shares, the shareholders of a

class may vote as a separate group.

#### PART IV - COMPANY NAME

##### **Company name**

14. (1) The Registrar shall not register a name and shall not register a company by a name -

- (a) the use of which contravenes any law in force in Lesotho;
- (b) that is identical to a trade name well known nationally, regionally or internationally or to a trademark registered nationally, regionally, internationally or a well known trademark;
- (c) that is identical or similar to a name that the Registrar has already registered under this Act or the Companies Act 1967, for another company;
- (d) that, in the opinion of the Registrar, is offensive, or
- (e) that includes the words "Imperial", "Royal", "Crown", "Empire", "Government", "State", "Commonwealth", "Dominion" or the combination of such words, "African Union", "United Nations" or any other word or words which import or suggest that the company enjoys the patronage of the Sovereign or Government of Lesotho, or of any part of the Commonwealth, or of any department of any such Government or Administration or of the General Assembly of the United Nations, unless the Registrar consents to the use of these words in a name.

(2) This section shall, with necessary modification, apply to a company that changes its name.

(3) The Registrar may order a company to change its name if, considering the provisions of this section, the name was registered erroneously.

### **Use of “Limited” and “Proprietary” in a company name**

15. (1) A company name shall include at the end of its name, the word “Limited” or its abbreviation “Ltd” and in the case of a private company, the words “Proprietary” or its abbreviation “Pty” and “Limited” or its abbreviation “Ltd”.

(2) Where the Registrar 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 be incorporated, the Registrar may register that association as a company without the addition of the word “limited” to its name.

(3) The association shall, upon such registration, enjoy all the privileges of a company and be subject to all the obligations of a company except the obligation to use the word “limited” in its name.

(4) The Registrar may, after providing the company with an opportunity to be heard, enter the word “limited” at the end its name if the Registrar is satisfied that the company no longer complies with the provisions of subsection (2) and the company shall amend its articles of incorporation accordingly and lodge them with the Registrar within 60 days failing which -

- (a) the company shall be subject to removal from the register in accordance with guidelines and procedure made pursuant to section 185(2)(e);
- (b) the company, its directors or officers who knowingly or negligently caused the failure shall be jointly and severally liable to compensate a person who suffers loss;
- (c) the company, its directors or officers who knowingly or negligently cause the failure commits an offence and on conviction shall be jointly and severally liable to a fine of M200,000 or to imprisonment for a term of 15 years or both.

(5) If a company fails to amend its articles of incorporation as required in subsection (4) the company or its directors or officers who knowing or negligently cause the failure shall be jointly and severally liable to compensate a person who suffers loss as a result.

### **Change of Company name**

16. (1) A company may by special resolution change its name, which change shall be subject to sections, 14 and 15.

(2) Where the name of the company is approved pursuant to sections 14 and 15, the Registrar shall -

- (a) enter the new name of the company on the register;
- (b) issue a certificate of change of name for the company recording the change of name of the company in the form prescribed in the Schedule, Form 6.

(3) A change of name of a company -

- (a) takes effect from the date the certificate is issued under subsection (2)(b); and
- (b) does not affect any rights or obligations of the company, or render defective any legal proceedings by or against the company, and any legal proceedings that might have been continued or commenced against the company by its former name, and may be continued or commenced against it by its new name.

(4) After the issuance of the certificate of change of name, a company shall publish in 3 consecutive editions of a newspaper widely circulating in Lesotho and through the electronic media, an advertisement informing the public of the change of name and stating the new company name and the company shall also make an announcement through a radio station with national coverage during prime time for at least 3 consecutive days.

(5) This section shall also apply to a registered external company wishing to change its name.

### **Use of company name and company logo in company documents**

17. (1) A company shall ensure that its full name and address are clearly stated on all documents issued or signed by or on behalf of the company.

(2) Where a company has or uses a logo, it shall use the same logo in all

its written communication.

(3) Without the consent of the Registrar a company shall not use, in its logo, communication or other documents -

- (a) a design that resembles, is similar or identical to the national flag;
- (b) words or designs that impart or suggest that the company enjoys the patronage of the Government of Lesotho or any part of the Commonwealth or General Assembly of the United Nations, or any other organisation referred to in section 14(1)(e).

(4) Where a company does not use a logo, the company shall affix a company date stamp in all its communication which shall contain the date, name and address of the company.

(5) A company that wishes to change its logo shall, 30 days before it changes the logo:

- (a) notify the Registrar of the intended change; and
- (b) publish the notice in a widely circulating newspaper in Lesotho indicating the old and new logo.

(6) All company communication shall contain the names of all the directors of the company.

(7) An external company shall ensure that its full name and the name of the country where it was incorporated are clearly stated in all -

- (a) communications sent by or on behalf of the company; and
- (b) documents issued or signed by or on behalf of the company.

(8) For the purposes of this section “logo” means words, symbols or designs by which a company can easily be recognised.

(9) For the purposes of subsection (6), a generally recognised abbreviation of a word in the name of an external company shall suffice, if it is not misleading to do so.

(10) If a company fails to comply with this section, the company or its directors or officers who knowingly or negligently cause the failure shall be jointly and severally liable to compensate a person who suffers loss as a result.

## PART V - SHARES

### **Types of shares**

18. (1) Subject to the articles of incorporation of a company and this Act, shares may be ordinary or preferred, including redeemable preference or convertible, and may have special or limited voting rights.

(2) Where there is one class of shares, the shares shall be ordinary.  
**Consideration for issue of shares**

19. (1) The consideration for which a share is issued may be in the form of cash, promissory notes, moveable or immovable, corporeal or incorporeal property or securities of another company or contracts for future service.

(2) Before a company issues shares, the board shall -

- (a) decide the consideration for which the shares shall be issued and the terms on which they shall be issued; and
- (b) resolve that, in its opinion, the consideration for and terms of the issue are fair and reasonable to the company and to all existing shareholders.

(3) The directors who vote in favour of the resolution required by subsection (2) shall sign a certificate that, in their opinion, subsection (2) has been complied with, and shall lodge that certificate with the Registrar within 15 working days of the making of the resolution.

(4) Subsection (2) shall not apply to the issue of shares that are fully paid-up from the reserves of the company to all shareholders of the same class in proportion to the number of shares held by each shareholder and such an issue shall be called “a bonus issue”.

(5) A board may resolve that the company may offer shareholders discounts in respect of some or all of the goods sold or services provided by the company.

(6) A board may approve a discount scheme under subsection (5) if it has previously resolved that the proposed discounts are -

- (a) fair and reasonable to the company and to all shareholders; and
- (b) to be available to all shareholders or all shareholders of the same class on the same terms.

(7) A discount scheme shall not be approved or continued by the board unless it is satisfied, on reasonable grounds, that the company satisfies the solvency test.

(8) It shall be lawful for a company to pay a commission or grant a discount to a person in consideration of his or her subscribing or agreeing to subscribe for any shares in the company, or procuring or agreeing to procure subscriptions for any shares in the company if -

- (a) the payment and the rate of the commission or grant and the rate of the discount is authorised by its board of directors and disclosed in the prospectus or the statement, as the case may be; and
- (b) the rate of payment or discount does not exceed 5 percent of the price at which the shares are issued.

(9) Subsections (2), (3) (4), (6) and (7) shall not apply to the issue of shares upon registration of the company.

### **Issue of shares and share capital**

20. (1) A company shall -

- (a) immediately after its registration, issue to a person named in the application for registration as a shareholder, the number of shares to be issued to that person; and
- (b) in the case of a merged company, immediately after the merger is effective, issue shares to a person who is entitled to shares under the merger proposal.

(2) Subject to this Act and to any restrictions in its articles of incorporation, a company may issue shares at any time and in any number it thinks fit:

Provided that it does not cause the total number of issued shares to exceed the number of authorised shares.

(3) The board of a company shall lodge with the Registrar, a report, as prescribed in Schedule, Form 7, each time the company issues shares within 15 working days of the issue of shares, stating the number and the nominal amount of shares issued and names and addresses of the persons to whom the shares have been issued.

(4) Where a board resolves to subdivide into series or consolidate any class of shares, the board shall lodge the resolution with the Registrar within 15 working days of making such resolution.

(5) A company shall have a share capital which shall be determined by the company and the directors shall -

(a) affirm that it is adequate; and

(b) sign a certificate of affirmation.

### **Redeemable preference shares**

21. (1) A company may, if so authorised by its articles of incorporation, issue preference shares which are, at the option of the company or the shareholder, liable to be redeemed.

(2) Where a preference share is redeemable at the option of the shareholder, and the shareholder gives proper notice to the company requiring the preference share to be redeemed, the company shall redeem the share upon the date specified in the notice, or if no date is specified, upon the date of the notice, and as of the date of redemption, the preference share shall be deemed to have been cancelled.

(3) Where a preference share is redeemable upon a date specified in the articles of incorporation, a company shall redeem the preference share upon that date, and the preference share shall be deemed to have been cancelled on that date:

Provided that the company shall not redeem preference shares unless it satisfies the solvency test after redeeming the shares.

(4) Preference shares, including premium, if any, shall be redeemed only out of the profits of the company, which would otherwise be available for payment of dividends or out of the proceeds of a fresh issue of shares made for the purpose of redemption.

(5) Where preference shares are to be redeemed out of the profits of the company, there shall be transferred out of the profits, a sum equal to the nominal amount of the shares to be redeemed to a reserve fund, to be called the capital redemption reserve fund.

(6) Subject to the articles of incorporation of a company, the board of the company may offer shareholders bonus shares by capitalising such amounts in the capital redemption reserve fund as are not required for the redemption of preference shares.

### **Acquisition of shares through convertible securities and options**

22. (1) Before a board issues any securities that are convertible into shares in a company or any options to acquire shares in the company, the board shall -

- (a) determine the consideration for which the convertible securities or options, and, the shares that will be issued and the terms on which they shall be issued on such conversion or exercise of option;
- (b) determine whether the consideration for and terms of the issue of the convertible securities or options and the shares that shall be issued on such conversion or exercise of option are fair and reasonable to the company and to all existing shareholders;
- (c) if the shares are to be issued other than for cash, determine a reasonable present cash value of the consideration for the issue; and
- (d) if the shares are to be issued other than for cash, determine whether the present cash value of the consideration to be provided is not less than the amount to be credited for the issue of the shares.

(2) The directors who vote in favour of the determination made under subsection (1) shall sign a certificate that, in their opinion, the determination made under subsection (1) is a fair and reasonable consideration for the shares and shall lodge that certificate with the Registrar within 15 working days of making that determination.

### **Bonus shares and shares in lieu of dividends**

23. (1) Subject to the articles of incorporation of a company, the board may offer

shareholders bonus shares by capitalising any undistributed profits of the company, not required for the payment of any preferential dividend, any sum standing to the credit of share premium account or capital redemption reserve fund as are not required for the redemption of preference shares.

(2) In addition to bonus shares, a board may offer shareholders the option of receiving shares in the company in lieu of any proposed dividend.

(3) The share option offered to shareholders may not be an offer made in accordance with shareholders pre-emptive rights.

(4) A board shall give notice to shareholders of the shares in lieu of dividend option, stating the date by which the option shall be exercised, and all shareholders shall be afforded at least 30 days to exercise the option.

(5) Upon the date specified in the notice given under subsection (4) a board may -

- (a) issue shares to those shareholders who have elected to receive shares in lieu of the proposed dividend; and
- (b) authorise the proposed dividend to be paid to those shareholders who have not elected to receive shares.

#### **Contracts for issue of shares**

24. A contract or deed under which a company is, or may be required to issue shares whether on the exercise of an option or on the conversion of securities or otherwise, is an illegal contract unless the board is entitled to issue the shares and has complied with sections 19 and 22.

#### **Rights and powers attached to shares**

25. (1) A share unless specified otherwise in the articles of incorporation, confers on the holder -

- (a) the right to one vote on a poll at a meeting of the company on a resolution, including a resolution to -
  - (i) appoint or remove a director or auditor;
  - (ii) approve any alteration to the articles of incorporation

of the company;

- (iii) approve a major transaction;
  - (iv) approve a merger of the company;
  - (v) approve the liquidation of the company;
  - (vi) approve the issue of new shares or a new class of shares;
  - (vii) convert the company into a public company and vice versa;
- (b) the right to an equal share in dividends authorised by the board;
  - (c) the right to an equal share in the distribution of the surplus assets of the company.

(2) Shares shall specify the rights, privileges, limitations and conditions attached to each share to be issued, if different from those set out in this section and, whether the transfer of shares is subject to any conditions or limitations.

#### **Acquisition by company of its own shares**

26. (1) A company may purchase or otherwise acquire shares issued by it -
- (a) in accordance with an order of the Court made under this Act on terms and conditions set out in that order; or
  - (b) in accordance with section 41 and 42.

(2) Any shares acquired by a company pursuant to this section shall immediately upon acquisition be deemed to have been cancelled.

(3) Where a share is cancelled under this section, all the rights and privileges attached to that share shall expire; however, the articles of incorporation of the company shall not be affected, and the share may be reissued in accordance with this Act.

### **Share certificates**

27. (1) Shares shall be represented by certificates and the rights and obligations of shareholders shall be identical whether or not their shares are represented by certificates.

(2) A share certificate shall state -

(a) the name of the issuing company and that it is incorporated under the laws of Lesotho;

(b) the name of the person to whom it is issued; and

(c) the number and class of shares and the designation of the series the certificate represents, if any.

(3) If a company is authorised to issue different classes of shares or series within a class, the designation, relative rights, preferences and limitations of each class and series shall be stated on the share certificate.

(4) A share certificate shall be signed by two officers or directors designated by the board and if the person so designated to sign no longer holds office when the share is issued, the certificate shall remain valid.

(5) Unless the articles of incorporation of a company provide otherwise, the board may authorise the issue of some or all of the shares of a class or series without certificates.

(6) A company shall, within 15 working days after the issue or transfer of shares without certificates, send the shareholder a written statement of the information required by subsections (2) and (3).

(7) A transferor of an uncertificated share or security shall, upon demand, supply the purchaser with proof of authority to transfer or with any other document necessary to obtain registration of the transfer of the share or security and if the transferor fails to comply with the demand within a reasonable time, the purchaser may reject or rescind the transfer.

(8) Delivery of an uncertificated share or security to a purchaser occurs when the transferor registers the purchaser as the registered owner.

### **Transfer of shares**

28. (1) Subject to the articles of incorporation of a company, shares in the company may be transferred by entry of the name of the transferee on the share register.

(2) For the purpose of transferring shares, a form of transfer signed by the present holder of the shares or by his or her personal representative and the transferee shall be delivered to the company.

(3) Within 15 days of the receipt of a form of transfer in accordance with subsection (2), a company shall enter the name of the transferee on the share register as the holder of the shares, unless -

- (a) the board resolves within 15 working days of receipt of the transfer to refuse or delay the registration of the transfer, and the resolution sets out in full reasons for doing so;
- (b) a notice of the resolution, including the reasons, is sent to the transferor and the transferee within 15 working days of the resolution being approved by the board; or
- (c) the articles of incorporation expressly permit the board to refuse or delay the registration for the reasons stated.

(4) Subject to the articles of incorporation of a company, the board may refuse or delay the registration of a transfer of shares if the holder of the shares has failed to pay to the company an amount due in respect of those shares, whether by way of consideration for the issue of the shares or in respect of sums payable by the holder of the share in accordance with the articles of incorporation.

(5) Shares in a company may pass by operation of law despite the articles of incorporation of the company.

### **Share register**

29. (1) A company shall maintain a share register that records the shares issued by the company and states -

- (a) whether under the articles of incorporation of the company or the terms of issue of the shares, there are any restrictions or limitations on their transfer; and
- (b) whether any document that contains the restrictions or limitations may be inspected.

- (2) A share register shall state, with respect to each class of shares -
- (a) the names, alphabetically arranged, and the latest known address of each person who is or has within the last 10 years been a shareholder;
  - (b) the number of shares of that class held by each shareholder within the last 10 years; and
  - (c) the date of any -
    - (i) issue of shares to;
    - (ii) repurchase or redemption of shares from; or
    - (iii) transfer of shares by, or to,

each shareholder within the last 10 years, and in relation to the transfer, the name of the person to or from whom the shares were transferred.

(3) An entry of the name of a person in a share register as the holder of a share shall be evidence of that person's legal title to that share.

(4) If a person falsely and deceitfully personates an owner of a share as if the impersonator were the true and lawful owner, he or she commits an offence and shall be liable on conviction to a fine of M10, 000 or to imprisonment for a period of 3 years or both.

(5) It shall be the duty of each director to take reasonable steps to ensure that the share register is properly kept and that share transfers are promptly entered on it.

(6) A share register shall be kept at the registered office of the company, unless if -

- (a) the maintenance of the register is carried out at another office of the company in Lesotho, it may be kept at that office; and
- (b) the company arranges with some other person to maintain the register on behalf of the company, it may be kept at the office in Lesotho of that other person at which the work is done.

(7) An agent of a company may maintain the share register of the company.

(8) If a share register is not kept at the registered office of the company, or if the place at which it is kept has changed, the company shall ensure that within 10 working days of it first being kept elsewhere or moved, as the case may be, notice is given to the Registrar of the place where the share register is kept.

(9) A personal representative of a deceased shareholder, whose name is registered in the share register of a company as the holder of a share in that company, is entitled to be registered as the holder of that share as a personal representative.

(10) A trustee of the property of an insolvent person registered in the share register of a company as the holder of a share in that company is entitled to be registered as the holder of that share as the trustee of the property of the insolvent.

#### **Power of court to rectify share register**

30. (1) If a name of a person is wrongly entered in, or omitted from, the share register of a company, and if the company refuses upon the persons' request to correct the entry, the aggrieved person or a shareholder may apply to Court -

- (a) for rectification of the share register;
- (b) for compensation for loss suffered; or
- (c) for both rectification and compensation.

(2) On an application under this section, the Court may order -

- (a) rectification of the register;
- (b) payment of compensation by the company or a director of the company for any loss suffered; or
- (c) rectification and payment of compensation.

(3) On an application under this section, the Court may decide -

- (a) a question relating to the entitlement of a person who is a party to the application to have his or her name entered in or omitted from the share register; and

- (b) a question necessary or expedient to be decided for rectification of the register.

### **Company as shareholder**

31. (1) A subsidiary shall not hold shares in its holding company.
- (2) Where a company that holds shares in another company becomes a subsidiary of that other company, the company shall surrender those shares.
- (3) Where, on the coming into operation of this Act, a subsidiary company holds shares in its holding company, the subsidiary company shall surrender those shares.

## **PART VI - SHAREHOLDERS' RIGHTS AND OBLIGATIONS**

### **Shareholders' rights and benefits**

32. (1) Shareholders may exercise any rights or receive any other benefit under this Act or the articles of incorporation.
- (2) A board may fix a date which shall entitle shareholders to receive any benefit under this Act or the articles of incorporation.

### **Shareholders' right to receive company documents**

33. (1) A shareholder or his or her duly authorised agent shall be entitled to obtain a copy of the articles of incorporation together with amendments, if any, on making a written request to the board of directors of the company or any agent authorised to maintain the company's records.
- (2) A company shall issue to a shareholder, on request, a statement that sets out -
- (a) the class of shares held by the shareholder, the total number of shares of that class issued by the company, and the number of shares of that class held by the shareholder; and
  - (b) the rights, privileges, conditions and limitations, including restrictions on transfer attaching to the shares held by the shareholder.

(3) A company shall not be obliged to issue a shareholder with a statement if -

- (a) the statement has been provided within the previous 6 months;
- (b) the shareholder has not acquired or disposed of any shares since the previous statement was provided; or
- (c) the rights attached to shares of the company have not been altered since the previous statement was provided.

(4) A shareholder may require a copy of, or extract from, a document which is available for inspection by him or her to be sent to him or her within 5 working days after he or she has made a request in writing for the copy or extract and has paid a reasonable copying and administration fee prescribed by the company.

(5) A statement referred to in subsection (2) shall not be evidence of title to the shares or of any matters set out in it.

### **Right to receive information**

34. (1) A shareholder or his or her duly authorised agent may, at any time, make a written request to a company for information held by the company.

(2) The request made pursuant to subsection (1) shall clearly specify the information sought.

(3) Within 10 working days of receiving a request under subsection (1), the company may -

- (a) provide the information;
- (b) agree to provide the information within a specified period;
- (c) agree to provide the information within a specified period if the shareholder pays a specified amount of money to the company to enable it to meet the cost of providing the information; or
- (d) refuse to provide the information specifying the reasons for the refusal.

(4) A company may refuse to provide information under this section if the

disclosure of that information would or would be likely to prejudice the commercial position of the company or if the request for information is unreasonable.

(5) A shareholder aggrieved by the decision of a company in relation to a request for information shall apply to Court for an order that the company provide the information within such reasonable time or upon the payment of a charge, if the Court is satisfied that -

- (a) the period specified for providing the information is unreasonable;
- (b) the charge set by the company is unreasonable; or
- (c) the refusal to provide information is unreasonable.

(6) The Court shall, in making an order under subsection (5), specify the use that may be made of the information and the persons to whom it may be disclosed.

#### **Right to receive dividends**

35. (1) A board may fix a date which shall entitle shareholders to receive a dividend.

(2) The entitlement under subsection (1) shall be available only to those shareholders whose names are registered in the share register on the day, and not more than 30 days from the date the proposed action will be taken.

(3) If no date is fixed by the board under subsection (1), the date for the determination of entitlements shall be the date on which the board passes the resolution concerned.

(4) Subject to any restrictions contained in its articles of incorporation, a board may authorise the payment of a dividend by the company to shareholders at such time and at such amount as it thinks fit.

(5) A board shall not authorise a dividend -

- (a) in respect of some but not all the shares in a class; or
- (b) of a greater value per share in respect of some shares of a class than in respect of other shares of that class,

unless the company satisfies the solvency test.

(6) Despite subsection (1), a shareholder may waive his or her entitlement to receive a dividend by notice in writing to the company signed by or on behalf of the shareholder.

(7) Subject to the articles of incorporation of a company, a dividend once authorised shall be a debt due and payable by the company to a shareholder.

### **Pre-emptive rights**

36. (1) A board may fix a date which shall entitle shareholders to exercise pre-emptive rights to acquire shares.

(2) Unless excluded or limited by the articles of incorporation, shareholders shall be entitled to pre-emptive rights, which are the rights to be offered any further issue of shares which rank equally with existing shares, whether as to voting or distribution rights, or both, in such a manner and on such terms as would, if accepted, preserve their relative voting and distribution rights and shareholders are entitled to exercise pre-emptive rights within at least 30 days after the offer is made.

(3) A share shall be issued in accordance with shareholders preemptive rights, unless the articles of incorporation provide otherwise.

(4) Nothing in this section shall affect the need to obtain the approval of the shareholders of a particular class where the issue of shares affects the rights of that class.

(5) Failure to comply with this section does not affect the validity of any issue of shares, but shareholders whose rights are prejudiced by the failure may apply to Court for redress.

### **Voting trust**

37. (1) One or more shareholders may create a voting trust, conferring on a trustee, the right to vote or otherwise act for them by signing an agreement setting out the provisions of the trust and transferring their shares to the trustee.

(2) After a voting trust agreement is signed, the trustee shall prepare a list of the names and addresses of shareholders who have an interest in the trust, together with the number and class of shares transferred to the trust, and deliver the agreement and copies of the list to the company's registered office.

(3) A voting trust shall be effective on the date the first shares subject to the trust are registered in the trustee's name, and it shall be valid for a period not exceeding 10 years unless extended under subsection (4).

(4) All or some shareholders to a voting trust agreement may extend it for an additional term not exceeding 10 years by signing a written consent to the extension and an extension agreement shall be binding only on the shareholders who sign it.

(5) A voting trustee shall deliver copies of an extension agreement and a list of shareholders who have an interest in the trust to the company's registered office.

### **Proxies**

38. (1) A shareholder may vote his or her shares in person or by proxy, and the company shall accept that vote.

(2) A shareholder or his or her attorney may appoint a proxy to vote or otherwise act for the shareholder by signing an appointment form, provided that the appointment form shall state the names of the appointer and the appointee in full.

(3) An appointment of a proxy is effective when a signed appointment form is received by the board of directors.

(4) An appointment form may entitle the proxy to vote at a specific meeting or at all meetings of the company.

(5) An appointment of a proxy is revocable unless the appointment form states that it is irrevocable.

(6) The death or incapacity of the shareholder appointing the proxy does not affect the right of the company to accept the proxy's authority unless notice of the death or incapacity is received by the board of directors before the proxy exercises his or her authority under the appointment.

(7) A transferee for value of shares subject to an irrevocable proxy appointment may revoke the proxy appointment if the transferee did not know of its existence when the transferee acquired the shares, and the existence of an irrevocable proxy appointment was not noted on the certificate or other document representing the shares without certificates.

### **Minority rights**

39. Where a shareholder voted against a resolution approving any matter referred to in section 53(2) or where the resolution to exercise that power was passed without a meeting and he or she did not sign the resolution and the shareholders resolve to exercise the power, that shareholder is entitled to require the company to purchase his or her shares.

#### **Failure to seek interest group approval**

40. (1) If action is taken by a company which required the approval of an interest group and the approval was not obtained, the aggrieved interest group shall be entitled to rescind the action.

(2) If action taken by the company was one that required approval by an ordinary resolution, the decision to bring an action for rescission shall be approved by the holders of not less than 25 percent of the shares issued and outstanding to members of the interest group.

(3) If action taken by the company was one that required approval by a special resolution, the decision to bring an action for rescission shall be approved by the holders of not less than 50 percent of the shares issued and outstanding to members of the interest group, plus one share.

(4) Where an interest group by special resolution approves the taking of action by the company under this section and the company becomes entitled to take that action, a shareholder belonging to that interest group who voted against the approval of the action is entitled to require the company to purchase the shares voted by him or her.

(5) Where a resolution approving the taking of an action was adopted without a meeting and a shareholder who was a member of an interest group did not sign the resolution, that shareholder is entitled to require the company to purchase those shares.

#### **Procedure for buy-out**

41. (1) A shareholder entitled to require a company to purchase shares by virtue of sections 39 and 40 may, within 20 working days of the announcement of the result of the vote in question or the company becoming entitled to take an action, give a written notice to the company requiring it to purchase his or her shares in the company.

(2) Within 20 working days of receiving a notice under subsection (1), the board shall -

- (a) agree to the purchase of shares by the company;
- (b) arrange for some other person to purchase the shares;
- (c) apply to the Court for an order exempting the company from minority buy-out;
- (d) arrange for the resolution to be rescinded or decide in the appropriate manner not to take the action concerned, as the case may be; or
- (e) give written notice to the shareholder of the board's decision under this subsection.

#### **Purchase by company**

42. (1) Where the board agrees under section 41(2)(a) to the purchase of shares by the company it shall, within 5 working days of agreeing to purchase shares, determine a fair and reasonable price for the shares to be acquired and communicate that price to the holders of those shares.

(2) If a shareholder considers that the price determined by the board is not fair or reasonable, he or she shall give notice of objection to the company within 10 working days, otherwise the company shall purchase the shares concerned at the determined price.

(3) If an objection to the price has been received by the company, the company shall -

- (a) with the consent of the shareholder, refer the question of what is a fair and reasonable price to arbitration; and
- (b) within 5 working days, pay a provisional price in respect of each share equal to the price determined by the board.

(4) A reference to arbitration under this section is deemed to be a "submission" for the purposes of the Arbitration Act, 1980 .

(5) Where the parties resort to arbitration, the arbitrator shall expeditiously determine a fair and reasonable price for the shares to be purchased and if the price determined by the arbitrator exceeds the provisional price, the company shall pay the balance owing to the shareholder within 30 days and if the price determined by the

arbitration is less than the provisional price, the shareholder shall pay the balance to the company within 30 days.

(6) The costs of arbitration under this section shall be borne by the company.

(7) The arbitrator may award interest on any balance payable or excess to be repaid under subsection (5) at such rate as he or she thinks fit, having regard to whether the provisional price paid or the reference to arbitration was reasonable and provide for interest to be paid to or by the shareholder whose shares are to be purchased.

(8) A company shall not purchase its shares under this section unless it satisfies the solvency test.

#### **Exemption from buy-out**

43. (1) Where a shareholder seeks to exercise minority buy-out rights, a company may apply to Court for an order that it should be exempted from the requirement to purchase the shareholders' shares on the grounds that -

- (a) such a purchase would be disproportionately damaging to the company;
- (b) the company cannot reasonably be required to finance the purchase;
- (c) it will not be just and equitable to require the company to purchase the shares;
- (d) the company has been unable, despite having made reasonable efforts to arrange the purchase of their shares by a third party; and
- (e) the board has resolved that the purchases by the company of the shares would result in the company failing to satisfy the solvency test.

(2) On an application under this section, the Court may exempt the company from the obligation to purchase the shares, and may make any further order it thinks fit, including an order -

- (a) setting aside a resolution of the shareholders;
- (b) directing the company to take or refrain from taking any action specified in the order;
- (c) requiring the company to pay compensation to the shareholders affected; or
- (d) that the company be put into liquidation.

(3) The Court shall not make an order under subsection (2) on either of the grounds set out in subsection (1)(a) or (b) unless it is satisfied that the company has made reasonable efforts to arrange for another person to purchase the shares in accordance with section 41(2)(b).

(4) On an application under this section, the Court may make an order, if satisfied as to the correctness of paragraphs (d) and (e) of subsection (1), exempting the company from the obligation to purchase shares or suspend the obligation to purchase shares for a specified period and may make such other order as it deems fit.

#### **Purchase of shares by third party**

44. (1) Section 42 applies to the purchase of shares by a person with whom the company has entered into an arrangement for purchase in accordance with section 41(2)(b) subject to such modifications and, in particular, as if the references in that section to the board and the company were references to that person.

(2) The company shall indemnify the holder of the shares to be purchased in accordance with this arrangement by reason of any failure by the intended purchaser to purchase the shares at the price determined by the board or fixed by the arbitrator.

#### **Review of management decisions by shareholders**

45. (1) Despite anything in this Act -

- (a) a shareholder may question, discuss or comment on the management of a company at a meeting of shareholders of the company; and
- (b) a meeting of shareholders may pass a resolution relating to the management of the company, which resolution shall be

binding on the board unless the articles of incorporation provide otherwise.

(2) Where a director or the board has purported to exercise a power vested in a shareholder or any other person, the shareholder or that person may ratify or approve the exercise of that power by the director or board, in the same manner as the shareholder or that person would be required to exercise that power.

(3) The purported exercise of a power that is ratified under subsection (2) shall be deemed to be or to have been a proper and valid exercise of that power.

(4) The ratification or approval under this section of the purported exercise of a power by a director or the board shall not prevent the Court from exercising a power which apart from the ratification or approval, would be exercised in relation to the action of the director or the board.

(5) Where the shareholder or the person referred to in subsection (2) does not ratify or approve the exercise of a power by a director or board of a company, the power shall be deemed not to have been exercised and where the shareholder or any other person suffers prejudice, the shareholder or that person may bring an action against the director or the company.

(6) The purported exercise of a power that is not ratified shall not affect the rights of a third party unless the third party was aware that the director or the board had no right to exercise that power.

### **Liability of shareholders**

46. (1) A shareholder shall not be liable for an obligation of the company by reason only of his or her being a shareholder.

(2) The liability of a shareholder to the company is limited to -

- (a) an amount unpaid on a share held by the shareholder;
- (b) any liability expressly provided for in the articles of incorporation of the company;
- (c) any liability under subsections (3), (4) and (5); or
- (d) any liability under this section.

(3) Nothing in this section shall affect the liability of a shareholder to a

company under a contract, including a contract for the issue of shares or in delict for any wrong or breach of a fiduciary duty or other actionable wrong committed by a shareholder.

(4) Where a share renders its holder liable to calls or otherwise imposes a liability on its holder, that liability attaches to the current holder of the share, and not to a prior holder of the share, whether or not the liability became enforceable before the share was registered in the name of the current holder.

(5) Where all or part of the consideration payable in respect of the issue of a share remains unsatisfied and the person to whom the share was issued no longer holds that share, liability in respect of that unsatisfied consideration attaches to subsequent shareholders.

(6) An amendment to the articles of incorporation that creates or increases exposure of a shareholder to liability under subsection (2)(b) or (4) may be adopted by special resolution of the shareholders.

(7) Despite anything in the articles of incorporation of a company, a shareholder is not bound by an alteration of the articles of incorporation of a company that requires the shareholder to acquire more shares in the company than the number held on the date the alteration is made, or increase the liability of the shareholder to the company, unless the shareholder agrees in writing to be bound by the alteration either before, on, or after it is made.

#### **Liability of personal representative or trustee**

47. (1) The liability of the personal representative of the estate of a deceased person who is registered as the holder of a share comprised in the estate shall not, in respect of that share, exceed the proportional amount available from the assets of the estate, after satisfaction of prior claims, for distribution among creditors of the estate.

(2) The liability of the trustee of the estate of an insolvent person, who is registered as the holder of a share comprised in the estate, shall not, in respect of that share, exceed the proportional amount available from the assets of the estate, after satisfaction of prior claims, for distribution among creditors of the estate.

(3) In this section “trustee” means the person in whom the estate of the insolvent is vested under the law governing insolvency.

### **Alteration of shareholder rights**

48. (1) A company shall not take an action which affects the rights attached to any shares unless that action has been approved by a special resolution of the relevant interest group.

(2) For the purposes of subsection (1), the rights attached to a share include -

- (a) the rights and privileges as stated in section 25 and conditions attached to the share by this Act or the articles of incorporation;
- (b) pre-emptive rights;
- (c) the right to have the procedure set out in this section, and any further procedure required by the articles of incorporation for the amendment or alteration of rights, observed by the company;
- (d) the right that a procedure required by the articles of incorporation for the amendment or alteration of rights not be amended or altered.

(3) For the purposes of subsection (1), the issue of further shares ranking equally with, or in priority to, existing shares, whether as to voting rights or dividends, is deemed to be action affecting the rights attached to the existing shares, unless -

- (a) the articles of incorporation of the company expressly permit the issue of further shares ranking equally with, or in priority, to those shares; or
- (b) the issue is made in accordance with the pre-emptive rights of shareholders under section 36.

### **PART VII - MEETINGS OF SHAREHOLDERS Annual meetings of**

#### **shareholders**

49. (1) Subject to subsection (2), the board of a company shall call an annual meeting of shareholders to be held -

- (a) once in each calendar year;
- (b) not later than 6 months after the end of the financial year of the company; or
- (c) not later than 15 months after the previous annual meeting.

(2) A company may not hold its first annual meeting in the calendar year of its incorporation but shall hold that meeting within 18 months of its incorporation.

(3) This section shall not apply to a private company which has less than 10 shareholders and none of the shareholders is a company:

Provided that such a private company shall call an annual meeting upon request by any shareholder.

#### **Special meetings of shareholders**

50. (1) A special meeting of shareholders entitled to vote on an issue may at any time be called by the board or any other person authorised to do so by the articles of incorporation to consider the issue.

(2) A special meeting shall be called by the board on the written request of shareholders holding shares totalling not less than 5 percent of the voting rights entitled to be exercised on the issue.

#### **Notice of shareholder meetings**

51. (1) A company shall notify shareholders of the date, time and place of each shareholders' meeting not less than 10 days before the date of the meeting.

(2) Unless the articles of incorporation require otherwise, the notice in subsection (1) shall be given to shareholders who are entitled to vote at the meeting, and attendance by a shareholder at a meeting constitutes a waiver by the shareholder of a failure by the company to comply with subsection (1).

(3) The record date for determining which shareholders are entitled to the notice and to vote in terms of subsection (2) shall be the day before notice is sent to the shareholders.

(4) Unless the articles of incorporation state otherwise, notice for an annual meeting may not disclose the purpose for which the meeting is called, but notice of a

special meeting shall disclose the purpose for which the meeting is called.

### **Proceedings at meetings**

52. (1) A chairperson, who shall be appointed by the shareholders, shall preside and a secretary, who shall be appointed by the chairperson, shall record the minutes at the meetings of the shareholders.

(2) Unless the articles of incorporation provide otherwise, the chairperson shall determine the order of business and establish rules for the conduct of the meeting, and such rules shall be fair to shareholders.

(3) A quorum for the transaction of business at a meeting of shareholders shall be a majority of issued shares represented in person or by proxy.

(4) The chairperson shall announce when the polls for each matter voted upon close, and where no announcement is made, the polls shall be deemed to have closed upon final adjournment of the meeting and after the polls close, no votes or changes thereto may be made.

(5) The minutes of the meeting shall be signed by the chairperson and secretary, and shall be recorded in the company's minute book.

### **Decisions by shareholders**

53. (1) Unless otherwise specified in this Act or the articles of incorporation of a company, a power reserved to shareholders may be exercised by an ordinary resolution.

(2) Despite the articles of incorporation of a company, when shareholders exercise the power -

- (a) to approve any alteration to the articles of incorporation;
- (b) to approve a major transaction;
- (c) to approve a merger of the company;
- (d) to approve the liquidation of the company;
- (e) to alter rights attached to shares;

- (f) to declare the company's inability to pay its debts;
- (g) to alter major or core business activity of the company; or
- (h) to convert the company into a public company and vice versa,

that power shall only be exercised by special resolution.

(3) A decision made by a special resolution pursuant to subsection (2)(a), (b), (c) or (d) may be rescinded only by a special resolution.

(4) A special resolution pursuant to subsection (2)(e) and (f) shall not be rescinded in any circumstances.

#### **Resolution in lieu of meeting**

54. (1) A written resolution in lieu of a meeting, signed by a majority of the shareholders entitled to vote on the resolution at a meeting of shareholders is as valid as if it had been passed at a meeting of those shareholders.

(2) It shall not be necessary for a company to hold an annual meeting of shareholders if everything required to be done at that meeting is done by a resolution in accordance with subsection (1).

(3) A resolution adopted without a meeting of the shareholders and the details of the adoption shall be recorded in the minute book of meetings of the shareholders.

(4) If a shareholder delivers written notice of an objection to the resolution in subsection (1) to the company's registered office within 30 days of the shareholder knowing of the adoption of the resolution, then the resolution shall be void.

#### **Meeting called by Court**

55. (1) If the Court is satisfied that -

- (a) it is impracticable to call or conduct a meeting of shareholders in the manner prescribed by this Act or the articles of incorporation; or
- (b) it is in the interests of the company that a meeting of

shareholders be held,

the Court may, on application by a director, or shareholder of a company, order a meeting of shareholders to be held or conducted in such manner as the Court may direct.

(2) The Court may make the order on such terms as to the costs of conducting the meeting and security for those costs as the Court may deem fit.

#### PART VIII - DIRECTORS AND THEIR POWERS AND DUTIES **Meaning**

##### **of “director”**

56. (1) For the purposes of this Part, “director” in relation to a company, includes -

- (a) a person who exercises or is entitled to exercise or who controls or who is entitled to control the exercise of powers which, apart from the articles of incorporation of the company, would be exercised by the board; or
- (b) a person to whom a power or duty of the board has been directly delegated by the board with that person’s consent or acquiescence, or who exercises the power or duty with the consent or acquiescence of the board.

(2) If the articles of incorporation of a company confer a power on shareholders which would otherwise be exercised by the board, a shareholder who exercises that power or who takes part in deciding whether to exercise that power shall be deemed, in relation to the exercise of that power, to be a director for the purposes of this Part.

(3) If the articles of incorporation of a company require a director or the board to exercise or refrain from exercising a power in accordance with a decision or direction of shareholders, a shareholder who takes part in the making of any such decision or direction shall be deemed, in relation to making such decision or direction, to be a director for the purposes of this Part.

(4) Subsection (1) shall not include a person to the extent that the person acts only in a professional capacity.

##### **Qualifications of directors**

57. (1) A natural person who is not disqualified by subsection (3) may be appointed

as a director of a company.

(2) Despite anything contained in customary or common law, a person married in community of property may be a director and shall not need the consent of his or her spouse for this purpose.

(3) The following persons are disqualified from being appointed or holding office as a director of a company -

- (a) a body corporate;
- (b) a person who is under 18 years of age;
- (c) except with leave of Court, an unrehabilitated insolvent;
- (d) a person who has been convicted, in the immediate preceding 5 years, of -
  - (i) an offence under this Act, Companies Act, 1967, or the Insolvency Proclamation, 1957<sup>4</sup> or any law relating to insolvency and sentenced to serve a term of imprisonment without the option of a fine;
  - (ii) an offence involving dishonesty; or
  - (iii) a criminal offence and was sentenced to a term of imprisonment without the option of a fine;
- (e) a person removed from an office of trust by a Court on account of misconduct;
- (f) a person of unsound mind; or
- (g) in relation to a particular company, anyone who does not comply with any qualification for directors contained in the articles of incorporation of the company.

### **Appointment and election of directors**

58. (1) A person named as a director in an application for incorporation of a company or in a merger proposal shall hold office as a director from the date of incorporation or the date the merger proposal is effective, until the earlier to occur of a

special meeting of the shareholders called for the purpose of electing directors or the first annual meeting of the shareholders.

(2) At the special meeting or first annual meeting, the shareholders shall elect the total number of directors provided for by the articles of incorporation, and they shall be appointed for one year and eligible for re-appointment.

(3) A person shall not be appointed a director of a company unless he or she has consented, as in the Schedule, Form 8, to be a director and certified that he or she is not disqualified from being appointed or holding office as a director of the company.

(4) If the articles of incorporation so provide, shareholders shall be entitled to vote their shares cumulatively for the directors to be elected at the meeting.

(5) The acts of a person as a director are valid despite any defect that may later be discovered in the person's appointment or qualification.

#### **Management of company**

59. (1) The business and affairs of a company shall be managed by, or under the direction or supervision of the board of the company, which shall have all the powers necessary for managing, directing and supervising the management of the business and affairs of the company, subject to modifications, exceptions or limitations in accordance with the articles of incorporation.

(2) Subject to subsection (3), when application for incorporation of a company is made, the applicant shall provide the Registrar with the names, addresses and contact details of persons, not less than 2 for public companies and at least one for private companies who have consented to be directors of the company pending appointment of directors.

(3) Notwithstanding subsection (2), and unless stated otherwise, every shareholder of a private company described in section 98(3) and the shareholder of a single shareholding company shall be deemed to be a director of the company and shall be bound by the provision governing the conduct of directors pending the appointment of directors.

(4) Unless the articles of incorporation reserve the authority to make, amend or revoke by-laws to the shareholders, the board of directors may make, amend or revoke by-laws to govern the management of the business and affairs of the company, but the by-laws shall not be inconsistent with the articles of incorporation.

(5) A board of a company may authorise the issuance of debentures, provided that an issue of debentures with an aggregate value in excess of 50 percent of the stated capital of the company shall be ratified by ordinary resolution of the shareholders.

(6) A company, its directors and shareholders shall ensure that there are adequate procedures and safeguards in place, which include adequate transparency concerning the beneficial ownership and control of their company, to prevent the unlawful use of the company in relation to serious criminal activities as defined under the Money Laundering and Proceeds of Crime Act 2008 or any other law.

#### **Officers of company**

60. (1) The board may appoint executive officers to exercise the day to day management functions of the company in accordance with the articles of incorporation.

(2) Executive officers of a company may comprise chief executive officer, treasurer, auditor and other officers the board may deem necessary.

(3) Executive officers of a company shall be held to the same fiduciary responsibilities as the board of directors.

#### **Major transactions**

61. (1) A company shall not enter into a major transaction unless the transaction is approved by special resolution or contingent upon the approval of the shareholders by special resolution.

(2) This section does not apply to a major transaction entered into by a liquidator appointed in accordance with this Act.

(3) A major transaction shall include an action affecting shareholder rights, and shall, be approved by special resolution.

#### **Power to establish committees**

62. (1) Subject to any restrictions in the articles of incorporation of a company, a board may establish a committee which shall consist of, among other persons, at least one director and may delegate to the committee, any one or more of its powers, except its power to -

(a) authorise or approve all kinds of payments to share holders,

- except according to a formula or method, or within limits prescribed by the board of directors;
- (b) approve or propose to shareholders, action that is required to be approved by shareholders;
- (c) fill vacancies on the board of directors or its committees; or
- (d) adopt, amend or repeal by-laws.

(2) A board that delegates powers under subsection (1) shall be responsible for the exercise of that power by the delegate, as if the power had been exercised by the board, unless the board -

- (a) believed on reasonable grounds before the exercise of the power that the delegate would exercise the powers in conformity with the duties imposed on directors of the company by this Act and the company's articles of incorporation; and
- (b) has, by means of reasonable methods properly used, monitored the exercise of the powers by the delegate.

### **Fundamental duties**

63. (1) Subject to subsection (2), a director of a company, when exercising powers or performing duties, shall act in good faith and on reasonable grounds in the interests of the company.

(2) A director of a company, when exercising powers or performing duties as a director, shall exercise the care, diligence and skill that a reasonable director would exercise in the same circumstances taking into account the nature of the business of the company, the nature of the decision taken, the position of the director and the nature of the responsibilities undertaken by that director.

(3) The directors, including former directors, shall be severally and individually liable to the company, its shareholders and any other person for any loss suffered by the company, its shareholders or any person as a result of the directors' failure to perform their duties stated in subsections (1) and (2).

### **Proceedings at board meetings**

64. (1) Subject to the articles of incorporation of a company, proceedings of the board of directors of a company may be governed by the by-laws.

(2) Unless otherwise provided for in the articles of incorporation or by-laws, the following rules shall govern proceedings of the board of directors -

- (a) members of the board may elect a chairperson, who shall preside at meetings, and a vice-chairperson, who shall preside in the chairperson's absence; and in the absence of both the chairperson and vice-chairperson, the members shall elect another member to act as a chairperson for that meeting;
- (b) notice of the time and place of meetings of the board shall be given to each director not less than 5 days, in case of an ordinary meeting and one day in case of special meeting, before the date and time of the meeting and attendance by a director at a meeting shall constitute waiver of failure to provide sufficient notice under this section;
- (c) a quorum shall be not less than 50 percent of all directors and if a quorum is achieved and a meeting is begun, business may be continued despite withdrawal of directors from the meeting that reduces the number to less than a quorum;
- (d) a director may be present at a meeting either in person at that meeting or by audio or audio-visual connection, and shall be counted towards a quorum if so connected;
- (e) a director shall have one vote on matters requiring a vote, and in the case of an equality of votes, the chairperson shall have the casting vote;
- (f) minutes of every meeting of the board shall be kept in the minute book of the board of directors; and
- (g) where the board of directors adopts a resolution by written consent of all the members of the board, that resolution shall be recorded in the minute book of the board of directors.

**Disclosure of interest**

65. (1) A director of a company, who has an interest in a transaction or proposed transaction with the company, shall immediately, after becoming aware of it, cause the nature and full extent of his or her interest to be entered in the register of directors and if the company has more than one director, disclose it to the board.

(2) If a director fails to comply with subsection (1), the director -

- (a) commits an offence and on conviction shall be liable to a fine of M50, 000 and imprisonment to a term of 10 years or

both; and

- (b) shall reimburse the company for any loss suffered by the company through the transaction with the other company.

**Meaning of “interest”**

66. (1) Subject to subsection (2), a director or executive officer of a company has an “interest” in a transaction to which the company is a party if the director -

- (a) is a party to, or will or may derive a material financial benefit from the transaction;
- (b) has a material financial interest in another party to the transaction;
- (c) is an officer, auditor or trustee of another party to, or person who will or may derive a material financial benefit from the transaction, not being a party or person that is -
  - (i) the holding company of which the company is a subsidiary;
  - (ii) a wholly-owned subsidiary of the company; or
  - (iii) a related company;
- (d) is a close relative of another party or person who will or may derive a material benefit from the transaction;
- (e) is otherwise directly or indirectly materially interested in the transaction.

(2) In this section “close relative” means -

- (a) parents, grandparents and other ascendants;
- (b) children, grandchildren and other descendants;
- (c) siblings, nieces and nephews and their children;
- (d) aunts, uncles and their children.

(3) For the purposes of this Act, a director or executive officer of a company has no interest in a transaction to which the company is a party if the transaction comprises only the giving by the company of security to a third party which has no connection with the director or executive officer at the request of the third party, in respect of a debt or obligation of the company for which the director or another person has personally assumed responsibility in whole or in part under a guarantee, indemnity, or by the deposit of a security.

### **Voting by interested director**

67. A director of a company who is interested in a transaction entered into or to be entered into by the company, and who has disclosed his or her interest in compliance with section 65, may -

- (a) vote on a matter relating to the transaction;
- (b) attend a meeting of directors at which a matter relating to the transaction arises and be included among the directors present for the purpose of a quorum;
- (c) sign documents relating to the transaction on behalf of the company; and
- (d) do any other thing in his or her capacity as a director in relation to the transaction, as if the director was not interested in the transaction:

Provided that -

- (i) the board is satisfied, on reasonable grounds, that the company will satisfy the solvency test after the director has done the things in paragraphs (a), (b), (c) and (d);
- (ii) the articles of incorporation of the company expressly authorise the director to do the things in paragraphs (a), (b), (c) and (d); or
- (iii) the shareholders have authorised him or her to do the things in paragraphs (a), (b), (c) and (d).

### **Disclosure of share dealing by directors**

68. (1) A director or executive officer of a company who acquires or disposes of a relevant interest in any shares issued by the company shall immediately after the acquisition or disposal, disclose to the board, the number and class of shares in which the relevant interest has been acquired or disposed, the nature of that interest, the consideration paid or received and the date of acquisition or disposal.

(2) If a director or executive officer of a company has information in his or her capacity as a director or employee of the company or a related company, being information that would not otherwise be available to him or her, but which information is material to an assessment of the value of the shares or other securities issued by the company or a related company, the director or executive officer may acquire or dispose of those shares or other securities, if -

- (a) in the case of an acquisition, the consideration given for the acquisition is not less than the fair value of the shares or securities; or
- (b) in the case of a disposition, the consideration received for the disposition is not more than the fair value of the shares or securities.

(3) For the purposes of subsection (2), the fair value of shares or securities is to be determined on the basis of all information known to the director or publicly available at the time.

(4) Subsection (2) shall not apply in relation to a share or security that is acquired or disposed of by a director only as a nominee for the company or a related company.

(5) Where a director or executive officer acquires shares or securities in contravention of subsection (2)(a), the director or executive officer shall be liable to the person from whom the shares or securities were acquired for the amount by which the fair value of the shares or securities exceeds the amount paid by the director.

(6) Where a director or executive officer disposes of shares or securities in contravention of subsection (2)(b), the director or executive officer shall be liable to the person to whom the shares or securities were disposed of for the amount by which the consideration received by the director or executive officer exceeds the fair

value of the shares or securities.

(7) For the purposes of this section, a director or chief executive officer of a company is deemed to have a relevant interest in a share issued by the company, whether or not that share is registered in his or her name, if the director is a beneficial owner of the share, or has the power or control to exercise any right to vote attached to the share, or has the power or control to acquire or dispose of the share by himself or herself or another person.

(8) Where a person, whether a director of the company or not, has a relevant interest in a share by virtue of subsection (1), and that person or its directors are accustomed or under an obligation, whether legally enforceable or not, to act in accordance with the directions, instructions, or wishes of a director of the company in relation to the exercise of the right to vote or the acquisition or disposition of that share, that director is deemed to have a relevant interest in the share.

(9) Regard shall not be had of a relevant interest of a person in a share if

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- (a) the ordinary business of that person who has the relevant interest consists of, or includes, the lending of money or the provision of financial services, or both, and that person has relevant interest only as security given for the purposes of a transaction entered into in the ordinary course of the business of that person;
- (b) that person has the relevant interest by reason only of acting for another person to acquire or dispose of that share on behalf of another person in the ordinary course of business of a registered share-broker;
- (c) that person has the relevant interest solely by reason of being appointed as a proxy to vote at a particular meeting of members of the company; or
- (d) that person is a trustee company or a nominee company and has the relevant interest by reason only of acting for another person in the ordinary course of business of that trustee or nominee company.

(10) The power referred to in subsection (1) exercisable jointly with

another person is deemed to be exercisable by him or her or any other person.

### **Disclosure and use of company information**

69. (1) A director of a company, who has information in his or her capacity as a director or employee of the company, being information that would not otherwise be available to him or her, shall not disclose that information to any person, or make use of or act on the information, unless -

- (a) it is for the purposes of the company;
- (b) it is required by law;
- (c) it is in accordance with subsection (2) or (3); or
- (d) it is in accordance with section 65.

(2) A director of a company may, unless prohibited by the board, disclose information to a person, whose interests the director represents, or a person in accordance with whose directions or instructions the director may be required or is accustomed to act in relation to the director's duties and powers, and if the director discloses the information, the name of the person to whom it is disclosed shall be entered in the register of directors.

(3) A director of a company may disclose, make use of, or act on information if particulars of such disclosure, use, or the act are entered in the register of directors and the director is authorised to do so by the board, and the company is not likely to be prejudiced.

(4) A director who discloses, makes use of or acts on information in violation of this section shall be liable to the company for any loss suffered by the company and for any financial gain realised by the director or by others in the transaction in which the director is interested, as a result of the disclosure, use or action.

### **Remuneration and other benefits**

70. (1) A board of a company shall, subject to any restrictions contained in the articles of incorporation of the company, authorise the payment of remuneration or the provision of other benefits by the company to a director for services as a director

or in any other capacity if the board is satisfied that to do so is fair to the company and the board may not authorise a loan from the company to a director.

(2) The board shall ensure that immediately after authorising payments or other benefits to a director, those payments or other benefits are entered into the register of directors.

(3) A director who votes in favour of authorising a payment under subsection (1) shall sign a certificate stating that, in his or her opinion, the making of the payment or the provision of the benefit is fair to the company, and stating the grounds for that opinion.

(4) Where a payment is made or other benefit provided to which subsection (1) applies and -

- (a) the procedures set out in subsections (1) and (3) have not been complied with; or
- (b) reasonable grounds did not exist for the opinion set out in the certificate given under subsection (3),

the director or former director to whom the payment is made or the benefit is provided shall be personally liable to the company for the amount of the payment, or the monetary value of the benefit, except to the extent to which he or she proves that the payment or the benefit was fair to the company at the time it was made or provided.

### **Indemnity and insurance**

71. (1) Unless otherwise provided in this section, a company shall not indemnify or effect insurance for an officer or employee of the company or related company in respect of any liability for an act or omission in his or her capacity as an officer or employee or costs incurred by that officer or employee in defending or settling any claim or proceedings relating to any such liability.

(2) An indemnity given or insurance effected in breach of this section shall be void.

(3) A company may, if expressly authorised by its articles of incorporation, indemnify an officer or employee of the company or a related company in respect of -

- (a) liability to any person other than the company or a related company for any act or omission in his or her capacity as a director or employee; and
- (b) costs incurred by that officer or employee in defending or settling any claim or proceedings relating to any such liability:

Provided that it is not criminal liability or liability in respect of breach, in the case of a director, of the duty specified in section 63 or, in the case of an employee, any fiduciary duty owed to the company or related company.

(4) A company may, if expressly authorised by its articles of incorporation, and with the prior approval of the board, effect insurance for an officer or employee of the company or a related company in respect of -

- (a) liability, not being a criminal liability, for any act or omission in his or her capacity as an officer or employee;
- (b) costs incurred by that officer or employee in defending or settling any claim or proceedings relating to any such liability; or
- (c) costs incurred by that officer or employee in defending any criminal proceedings relating to the activities of the company in which he or she is acquitted.

(5) A director who votes in favour of authorising the effecting of insurance under subsection (4) shall sign a certificate stating that in the director's opinion, the cost of effecting insurance is fair to the company.

(6) A board shall ensure that particulars of an indemnity given to, or insurance effected for an officer or employee of the company or a related company, are immediately entered in the register of directors.

(7) Where insurance is effected for an officer or employee of a company or a related company and provisions of either subsection (4) or (5) are not complied with, or reasonable grounds did not exist for the opinion set out in the certificate given under subsection (5), the officer or the employee is personally liable to the company for the cost of effecting the insurance except to the extent that he or she proves that it was fair to the company at the time the insurance was effected.

### **Vacation of office by director**

72. (1) The office of a director shall be vacated if the person holding that office

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- (a) resigns;
- (b) is removed from office;
- (c) becomes disqualified from being a director;
- (d) dies; or
- (e) otherwise vacates office in accordance with the articles of incorporation of the company.

(2) A director of a company may resign from office by signing a written notice of resignation and delivering it to the company and the notice shall be effective from the date of receipt by the company or on such later date as is specified in the notice.

(3) Despite the vacation of office, a person who held office as a director or employee shall remain liable under the provisions of this Act that imposes liabilities on directors or employees in relation to acts and omissions and decisions made while that person was a director or an employee.

### **Removal of directors**

73. (1) A board of directors shall call a special meeting for the purpose of removing one or more directors upon receiving a written request signed by shareholders whose shares represent not less than 20 percent of the issued shares entitled to vote and the request shall name each director whose removal is sought and the reasons for such removal by the shareholders.

(2) Subject to subsection (3) and the articles of incorporation, a director of a company may be removed from office by ordinary resolution passed at a special meeting called for the purpose or for purposes that include the removal of the director.

(3) Where the articles of incorporation provide for cumulative voting for directors, a director may be removed from office only by special resolution

passed at a special meeting called for the purpose or for purposes that include the removal of that director.

(4) If the removal of two or more directors is to be considered at the special meeting, voting on each director's removal shall be conducted by separate poll.

#### **Notification of change of directors**

74. (1) A board shall ensure that within 30 days of a change of the directors of a company, a notice, as prescribed in the Schedule, Form 9, is delivered to the Registrar.

(2) If the period for the submission of a report to reflect a change of directors coincides with the period for the submission of the company's regular annual report, the company may satisfy the requirements of this section by submission of its regular annual report.

#### **Use of information and advice**

75. (1) Subject to subsection (2), a director of a company, when exercising powers or performing duties as a director, may rely on reports, statements, financial data and other information prepared or supplied, and on professional or expert advice given by any of the following persons -

- (a) an employee of the company whom the director believes on reasonable grounds to be reliable and competent in relation to the matters concerned;
- (b) a professional adviser or expert in relation to matters which the director believes on reasonable grounds to be within the person's professional or expert competence;
- (c) any other director or committee of directors with whom the director did not serve, in relation to matters within the director's or committee's designated authority.

(2) Subsection (1) applies to a director only if the director acts in good faith, makes proper inquiry where the need for inquiry is indicated by the circumstances, and has no knowledge that such reliance is unwarranted.

#### **PART IX - SHAREHOLDER ACTIONS**

### **Interdict to restrain action**

76. (1) Where a company or a director proposes to engage in conduct that contravenes the articles of incorporation of the company or this Act, the company, a director or shareholder of the company may apply to Court for an order interdicting the company or the director from so acting.

(2) Where the Court grants an order under subsection (1), it may grant such consequential relief as it deems fit.

### **Derivative action**

77. (1) Subject to subsection (2), a shareholder or director of a company may apply to Court for leave to bring proceedings in the name and on behalf of the company or a related company, or intervene in proceedings to which the company or a related company is a party, for the purpose of continuing, defending or discontinuing the proceedings on behalf of the company or related company.

(2) Without limiting subsection (1), in determining whether to grant leave, the Court shall have regard to -

- (a) the likelihood of the proceedings succeeding;
- (b) the costs of the proceedings in relation to the relief likely to be obtained;
- (c) any action already taken by the company or related company to obtain relief; and
- (d) the interests of the company or related company in the proceedings being commenced, continued, defended, or discontinued, as the case may be.

(3) An application for leave to bring proceedings or intervene in proceedings shall be granted only if the Court is satisfied that -

- (a) the company or related company does not intend to bring, diligently continue, defend or discontinue the proceedings; or
- (b) it is in the interests of the company or related company that the conduct of the proceedings should not be left to the

directors or to the determination of the shareholders as a whole.

(4) Notice of application shall be served on the company or related company, which may appear and be heard and shall advise the Court whether or not it intends to bring, continue, defend, or discontinue the proceedings.

(5) Where leave is granted under this section on the application of the shareholder or director to whom leave was granted to bring or intervene in the proceedings, the Court shall -

- (a) make an order authorising the shareholder or any other person to control the conduct of the proceedings;
- (b) give directions for the conduct of the proceedings;
- (c) make an order requiring the company or the directors to provide information or assistance in relation to the proceedings;
- (d) make an order directing that any amount ordered to be paid by a defendant in the proceedings shall be paid, in whole or in part, to former and present shareholders of the company or related company; or
- (e) make an order that the whole or part of the reasonable costs of bringing the action or intervening in the proceedings including any costs relating to any settlement, compromise or discontinuance be borne by the company, unless the Court is of the opinion that it would be unjust or inequitable for the company to bear the costs.

(6) Unless otherwise provided in this section, a shareholder shall not be entitled to bring or intervene in any proceedings in the name of, or on behalf of a company or a related company.

#### **Compromise or settlement of derivative action**

78. Proceedings brought by a shareholder or a director, or in which a shareholder or a director intervene with leave of the Court granted under section 77 shall not be settled, compromised or discontinued without the approval of the Court.

### **Personal action by shareholders against directors**

79. (1) A shareholder or former shareholder may bring an action against a director for breach of a duty owed to him or her as a shareholder where the breach causes the shareholder to suffer loss.

(2) Despite subsection (1), a shareholder may apply to the Court for an order requiring a director of the company to take any action that is required to be taken by the directors under the articles of incorporation of the company or this Act and, the Court may, if it is satisfied that it is just and equitable to do so, make an order and grant such consequential relief as it deems fit.

### **Personal actions by shareholder against company**

80. (1) A shareholder may bring an action against the company for breach of a duty owed by the company to him or her as a shareholder.

(2) Despite subsection (1), a shareholder may apply to the Court for an order requiring a board to take any action that is required to be taken by the articles of incorporation of the company or this Act and, the Court may, if it is satisfied that it is just and equitable to do so, make such an order and grant such other consequential relief as it deems fit.

### **Representative action**

81. Where a shareholder of a company brings proceedings against the company or a director, and other shareholders have the same or substantially the same interest in relation to the subject-matter of the proceedings, the Court shall appoint that shareholder to represent all or some of the shareholders who have the same or substantially the same interest, and may, for that purpose, make such order as it deems fit including an order -

- (a) as to the control and conduct of the proceedings;
- (b) as to the costs of the proceedings; and
- (c) directing the distribution of any amount ordered to be paid by a defendant in the proceedings among the shareholders represented.

## PART X - ADMINISTRATION OF COMPANIES

### **Registered office**

82. (1) A company shall at all times have a registered office in Lesotho.
- (2) A registered office of a company shall be the place that is described as such on the register of companies at that time.
- (3) A board may change the registered office of the company at any time, and a notice of change of registered office shall be lodged with the Registrar as prescribed in the Schedule, Form 10.
- (4) A company shall publish a notice of change of registered office in 3 consecutive editions of a newspaper widely circulating in Lesotho and through electronic media including a radio station with national coverage during prime time for at least 3 consecutive days.
- (5) Where a period for submission of a notice to reflect the change of the registered office coincides with a period for submission of the regular annual report, the requirement in subsection (3) may be satisfied by the regular annual report.

### **Address for service**

83. (1) A company shall at all times have a physical address for service in Lesotho to which documents may be delivered between 9.00 a.m. and 5.00 p.m. on a working day.
- (2) An address for service shall be the company's registered office or another place described as such in the Registrar's register, but shall not be a post office box or private bag at a post office.
- (3) A board of a company may change the address for service of the company at any time, and a notice, as prescribed in the Schedule, Form 11, that reflects the change, shall be lodged with the Registrar to make the change effective.
- (4) A company shall publish a notice of change of registered office in 3 consecutive editions of a newspaper widely circulating in Lesotho and through electronic media including a radio station with national coverage during prime time for at least 3 consecutive days.

(5) If a change of address for service or agent for service coincides with a period for submission of the company's regular annual report, the notice requirement may be satisfied by including the new address for service or agent for service on the regular annual report.

### **Company records**

84. (1) A company shall keep at its registered office or at some other place in Lesotho, the following documents -

- (a) the articles of incorporation of the company;
  - (b) minutes of all meetings and resolutions of shareholders;
  - (c) a share register;
  - (d) a register of directors;
  - (e) minutes of all meetings and resolutions of directors and directors' committees within the last 10 years;
  - (f) certificates given by directors under this Act within the last 10 years;
  - (g) the full names and addresses of the current directors and executive directors;
  - (h) copies of all written communications to shareholders during the last 10 years, including annual reports;
  - (i) the accounting records required by this Act for the last 10 completed financial years of the company;
  - (j) copies of all accounts for the last 10 completed financial years of the company; and
  - (k) detailed inventory of company property including any registered bonds or other charges on the property.
- (2) A custodian of the documents may be -

- (a) if a company has designated executive officers, the secretary or chief executive officer;
  - (b) where there is no executive officer, the managing director or chairperson of the board of directors;
  - (c) the board of directors collectively.
- (3) A company shall keep its accounting records at a place in Lesotho.
- (4) The records of a company shall be kept either in written form or in electronic form which can easily be accessible and convertible into written form.
- (5) A board shall ensure that adequate measures exist to prevent falsification of the company's records, and for detecting any falsification of them.

#### **Inspection of records by directors and shareholders**

85. (1) Subject to subsection (3), a director or shareholder of a company is entitled, on giving reasonable notice to the custodian, to inspect records of the company either in person or by an agent designated in the written notice.

(2) The custodian under subsection (1) shall make the records available to a director, shareholder or agent without charge at the registered office or designated location during regular business hours within 5 working days of receiving a notice.

(3) The Court may, on application by a company, if it is satisfied that it would not be in the company's interests for a director or shareholder to inspect the records or that the proposed inspection is for a purpose that is not properly connected with the director's duties or shareholder interest, direct that the records need not be made available for inspection or limit the inspection of them in any manner it deems fit.

### **PART XI - REGISTRAR OF COMPANIES**

#### **Registrar of companies**

86. (1) There shall be -

- (a) a Registrar of Companies; and

- (b) as many Deputy Registrars of Companies as may be deemed necessary for the purposes of this Act.

(2) All powers, duties and functions vested by the Companies Act 1967 or any other law in Lesotho in relation to companies and which the Registrar has a duty to carry out shall vest in the Registrar at the commencement of this Act.

### **Functions of the Registrar**

87. (1) The Registrar shall register documents that are lodged with the Registrar's office if such documents satisfy the requirements of this Act.

(2) Where the Registrar refuses to register a document, the Registrar shall avail the document to the company, promoter or representative within 5 days of receipt of that document, accompanied by a written explanation of such refusal.

(3) Where there are no prescribed forms, the Registrar shall prescribe forms for the effective administration of this Act, and the information contained in the forms shall not be in conflict with this Act.

(4) The Registrar shall develop model articles of incorporation and cause them to be published in the Government Gazette.

(5) The Registrar may remove a company from the company register in accordance with prescribed guidelines and procedures if -

- (a) the company fails to commence business within 12 months of the time stated in its certificate of incorporation;
  - (b) the company fails to submit an annual report in accordance with Part XIII;
  - (c) the company has ceased to carry on business for a period of 12 consecutive months; or
  - (d) the company has been absent at its registered address of service for 6 consecutive months.
- (6) Subsection (5)(a) shall not apply to:
- (a) a company that does not commence business due to delays relating to licensing or other legal requirements; or

- (b) where the Registrar is satisfied that the company had valid and reasonable grounds that prevented it to commence business within the stipulated time.

(7) A company that has been removed from the register of companies under subsection 5 may, within 14 days apply, to the Registrar for reinstatement failing which the Registrar may apply for dissolution of the company under section 171.

(8) The Registrar may reinstate a company upon application if the Registrar is satisfied on reasonable grounds that the Company should be reinstated.

(9) The Registrar shall have the power to investigate the affairs of a company and inform the board and the shareholders if -

- (a) it appears that the business of the company is being conducted with intent to defraud its shareholders or creditors or any other person or otherwise for a fraudulent or unlawful purpose or in a manner oppressive of any part of its members or that it was formed for any fraudulent or unlawful purpose;
- (b) the persons concerned with its formation or the management of its affairs have in connection therewith been guilty or are suspected of being guilty of fraud or other misconduct towards it or its members; or
- (c) its members have not been given all the information with respect to its affairs which they might reasonably expect.

(10) If the Registrar becomes aware during his or her investigations or on the basis of an auditor's report that a person might be guilty of a criminal offence, the Registrar shall refer the matter to the Director of Public Prosecutions, and a copy of the Registrar's report shall be admissible in any legal proceeding as evidence of the opinion of the Registrar in relation to any matter contained in the report.

(11) All officers, auditors and agents of a company shall produce all documents required by the Registrar during an investigation of the company and the Registrar shall have power to examine any person on oath in relation to the affairs and business of the company under investigation.

(12) A person who fails to comply with the order of the Registrar to produce a document or provide oral evidence commits an offence and is liable upon conviction to a fine of M20,000 or imprisonment for 3 years, or both.

### **Registration of documents**

88. (1) On receipt of a document for registration under this Act, the Registrar shall -

- (a) mark the time and date of receipt on the document;
- (b) subject to subsection (2), register it in the register or the external register, as the case may be; and
- (c) give written advice of registration to the person from whom the document was received.

(2) If a document submitted to the Registrar for registration under this Act -

- (a) is not in the prescribed form, if any;
- (b) does not comply with this Act or Regulations made under this Act;
- (c) is not printed, typewritten or electronically submitted;
- (d) has not been properly completed; or
- (e) contains material that is not clearly legible,

the Registrar shall refuse to register the document, and in that event shall request that the document be appropriately amended or completed and submitted for registration again or that a fresh document be submitted in its place.

(3) A decision to register or not to register a document by the Registrar shall not affect or create any presumption as to the validity or invalidity of the document or the correctness or otherwise of the information contained in the document.

(4) A document lodged with the Registrar for registration shall be effective -

- (a) on the date of registration; or

- (b) at a later date to be specified in the document, which shall not be later than 30 days of receipt of the document by the Registrar.

### **Power to charge fees**

89. (1) The Registrar may require payment of a prescribed fee, before issuing a certificate of incorporation or a registration certificate.

(2) The Registrar may charge such fees as appropriate for providing copies or extracts from the companies register or other documents lodged with the Registrar, and such charges and fees shall be published in the Gazette.

### **Notice by Registrar**

90. (1) Where the Registrar is required by this Act to give notice to any person, the Registrar shall give the notice in writing in such a manner as the Registrar considers appropriate in the circumstances.

(2) A document that appears to be a copy of the notice given by the Registrar and is certified by the Registrar, or a person authorised by the Registrar, shall be admissible in legal proceedings as a copy of the notice.

### **Company Registers**

91. (1) The Registrar shall keep in Lesotho, a register of companies incorporated or registered in Lesotho and a register of external companies registered in Lesotho, which shall contain such information as may be prescribed by this Act.

(2) All registers of companies and other documents relating to companies filed for record under the Companies Act, 1967, this Act or any other law, shall be incorporated in and form part of the register of companies maintained by the Registrar under this section.

### **Inspection and evidence of registers**

92. (1) A person shall, on payment of the prescribed fee and during normal business hours on any working day, inspect any document that constitutes part of the register or external register.

(2) A person shall, on payment of the prescribed fee, require the Registrar to give or certify a certificate of incorporation or registration of a company

or a copy of or extract from a document or any part of any document forming part of the register or the external register.

(3) A copy of or extract from any document forming part of the register or the external register, certified to be a true copy under the hand and seal of the Registrar, shall be admissible in all legal proceedings as evidence of equal validity with the original document.

#### **Review**

93. (1) A person who is aggrieved by a decision of the Registrar under this Act may within 14 days seek review of the decision by the Minister who shall either affirm or vary the decision of the Registrar.

(2) If the Minister fails to respond to the appeal within 14 days the Minister shall be deemed to have upheld the appeal.

(3) A person aggrieved by the decision of the Minister under this Act may apply to the High Court.

## PART XII - ACCOUNTS AND AUDIT

#### **Obligation to prepare accounts**

94. (1) A board shall ensure that, within 3 months of the end of each financial year, accounts are -

- (a) completed in respect of the company's financial year; and
- (b) signed on behalf of the board by at least (2) directors of the company or, if there is only one director, by that director.

(2) A board shall ensure that within 6 months of the end of each financial year, accounts of the company are audited.

(3) Where a board fails to comply with subsections (1) and (2), a shareholder or group of shareholders may demand in writing that the board produce the completed or audited accounts and if the board fails to do so within 30 days of the written demand, the shareholders may bring an action to Court to compel the company to produce such accounts.

(4) If the Court finds that a board failed to comply with subsection

(1) and to respond in a timely manner with the written demand, the Court shall order the board to produce the accounts and may make an order as to costs.

(5) Subject to subsection (6), if at the end of a financial year, a company has one or more subsidiaries, the board shall ensure that within 3 months of the end of the financial year, group accounts are -

- (a) completed in relation to the group of companies; and
- (b) signed on behalf of the board by at least 2 directors of the company or, if there is only one director, by that director.

(6) The group accounts may consist of more than one set of consolidated statements dealing respectively with the company and one group of subsidiaries and with other groups of subsidiaries or of separate statements dealing with each of the subsidiaries, or of statements expanding the information about the subsidiaries in the company's own statements, or any combination of those forms.

(7) The group accounts for a company and its subsidiaries shall be wholly or partly incorporated in the company's own annual financial statements.

(8) Group accounts need not deal with a subsidiary of a company if the board of directors is of the opinion that -

- (a) it is impracticable, or would be of no real value to shareholders of the company in view of the insignificant amounts involved, or would involve expense or delay out of proportion to any value that shareholders of the company may derive; or
- (b) the result would be misleading.

(9) This section shall not apply, in any year, to a company registered before the 31st of March that year.

(10) Where the Registrar is satisfied that it is necessary to do so, the Registrar may allow a company, for purposes of this Part, to use a twelve month period other than a twelve month period ending on 31 March as the year of assessments the Registrar may impose any conditions he or she thinks necessary.

### **Standards for preparation of accounts**

95. (1) The accounts of a company shall be prepared under and in compliance with financial reporting standards issued, adopted and published by the Lesotho Institute of Accountants.

(2) The accounts of a company shall be prepared in accordance with prescribed financial reporting framework prescribed by the Lesotho Institute of Accountants.

### **Accounting records**

96. (1) A board shall keep accounting records that -

- (a) correctly reflect and explain the financial transactions of the company;
- (b) provide the financial position of the company at any time with reasonable accuracy; and
- (c) enable the accounts of the company to be readily available for audit purposes.

(2) Without limiting subsection (1), the accounting records shall contain -

- (a) entries of money received and money spent each day and the matters to which it relates;
- (b) a record of the assets and liabilities of the company;
- (c) if the company's business involves dealing in goods, a record of physical stock held at the end of the financial year together with stock records if any during the year; and
- (d) if the company's business involves providing services, a record of services provided and relevant invoices and documents.

(3) Accounting records shall be kept in written form or in a form or manner in which they are easily accessible and convertible into written form, either

in English or Sesotho.

### **Qualifications of auditors**

97. (1) A person shall not be appointed or act as auditor of a company unless the person is -

- (a) a member of the Lesotho Institute of Accountants who holds a valid certificate to practice as an auditor;
- (b) a member, fellow or associate of an association of accountants constituted outside Lesotho which is recognised by the Lesotho Institute of Accountants for the purposes of this section and registered with Lesotho Institute of Accountants; or
- (c) registered with, and recognised by, the Lesotho Institute of Accountants as qualified for appointment under this section on the basis of his or her adequate knowledge and experience in the course of employment.

(2) The following persons shall not be appointed or act as auditors of a company -

- (a) an officer or employee of the company or related company;
- (b) a person who is a partner of or in the employment of an officer or employee of the company or related company;
- (c) a liquidator or a person who is a receiver in respect of the property of the company;
- (d) a person who, by himself or herself, his or her partner or his or her employee, performs duties of a secretary or accounting officer or book-keeper to the company;
- (e) a person who is an accountant of the company;
- (f) a person who has financial interest in the company or a related company;
- (g) a person who is related to the officer or employee of the

company in a position to influence financial transactions or statements of the company; or

- (h) a person who is indebted in an amount exceeding M10,000 to the company or related company unless the debt was incurred in the ordinary course of business.

(3) A person shall not be appointed as an auditor unless the Lesotho Institute of Accountants is satisfied that during the performance of his or her duties as an auditor, the person shall reside in Lesotho.

### **Appointment of auditors**

98. (1) Unless the articles of incorporation of a company provide otherwise, a company shall, at each annual meeting, appoint an auditor to hold office from the conclusion of the meeting until the conclusion of the next annual meeting to audit the accounts of the company and, if the company is required to complete group accounts, the group accounts for the financial year of the company.

(2) A board may fill any casual vacancy in the office of the auditor and in that case section 97 shall apply.

(3) Notwithstanding this Part, a private company shall not be required to appoint an auditor if -

- (a) the number of shareholders in the company is less than 10;
- (b) none of the shareholders in the company is a company;
- (c) 75% of the shareholders agree that an auditor shall not be appointed; or
- (d) the company is a single shareholding company.

### **Appointment of first auditor**

99. (1) The directors of a company may appoint the first auditor before the first annual meeting, and where so appointed, the auditor shall hold office until the conclusion of the meeting.

(2) If the directors fail to appoint an auditor under subsection (1), the company shall appoint an auditor at the annual meeting of the company.

### **Avoidance of conflict of interest**

100. An auditor of a company shall ensure, in carrying out his or her duties under this Part, that his or her judgment is not impaired by reason of any relationship with or interest in the company or any of its subsidiaries.

### **Auditor's right of access to accounting records**

101. (1) A board of a company shall ensure that an auditor of a company has a right of access at all times to the accounting records and other relevant documents of the company.

(2) An auditor of a company is entitled to require from an officer or employee of the company, including a former director or employee such information and explanation as he or she thinks necessary for the performance of his or her duties as auditor.

(3) An auditor shall, in the performance of his or her duties, be guided and governed by auditors' rules and regulations prescribed by the Lesotho Institute of Accountants.

### **Auditor's attendance at shareholders meetings**

102. A board shall ensure that the auditor of the company -

- (a) is permitted to attend any meeting of shareholders of the company;
- (b) receives notices and communications relating to the meeting which a shareholder of the company is entitled to receive; and
- (c) is heard at a meeting of the company which he or she attends on any part of business of the meeting which concerns him or her as auditor.

### **Auditor's report**

103. (1) An auditor of a company shall make a report to the shareholders on the accounts audited by him or her.

(2) An auditor's report shall comply with auditing standards issued, adopted and published by the Lesotho Institute of Accountants.

(3) An auditor's report under subsection (1) shall state whether -

- (a) the auditor has obtained all information and explanations that he or she requires;
- (b) in the auditor's opinion, proper accounting records have been kept by the company, in so far as appears from the examination of those records;
- (c) in the auditor's opinion, and according to the information and explanations given to him or her as shown by the accounting records, documents and other information of the company, the accounts comply with this Part and where they do not, the respects in which they fail to comply; and
- (d) in the auditor's opinion, the financial statements give a true and fair view of the financial position of the company, the results of its operations comply with accounting and auditing standards issued or adopted by Lesotho Institute of Accountants.

(4) Where, in the performance of his or her duties an auditor of a company becomes aware of -

- (a) any irregularity in the conduct of the company's financial affairs; or
- (b) any matter which, in his or her opinion, is relevant to the exercise of the powers and duties under a credit agreement,

the auditor shall within 7 days, after being aware of such an irregularity or matter, prepare a written report and submit it to the board and the Registrar.

(5) An audit report shall be kept at the registered office of a company and shall be available for inspection by the shareholders, directors and creditors during working hours.

(6) A company when called upon to do so shall submit an auditor's

report to the Registrar within 3 months of such call by the Registrar.

### PART XIII - ANNUAL REPORT

#### **Preparation of annual report**

104. (1) Aboard shall, within 3 months of the end of the financial year, cause to be prepared an annual report on the affairs of the company for the financial year.

(2) This section shall not apply, in any calendar year, to a company registered before the 31st March in that calendar year.

(3) A company may apply to the Registrar to use a different financial year and the Registrar if satisfied that it is necessary to do so, may allow the company to do so.

#### **Contents of annual report**

105. (1) An annual report for a company shall be in writing, dated and, subject to subsection (2), shall -

- (a) describe any change during the financial year in the nature of the business of the company or any of its subsidiaries, or the classes of business in which the company has an interest, whether as a shareholder of another company or otherwise;
- (b) where group accounts for the company and its subsidiaries are required to be completed and signed, include the group accounts;
- (c) where group accounts are not required to be so completed and signed, include the accounts for the company for that financial year;
- (d) where an auditor's report is available, include the report;
- (e) describe any change in accounting policies made since the date of the previous annual report;
- (f) state particulars of entries in the register of directors made since the date of the previous annual report;

- (g) state the total amount of donations made by the company and any subsidiary since the date of the previous annual report;
- (h) state the names and addresses of the directors of the company and the names of any directors who ceased to hold office since the date of the previous annual report;
- (i) state, in respect of each director or former director of the company, the total remuneration and the value of other benefits received by that director or former director during the financial year;
- (j) the place where the register of shareholders and other company documents are kept, if they are not kept at the registered office of the company; and
- (k) the number of shares issued for cash and for consideration other than cash; and
  - (l) state the registered office of the company, the address for service, the postal and e-mail addresses if any.

(2) A company which is required to include group accounts in its annual report shall include, in relation to its subsidiaries, the information specified in paragraphs (e) to (i) of subsection (1).

(3) An annual report shall -

- (a) be signed on behalf of the board by 2 directors of the company or if there is only one director, by that director;
- (b) be lodged with the Registrar within 3 months of the anniversary date of the incorporation of the company; and
- (c) be as prescribed in the Schedule, Form 12.

(4) The annual report may be submitted electronically.

(5) With respect to information specified in subsection (1)(f), (h) and (i) the second subsequent annual report may only indicate that there have been no changes to the prior year's information.

(6) Where an annual report is submitted electronically, the submitter shall provide the Registrar with alternative means of authenticating the submitter.

### **Distribution of annual report to shareholders**

106. (1) Subject to subsection (2), a board shall cause a copy of an annual report to be sent to every shareholder of the company not less than 20 working days before the date fixed for holding the annual meeting of shareholders.

(2) A board is not required to send an annual report to a shareholder if the shareholder has notified the company in writing that he or she waives the right to be sent a copy of that annual report and the shareholder has not revoked that notice.

(3) A private company referred to under section 98(3) is not required to send an annual report to shareholders but the directors shall provide a shareholder with a copy of annual report upon request by the shareholder.

(4) Subject to the articles of incorporation of a company, failure to send an annual report, notice or other document to a shareholder in accordance with this Act shall not affect the validity of proceedings at a meeting of the shareholders of the company if the failure to do so does not impair the ability of shareholders to act knowledgeably at the meeting.

### **Inspection of company records by shareholders**

107. (1) A company shall avail the following records for inspection by a shareholder of the company, or by a person authorised in writing by a shareholder for the purpose, who has notified the company in writing of his or her intention to inspect the company records -

- (a) the register of shareholders;
- (b) minutes of all meetings and resolutions of shareholders;
- (c) copies of all written communications to shareholders during the preceding 10 years;
- (d) annual reports, accounts and group accounts;
- (e) certificates given by directors under this Act; and
- (f) the register of directors of the company.

(2) Where a company fails to comply with subsection (1), the shareholder who gave notice shall be entitled to an expedited order from the Court directing the company to grant access to the shareholder.

(3) If the company's refusal or delay in granting access to records in accordance with subsection (1) prejudiced the ability of a shareholder to distribute proxy solicitations for an issue at a meeting of the shareholders, and if the issue was decided against the shareholder at the meeting, the Court may set aside the decision taken at the meeting.

(4) Documents which may be inspected by a shareholder shall be available for inspection at a place where company records are kept between the hours of 9.00 a.m. and 5.00 p.m. on each working day during the inspection period and the inspection period and hours of availability may be extended at the discretion of the board of directors.

(5) In this section, "inspection period" means the period commencing on the third working day after the day on which the notice of intention to inspect is served on the company by the person or shareholder concerned and ending with the eighth working day after that day of service.

#### **Consequences for failure to submit annual report**

108. (1) Where a company fails to submit its regular annual report as provided by section 105, the company may be, removed from the register of companies in accordance with section 87(5).

(2) A company which, or its officers who, fail to comply with this section shall be subject to a penalty as may be determined by the Minister in the guidelines made pursuant to section 185(2) or (e).

(3) This section shall apply to an external company that carries on business in Lesotho.

### **PART XIV - MERGERS**

#### **Mergers**

109. (1) Two or more companies may make a proposal to merge with the intention to continue as one company, which may be one of the merging companies or may be a new company.

(2) A merger proposal shall set out the terms of the merger, in particular -

(a) the names of the merging companies;

- (b) the name of the surviving or new company;
- (c) the registered office of the surviving or new company;
- (d) the full names and residential addresses of the director or directors of the surviving or new company;
- (e) the address for service of the surviving or new company;
- (f) the share structure of the surviving or new company, specifying -
  - (i) the number of shares of the company;
  - (ii) the rights, privileges, limitations and conditions attached to each share of the company, if different from those set out in section 25;
- (g) the manner in which the shares of each merging company are to be converted into shares of the surviving or new company;
- (h) if shares of the merging company are not to be converted into shares of the surviving or new company, the consideration that the holders of those shares are to receive instead of shares of the merged company;
- (i) any payment to be made to a shareholder or director of a merging company, other than a payment of the kind described in paragraph (h); and
- (j) details of any arrangements necessary to complete the merger and to provide for the subsequent management and operation of the surviving or new company.

(3) A merger proposal may specify the date on which the merger is intended to become effective and if no effective date is specified, the merger shall be effective on the date on which the approved merger proposal is registered as provided by section 111.

(4) If shares of one of the merging companies are held by or on behalf

of another of the merging companies, the merger proposal shall provide for the cancellation of those shares without payment or provision of other consideration when the merger becomes effective and shall not provide for the conversion of those shares into shares of the surviving company or new company.

### **Approval of merger proposal**

110. (1) Aboard of each merging company shall determine whether -

- (a) in its opinion the merger is in the best interests of the shareholders of the company; and
- (b) it is satisfied on reasonable grounds that the surviving or new company will, immediately after the merger becomes effective, satisfy the solvency test.

(2) The directors who vote in favour of a merger shall sign a certificate which states that the merger is in the best interests of the company and shareholders and that, subsequent to the merger, the surviving company will satisfy the solvency test.

(3) The board of a merging company shall send to each shareholder of the company within 30 working days of the board's merger approval -

- (a) a copy of the merger proposal;
- (b) copies of the certificates given by the directors of each board;
- (c) a statement that a copy of the articles of incorporation of the merged company shall be supplied to a shareholder who requests it;
- (d) a statement setting out the rights of shareholders;
- (e) a statement of any material interests of the directors in the proposal, whether in that capacity or otherwise; and
- (f) such further information and explanation as may be necessary to enable a reasonable shareholder to understand the nature and implications for the company and

its shareholders of the proposed merger.

- (4) A merger proposal shall be approved -
- (a) by the shareholders of each merging company; and
  - (b) if a provision in the merger proposal would, if contained in an amendment to a merging company's articles of incorporation or otherwise proposed in relation to that company, require the approval of an interest group by a special resolution of that interest group.

(5) The board of each merging company shall, not less than 20 working days before the merger is proposed to take effect, send a copy of the merger proposal to every secured creditor of the company.

(6) Within 15 days of the shareholders approval of the merger, the company shall publish a notice of merger in 3 consecutive editions of a newspaper widely circulating in Lesotho and through the electronic media including through a radio station with national coverage during prime time for at least 3 consecutive days.

(7) A merger shall not be effective unless the body responsible for competition policy and law has been consulted and concurred.

### **Registration of merger proposal**

111. (1) For the purpose of effecting a merger, the following documents shall be lodged with the Registrar for registration -

- (a) the approved merger proposal; and
- (b) a certificate signed by the board of each merging company stating that the merger is approved in accordance with this Act and the articles of incorporation of the company.

(2) Immediately after receipt of the documents required under subsection (1), the Registrar shall -

- (a) if one of the merging companies survives, issue a certificate of merger as prescribed in the Schedule, Form 13; or

- (b) if a new company results from the merger, enter on the register the particulars of the company and issue a certificate of merger together with a certificate of incorporation.
- (3) On the date shown in a certificate of merger -
- (a) the merger becomes effective;
  - (b) the Registrar shall mark the records of the merging companies other than the surviving or new company to show that they no longer exist;
  - (c) the surviving or new company succeeds to all the property, rights and privileges of each of the merging companies;
  - (d) the surviving or new company succeeds to all the liabilities and obligations of each of the merging companies;
  - (e) proceedings pending by or against a merging company may be continued by or against the surviving or new company;
  - (f) a conviction, ruling, order or judgment in favour of or against a merging company may be enforced by or against the surviving or new company; and
  - (g) the provision of the merger proposal that provides for the conversion of shares or rights of shareholders in the merging companies shall have effect.

**Merger of related companies**

112. (1) A company and one or more of its wholly-owned subsidiaries may merge and continue as one company without complying with sections 109 and 110 if

-

- (a) the merger is approved by a resolution of the board of each merging company; and
- (b) each resolution provides that -
  - (i) the shares of each non-surviving company shall be cancelled without payment or other consideration;

- (ii) the articles of incorporation of the surviving company will not be amended by the merger; and
- (iii) the board is satisfied on reasonable grounds that the surviving company shall, immediately after the merger becomes effective, satisfy the solvency test.

(2) Two or more wholly-owned subsidiary companies of the same holding company may merge and continue as one company without complying with sections 109 and 110 if -

- (a) the merger is approved by a resolution of the board of each merging company; and
- (b) each resolution provides that -
  - (i) the shares of all but one of the merging companies shall be cancelled without payment or other consideration;
  - (ii) the articles of incorporation of the surviving company shall not be amended by the merger; and
  - (iii) the board is satisfied on reasonable grounds that the surviving company shall, immediately after the merger becomes effective, satisfy the solvency test.

(3) A resolution approving a merger under this section shall be deemed to constitute a merger proposal that has been approved.

(4) A board of each merging company shall, not less than 20 working days before the merger is proposed to take effect, notify every creditor of the company in writing of the proposed merger.

(5) A director who votes in favour of a resolution required by subsection (1) or (2) shall sign a certificate stating that, in his opinion, the conditions set out in subsection (1) or (2) are satisfied, and the grounds for that opinion.

### **Powers of court in cases of prejudice**

113. Where the Court is satisfied that giving effect to a merger proposal would prejudice a shareholder or creditor of a merging company or a person to whom a merging company is under an obligation, it may, on an application by that person made before the date on which the merger becomes effective, make an order -

- (a) directing that effect shall not be given to the proposal; or
- (b) directing the company or its board to reconsider the proposal or any part of it.

### **PART XV - PROSPECTUS**

#### **Non application to private company**

114. This Part shall not apply to a private company or single shareholding company.

#### **Offer of shares through prospectus**

115. (1) Where a company wishes to offer or solicit offers for shares in or debentures of a company to the public, such offer or solicitation shall be accompanied by a prospectus.

(2) If a company allots or agrees to allot any shares in or debentures of the company with a view that all or any of the shares or debentures may be offered for sale to the public, the document by which such offer is made shall be deemed to be a prospectus and shall comply with the provisions of this Part.

(3) A company may advertise in a newspaper or elsewhere, 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 provided the place or places and times during which copies of the prospectus may be obtained are clearly indicated.

(4) It shall be lawful for a person to make, verbally or in writing, including a newspaper advertisement, an offer of shares for sale to the public or invite an offer from the public to purchase shares or authorised securities available in Lesotho that -

- (a) have been allotted, or agreed to be allotted, by a company with a view to their being offered for sale to the public;

- (b) are published only to persons whose ordinary business, in whole or part, is to deal in shares or debentures;
- (c) belong to a person who is a registered beneficial owner of them and the offer is not made to the public generally:

Provided that the offer is accompanied by a written statement identifying the person and location from which a prospectus may be obtained.

(5) An allotment or an agreement to allot shares or debentures shall be evidence that the agreement 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 for sale to the public was made within 6 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.

(6) It shall be unlawful for a person to offer shares or debentures for subscription or purchase or to offer to purchase shares without making a prospectus available to the offeree.

### **Contents**

116. (1) A prospectus shall be in the English or Sesotho language and shall include -

- (a) the date of incorporation of the company and the address of its registered office;
- (b) the number of shares, if any, held by officers of the company and provisions concerning the remuneration of directors and officers;
- (c) names and addresses of shareholders and the number of shares held by each of them;
- (d) names, addresses and occupations of directors and proposed directors, and the term for which they hold office;

- (e) name and address of the auditor, if any;
- (f) the minimum amount which, in the opinion of the directors, shall be raised by the issue of those shares or in order to satisfy the objectives of the issue, which objectives shall be provided;
- (g) the time of opening the subscription lists;
- (h) the amount payable on application and allotment on each share;
- (i) complete information regarding the issue of shares, if any, in the 2 preceding years;
- (j) the amount payable by way of premium, if any, on each class of shares which have been issued or are to be issued, stating the dates of issue and the justification for such premium;
- (k) the number of founders and management or deferred shares, if any, and any special rights attaching thereto, and the nature and extent of the interest of the holders in the property and profits of the company;
- (l) particulars of the share capital;
- (m) the number and class of shares, and if the prospectus invites the public to subscribe for shares in the company, a description of the respective voting rights, preference, conversion and exchange rights, rights to dividends of each class, including redemption rights and rights to liquidation or distribution of capital assets;
- (n) the length of time for which the business of the company has been carried on;
- (o) the substance of any contract or arrangement including a proposed contract or arrangement, whereby an option or preferential right has been or is intended to be given to a person to subscribe for any shares in or debentures of the company, including the following particulars of an option or right -
  - (i) the period during which it is exercisable;
  - (ii) the price to be paid for shares or debentures subscribed for under it;

- (iii) the consideration, if any, given or to be given for it or for the right to it;
- (iv) the names and addresses of the persons to whom it or the right to it was given to existing members or debenture holders as such, the relevant information in this regard;

(p) the number and amount of shares and debentures which, within the preceding 2 years, were or agreed to be issued otherwise than in cash, the extent to which they are paid up and the consideration that has been or is intended to be obtained for them;

(q) the following particulars of any property transaction within the preceding 2 years in which the vendor of the property, who was a promoter or director or a proposed director of the company had any direct or indirect interest -

- (i) the names and addresses of the vendors;
- (ii) the amount payable in cash, shares or debentures to each vendor;
- (iii) the property which is or proposed to be purchased wholly or in part, out of the proceeds of the issue offered for subscription by the prospectus; and
- (iv) the amount if any, paid or payable for the property in cash, shares or debentures including the amount if any, payable for goodwill;

(r) any amount or benefit given or intended to be given within the preceding 2 years to a promoter, and his/her name and address;

(s) the dates of, parties to, and general nature of every major transaction, whether in writing or not; and

(t) full particulars of the nature and extent of the interest, if any, of every director or promoter in the promotion of or in any property acquired within the preceding 2 years or to be acquired by the company.

(2) The document referred to in section 115(2) shall state the net amount received or to be received by the company in respect of the shares or debentures to which the offer relates, and the place and time at which the contract under which the company allotted, or is to allot the shares or debentures may be inspected.

### **Allotment of shares**

117. (1) An offer to purchase shares in, or debentures of, a company made in pursuance of a prospectus shall not be revocable after the expiration of the third working day after the time of the opening of the subscription list.

(2) A company shall not proceed with allotment of shares or debentures offered for subscription unless the amount stated in the prospectus as the minimum amount has been subscribed to, and the sum payable on application has been paid to, and received by, the company.

(3) The amount paid on application shall be segregated from other funds of the company and shall not be available for the purpose of the company or for the payment of its debts until the minimum subscription has been paid up.

(4) If subsections (1), (2) and (3) have not been complied with on the expiration of 60 days after the first issue of the prospectus, all money received from applicants for shares shall immediately be returned to them without interest.

(5) If any such money is not repaid within 70 days after the issue of the prospectus, the directors of the company shall be jointly and severally liable to repay that money with interest at the prime rate from the expiration of 70 days excepting those who prove that the default in repayment of the money was not due to their misconduct or negligence.

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

(7) An allotment made by a company in contravention of this section shall be voidable at the instance of an applicant within 30 days after the date of allotment and not later, and shall be so voidable despite that the company is in the course of being wound up.

(8) If a director or promoter of a company knowingly contravenes, permits or authorises the contravention of this section, he or she shall be liable to compensate the company and the allottee for any loss, damages or costs which the

company or the allottee may incur.

(9) Proceedings to recover any such loss, damages or costs shall not be commenced after the expiration of 2 years from the date of the allotment.

### **Registration of prospectus**

118. (1) A prospectus issued by or on behalf of a company shall be signed by every director or promoter, dated and submitted to the Registrar for registration at least 15 working days and not more than 30 working days before its issue to the public.

(2) The Registrar shall not register a prospectus which names a person as an auditor, attorney, banker or broker of the company unless it is accompanied by a written consent of the person so named, but that person shall not be deemed thereby to have authorised the issue of prospectus.

(3) An expert's statement in a prospectus shall be accompanied by a statement that the expert has given, and has not, before delivery of a copy of the prospectus to the Registrar, withdrawn his or her written consent to the inclusion of his or her statement in the form and context in which it is included.

### **Consequences for failure to issue prospectus**

119. (1) Where a company has failed to comply with section 115, the allotment made thereunder, if any, shall be voidable at the option of the allottee within 30 days after allotment, unless the company proves that the allottee was aware of the contents of the prospectus.

(2) A person who contravenes section 115 commits an offence and is liable on conviction to a fine of M20,000 or imprisonment for a period of 3 years or both.

(3) If a board fails to comply with section 115, every director of the company who knew or ought to have known of the failure commits an offence and on conviction shall be liable to a fine of M50,000 or imprisonment for a period of 5 years or both.

(4) It shall be a defence for a person responsible for the issue of prospectus that -

(a) as regards any matter not disclosed, he or she was not

cognisant of it;

- (b) any non-compliance or contravention of this Act arose from an honest mistake of fact on his or her part;
- (c) the non-compliance or contravention was in respect of matters that, in the opinion of the Court, were immaterial or of such a nature that under the circumstances, ought reasonably to be excused; or
- (d) the non-compliance was in respect of matters which were not in the knowledge of either a director or a promoter.

(5) If a person is convicted of having made an offer in contravention of section 115, the Court, before which he or she is convicted, may order that a contract made as a result of the offer shall be void, and, where it makes such an order, may give such consequential directions as it deems fit for the repayment of any money or the retransfer of any shares.

#### **Responsibility of the underwriter**

120. (1) If a prospectus states that the whole or part of the share capital or debentures offered for subscription has been underwritten, a copy of the underwriter's contract and a sworn declaration by the underwriter or, if such underwriter is a company, by each of 2 directors of such company, shall be lodged with the Registrar at the same time the prospectus is delivered for registration.

(2) A sworn declaration shall state 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 are applied for.

#### **Untrue statements in a prospectus**

121. (1) A statement in a prospectus is deemed to be untrue if it is misleading in the form and context in which it is included.

(2) If any matter or report required to be included in a prospectus is omitted from it and if such omission is likely to mislead the public, the prospectus shall be deemed to contain untrue statements.

(3) Subsections (1) and (2) shall not apply to -

- (a) an invitation to a person to enter into an underwriting agreement with respect to shares or debentures;
- (b) an issue of shares or debentures to existing members or debenture holders of a company by way of a rights or bonus issue; and
- (c) an issue of shares or debentures to persons who are engaged in the management or control of the company.

### **Liability for mis-statements**

122. (1) 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 persons subscribing on the faith of the prospectus for loss or damage they may have sustained by reason of any untrue statement included therein -

- (a) a director of the company at the time the prospectus was issued;
- (b) a person who has in writing authorised himself or her self to be named and is named in the prospectus as a director or who has agreed to become a director either immediately or after an interval of time; and
- (c) a promoter of the company.

(2) It shall be a defence for a person liable under subsection (1), if the person proves -

- (a) that he or she withdrew his or her consent to be a director of the company in writing before the issue of a prospectus, and that it was issued without his or her authority;
- (b) that the prospectus was issued without his or her knowledge or consent and, on becoming aware of its issue, he or she immediately gave reasonable public notice of it;
- (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 it including the reason for doing so;

- (d) that, as regards every untrue 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;
- (e) that the untrue statement was a correct and fair copy of a statement or fairly represented the statement by an expert or what purported to be a copy or an extract from a report or valuation of an expert and he or she had reasonable grounds to believe and did up to the time of the issue of prospectus believe that the author of the statement was competent to make it, had given his or her consent required by section 118, had not withdrawn such consent before delivery of a copy of the prospectus for registration or, to the defendant's knowledge, before allotment thereunder; or
- (f) that the untrue statement was a copy or an extract from what purported to be a public official document, or a correct and fair representation of statements contained in the official document.

(3) An expert who consented to the inclusion of his or her statement in terms of section 118 which is found to be untrue shall be liable to compensate any person subscribing on the faith of the prospectus for loss or damage he or she may have sustained by reason of the untrue statement unless he or she proves -

- (a) that he or she withdrew his or her consent in writing before delivery of a copy of the prospectus for registration;
- (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 it including the reason therefor; or
- (c) that he or she was competent to make the statement and that 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 state ment was true.

(4) Directors shall be liable, jointly or severally, to indemnify a person whose name appears as a director or an expert in a prospectus without his or her consent, against all damage, costs and expenses occasioned to him or her.

(5) A person who authorises the issue of a prospectus containing an untrue statement, commits an offence and shall be liable on conviction to a fine of M100,000, unless he or she proves 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.

(6) For the purposes of this section, a person is not deemed to have authorised the issue of a prospectus by reason only of having given the consent to the inclusion of his or her name.

## PART XVI - LIQUIDATION

### **Liquidation**

123. For the purposes of this Part -

- (a) “ a director” includes a former director;
- (b) “an employee” includes a former employee;
- (c) failure to comply means failure of a liquidator to comply with a relevant duty arising -
  - (i) under the special resolution or unanimous shareholder agreement or resolution of the board or the order of the Court by which the liquidator was appointed;
  - (ii) under any order or direction of the Master;
  - (iii) under this Act, rule of law or rules of Court, and

“comply”, “compliance” and “failed to comply” have a corresponding meaning.

### **Application of insolvency rules to liquidation**

124. (1) Subject to this Part, the rules in force under the law of insolvency with respect to the estates of persons adjudged insolvent shall apply in a liquidation of a company to -

- (a) meetings of creditors;
- (b) the rights of secured and unsecured creditors;
- (c) claims by creditors; and
- (d) the valuation of future and contingent liabilities.

(2) A person who is entitled to make a claim and receive payment in whole or in part from a company shall be entitled to do so in a liquidation of a company.

(3) In applying rules of the law of insolvency in liquidation a claim by an unsecured creditor admitted by a liquidator shall be treated as if it were a debt proved in accordance with the requirements of the Insolvency Proclamation 1957 or any other law relating to insolvency.

### **Applications for liquidation**

125. (1) A company shall be put into liquidation by order of Court upon application by the Registrar, the company, a shareholder, a director or creditor of the company if the Court -

- (a) determines that the company is unable to pay its debts, or;
- (b) is satisfied that 75 percent of the issued share capital of the company has been lost or has become useless for the business of the company.

(2) A company shall be deemed to be unable to pay its debts -

- (a) if a creditor, by cession or otherwise, to whom the company is indebted has served on the company execution or other process issued in respect of the debt on a judgment or order of any court in favour of the creditor, or one or more of the creditors to whom the debt is owed, has been returned

- (b) unsatisfied in whole or in part; or if it is proved to the satisfaction of the court that the company is unable to pay its debts, and in determining whether the company is unable to pay its debts, the Court shall take into consideration the contingent and prospective liabilities of the company.

(3) The Court may, before issuing an order putting the company into liquidation, stay any proceedings against the company.

(4) Liquidation shall commence on the date the Court makes an order putting the company into liquidation.

(5) For purposes of liquidation of companies, the Master shall have the jurisdiction conferred on him or her by this Part.

#### **Qualifications of liquidators**

126. (1) A person shall not be appointed as a liquidator unless the person has experience in administering or advising on the administration of insolvent estates of individuals and companies.

(2) Unless the Court orders otherwise, a sole liquidator, or where there is more than one liquidator, at least one of them, shall be experienced in the administration of insolvent estates.

- (3) The following persons shall not be appointed or act as a liquidator -
- (a) a person under 18 years of age;
  - (b) a creditor of the company in liquidation;
  - (c) a person who has, within the 2 years immediately preceding the commencement of the liquidation, been a shareholder, director or auditor of the company in liquidation or of any related company;
  - (d) an unrehabilitated insolvent; and
  - (e) a person who is mentally disordered under the Mental Health Act, 1964<sup>5</sup> or any other law that relates to mental

health.

(4) Unless the Court orders otherwise, the validity of acts of a person who is disqualified under this section from being appointed as a liquidator are not affected by the defect in the appointment.

### **Appointment of liquidators**

127. (1) If an application has been made to the Court for an order that a company be put into liquidation, the Court may order liquidation of the company or judicial management.

(2) If the Court is satisfied that it is necessary or expedient for the purpose of maintaining the value of assets owned or managed by the company, appoint a liquidator; otherwise the Court shall direct the Master to appoint the liquidator.

(3) The appointment of a liquidator by the Court under subsection

(2) shall be subject to confirmation by the Master.

(4) Before confirmation by the Master, a liquidator appointed by the Court shall have the rights and powers, duties and entitlements of a liquidator, unless the Court limits the powers or imposes conditions on their exercise.

(5) The Master shall confirm or appoint a liquidator in accordance with the law governing insolvency.

(6) A person's appointment as liquidator is of no legal effect unless the person has consented in writing to the appointment.

(7) In every liquidation or judicial management, the liquidator or the judicial manager shall furnish security to the satisfaction of the Master for due performance of his or her duties as such and shall choose an address for service within Lesotho which address shall be his or her active place of business. Until he or she has complied with this section, he or she shall not be capable of acting as liquidator and should he or she fail to comply with this section within such time as may be determined by the Master, he or she shall be deemed to have resigned.

(8) The Master may consent to release part of the security paid pursuant to subsection (1) if satisfied that the reduced security will suffice to indemnify the company, creditors and shareholders against any maladministration by the liquidator

or judicial manager of the property of the company.

### **Effect of commencement of liquidation**

128. (1) As from the commencement of the liquidation of a company -

- (a) the liquidator shall have custody and control of the company's assets;
- (b) the directors shall remain in office but cease to have powers, functions or duties other than those required or permitted to be exercised under this Part;
- (c) a person may not commence or continue legal proceedings against the company or in relation to its property, or exercise or enforce a right or remedy over or against property of the company, unless the liquidator otherwise agrees or the Court otherwise orders;
- (d) a person shall not enforce against a liquidator a lien over books, records or documents of the company;
- (e) unless the Court orders otherwise, shares in the company shall not be transferred;
- (f) an alteration shall not be made to the rights or liabilities of a shareholder of the company and to the articles of incorporation of the company; and
- (g) a shareholder shall not exercise a power under the articles of incorporation of the company or this Act except for the purposes of this Part.

(2) Subsection (1) does not affect the right of a secured creditor to take possession of, and realise or otherwise deal with the property of the company over which that creditor has a preferential right by virtue of any mortgage, landlord's legal hypothec, pledge or right of retention or any charge.

129. (1) A liquidator shall have the powers necessary to carry out his or her functions and duties under this Act and those provided for under the Insolvency Proclamation, 1957 or any other law relating to insolvency.

- (2) Without limiting subsection (1), a liquidator may -
- (a) require a director or shareholder of the company or any other person to deliver to the liquidator books, records, documents or electronically stored data of the company in that person's possession or under that persons' control as the liquidator may require;
  - (b) administer an oath and require any of the following persons to provide him or her with such information about the business, accounts or affairs of the company -
    - (i) a director or former director or shareholder of the company;
    - (ii) a person who was a promoter of the company;
    - (iii) a person who is or has been an employee or officer of the company;
    - (iv) an accountant, auditor, bank officer or other person having knowledge of the affairs of the company;  
or
    - (v) a person who is acting or who has at any time acted as a lawyer for the company;
  - (c) make calls or enforce all or part of any outstanding liability where the company's articles of incorporation provide that a share renders its holder liable to calls or otherwise imposes a liability on its holder; or
  - (d) on winding up, and with the sanction of a special resolution, divide among the shareholders in specie the whole or any part of the assets of the company and, for that purpose value any assets and determine how the division shall be carried out as between the shareholders or different classes of shareholders.

(3) A liquidator shall pay to a person referred to in subsection (2), reasonable travelling and other expenses in complying with the requirement of the liquidator under that subsection.

(4) Where a person fails to comply with a requirement of the liquidator under subsection (2), the Court shall, on the application of the liquidator, order the person to comply or make such order as it deems appropriate.

(5) Notwithstanding anything in this section, the liquidator shall not enter into a major transaction without the approval of the Master.

### **Search and seizure**

130. Where the Court is satisfied, on the application of a liquidator that there are reasonable grounds to believe that there is in or on any place or thing, any property, books, documents or records of a company, the Court shall issue a warrant that authorises the person named in the warrant to search for and seize property, books, documents or records of the company in or on that place or thing and deliver them to the liquidator.

### **Supply of essential services**

131. (1) For the purposes of this section an “essential service” means -

- (a) the supply of electricity;
- (b) the supply of water; and
- (c) telecommunication services.

(2) Despite any other law or pre-existing contract entered into by a company in liquidation and a supplier of an essential service, the supplier of the essential service shall not -

- (a) refuse to supply the service to a liquidator or to the company in liquidation by reason of the company’s default in paying charges due for the service in relation to a period before the commencement of the liquidation;
- (b) make it a condition of the supply of the service to a liquidator or to a company in liquidation that payment be made of outstanding charges due for the service in relation to a period before the commencement of the liquidation; or
- (c) make it a condition of the supply of the service to a company in liquidation that the liquidator personally

guarantees the payment of charges that would be incurred for the supply of the service.

(3) Charges incurred by a liquidator for the supply of an essential service are an expense incurred by the liquidator.

### **Examination of persons by liquidator and Court**

132. (1) On the application of a liquidator, the Court shall order any person to whom subsection (2) applies to attend before the Court and be examined on oath by the Court or the liquidator on any matter relating to the business, accounts or affairs of the company and produce any books, records or documents in that person's possession or control relating to the business, accounts or affairs of the company.

(2) A person examined under this section is not excused from answering a question on the ground that the answer shall incriminate or tend to incriminate him or her and such testimony shall not be admissible as evidence in any criminal proceedings against that person, except on a charge of perjury in respect of that testimony.

(3) Where a person is examined under this section, the examination shall be recorded in writing and the person examined shall sign the record, which shall be admissible in evidence in any proceedings under this Part.

(4) A person required to be examined under this section shall be entitled to be represented by a legal practitioner of his or her choice. **Disclaimer of**

### **onerous property**

133. (1) For the purposes of this section "onerous property" means -

- (a) a non-profitable contract; or
- (b) other property of a company which is un-saleable or not readily saleable or may give rise to a liability to pay money or perform any other onerous act.

(2) A liquidator may disclaim any onerous property, even if the liquidator has taken possession of it, tried to sell it, or otherwise exercised rights of ownership.

- (3) A disclaimer under this section -
- (a) brings to an end the rights, interests and liabilities of the company in respect of the property disclaimed; and
  - (b) does not, except so far as necessary to release the company from any liability, affect the rights or liabilities of any other person.

(4) A liquidator who disclaims onerous property shall, within 10 working days of the disclaimer, give notice in writing of the disclaimer to every person whose rights are, to the knowledge of the liquidator, affected by the disclaimer.

(5) A person suffering loss or damage as a result of a disclaimer under this section may -

- (a) claim as a creditor of the company for the amount of the loss or damage, taking account of the effect of an order made by the Court under paragraph (b); or
- (b) apply to the Court for an order that the disclaimed property be delivered to or vested in that person and the Court may make such an order.

#### **Duties of the liquidator**

134. (1) The primary duty of a liquidator is to take all reasonable steps necessary to take possession of, protect, realise and distribute the assets or the proceeds of the realisation of the assets of the company to its creditors, and if there are surplus assets, to distribute them or the proceeds of the realisation of the surplus assets in accordance with this Act and the articles of incorporation.

- (2) Without limiting subsection (1), a liquidator shall -
- (a) within 10 working days of the commencement of the liquidation -
    - (i) give public notice of the appointment of the liquidator, the date of the commencement of the liquidation and the address and telephone number to which inquiries may be directed by a creditor or

shareholder during normal business hours;

- (ii) send or deliver to the Registrar, a notice of the appointment of the liquidator as prescribed in the Schedule, Form 14;
  - (iii) prepare a list of every known creditor of the company;
  - (iv) prepare an inventory showing the value of all assets belonging to the company and submit it to the Master and submit additional inventory as and when he or she discovers additional assets of the company; and
  - (v) open a liquidation account and provide the Master with banking details of the company, including account numbers, account types and account names;
- (b) within 20 working days of the commencement of the liquidation, prepare and send to every known creditor and every shareholder, and send or deliver to the Master -
- (i) a statement of the state of the company's affairs, proposals for conducting the liquidation and the estimated date of its completion; and
  - (ii) a notice explaining the right of a creditor or shareholder to require the liquidator to call a meeting of creditors;
- (c) keep accounts and records of the liquidation and permit those accounts and records, and the accounts and records of the company to be inspected by -
- (i) the committee of inspection if appointed under section 137; or
  - (ii) a creditor or shareholder, unless the liquidator

believes on reasonable grounds that inspection would be prejudicial to the liquidation; and

- (d) retain the accounts and records of the liquidation and of the company for not less than 10 years after the completion of the liquidation, unless the Master orders otherwise.

(3) A liquidator of a company shall provide the Master with periodic reports every 2 months or whenever the Master so requires, indicating the progress of the liquidation.

(4) A liquidator of a company shall lodge with the Master a distribution and liquidation account within 6 months of the appointment of the liquidator, but the Master may extend this period upon request of the liquidator.

(5) The account referred to in subsection (4) shall lie open for inspection at the office of the Master by creditors or other interest persons for a period of not less than 21 days.

(6) A liquidator of a company shall, immediately after completion of his or her duties in relation to the liquidation, prepare and send to every creditor and shareholder whose claim has been admitted, and the Master -

- (a) the final report and statement of realisation and distribution in respect of the liquidation;
- (b) a statement that all known assets have been disclaimed, realised or distributed without realisation;
- (c) a statement that all proceeds of realisation have been distributed;
- (d) a statement that the company is ready to be removed from the register;
- (e) a summary of the applicable grounds on which a creditor or shareholder may object to the removal of the company from the register; and
- (f) send or deliver to the Registrar copies of the documents referred to in paragraph (a), (b), (c), (d) and (e).

- (7) The liquidator shall not -
- (a) dispose of any assets of the company without approval of the Master;
  - (b) enter into a major transaction without approval of the Master.

### **Rights of creditors**

135. (1) Within 14 working days of the public notice of the commencement of the liquidation, every creditor of a company in liquidation shall send or deliver to the liquidator written notice of a debt, and in the case of a debt secured by a charge over any property of the company, the secured creditor shall include particulars of the property subject to the charge and the amount secured.

(2) On the expiry of 30 working days from the time at which the liquidator has given public notice of the commencement of the liquidation, a secured creditor whose charge is not created by an instrument registered under the Deeds Registry Act 1967<sup>1</sup> or any relevant law, and who has not sent notice of his or her charge to the liquidator in accordance with subsection (1), shall be taken as having surrendered that charge to the liquidator under subsection (3)(c).

- (3) A secured creditor may -
- (a) realise any property subject to a charge, if entitled to do so;
  - (b) claim as a secured creditor in the liquidation; or
  - (c) surrender the charge to the liquidator for the general benefit of creditors, and claim in the liquidation as an unsecured creditor for his whole debt.
- (4) A secured creditor who realises property subject to a charge -
- (a) may claim as an unsecured creditor for any balance due to him or her after deducting the net amount realised; or

- 
- (b) set out full particulars of the charge including the date on which it was given; and

- (b) shall account to the liquidator for any surplus remaining from the net amount realised after satisfaction of his or her whole debt, including any interest payable in respect of that debt up to the time of its satisfaction, and after making any proper payments to the holder of any other charge over the property subject to the charge.
- (c) identify any documents that substantiate the claim and the charge.

(6) A liquidator may require production of any document mentioned in subsection (5)(c).

(7) Production to the liquidator of a document that is redeemable for property or that secures an obligation with property does not prejudice the existence or priority of the charge, and the liquidator shall make the document available to any person otherwise entitled to it for the purpose of dealing with or realising the charge or the secured property.

(8) Where a claim is made by a creditor as a secured creditor, a liquidator shall -

- (a) meet the claim in full and redeem the security;
- (b) realise the property subject to the charge, and pay the secured creditor the lesser of the amount of the claim and the net amount realised taking into account the liquidator's reasonable remuneration; or
- (c) reject the claim in whole or in part, but -
  - (i) where a claim is rejected in whole or in part, the creditor may make a revised claim as a secured creditor within 10 working days of receiving notice of the rejection; and
  - (ii) the liquidator may, if he or she subsequently considers that a claim was wrongly rejected in whole or in part, revoke or amend any such decision.

(9) A secured creditor may claim as an unsecured creditor for any

balance due to him or her, after deducting any payment made by the liquidator under subsection (8).

(10) A liquidator may, at any time, require a secured creditor by notice in writing either to -

- (a) take possession of property subject to a charge, if entitled to do so; or
- (b) file a claim as a secured creditor,

within not more than 20 working days of receipt of the notice, if he or she intends to rely on the security.

(11) A secured creditor on whom notice has been served under subsection (10) who fails to comply with the notice, shall be taken as having surrendered his or her charge to the liquidator under subsection (3)(c) for the general benefit of creditors, and may claim in the liquidation as an unsecured creditor for his or her whole debt.

(12) A secured creditor who has surrendered his or her charge under this section may, with the leave of the Court or the liquidator and subject to such terms and conditions as the Court or the liquidator deems fit, at any time before the liquidator has realised the property charged -

- (a) withdraw the surrender and rely on the charge; or
- (b) submit a new claim under this section.

### **Creditors' claims**

136. (1) Any debt or liability, present or future, certain or contingent, whether it is an ascertained debt or liability or a liability sounding only in damages, shall be admitted as a claim against a company in liquidation.

(2) An unsecured creditor shall set out full particulars of the claim and attach any documents that evidence or substantiate the claim.

(3) A liquidator may admit or reject any claim in whole or in part, and if the liquidator subsequently considers that a claim has been wrongly admitted or rejected in whole or in part, he or she shall revoke or amend any such decision.

(4) An amount of a claim shall be ascertained as at the date of commencement of the liquidation.

(5) An amount of a claim based on a debt or liability denominated in a currency other than Lesotho currency shall be converted into Lesotho currency at the rate of exchange on the date of commencement of the liquidation.

(6) If a claim is subject to a contingency or is for damages or if for some other reason the amount of the claim is not certain, the liquidator may -

- (a) make an estimate of the amount of the claim; or
- (b) refer the matter to the Court for a decision on the amount of the claim.

(7) On the application of a liquidator, or of any claimant who is aggrieved by an estimate made by the liquidator, the Court shall determine the amount of the claim.

#### **Meetings of creditors or shareholders**

137. (1) At any time in the course of the liquidation, the liquidator shall, at the written request of a creditor or shareholder or on his or her own motion, call a meeting of creditors or shareholders to vote on a proposal that a committee of inspection be appointed to oversee the liquidation process.

(2) The committee of inspection elected by a meeting of creditors or shareholders shall -

- (a) consist of not less than three persons who are creditors or shareholders, or persons holding general powers of attorney from creditors or shareholders, or authorised directors of companies which are creditors or shareholders of the company in liquidation; and
- (b) take office immediately after election.

(3) Subject to subsections (4) and (5), a liquidator who receives a request to call a meeting of creditors or of shareholders shall immediately call such a meeting.

(4) A liquidator may decline a request by a creditor or shareholder to

call a meeting on the ground that -

- (a) the request is unreasonable;
- (b) the request was not made in good faith; or
- (c) the costs of calling a meeting would be out of proportion to the value of the company's assets.

(5) A decision of a liquidator to decline the request may be reviewed by the Master on the application of a creditor or shareholder and the decision of the Master may be reviewed by the Court.

(6) A sole shareholder of a company may present to the liquidator a view on any matter which could have been decided at a meeting of shareholders under this section, and that view shall for all purposes be treated as though it were a decision taken at a meeting of shareholders.

(7) Notwithstanding the publication in the Gazette of the notice of the meetings, the liquidator shall publish a notice of the creditors and shareholders' meetings in 3 consecutive editions of a newspaper widely circulating in Lesotho and through the electronic media including through a radio station with national coverage during prime time for at least 3 consecutive days.

#### **Claim in respect of debts payable after commencement of liquidation**

138. The amount of a claim made in respect of a debt that, but for the liquidation, would not be due and payable until 6 months after the commencement of the liquidation, shall be ascertained according to the present value of the debt, having regard to the prescribed rate of interest as at the date of commencement of the liquidation.

#### **Interest on claims**

139. If there is a surplus after payment in full of all admitted claims, interest on a claim accrues as from the date of the commencement of the liquidation at a rate not exceeding the prime rate.

#### **Voidable transactions**

140. (1) In this section, "transaction" includes an execution under judicial proceedings or a payment, including a payment made in pursuance of a

judgment or order of a court.

(2) A transaction which is entered into by a company is voidable on the application of a liquidator if -

- (a) it was entered into within the year preceding the commencement of the liquidation;
- (b) the value of the consideration or benefit received by the company was less than the value of the consideration provided by the company, or the company received no consideration or benefit;
- (c) when the transaction was entered into, the company -
  - (i) was unable to pay its due debts;
  - (ii) was engaged or about to engage in business for which its financial resources were limited; or
  - (iii) incurred an obligation knowing that the company would not be able to perform the obligation when required to do so; and
- (d) the company became unable to pay its due debts as a result of the transaction and the other party knew or ought to have known of matters referred in sub-paragraphs (i), or (ii) or (iii) of paragraph (c).

(3) Unless the contrary is proved, the value of the consideration received by the company under a transaction -

- (a) with a related company;
- (b) with a person or a relative of a person who was, at the time of the transaction, a director of the company or a nominee or relative of or a trustee for, or a trustee for a relative of, a director of the company; or
- (c) a person or a relative of a person who, at the time when the transaction took place, had control of the company,

entered into within 12 months preceding the commencement of the liquidation, is deemed to be significantly less than the value of the consideration provided by the company.

(4) A transaction which provides for or creates a charge over any property or undertaking of a company in respect of a debt is voidable on the application of a liquidator if the charge was given within 12 months preceding the commencement of the liquidation on account of antecedent debt, unless -

- (a) the charge secures the actual price or value of property sold or supplied to the company, or any other valuable consideration given by the grantee of the charge prior to the execution of the security, and, immediately after the charge was given, the company was able to pay its due debts; or
- (b) the charge is in substitution for a charge given more than one year preceding the commencement of the liquidation.

(5) Unless the contrary is proved, a company that gives a charge within the 6 months preceding the commencement of the liquidation is deemed to have been unable to pay its due debts immediately after giving the charge.

(6) A transaction involving a transfer of property by the company to another person is voidable on the application of a liquidator if the transfer -

- (a) was made -
  - (i) at a time when the company was unable to pay its due debts; and
  - (ii) within 12 months preceding the commencement of the liquidation; and
- (b) enabled that person to receive more toward satisfaction of the debt than the person would otherwise have received or likely to have received in the liquidation,

unless the debt was incurred in the ordinary course of business and the transfer was made no later than 45 working days after the debt was incurred.

(7) Unless the contrary is proved, for the purposes of subsection (6) , a transfer made within the 6 months preceding the commencement of the

liquidation shall be deemed to have been made -

- (a) at a time when the company was unable to pay its due debts; and
- (b) on account of a debt which is not incurred in the ordinary course of business.

**Procedure for setting aside voidable transactions**

141. (1) A liquidator, creditor or other person who wishes to have a transaction that is voidable set aside shall -

- (a) file with the Court, a notice to that effect specifying the transaction to be set aside and the property or value thereof which the liquidator, creditor or other person wishes to recover; and
- (b) serve a copy of the notice on the other party to the transaction and on every other person from whom the liquidator wishes to recover.

(2) A person -

- (a) who would be affected by the setting aside of the transaction specified in the notice referred to in subsection (1) ; and
- (b) who considers that the transaction is not voidable,

shall apply to the Court for an order that the transaction not be set aside.

(3) Unless a person on whom the notice was served has applied to the Court under subsection (1), the transaction shall be set aside as from the thirteenth working day after the date of service of the notice.

(4) If one or more persons have applied to the Court under subsection (1), the transaction shall be set aside as from the day on which the last such application is finally determined, unless the Court orders otherwise.

(5) Where a transaction is set aside under this section, the Court may make one or more of the following orders or declarations -

- (a) an order that requires a person to pay to the liquidator, in respect of benefits received by that person as a result of the transaction, such sums as fairly represent those benefits;
- (b) an order requiring property transferred as part of the transaction to be restored to the company;
- (c) an order which requires property to be vested in the company if it represents in a person's hands the application, either of the proceeds of sale of property, or of money, so transferred;
- (d) an order which releases in whole or in part, a charge given by the company;
- (e) an order that requires security to be given for the discharge of an order made under this section; or
- (f) an order that specifies the extent to which a person affected by the setting aside of a transaction or by a declaration or order made under this section is entitled to claim as a creditor in the liquidation.

(6) Where a transaction is set aside under this section, a person affected may, after giving up the benefit of the transaction, claim for the value of the benefit as a creditor in the liquidation.

(7) The setting aside of a transaction, a declaration or order made under this section does not affect the title or interest of a person in property which that person has acquired -

- (a) from a person other than the company;
- (b) for valuable consideration; and
- (c) without knowledge of the circumstances of the transaction under which the second-mentioned person acquired the property from the company.

(8) The Court shall deny wholly or in part recovery by a liquidator of any property or its equivalent value if -

- (a) a person from whom recovery is sought received the property in good faith and has altered his or her position in the reasonably held belief that the transfer or payment of the property to that person was validly made and would not be set aside; or
- (b) in the opinion of the Court it is inequitable to order partial recovery or recovery in full.

### **Pooling of assets of related companies**

142. (1) On the application of a liquidator or a creditor or shareholder, the Court may order that -

- (a) a company that is or has been related to the company in liquidation shall pay to the liquidator the whole or part of any or all of the claims made in the liquidation; or
- (b) where 2 or more related companies are in liquidation, the liquidations in respect of both companies shall proceed together, as if they were one company, to the extent that the Court so orders and subject to such terms and conditions as the Court may impose.

(2) In deciding whether it is just and equitable to make an order under this section, the Court shall have regard to the following matters -

- (a) the extent to which the related company took part in the management of the company in liquidation;
- (b) the conduct of the related company towards the creditors of the company in liquidation;
- (c) the extent to which the circumstances that gave rise to the liquidation of the company are attributable to the actions of the related company; and
- (d) such other matters as the Court deems fit.

(3) Where the creditors of a company in liquidation relied on the fact that another company is, or was related to it, it shall not be a ground for making an

order under this section.

### **Mutual credit and set-off**

143. (1) Where there have been mutual credits, mutual debts or other mutual dealings between a company and a person who seeks, or, but for the operation of this section, would seek, to have a claim admitted in the liquidation of the company -

- (a) an account shall be taken of what is due from one party to the other in respect of those credits, debts or dealings;
- (b) an amount due to one party shall be set off against an amount due to the other party; and
- (c) only the balance of the account shall be claimed in the liquidation, or is payable to the company.

(2) This section does not apply to any amount paid or payable by a shareholder as the consideration or part of the consideration for the issue of a share or in satisfaction of a call in respect of any outstanding liability of the shareholder.

### **Meaning of “compromise” and “proposer”**

144. For the purposes of this Part, unless the context otherwise requires -

“compromise” means an agreement between a company and its creditors cancelling all or part of a debt, of the company, or varying the rights of its creditors or the terms of a debt or relating to an alteration of a company’s articles of incorporation that affects the likelihood of the company being able to pay a debt; and

“proposer” means a person who proposes a compromise.

### **Proposal of compromise**

145. The following persons may propose a compromise if any of them has reason to believe that a company is or will be unable to pay its debts -

- (a) the board of directors of the company;
- (b) a judicial manager or liquidator of the company; or

- (c) a creditor or shareholder of the company.

### **Notice of proposed compromise**

146. (1) A proposer shall compile a list of creditors known to the proposer who would be affected by the proposed compromise, setting out the amount owing or estimated to be owing to each of them, and the number of votes which each of them is entitled to cast on a resolution approving the compromise.

(2) A proposer shall deliver by hand to each known creditor or his or her legal representative, the company, a judicial manager or liquidator -

- (a) notice of the intention to hold a meeting of creditors, or any 2 or more classes of creditors, for the purpose of voting on the resolution;
- (b) a statement which -
  - (i) contains the name and address of the proposer and the capacity in which the proposer is acting;
  - (ii) contains the address and telephone number to which inquiries may be directed during normal business hours;
  - (iii) sets out the terms of the proposed compromise and the reasons for it;
  - (iv) sets out the reasonably foreseeable consequences for creditors of the company if the resolution for compromise is approved; and
  - (v) sets out the extent of any interest of a director in the proposed compromise; and
- (c) a copy of the list or lists of creditors.

### **Creditors meeting on proposed compromise**

147. (1) A compromise, including any amendment proposed at a meeting, is approved by creditors or a class of creditors, if at a meeting of creditors, or that class

of creditors conducted in accordance with the articles of incorporation, the compromise, including any amendment, is adopted.

(2) A quorum for the approval of a compromise by the creditors or a class of creditors pursuant to subsection (1) may be met by the presence in person or by proxy of either a majority of the number of creditors or creditors representing 75 percent of the value of the amounts owed.

(3) A resolution approving a compromise shall be adopted by majority vote, both by number and by value of the amounts owed of all creditors or class of creditors present in person or by proxy, otherwise the compromise shall be deemed not to have been approved.

(4) A compromise approved by creditors or a class of creditors of a company is binding on the company and on all creditors or class of creditors to whom notice of the proposal was given.

(5) If a resolution that proposes a compromise is put to the vote of more than one class of creditors, it shall be presumed, unless the contrary is expressly stated in the resolution that the approval of the compromise by each class is conditional on the approval of the compromise by every other class that votes on the resolution.

(6) The proposer shall notify the result of the voting in writing to each known creditor, the company, judicial manager or liquidator.

### **Powers of Court**

148. (1) Where a compromise is approved and the company is in liquidation or is subsequently liquidated, the Court may, on the application of an interested party, determine by an order the extent to which the compromise shall continue in effect and be binding on the liquidator of the company.

(2) If the Court is satisfied, on the application of a creditor who was entitled to vote on a compromise that -

- (a) insufficient notice of the meeting or of the matter was given to that creditor;
- (b) there was some other material irregularity in obtaining approval of the compromise; or

- (c) in the case of a creditor who voted against the compromise, the compromise is prejudicial to that creditor or to the class of creditors to which that creditor belongs,

the Court may order that the creditor is not bound by the compromise or make such order as it deems fit.

(3) An application under subsection (2) shall be made not later than 15 working days after the date on which notice of the result of the voting was given to the creditor.

(4) On the application of the proposer or the company, the Court may -

- (a) give directions in relation to a procedural requirement imposed by this Part, or waive or vary any such requirement, if satisfied that it would be just to do so; or
- (b) order that, during any period specified in the order -
  - (i) proceedings in relation to a debt owed by the company be stayed; or
  - (ii) a creditor refrain from taking any other measure to enforce payment of a debt owing by the company.

(5) Nothing in subsection (4)(b) shall affect the right of a secured creditor during that period to take possession of, realise or otherwise deal with, any property of the company over which that creditor has a charge.

### **Costs of compromise**

149. Unless the Court orders otherwise, the costs incurred in organising and conducting a meeting of creditors for the purpose of voting on a proposed compromise -

- (a) shall be borne by a company; or
- (b) if incurred by a judicial manager or liquidator, shall be costs of the judicial management or liquidation.

### **Judicial supervision of liquidation**

150. (1) On the application of a liquidator or with the leave of the Court, a creditor, shareholder or director of a company in liquidation, the Court may -

- (a) give directions in relation to any matter arising in connection with the liquidation;
- (b) confirm, reverse or modify an act or decision of the liquidator;
- (c) order an audit of the accounts of the liquidation;
- (d) order the liquidator to produce the accounts and records of the liquidation for audit and to provide the auditor with such information concerning the conduct of the liquidation as the auditor requests;
- (e) in respect of any period, review or fix the remuneration of the liquidator at a level which is reasonable in the circumstances;
- (f) to the extent that an amount retained by the liquidator as remuneration is found by the Court to be unreasonable in the circumstances, order the liquidator to refund the amount;
- (g) declare whether or not the liquidator was validly appointed or validly assumed custody or control of any property; or
- (h) make an order concerning the retention or the disposition of the accounts and records of the liquidation or of the company.

(2) The powers under subsection (1) are in addition to any other powers the Court may exercise relating to liquidators under this Part, and may be exercised in relation to a matter occurring either before or after the commencement of the liquidation or the striking off of the company from the register, and whether or not the liquidator has ceased to act as liquidator when the application or the order is made.

(3) A liquidator who has -

- (a) obtained a direction of a Court or Master with respect to a matter connected with the exercise of the powers or functions of a liquidator; and
- (b) acted in accordance with the direction,

is entitled to rely on having so acted as a defence to a claim in respect of anything done or not done in accordance with the direction.

### **Enforcement of liquidator's duties**

151. (1) If a liquidator fails to comply with his or her duties, the Master may direct the liquidator in writing to comply, and if the liquidator fails to comply with the directive, the Master may terminate the appointment of the liquidator or take such other action as he or she thinks fit.

(2) Where a creditor, shareholder or director is not satisfied with a decision or conduct of the liquidator, or where such a person believes that the liquidator has failed to comply, the person may apply to the Master and the Master may -

- (a) relieve the liquidator of the duty to comply, wholly or in part;
- (b) without prejudice to any other remedy which may be available in respect of any breach of duty by the liquidator, direct the liquidator to comply to the extent specified in the directive;
- (c) remove the liquidator from office;
- (d) make a directive extending any time for compliance;
- (e) impose any term or condition; or
- (f) make any other ancillary directive.

(3) Where necessary, before making a determination under subsections (1) and (2) the Master may investigate the conduct of the liquidator in respect of the liquidation.

(4) The decision of the Master may be reviewed by the High Court on application by the liquidator or aggrieved person within 7 days of the notification of the decision.

### **Completion of liquidation**

152. (1) The liquidation of a company is completed when the liquidator files with the Registrar a final report and final accounts of the liquidation and a statement that -

- (a) known assets have been disclaimed, realised or distributed without realisation;
- (b) proceeds of realisation have been distributed; and
- (c) the company is dissolved.

(2) Upon receipt of a final report and statement from a liquidator, the Registrar shall endorse the register and in the record of the company to show that it has been dissolved in liquidation.

(3) Upon sending or delivering to the Registrar a final report, the final accounts and the statement of completion of liquidation, the liquidator ceases to hold office, but this section does not limit the Court or the Master's supervision of the liquidation or enforcement of the liquidator's duties.

### **Removal and vacation**

153. (1) A liquidator may at any time be removed from office by the Master or may resign by giving notice of resignation in a prescribed manner to the Master.

(2) A liquidator shall vacate office if he or she dies or ceases to qualify to hold office under section 126.

(3) If a vacancy occurs by death, resignation or otherwise in the office of the liquidator, the Master shall appoint another liquidator to complete the liquidation.

### **De-registration of external companies**

154. (1) An external company registered under this Act that intends to cease to have a place of business in Lesotho shall -

- (a) give public notice of that intention and that notice shall be published in 3 consecutive editions of a newspaper widely circulating in Lesotho and through the electronic media including through a radio station with national coverage during prime time for at least 3 consecutive days; and
- (b) not later than 3 months after giving notice in accordance with paragraph (a), notify the Registrar as prescribed in the Schedule, Form 15, stating the date on which it intends to cease to carry on business in Lesotho.

(2) The Registrar shall remove an external company from the external register immediately after receipt of a notice given in accordance with subsection (1)(b).

#### **Offences, fines and penalties**

155. (1) Nothing in this Part limits or affects the recovery of -

- (a) a fine imposed on a company for the commission of an offence, whether before or after the commencement of the liquidation of the company;
- (b) a monetary penalty for the commission of an offence payable to the State imposed on a company by a Court, whether before or after the commencement of the liquidation of the company; or
- (c) costs ordered to be paid by the company in relation to proceedings for the offence or breach.

(2) If a company is in liquidation or an application has been made to the Court for an order that the company be put into liquidation, a shareholder, director, officer or employee of the company or their agent shall not -

- (a) conceal or remove property of the company with the intention of preventing or delaying the liquidator from taking custody or control of it; or
- (b) destroy, conceal or remove records or other documents of the company.

(3) On the commencement of the liquidation of a company, it shall be the duty of every present or former director and employee of the company -

- (a) to provide full and true information to the liquidator regarding all the property of the company, and the details of the disposal of any property by the company other than in the ordinary course of business; and
- (b) to deliver to the liquidator, or in accordance with the liquidator's directions -
  - (i) all property of the company in or under his or her custody or control; and
  - (ii) all books, documents or records belonging to the company in or under his or her custody or control.

(4) A person who contravenes this section commits an offence and shall be liable on conviction to a fine of M100,000 or imprisonment for a term not exceeding 10 years or both.

## PART XVII - JUDICIAL MANAGEMENT

### **Grounds for judicial management**

156. (1) The Court may order judicial management under section 125 or upon application by any shareholder, director or creditor if it appears to the Court that -

- (a) by reason of mismanagement or any other issue, it is desirable that the company be put under judicial management;
- (b) the directors or other officers of the company have acted in a way that is contrary to the provisions of this Act; or
- (c) the assets of the company are being misapplied or misused and the viability of the company is threatened.

(2) Before a judicial management order is made, the Court may require the Registrar to prepare a report on any circumstances which appear to justify the Court in withholding a judicial management order or postponing consideration of the making of such an order or may declare that the affairs of the company ought to be

investigated by an investigator appointed by the Minister.

(3) For the purposes of compiling a report under subsection (2), the Registrar or any person appointed by him or her, may require the production of any books and documents of the company and any information relating to the affairs of the company from any person who is or was an officer of the company or who has made the application for judicial management.

(4) The report of any investigation made under subsection (2) shall be furnished to the company and the person who had made the application for a judicial management order under subsection (1).

(5) The Court may order judicial management if it is not satisfied that under proper management the company may be revived.

### **Judicial manager**

157. (1) Where a Court orders judicial management, the Court shall appoint a judicial manager.

(2) The provisions of sections 126, 127 and 153 in relation to the appointment, qualification and removal of a liquidator shall, with necessary modifications, apply to a judicial manager and reference to the liquidator shall be taken as reference to the judicial manager.

### **Effect of the commencement of judicial management**

158. As from the commencement of the judicial management, the judicial manager shall have custody and control of the company's assets and the provisions of section 128 relating to the effect of commencement of liquidation shall apply and reference to the liquidator and liquidation shall be taken as reference to the judicial manager and judicial management, as the case may be.

### **Powers and privileges of the judicial manager**

159. The provisions of section 129, except sections 129(2)(d), 130,131,132 and 133 and any other provisions conferring powers or privileges on the liquidator shall, with necessary modification, apply to a judicial manager or during judicial management and reference to the liquidator and liquidation shall be taken as reference to the judicial manager or judicial management, as the case may be.

### **Duties of judicial manager**

160. (1) The judicial manager shall -

- (a) take custody of the assets of the company and manage the company;
- (b) prepare an inventory of the assets of the company and submit it to the Master within 7 days of his or her appointment;
- (c) submit an annual report, to the Master in accordance with section 105 and periodic progress reports as the Master may direct;
- (d) keep accounting records in accordance with section 96;
- (e) advise the Court within 6 months of his or her appointment whether the company can be revived;
- (f) prepare a creditor's payment schedule and submit it to the Master;
- (g) manage the company in a most economic and most conducive manner in the interest of the shareholders; and
- (h) convene, during the period the company is under judicial management, the annual general shareholders' meeting and ensure that the company complies with all the provisions of this Act and any other law.

(2) Without prejudice to the provisions of subsection (1) in every case in which a company is put under judicial management, the duties of the liquidator relating to the company, shareholders and the creditors shall apply, with necessary modifications, to the judicial manager.

(3) The contents of the progress report referred to under subsection

(1) (c) shall be prescribed by the Registrar in rules made under section 186.

(4) The judicial manager shall not enter into a major transaction without the approval of the Master.

(5) Before seeking the approval of the Master under subsection (4), the judicial manager shall consult the shareholders on whether to enter into the major transaction and shall attach the consultation report to the request for approval.

### **Conversion from judicial management to liquidation**

161. If, at any time during the judicial management, the judicial manager is of the opinion that the continuance of the judicial management will not enable the company to either meet its obligations or remove the need for judicial management, the judicial manager shall apply to Court for the cancellation of the judicial management order and the issue of a liquidation order:

Provided that the judicial manager shall notify the shareholders and the creditors of his or her intention to make such an application.

### **Completion of judicial management**

162. (1) If, at any time, on application of the judicial manager or any person interested, it appears to the Court that the purpose of the judicial management order has been fulfilled, or that for any reason it is undesirable that such order should remain in force, the Court may cancel such order and thereupon the judicial manager shall be divested of such management.

(2) In cancelling such order, the Court shall give such directions as may be necessary for the resumption of the management and control of the company to the directors thereof, which directions may include directions for the summoning of a general meeting of shareholders for the election of directors.

## **PART XVIII - VOLUNTARY DISSOLUTION**

### **Dissolution by shareholders**

163. (1) The board of directors of a company may propose dissolution for approval by the shareholders and call a meeting for that purpose.

(2) For a proposal for dissolution to be approved -

(a) the board of directors of a company shall recommend

dissolution to the shareholders, unless the board determines that, because of a conflict of interest or other special circumstance, it shall make no recommendation and shall communicate the basis for its determination to the shareholders;

- (b) unless the articles of incorporation or the board of directors require a greater vote, a greater number of shares to be present or a vote by voting groups, the shareholders entitled to vote shall approve the proposal for dissolution by ordinary resolution meeting.

(3) The company shall notify each shareholder, whether entitled to vote or not, of the proposed shareholders' meeting referred to in subsection (1) and the notice shall state that the purpose or one of the purposes of the meeting is to consider dissolution of the company.

(4) The notice referred to in subsection (3) shall be delivered by hand to each shareholder or his or her legal representative and published in 3 consecutive editions of a widely circulating newspaper in Lesotho.

(5) At the meeting referred to in subsection (1) the shareholders may appoint a liquidator, otherwise another shareholders' meeting shall be held to appoint a liquidator and the shareholders may decide to invite creditors to such a meeting.

### **Notice of dissolution**

164. (1) At any time after a proposal for dissolution is approved, the company may commence dissolution proceedings by delivering notice of dissolution to the Master and the Registrar, stating -

- (a) the name of the company;
- (b) the date the dissolution proposal was approved;
- (c) a statement that the proposal to dissolve the company was approved by the shareholders in a manner required by this Act or the articles of incorporation of the company; and
- (d) the particulars of the liquidator.

(2) A company's dissolution proceedings commence on the date

the notice of dissolution is delivered to the Master.

### **Revocation of notice of dissolution**

165. (1) A company may revoke its notice of dissolution before it delivers a notice of completion of dissolution proceedings to the Master as provided by section 164.

(2) Revocation of the notice of dissolution shall be approved in the same manner as the dissolution was approved, unless that approval permitted revocation by action of the board of directors alone, in which case the board of directors of the company may revoke the notice of dissolution without shareholder's action.

(3) After a revocation of the notice of dissolution is approved, a company may revoke the notice of dissolution by a notice of revocation of dissolution to the Master and the Registrar, stating -

- (a) the name of the company;
- (b) the effective date of the notice of dissolution that is being revoked;
- (c) the date that the revocation of the notice of dissolution was approved;
- (d) if the company's board of directors revoked the notice of dissolution, a statement that revocation was made in accordance with the approval referred to under subsection (2); and
- (e) a statement that the proposal to revoke was duly approved by the shareholders in the manner required by this Act and the articles of incorporation.

(4) Revocation of a notice of dissolution is effective upon the date on which the notice of revocation of dissolution is delivered to the Registrar and shall take effect on the date on which the notice of dissolution was delivered to Registrar, and the company shall resume carrying on business as if the dissolution had never occurred.

### **Effect of commencement of dissolution proceedings**

166. (1) A company's existence shall continue after it commences dissolution proceedings, but it may not carry on any business except business that is appropriate to wind up and liquidate its business and affairs, including -

- (a) collecting its assets;
- (b) disposing off its property that is not to be distributed in kind to its shareholders;
- (c) discharging or making provision for discharging its liabilities;
- (d) distributing its remaining property among its shareholders according to their interests; and
- (e) doing every other act necessary to wind up or liquidate its business and affairs.

(2) Commencement of dissolution does not -

- (a) transfer title to the company's property;
- (b) prevent transfer of its shares, although the approval to dissolve may provide for closing the company's shareholder register;
- (c) change voting requirement for its directors or shareholders;
- (d) prevent commencement of proceedings by or against the company in its company name;
- (e) abate or suspend proceedings by or against the company; or
- (f) terminate the authority of its directors or other authorised person to accept service on behalf of the company.

### **Claims against the company**

167. (1) For purposes of this section, “claim” does not include a contingent liability or claim based on an event occurring after the effective date of the notice of dissolution.

(2) A liquidator of a company under dissolution may dispose of any known claims against it by notifying its known claimants in writing of the commencement of dissolution at any time after the notice of dissolution is delivered to the Master and the Registrar.

(3) The notice shall -

- (a) describe information that shall be included in the claim;
- (b) provide a mailing address where a claim may be sent;
- (c) state the deadline by which the dissolving company shall receive the claim, which may not be less than 90 days from the date of the written notice; and
- (d) state that the claim may be barred if not received by the deadline.

(4) A claim against a dissolving company may be barred -

- (a) if a claimant who was given written notice under subsection (2) does not deliver the claim to the dissolving company by the deadline; or
- (b) if a claimant whose claim was rejected by the dissolving company does not commence proceedings to enforce the claim within 90 days from the date on which the claimant was notified that the claim was rejected.

(5) A dissolving company may publish notice of its intended dissolution and request persons with claims against the dissolving company to present them in accordance with this section.

(6) The notice referred to in subsection (5) shall -

- (a) be published in 3 consecutive editions of a newspaper widely circulating in Lesotho and through the electronic media including through a radio station with national coverage during prime time for at least 3 consecutive days ;
  - (b) describe the information that shall be included in a claim and provide a mailing address where the claim may be sent; and
  - (c) state that a claim against a dissolving company shall be barred unless proceedings to enforce the claim are commenced within one year after the publication date of the notice.
- (7) A company shall, within 6 months, act upon a claim -
- (a) submitted by a known claimant under subsection (2); or
  - (b) submitted under subsection (5).
- (8) A claim may be enforced -
- (a) against a dissolving company to the extent of its undistributed assets; or
  - (b) if the assets have been distributed against a shareholder of the dissolving company or the dissolved company to the extent of the shareholder's prorata share of the claim or the distributed assets, whichever is less, but a shareholder's total liability for all claims under this section may not exceed the total amount of assets distributed to the shareholder.

### **Distribution of assets to be made after payment of claims**

168. (1) A board of directors shall cause a dissolving company to make reasonable provision for the payment of claims after which assets may be distributed to shareholders.

(2) The Master shall, by notice published in the Gazette, issue guidelines for the implementation of this Part.

### **Duties of a liquidator under voluntary dissolution**

169. Within 10 days of his or her appointment, a liquidator of a company under voluntary dissolution shall -

- (a) publish a notice of his or her appointment or otherwise give public notice of his or her appointment, the date of the commencement of the liquidation and the address and telephone number to which inquiries may be directed;
- (b) prepare a list of every known creditor; and
- (c) prepare a creditors payment schedule and lodge it with the Master.

### **Completion of voluntary dissolution proceedings**

170. (1) Before one year expires after all known claims are disposed of, a board shall deliver a notice of completion of dissolution proceedings to the Master and the Registrar, which shall within 3 months -

- (a) state the name of the dissolved company;
- (b) have a written statement that all known claims have been disposed of; and
- (c) have a statement that all of the company's assets have been distributed as provided by this Act and the articles of incorporation or shareholders' resolution.

(2) Upon delivery to the Registrar of a notice of completion of dissolution proceedings, the corporate existence of the company shall cease and the Registrar shall endorse in the register and in the company's record that the company is dissolved.

(3) Claims that have arisen from liabilities that were contingent at the commencement of dissolution proceedings or that have arisen from events that occurred after the commencement of dissolution proceedings, may be satisfied after completion of dissolution proceedings as provided by section 167(8).

## **PART XIX - JUDICIAL DISSOLUTION**

### **Grounds for judicial dissolution**

171. The Court may dissolve a company in proceedings instituted by -

- (a) the Registrar if the Court is satisfied that -
  - (i) the company fraudulently lodged its articles of incorporation; or
  - (ii) the company has continued to exceed or abuse the authority conferred on it by this Act; or
  - (iii) the company has failed to apply for reinstatement within the time stipulated in section 87(7) or such application was not successful or the company has continuously failed to comply with any provision of this Act.
- (b) a shareholder if it is established that -
  - (i) the directors are deadlocked in the management of the company and the shareholders are unable to break that deadlock; and
  - (ii) irreparable injury to the company is threatened or being suffered and the business of the company can no longer be conducted to the benefit of the shareholders because of the deadlock referred to in subparagraph (i); or
  - (iii) the shareholders are deadlocked in voting power and have failed for 2 consecutive annual meeting dates to elect successors to directors whose terms have expired.

### **Procedure for judicial dissolution**

172. (1) It shall not be necessary to make shareholders party to a judicial dissolution application unless relief is sought against them individually.

(2) The Court may, in judicial dissolution proceedings, issue an

interdict, appoint a custodian with all powers and duties as the Court may direct, to preserve the company's assets and carry on the business of the company until a full hearing is held.

**Order of judicial dissolution and appointment of judicial liquidator or custodian**

173. (1) If after the hearing referred to in section 172 the Court determines that grounds for judicial dissolution exist, the Court shall direct winding up and liquidation of the company's business and affairs.

(2) The Court may appoint one or more liquidators to wind up and liquidate, or one or more custodians to manage the affairs and business of, the company.

(3) The Court shall, after notifying all parties to the proceedings and interested persons, hold a hearing before issuing an order for the appointment of a liquidator or custodian.

(4) The Court may appoint an individual or company as liquidator or custodian, and may require the liquidator or custodian to post a bond in an amount to be determined by the Court.

(5) The Court shall outline the powers and duties of a liquidator or custodian in the appointing order, which may include -

- (a) the power of the liquidator to dispose of all or any part of the assets of the company at a public or private sale if authorised by the Court, and may sue and defend in his or her own name as liquidator of the company; or
- (b) the power of the custodian to exercise all of the powers of the company through or in place of the board of directors to the extent necessary to manage the affairs of the company in the best interest of shareholders or creditors.

(6) The Court may, during liquidation, re-designate a liquidator or custodian, and during a custodianship, re-designate a custodian or a liquidator, if doing so would be in the best interest of the company, its shareholders and creditors.

(7) The Court may, during the liquidation or custodianship, order compensation to be paid and expense disbursements or reimbursement to be made to

the liquidator or custodian from the assets of the company or proceeds from the sale of the assets.

### **Completion of judicial dissolution**

174. When a liquidator or custodian reports that the assets of the company have been distributed and its affairs and business wound up, the Court may make an order dissolving the company which shall state the effective date of the dissolution, and the Court shall deliver a copy of that order to the Registrar, who shall enter it in the company's record and note that the company is dissolved.

## **PART XX - OFFENCES AND PENALTIES**

### **False statements**

175. (1) A person who, with respect to a document required by or for the purposes of this Act -

- (a) makes or authorises the making of a statement therein that is false or misleading in a material way, knowing it to be false or misleading; or
- (b) omits or authorises the omission from it of any matter knowing that the omission makes the document false or misleading in a material way, commits an offence, and is liable on conviction to a fine of M20, 000 or to imprisonment for a period of 3 years, or both.

(2) A director, officer or employee of a company who makes, authorises or permits the making of a statement or report that relates to the affairs of the company that is false or misleading in a material way in relation to -

- (a) a director, employee, auditor, shareholder, debenture holder, or trustee for debenture holders of the company;
- (b) a liquidator, judicial manager, committee of inspection, or manager of property of the company; or
- (c) if the company is a subsidiary, a director, employee, or auditor of the holding company, knowing it to be false or misleading, commits an offence, and is liable on conviction

to a fine of M500, 000 or to imprisonment for a term of 20 years, or both.

(3) For the purposes of this section, a person who voted in favour of the making of a statement at a meeting is deemed to have authorised the making of the statement.

### **Fraudulent destruction of property**

176. A director, employee or shareholder of a company who -

- (a) fraudulently takes or applies property of the company for his or her own use or benefit, or for a use or purpose other than the use or purpose of the company; or
- (b) fraudulently conceals or destroys any property of the company, commits an offence, and is liable on conviction to a fine of M500, 000 or to imprisonment for a term of 20 years, or both.

### **Falsification of records**

177. (1) A director, employee or shareholder of a company who, with intent to defraud or deceive another person -

- (a) destroys, parts with, mutilates, alters, or falsifies, or is a party to the destruction, mutilation, alteration, or falsification of any register, accounting records, book, paper, or other document belonging or relating to the company; or
- (b) makes, or is a party to the making of, a false entry in any register, accounting records, book, paper, or other document belonging or relating to the company,

commits an offence, and is liable on conviction to a fine of M20, 000 or to imprisonment for a term of 3 years, or both.

(2) Where any mechanical, electronic, or other device is used in connection with keeping or preparation of any register, accounting or other records, index, book, paper, or other document for the purposes of a company or this Act, every person who -

- (a) records or stores in the device, or makes available to any person from the device, any matter that he or she knows to be false or misleading in a material manner; or
- (b) with intent to falsify or render misleading any such register, accounting or other records, index, book, paper, or other document, destroys, removes, or falsifies any matter recorded or stored in the device, or fails or omits to record or store in the device any matter,

commits an offence, and is liable on conviction to a fine of M500, 000 or to imprisonment for a term of 20 years, or both.

### **Defences**

178. (1) If a director is charged with an offence in relation to a duty imposed on the board, it shall be a defence to the charge if he or she proves that the board took all reasonable and proper steps to ensure that the requirements of this Act would be complied with or that he or she took all reasonable and proper steps to ensure that the board complied with the requirements of this Act, or in the circumstances he or she could not reasonably have been expected to take steps to ensure that the board complied with the requirements of this Act.

(2) If a director is charged with an offence in relation to a duty imposed on a company, it shall be a defence to the charge if he or she proves that the company took all reasonable and proper steps to ensure that the requirements of this Act would be complied with or that he or she took all reasonable and proper steps to ensure that the company complied with the requirements of this Act or in the circumstances he or she could not reasonably have been expected to take steps to ensure that the company complied with the requirements of this Act.

## **PART XXI - MISCELLANEOUS General**

### **provisions relating to liquidators rules of procedure**

179. (1) The Master may make rules concerning the procedure to be followed with respect to any matter in connection with liquidation or dissolution of companies and generally as to all matters in which the Master is empowered under this Act to

exercise jurisdiction.

(2) The rules made under subsection (1) shall be published in the Gazette and shall take effect and have force of law.

### **Power of Attorney**

180. Subject to its articles of incorporation, a company may, by an instrument executed in writing, appoint a person as its attorney or agent, either generally or in relation to a specified matter, and any act of the attorney or agent in accordance with the instrument shall be binding on the attorney, agent or any other person and the company.

### **Service of documents on companies in legal proceedings**

181. (1) A document that includes a summons, writ, notice or order in any legal proceedings may be served on a company as follows -

- (a) by delivery to a person named as a director of the company on the register;
- (b) by delivery to an employee of the company authorised by the articles of incorporation to accept service of the company at the company's registered office or address for service;
- (c) by serving it in accordance with any direction as to service given by the Court; or
- (d) in accordance with an agreement made with the company.

(2) A document that includes a summons, writ, notice or order in any legal proceedings shall be served on an external company as follows -

- (a) by delivery to a person named as a director of the company on the external register;
- (b) by delivery to a person named in the external register as being authorised to accept service in Lesotho of documents on behalf of the external company;

- (c) by delivery to an employee of the external company at the external company's registered office or address for service;
- (d) if the person named in paragraph (b) cannot be found at the given address, by delivery to the Registrar, who shall send the documents to the address in the external company's jurisdiction that is identified in its notice to the Registrar upon registration;
- (e) by serving it in accordance with any direction as to service given by the Court; or
- (f) in accordance with an agreement made with the company.

#### **Service of other documents on companies**

182. A document other than a document in any legal proceedings may be served on a company or external company as follows -

- (a) by any of the methods set out in section 181;
- (b) by posting it to the company's registered office or address for service;
- (c) by sending it by facsimile machine to a telephone number used for the transmission of documents by facsimile at the company's registered office or address for service; or
- (d) by electronic mail.

#### **Service of documents on shareholders and creditors**

183. (1) A notice, statement, report, accounts or other documents to be sent to a shareholder or creditor who is a natural person shall be -

- (a) delivered to that person;
- (b) posted to that person at his or her last known address;
- (c) sent by facsimile machine to a telephone number used by that person for the transmission of documents by facsimile;

or

(d) sent by electronic mail.

(2) A notice, statement, report, accounts or other documents to be sent to a shareholder or creditor that is a company or an external company shall be sent by any of the methods of serving documents referred to in section 181 or 182 as the case may be.

(3) Where a liquidator sends documents -

- (a) to the last known address of a shareholder or creditor who is a natural person; or
- (b) to the address for service of a shareholder or creditor that is a company, and the documents are returned unclaimed 3 consecutive times,

the liquidator need not send further documents to the shareholder or creditor until the shareholder or creditor notifies the company of his or her new address.

#### **Additional provisions relating to service**

184. (1) Subject to subsection (2), for the purposes of sections 181, 182 and 183

-

- (a) if a document is to be served by delivery to a natural person, service shall be made -
  - (i) by handing the document to the person; or
  - (ii) if the person refuses to accept the document, by bringing it to the attention of, and leaving it in a place accessible to, the person;
- (b) a document posted is deemed to be received by the recipient 5 working days or any shorter period as the Court may determine in a particular case, after it is posted or delivered;
- (c) a document sent by facsimile machine is deemed to have

been received on the working day following the day on which it was sent;

- (d) in proving service of a document by post, it is sufficient to prove that the document was properly addressed, that all postal charges were paid and that the document was posted; and
- (e) in proving service of a document by facsimile machine, it is sufficient to prove that the document was properly transmitted by facsimile machine to the person concerned.

(2) A document is not to be deemed to have been served or sent or delivered to a person if the person proves that, through no fault on the person's part, the document was not received within the time specified.

### **Regulations**

185. (1) The Minister may, by notice published in the Gazette, make regulations which provide for such matters, not inconsistent with this Act, as are contemplated by or necessary for giving effect to this Act and for its due administration.

(2) Without limiting the generality of subsection (1), the Minister may -

- (a) prescribe the fees payable to the Registrar for the performance of the Registrar's functions under this Act;
- (b) prescribe penalty fees payable to the Registrar for failure to lodge a document with the Registrar within the time prescribed by this Act;
- (c) amend the monetary figures in this Act;
- (d) amend the Schedule;
- (e) prescribe guidelines and procedures for the removal of companies from the register;
- (f) prescribe the requirements or dimensions for notices made in newspapers;

- (g) prescribe timeframes for the performance of the Registrar's duties; and
- (h) prescribe other requirements or information that shall appear in the annual report.

(3) Where a fee is prescribed for the performance of a function of the Registrar, the Registrar shall refuse to perform the function until the fee is paid.

(4) The Registrar may waive or reduce a penalty fee prescribed pursuant to subsection (2) (b) in any case if the Registrar considers that in the circumstances it is proper and reasonable to do so.

**Rules**

186. The Registrar may make rules for the effective administration of this Act in relation to registration of companies where there is no provision in this Act.

**Repeal**

187. Subject to this Act, the Companies Act, 1967 is repealed.

**NOTE**

- 1. Act No. 25 of 1967
- 2. Act No. 9 of 1977
- 3. Act No. 12 of 1980
- 4. Procl. No. 13 of 1957
- 5. Act No. 7 of 1964
- 6. Act No. 12 of 1967

**Application for incorporation**

We, the undersigned, being desirous of having a company incorporated with the following particulars hereby state -

- 1. The name of the proposed company is....., and we confirm that we have caused a search of the registers, directories and records of names of companies in Lesotho and this name is not identical to any registered name except for ..... which has consented to the use of the name in Lesotho by us as evidenced by the attached agreement/consent form. *(delete*

*whichever is not applicable).*

2. The Company will carry business under the name: .....
3. The company is a private/public company (*delete whichever is applicable*)
4. The authorised share capital is: M .....
5. The main purposes/intended business of the company is as follows: (*see*

*annex 'A' hereunto attached)*

6. The liability of the members is limited in accordance with the provisions of the Act.

7. The rights, privileges, limitations and conditions, where applicable, attached to each share in so far as different from those set out in section 25 of the Act are as follows:

Type of share Rights attached to Privileges Limitations Conditions shares

8. The maximum number of directors shall be ..... and the first director(s) is/are: -

***N.B. (at least 2 for public companies and at least one for private companies)***

Full names	Nationality and Residential	Telephone No.	e-mail address	Passport No.
	Address		if any) &	Postal address

1.

2.

9. The first registered office of the proposed company is .....  
(Physical address) .....

• contact : Telephone.....

o.....telefax

o..... e-mail

o..... postal

10. The first address for service of the proposed company is .....  
*(physical address)*

11. The company will use:

- (a) model articles
  - (b) own articles
- (Tick whichever is applicable)*

12. We agree to subscribe for the number of shares indicated opposite our names:

Full Names	No. of shares	Type of shares
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1.

2.

13. And we hereby make application for a company to be registered under the provisions of the Companies Act, 2011.

14. The company expects to start business in .....(month) .....(year).

15. Subscribers:

Full names	Occupation	Contact details	Signature
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1.

2.

Dated:

**FOR OFFICIAL USE ONLY**

1. Application received on ..... (date) at.....(Time)

by .....

2. Application approved on .....

3. Company registered as company No .....

Application approved by:

Registrar of Companies  
**Certificate of Incorporation**

I..... the Registrar of Companies, hereby certify that ..... (name of company) was incorporated under that name on this..... day of..... in the year ..... and has been registered as Company number.....in the register of companies with the powers, rights, and privileges, and subject to the limitations, duties and restrictions as prescribed in the Act.

The Company shall commence business in..... (month)..... (year).

Witness my signature hereunto subscribed, and the Official Seal of the Office of the Registrar of Companies hereunto affixed, this ..... day of..... in the year.....

Registrar of Companies

FORM 3

COMPANIES ACT, 2011.

(Section 11)

**Application for registration of an external Company**

1. This application is made on behalf of ..... (name of external company), a company incorporated under the laws of ..... (state the country) and having its registered office at .....

..... (specify address of registered office).

2. We confirm that we have caused a search of the registers, directories and records of names of companies in Lesotho and this name is not identical to any registered name except for..... which has consented to the

use of the name in Lesotho by us as evidenced by the attached agreement/consent form. *(delete whichever is not applicable)*,

3. Thus, we hereby make application for ..... to be registered as an external company in Lesotho;

4. The particulars of the company in Lesotho are as follows:

- (i) Place of business: .....
- (ii) Registered office: .....
- (iii) Address for service: .....
- (iv) Persons who may accept service in Lesotho on behalf of the company are:

Full names, nationality and Capacity Full contact details passport number  
(physical address, postal  
address, telephone, fax, e-mail)

1.

2.

(v) The current Directors of the company are:

Full names, Nationality and Physical address Telephone, fax, e-mail identity number

1.

2.

*The above Directors have agreed to act as Directors of the company, see the attached consent forms.*

5. Attached are the certified copies of incorporation certificate and company rules.

6. This application is made by: Name ..... of ..... on behalf of the company.

Signed:

Date:

**Certificate of Registration for external companies**

..... the Registrar of Companies, hereby certify that ..... (*name of company*) was registered under that name on this ..... day of ..... in the year ..... and has been registered as Company number ..... in the register of external companies with the powers, rights, and privileges, and subject to the limitations, duties and restrictions as prescribed in the Act.

Witness my signature hereunto subscribed, and the Official Seal of the Office of the Registrar of Companies hereunto affixed, this ..... day of ..... in the year

Registrar of Companies

FORM 5

COMPANIES ACT, 2011.

(Section 12)

**Notice of amendment to the Articles of Incorporation**

To the Registrar of Companies:

Kindly note that on ..... day of ..... , the shareholders of ..... , (name of company and registration number) resolved to amend the company Articles of Incorporation. A copy of the amendment is hereunto attached for your information.

Filed on behalf of the company by: (full name) ..... (Secretary/Director) on this ..... day of

Signature: .....

**Certificate of Change of Name**

I, ..... the Registrar of Companies, hereby certify that the name of ..... (old name of the company), registered number ..... has been changed and it is now registered as ..... (new name) in

the companies register.

Date: .....

Signed: .....

Registrar of Companies

FORM 7

COMPANIES ACT, 2011.  
(Section 20)

**Notification of Change of shareholders**

To the Registrar

..... (name of Company) registered as company No.  
..... hereby gives you notice that there has been a change of  
shareholders in the company.

The particulars of the change are as follows:

Date of change	Names of old shareholders	Names of new shareholders	No. of shares	Nature of change	Occupation of new shareholders	Contacts of new shareholders
shares of change (new)						details - new shareholders (physical address, e-mail, telephone, fax etc.)
				and nominal value		

Signed by Managing Director, Director, Secretary

Date: .....

FORM 8

COMPANIES ACT 2011.  
(sections 5 and 58)



Include details directorships  
Passport/Id number

## 2. Terminated appointments

Full names Address Position Occupation Particulars of Date of  
& Nationality and contact other appointment  
appointment details directorships termination  
Include  
Passport/Id  
number

Presented for filing by: *(full name and signature)* Date: .....

Managing Director, Director, Secretary *(delete whichever is not applicable)*  
**Notice of Change of Registered Office**

To: The Registrar of Companies

Name of Company: .....

Company Registration Number: .....

Notice is hereby given that the registered office of ..... *(company Name)* has been changed from ..... *(old address)* to ..... *(full address of new registered office)* with effect from ..... *(specify effective date)*.

Dated: .....

Presented for filing by: *(full name and signature)* Date: .....

(Managing Director, director or Secretary)

FORM 11

COMPANIES ACT, 2011.

(section 83)

**Notice of Change of Address for Service**

To: The Registrar of Companies

Name of Company: .....

Company Registration Number: .....

Notice is hereby given that the registered address for service of .....  
(company Name) has been changed from ..... (old address for service)  
to..... (full address of new  
address for service)  
with effect from..... (specify effective  
date).

**DATED:**

Presented for filing by: (full name and signature) Date: .....

(Managing Director, director or Secretary)

FORM 12

COMPANIES ACT, 2011.

(sections 104 and 105)

**Annual Report for the year ended .....**

Name of Company.....

Registered Number.....

1. Address of Registered Office

- (i) Physical.....
- (ii) Postal .....
- (iii) E-mail .....

- 2. Address for service .....
- 3. Agent for service .....
- 4. Place and Address where company records are kept .....

5. **(to be completed if a notification was not made under Section 76)**

A. Directors, secretary, executives and agents

Full Names	Addresses and Position	Remuneration	Service (tick if
	contact details (Director, and other benefits authorised to Secretary, received service) CEO etc)		accept

- 1.
- 2.

B. Directors, secretary, executives and agents whose appointments were terminated during the financial year:

Full names	Addresses	Position (Director, Secretary, CEO etc)	Date of termination and other	Remuneration benefits received
------------	-----------	--	-------------------------------	-----------------------------------

- 1.
- 2.

6. Share capital:

- (i) Authorised share capital .....Maloti
- (ii) Issued shares .....
- (iii) Number of shares issued for cash .....
- (iv) Number of shares issued for consideration other than cash.

7. External company: Yes/No **(tick appropriate one)**

8. Describe any change, if any, during the financial year in the nature of the business of the company or any of its subsidiaries, or the classes of business in which the company has an interest, whether as shareholder or otherwise:

9. Describe any change in the accounting policies of the company in during the financial year:

10. The total number of donations made by the company during the financial year are as follows:

11. The accounts and the audit report of the company are attached.

I affirm that the information contained herein in relation to the company at the date hereof is correct.

Date.....  
*(to be signed by at least 2 Directors of the company, or if the company has only one Director, by that Director.*

Signed:1..... 2.....

being Directors of the company duly authorised to sign this report on behalf of the Board.

FORM 13

COMPANIES ACT, 2011.

(section 111)

**Certificate of Merger**

I,..... the Registrar of Companies

hereby certify that ..... (Company name) registered as company number ..... in the register of companies, with registered office at ..... has merged with.....(company name) registered as company number ..... in the register of companies and the merged company shall

continue as:

..... *(name of surviving or new company)* with the registered number..... and registered office at ..... and address for service at .....  
Date: .....

Signed: .....

Registrar of Companies

FORM 14

COMPANIES ACT, 2011.

(section 134)

**Notice of appointment of the liquidator**

To: The Registrar of Companies

Name of Company: .....

Company Registration Number: .....

I ..... hereby give notice that I,

*(name of liquidator)* was appointed as the

Liquidator of .....  
*(company name)* with effect from ..... *(date)*.

Full Name: .....

Signature: .....

Date:

**Notice of cessation of business by an external company**

To: The Registrar of Companies

Name of Company: .....

Company Registration Number: .....

I ..... hereby give notice that on.....  
*(date)*, ..... *(name of company)* will cease to have a place  
of business in Lesotho.

Presented for filing by:

Name: .....

Capacity: .....

Signature: .....

Date: .....

GOVERNMENT NOTICE NO. 58 OF 2011

**Statement of Objects and Reasons of the Companies Act, 2011  
(Circulated by the Authority of the Honourable Minister of Trade and  
Industry, Cooperatives and Marketing, Dr. Leketekete Victor Ketso)**

The purpose of the Companies Bill, 2011 is to make registration of companies short, simple and responsive to the needs of the business community. The Bill has been modernised to take into account several business reforms already taking place within the Ministry of Trade and Industry, Cooperatives and Marketing including the establishment and operation of the One Stop Business Facilitation Centre with a view to make doing business in Lesotho easier and less costly.

The Bill provides a structure for the organization and operation of companies; and imposes minimum formalities yet capable of meeting diverse needs and circumstances of the business. It further clarifies the relationship between companies,

their management organs and shareholders as well as the rights and obligations of the shareholders and directors.

Further, the Bill gives directors wide management powers without prejudicing shareholders and creditors; shareholders are empowered to question directors' decisions.

The Bill further introduces one person companies and in this way, the business risk is considerably reduced and people will be free to open business without being obliged to join with others. The Companies Bill in this regard caters for the needs of both small and large businesses.

Finally, the Bill introduces a simple and transparent exit mechanism for companies so that companies that wish to exit the market can do so without any burdensome administrative requirements.

The existing Companies Act of 1967 had a number of shortcomings which proved to be barriers to doing business in Lesotho. These include, among others, cumbersome procedures which make formation and operation of companies an expensive and time consuming exercise and complex requirements which were difficult for companies to comply with. Consequently, the Bill repeals the 1967 Companies Act.

(5) If a creditor claims as a secured creditor in the liquidation, he or she shall -

- (a) set out full particulars of the claim;