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THE COMPANIES BILL, 2024

(Bill No. 5 of 2023)

(To be presented by the Minister for Commerce, Industry and Trade)

MEMORANDUM OF OBJECTS AND REASONS

The object of this Bill is to provide for –

- (a) the efficient registration and incorporation of companies on electronic and online platforms;
- (b) economically efficient and economically enhancing flexible and adaptable company structures;
- (c) the application of modernised rules in the regulation of companies;
- (d) procedures for the efficient and orderly closing of a company including liquidation, receivership and voluntarily ceasing to do business;
- (e) compulsory identification of beneficial owners, assessing liability against shadow directors, and prohibiting the issuance of bearer shares;
- (f) the repeal of Companies Act 2009; and
- (g) incidental matters.

SIFISO M. M. KHUMALO
ATTORNEY GENERAL

A BILL
ENTITLED

ANACT provide for the efficient registration and incorporation of companies on electronic and online platforms, the regulation of companies, procedures for the orderly winding up of companies, compulsory identification of beneficial owners, repeal of the Companies Act 2009; and incidental matters.

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PART I - PRELIMINARY PROVISIONS

Short title and commencement.

- 1. (1) This Act may be cited as the Companies Act 2023.

(2) This Act shall come into force on a date to be appointed by the Minister by notice in the Gazette.

Interpretation.

- 2. In this Act, unless the context otherwise requires, -

“accounting period”, in relation to a company, means -
 - (a) the period from the date on (one) 1 balance date to the close of the following balance date; or
 - (b) in the case of a company’s first accounting period, the period from the date of incorporation to the close of the first balance date

“annual meeting” means a meeting required to be held by section 65;

“balance date”, in relation to a company, means the close of 31 March or of any other date that the directors of the company adopt as the company’s balance date in accordance with any regulations made under this Act;

“board” and “board of directors”, in relation to a company, means -

- (a) directors of the company who constitute the required quorum acting together as a board of directors; or
- (b) if the company has only one (1) director, that director

“category A records” means the company records specified in section 141(1)(a);

“category B records” means the company records specified in section 141(1)(b);

“category C records” means the company records specified in section 141(1)(c);

“company” means a company registered or re-registered under this Act;

“company records” means the records that must be kept under section 141;

“Eswatini register” or “register” means the register of companies kept by the Registrar under section 412;

“Court” means the High Court of Eswatini;

“creditor” means -

- (a) in Part XIII, a person who, in a liquidation would be entitled to claim that a debt is owing to that person by the company, and includes a secured creditor; or
- (b) in Part XIV, a person who, in a liquidation, would be entitled to claim in accordance with clause 1 of Schedule 9 that a debt is owing to that person by the company, and includes a secured creditor only -
 - (i) for the purposes of sections 203, 207, or 235; or
 - (ii) to the extent of the amount of any debt owing to the secured creditor in respect of which the secured creditor claims under Part 3 of Schedule 9 as an unsecured creditor;

“default constitution” means a default constitution set out in Schedule 1, 2, or 3;

“digital format” means a format in which information, a document, or register may be stored, accessed, and displayed by a computer or similar device; and includes a format specified as a digital format by regulations made under this Act; and

- (c) includes any format (other than a photocopy document) produced by making a digital copy, image or reproduction of a document that is in hard copy format;

“digital” register means a register in digital format;

“director” has the meaning set out in section 72;

“distribution”, in relation to a distribution by a company to a shareholder, has the meaning set out in section 27;

“document” means a document in any form; and includes

- (a) any writing on any material; and
- (b) information recorded or stored by means of a tape recorder, computer, or other device; and
- (c) a book, graph, or drawing; and
- (d) a photograph, film, negative, tape, or other device in which 1 or more visual images are embodied so as to be capable (with or without the aid of equipment) of being reproduced;

“electronic” includes electrical, digital, magnetic, optical, electromagnetic, biometric, and photonic;

“enforcement process”, in relation to property, means -

- (a) execution against that property; or
- (b) any other enforcement process in relation to that property that involves the Court;

“entitled person” means a person upon the constitution confers any of the rights and powers of a shareholder;

“file” means to file, give, provide, submit, deposit, apply, or otherwise make available;

“financial statements”, in relation to a company and a balance date, means -

- (a) a statement of financial position for the company as at the balance date; and
- (b) in the case of –
 - (i) a company trading for profit, an income and expenditure statement for the company in relation to the accounting period ending at the balance date; and
 - (ii) a company not trading for profit, an income and expenditure statement for the company in relation to the accounting period ending at the balance date; and
- (c) if required by regulations made under this Act, a statement of cash flows for the company in relation to the accounting period ending on the balance date; and
- (d) any other financial statements in relation to the company or any group of companies of which it is the holding company as may be required by regulations made under this Act; and
- (e) any notes or documents giving information relating to the statement of financial position and other statements

“foreign company” means a body corporate incorporated under the laws of a foreign country;

“foreign non-profit company” means a non-profit company or other similar non-profit entity incorporated under the laws of a foreign country;

“holding company”, means for the purposes of this Act, a company is another company’s holding company if that other company is its subsidiary and company includes a corporation.

“information” includes information (whether or not in its original form) that is in the form of a document, a signature, a seal, data, text, images, sound, or speech;

“interest group” has the meaning set out in section 61(1);

“liquidation committee” means the committee referred to in section 224;

“liquidator” means the person appointed under section 197(1);

“major transaction” has the meaning set out in section 58(2);

“Minister” means the Minister responsible for this Act;

“ordinary resolution” has the meaning set out in section 57(1);

“person” includes a corporation sole, a company or other body corporate (whether incorporated in Eswatini or elsewhere), an unincorporated body of person, a public body, and a Government department;

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

“predecessor Act” means the Companies Act, 2009 ;

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

“prescribed form” means a form or format prescribed by regulations or, if none is prescribed by regulations, a form or format approved by the Registrar;

“property” includes –

- (a) real and personal property; and
- (b) an estate or interest in real or personal property; and
- (c) a debt; and
- (d) a res in personam; and
- (e) any other rights, interests, and claims of any kind in relation to property;

“property in receivership” means property in respect of which a receiver is appointed;

“public notice” means notice by publication in a newspaper circulating in Eswatini;

“receiver” means a receiver, or manager, or a receiver and manager in respect of any property of a company appointed -

- (a) by or under a document; or

(b) by the Court,

whether or not the person appointed is empowered to sell any of the property in receivership, but does not include a mortgagee who, whether personally or through an agent, exercises a power -

- (i) to receive income from mortgaged property; or
- (ii) to enter into possession or assume control of mortgaged property; or
- (iii) to sell or otherwise alienate mortgaged property; or

(c) an agent of any such mortgagee;

“registered office” means the place referred to in section 139(2)(a);

“Registrar” means the Registrar of Companies appointed under section 409;

“regulations” means regulations made under this Act;

“related company” means a company related to another company where –

- (a) the other company is its holding company or subsidiary; or
- (b) more than half the issued shares of the company (other than shares that carry no right to participate beyond a specified amount in a distribution of profits or capital) is held by the other company and companies related to that company (whether directly or indirectly, but other than in a fiduciary capacity); or
- (c) more than half the issued shares of each of them (other than shares that carry no right to participate beyond a specified amount in a distribution of either profits or capital) is held by shareholders of the other (whether directly or indirectly, but other than in a fiduciary capacity); or
- (d) the businesses of the company have been so carried on that the separate business of each company, or a substantial part of it, is not readily identifiable; or
- (e) there is another company to which both companies are related; and includes a corporation.

“relative”, in relation to any person, means -

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

“security” means a charge over, or security interest in, property;

“shareholder” means a person whose name is entered on the share register of a company as the holder of one (1) or more shares in the company;

“share register” means the share register that is required to be kept under section 46;

“signature” means –

- (a) the name of a person affixed with his or her own hand on a document; or
- (b) in the case of a document filed with the Registrar via electronic means, the name of a person affixed to the document by a method that the Registrar considers acceptable;

“solvency test” means the test whether –

- (a) a company 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 not less than the value of its liabilities, including its contingent liabilities,

Without limiting the foregoing, in determining for the purposes of this Act whether the value of a company’s assets is greater than the value of its liabilities, including contingent liabilities, the directors -

- (a) must have regard to -
 - (i) the most recent financial statements of the company that are prepared under this Act or any other enactment (if any); and
 - (ii) the accounting records of the company; and
 - (iii) all other circumstances that the directors know or ought to know affect, or may affect, the value of the company’s assets and the value of the company’s liabilities, including its contingent liabilities:
- (b) may rely on valuations of assets or estimates of liabilities that are reasonable in the circumstances.

“special resolution” has the meaning set out in section 57(2);

“statutory demand” has the meaning set out in section 203(1);

“subsidiary” means in relation to another company where –

- (a) that other company –
 - (i) controls the composition of the board of the company; or
 - (ii) is in position to exercise, or control the exercise, or more than one-half the maximum number of votes that may be exercised at a meeting of the company; or
 - (iii) holds more than one-half of the issued shares of the company (other than shares that carry no right to participate beyond a specified amount in a distribution of either profits or capital); or

(iv) is entitled to receive more than one-half of every dividend paid on shares issued by the company (other than shares that carry no right to participate beyond a specified amount in a distribution of either profits or capital); or

(b) the company is a subsidiary of a company that is that other company's subsidiary. and "company" includes a corporation.

"working day" means a day of the week that is not –

(a) Saturday and Sunday; or

(b) a day that is defined as, or declared to be, a public holiday under any Act

"writing" includes representing or reproducing words, figures, or symbols in –

(a) a visible and tangible form by any means and in any medium; or

(b) a visible form in any medium by electronic means that enables them to be stored in permanent form and be retrieved and read.

Purpose of this Act.

3. The purpose of this Act is to provide for-

(a) the efficient registration and incorporation of companies on electronic and online platforms;

(b) economically efficient and economically enhancing flexible and adaptable company structures;

(c) non-excessive regulation and administration of companies;

(d) modern and clear statement of the rules that apply to companies;

(e) procedure for the creditors of an insolvent company to enter into a compromise with a company;

(f) the efficient and orderly liquidation of insolvent companies;

(g) modernise the law relating to company receiverships, and

(h) the repeal of the Companies Act 2009.

PART II - INCORPORATION

Essential requirements.

4. A company shall have –

(a) a name;

(b) a constitution;

(c) one (1) or more shares;

- (d) one (1) or more shareholders, having limited or unlimited liability for the obligations of the company; and
- (e) one (1) or more directors, of whom at least one (1) shall reside in Eswatini.

Application for registration

5. (1) A person may, either alone or together with another person, apply for the registration of a company under this Act.

(2) An application for the registration of a company shall be –

- (a) in the prescribed form;
- (b) signed by the person or persons making the application; and
- (c) filed with the Registrar.

(3) The application shall state –

- (a) the name of the company, which name shall comply with section 8;
- (b) whether the constitution of the company differs from the default constitution prescribed for a company under Schedule 1, 2, or 3;
- (c) the full name, residential address, and postal address of every proposed director of the company;
- (d) whether each person named as a director of the company has consented to act as a director of the company;
- (e) the full name of every shareholder of the proposed company, and the number of shares to be issued to every shareholder;
- (f) the registered office of the proposed company;
- (g) the postal address of the company, provided that the registered office shall suffice as the postal address; and
- (h) whether the company will be a local company.

(4) A company is deemed to be a local company if that company has Eswatini who hold more than one half of the company's issued voting shares.

(5) The application for registration shall be accompanied by -

- (a) a copy of the constitution of the company where the company elects not to use, or elects to modify, the default constitution prescribed for a company under Schedule 1, 2, or 3; and
- (b) the prescribed fee.

Certificate of incorporation.

6. (1) The Registrar shall promptly review an application for registration of a company, and where the application is fully compliant with section 5 -

- (a) enter the company on the register of Companies; and
- (b) issue a certificate of incorporation of the company.

(2) A certificate of incorporation of a company shall be conclusive evidence that -

- (a) all the requirements of this Act as to incorporation have been complied with; and
- (b) on and from the date of incorporation stated in the certificate, the company is incorporated under this Act.

Legal personality

7. (1) A company is a legal entity with its own rights separate from its shareholders and continues in existence until it is removed from the register.

(2) A company -

- (a) has full capacity to carry on or undertake any business or activity, do any act, or enter into any transaction;
- (b) may do anything authorised by this Act or the company's constitution; and
- (c) may do anything that a natural person of full age and capacity may do.

PART III - COMPANY NAME

Name of company

8. (1) The name of a company shall end either with the word "Limited" or "Ltd".

(2) The Registrar shall not register a company with a name that -

- (a) is likely to contravene any enactment;
- (b) is identical or almost identical to the name of another company; or
- (c) in the opinion of the Registrar, is offensive.

Change of name.

9. (1) An application to change the name of a company shall be -

- (a) in the prescribed form;
- (b) signed by a director of the company;
- (c) filed with the Registrar; and

(d) accompanied by the prescribed fee.

(2) An application to change the name of a company shall not constitute an amendment of the constitution of the company.

(3) Where the Registrar receives an application that complies with subsection (1) and the requirements of section 8, the Registrar shall -

(a) enter the new name of the company in the register; and

(b) issue a new certificate of incorporation for the company showing the new name of the company and the date upon which such change takes effect, which date shall not be later than 30 days after the issue of the new certificate.

(4) A change of a name of a company shall not affect the rights or obligations of the company, or legal proceedings, if any, by or against such company.

Direction to change name.

10. (1) Notwithstanding section 6, where the Registrar believes on reasonable grounds that a company has been registered under a name that contravened section 8 at the time of registration, the Registrar may -

(a) serve a written notice on the company requiring it to change its name within a date specified in the notice that is not less than 28 days after service of the notice; and

(b) if the company does not comply with the notice, enter a new name for the company on the register in the form of "Number x Company Limited" with "x" being a unique number assigned to the company by the Registrar.

(2) On a change of name under subsection (1)(b), -

(a) the Registrar shall issue an amended certificate of incorporation for the company recording the new name of the company; and

(b) section 11(3) (b) applies to the registration of the new name as if the name of the company had been changed under section 9.

Use of company name.

11. (1) A company shall ensure that the company name is clearly stated in -

(a) every written communication sent by, or on behalf of, the company; and

(b) every document issued or signed by, or on behalf of, the company that evidences or creates a legal obligation of the company.

(2) Where a document referred to in subsection (1)(b) does not correctly state the name of the company, a person who issues or signs the document is liable to the same extent as the company if the company fails to discharge the obligation.

(3) A person who would be otherwise liable under subsection (2) shall be absolved from liability where -

- (a) such person proves that the person in whose favour the obligation was incurred was aware at the time the document was issued or signed that the obligation was incurred by the company; or
- (b) it would not be just or equitable for the issuer or signatory to be liable.

(4) If a company gives public notice of any matter and the name of the company has been changed within the previous 12 months, the company must ensure that the notice states that the name of the company has changed in that period, and the former name or names of the company.

PART IV - COMPANY CONSTITUTION

Company constitution.

12. (1) A company shall have a constitution.

(2) Subject to subsection (4), the constitution may be either of the following-

- (a) the appropriate default constitution;
- (b) the appropriate default constitution as altered or modified; or
- (c) a constitution in substitution for an appropriate default constitution.

(3) A constitution of a company shall be a company's appropriate default constitution as determined by the number of shareholders of the company except to the extent that, whether on registration, re-registration, or at any subsequent time, -

- (a) there is substituted another constitution for it; or
- (b) it is altered or modified.

(4) A company's appropriate default constitution is the constitution prescribed for the company under Schedule 1, 2, or 3 as determined by the number of shareholders, as follows; -

- (a) a single shareholder, Schedule 1 shall apply;
- (b) two (2) to nine (9) shareholders, Schedule 2 shall apply; or
- (c) where ten (10) or more shareholders, Schedule 3 shall apply.

(5) A company that substitutes a constitution for its default constitution, or alters or modifies its default constitution, shall keep at its registered office and make available for inspection the following-

- (a) the substituted constitution; or
- (b) the modifications and alterations to its default constitution.

Substitution, adoption, or amendment of constitution after incorporation.

13. (1) Subject to any restrictions in its constitution, a company may by special resolution, substitute or adopt a new constitution or amend its existing constitution or default constitution.

(2) Within fourteen (14) days after a change in constitution under subsection (1), the company shall file a notice in the prescribed form with the Registrar for registration.

Content and effect of constitution.

14. (1) The constitution of a company may contain -

- (a) matters contemplated by this Act for inclusion in the constitution of a company; and
- (b) any other matters that the company intends to include in its constitution.

(2) The constitution shall have no effect to the extent that it contravenes, or is inconsistent with, this Act.

(3) Subject to subsection (2) -

(a) the constitution has effect and may be enforced as if it is a constituted contract -

- (i) between the company and its shareholders;
- (ii) between the company and each director; and

(b) the shareholders and directors of a company have the rights, powers, duties, and obligations set out in the constitution of the company.

PART V - SHARES

SUBPART 1 - GENERAL

Legal nature of shares.

15. A share in a company is personal property.

No nominal value or bearer share.

16. (1) A share shall not have a nominal or par value.

(2) Notwithstanding subsection (1) a company may issue a redeemable share.

(3) A company shall not issue a share that is a bearer share, and a share that is issued in contravention of this subsection. shall be deemed to be null.

- (a) company shall identify a nominee shareholders and such nominee shall disclose the identity of their nominator to the company and the nominator be registered in share registry of the company.

- (b) a nominee shareholder shall provide information and documentation that grants them authority to act instead of their nominator. Such information will be lodged with the registrar within 14 days and shall be publicly available to all competent authorities.

Minimum number of shares.

17. A company shall have at least one (1) issued share.

Rights and powers attached to shares.

18. (1) Subject to subsection (2), a share in a company shall confer on the holder -

- (a) the right to vote on a poll at a meeting of the company on any resolution, including any resolution to -

- (i) appoint or remove a director or auditor;

- (ii) adopt a constitution;

- (iii) amend the company's constitution;

- (iv) approve a major transaction;

- (v) approve an amalgamation; or

- (vi) appoint a liquidator.

- (b) the right to an equal share in dividends paid by the company; and

- (c) the right to an equal share in the distribution of the surplus assets of the company.

(2) The rights specified in subsection (1) may be negated, limited, modified, or added to -

- (a) by the constitution of the company; or

- (b) in accordance with the terms on which the share is issued.

(3) Subject to its constitution, a company may issue different classes of shares.

(4) Without limiting subsection (2), shares in a company may -

- (a) be redeemable; or

- (b) confer preferential rights to distribution of capital or income; or

- (c) confer special, limited, or conditional voting rights; or

- (d) not confer voting rights.

Shares not to impose liabilities on holder.

19. (1) A share shall not -

- (a) be partly paid; or
 - (b) impose any liability on its holder to make a payment to the company.
- (2) A company shall not issue a share that contravenes subsection (1).
- (3) Nothing in subsection (1) or (2) prevents a company from –
- (a) attaching conditions, limits, or restrictions to the rights and powers attached to the share; or
 - (b) issuing a share on credit terms that provide for a liability to make future payments to the company on the part of the person to whom it is first issued.

SUBPART 2 - ISSUE OF SHARES

Issue of initial shares

20. A company shall, immediately after the registration of the company, issue to any person named in the application for registration as a shareholder the number of shares specified in the application as being the number of shares to be issued to that person or those persons.

Issue of other shares.

21. (1) A company may issue shares -

- (a) in accordance with its constitution; or
- (b) with the approval of all shareholders under section 60.

(2) A company shall, within 14 days after the issue of any shares, file with the Registrar for registration a notice in the prescribed form of the issue of the shares by the company.

(3) Where the rights attached to the shares are not set out in full in the constitution, the notice shall be accompanied by a document setting out the terms of the issue of the shares.

(4) A company which contravenes subsection (2) commits an offence and, every director of the company shall upon conviction be liable to a fine not exceeding One hundred thousand Emalangeni (E100,000.00) or to a term of imprisonment not exceeding six years or both.

Time of issue of shares.

22. A share shall be deemed to be issued when the name of the holder is entered in the share register.

Pre-emptive rights.

23. (1) Shares issued or proposed to be issued by a company that rank or would rank as to either voting or distributing rights, or both, equally with or prior to shares already issued by the company shall be offered for acquisition to the holders of the shares already issued in a manner and on terms that would, if accepted, maintain the existing voting or distribution rights, or both, of those holders.

(2) An offer under subsection (1) shall remain open for acceptance for a period not exceeding twelve months.

(3) The constitution of a company may negate, limit, modify, or add to the requirements of this section.

Consideration for issue of shares.

24. (1) The consideration for which a share is issued may be cash, promissory notes, contracts for future services, real or personal property, or other financial products of the company, including a debt security.

(2) Before a company issues shares under section 21, the directors shall -

- (a) decide the consideration for which the shares will be issued;
- (b) if the shares are to be issued other than for cash, determine the reasonable present cash value of the consideration for the issue; and
- (c) resolve that, in their opinion, the consideration for, and the terms of, the issue are fair and reasonable to the company and all existing shareholders.

Consent to issue of shares.

25. (1) A company shall not issue a share to a person that increases that person's liability to the company or imposes a new liability on that person to the company unless the person or the person's agent has first consented in writing.

(2) Where a company issues a share in contravention of subsection (1) that share issued shall be void.

SUBPART 3 - DISTRIBUTIONS TO SHAREHOLDERS

Distributions prohibited unless solvency test satisfied.

26. (1) A director of a company shall not make, or authorise a distribution to shareholders unless, there are reasonable grounds for believing that, after the distribution is made, the company will satisfy the solvency test.

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

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

Meaning of distribution.

27. For the purposes of this Part, a company makes a distribution to a shareholder if -

- (a) the company -

- (i) directly or indirectly transfers money or property, other than the company's own shares, to or for the benefit of the shareholder; or
- (ii) incurs a debt to or for the benefit of the shareholder; and
- (b) the company makes a distribution in relation to the shares held by that shareholder, whether by means of -
 - (i) a dividend; or
 - (ii) the purchase, redemption, or other acquisition of shares; or
 - (iii) a distribution of indebtedness; or
 - (iv) some other means.

Recovery of improper distributions.

28. (1) A company that has made a distribution to a shareholder in breach of sections 26, 29, or 30 may recover the distribution from the shareholder unless subsection (2) applies.

(2) The company may not recover the distribution if -

- (a) the shareholder received the distribution in good faith and without knowledge of the company's breach of section 26, 29, or 30, as the case may be; and
- (b) the shareholder has altered the shareholder's position in reliance on the validity of the distribution; and
- (c) it would be unfair to require payment in full or in part.

(3) A person who has authorised a distribution that has been made in contravention of section 26 and who at the time of authorising knew or ought to have known that the distribution did not comply with section 26 is liable to pay to the company so much of that distribution as is not reasonably recoverable from the person or persons to whom it was made.

(4) In a proceeding under this section to recover an improper distribution, the Court may, if satisfied that distribution of a lesser amount could have complied with section 26, permit a shareholder to retain, or excuse a person who authorised the distribution from liability in respect of, any amount equal to the value of any distribution that could properly have been made.

SUBPART 4 - DIVIDENDS

Dividends.

29. (1) A company may pay a dividend to shareholders if -

- (a) the company complies with section 26; and
- (b) the dividend is authorised by -
 - (i) all the shareholders under section 59; or

(ii) the directors, if the constitution so provides.

(2) A dividend authorised by the directors shall comply with any conditions or restrictions set out in the constitution.

(3) Subject to the constitution and to the terms of issue of any share, a company shall not pay a dividend -

(a) in respect of some but not all the shares; or

(b) that is of greater value per share in respect of some shares than of others.

(4) In this section, “dividend” means any distribution other than -

(a) a distribution by way of the repurchase or redemption of shares; or

(b) a distribution of the surplus assets of the company in liquidation.

Subpart 5 - Company may acquire its own shares

Company may acquire its own shares.

30. (1) A company may acquire its own shares if -

(a) the company complies with section 26; and

(b) the acquisition is an approved acquisition.

(2) An approved acquisition is -

(a) an acquisition made by agreement with a shareholder in accordance with the constitution or with the approval of all shareholders under section 59; or

(b) the acquisition of a dissenter’s shares under section 62.

Notice of company’s acquisition of its own shares.

31. (1) A company that acquires its own shares shall, within 14 days of the acquisition, file with the Registrar for registration a notice in the prescribed form of the acquisition.

(2) The company shall also send the notice required under subsection (1) to each shareholder within 28 days after the acquisition unless the acquisition results from an offer made to all shareholders that -

(a) would, if accepted, leave unaffected relative voting and distribution rights; and

(b) affords a reasonable time for acceptance of the offer.

(3) A company which contravenes subsection (1) or (2) commits an offence and, every director shall upon conviction be liable to a fine not exceeding One hundred thousand Emalangení(E100,000.00) or to a term of imprisonment not exceeding six (6) years or to both.

Cancellation of shares acquired by company.

32. (1) Where a company acquires its own shares, the shares shall be treated as immediately cancelled on acquisition unless section 34 applies.

(2) For the purposes of this section, a company acquires a share at the time when it would, apart from this section, become entitled to-

- (a) exercise the rights attached to that share; or
- (b) give directions to the shareholder as to the manner in which any of those rights should be exercised.

Enforceability of contract to repurchase shares.

33. (1) A contract with a company providing for the acquisition by the company of its shares is specifically enforceable against the company except to the extent that performance would breach section 26.

(2) The company has the onus of proving that performance of the contract would breach section 26.

(3) Until the company has fully performed a contract referred to in subsection (1), the other party to the contract retains the status of a claimant entitled -

- (a) to be paid as soon as the company is lawfully able to do so; or
- (b) before removal of the company from the register, to be ranked subordinate to the rights of creditors but in priority to the other shareholders.

SUBPART 6 - TREASURY STOCK***Company may hold its own shares.***

34. (1) Shares that are acquired by a company under section 30 shall not be treated as immediately cancelled on acquisition if -

- (a) the constitution of the company expressly permits the company to hold its own shares; and
- (b) the directors resolve that the shares in question not be cancelled.

(2) Shares referred to in subsection (1) are held by the company itself.

Rights and obligations of treasury stock suspended.

35. (1) The rights and obligations attaching to a share that a company holds in itself shall not be exercised by or against the company while the company holds the share.

(2) Notwithstanding subsection (1), while a company holds a share in itself, the company shall not -

- (a) exercise any voting rights attaching to the share; and

- (b) make or receive any distribution in respect of the share.

Company may transfer treasury stock.

36. (1) A company may transfer a share that the company holds in itself as if the transfer were the issue of the share.

(2) The transfer of a share by a company in itself is not subject to any provision in this Act or the company's constitution relating to the issue of shares, except to the extent that the company's constitution expressly applies that provision.

SUBPART 7 - REDEEMABLE SHARES

Meaning of redeemable.

37. For the purposes of this Act, a share is redeemable if the constitution makes provision for the issue of redeemable shares and under the constitution or the terms of issue -

- (a) the share is redeemable -
 - (i) at the option of the company; or
 - (ii) at the option of the holder of the share; or
 - (iii) on a date specified in the constitution or the terms of issue; and
- (b) the share is redeemable for a consideration that is -
 - (i) specified; or
 - (ii) to be calculated by reference to a formula; or
 - (iii) required to be fixed by a suitably qualified person who is not associated with or interested in the company.

Redemption of redeemable shares.

38. (1) A company may redeem a redeemable share if the company complies with section 26.

(2) The company has the burden of proving that redemption of the share would breach section 26.

(3) Until the company has fully redeemed a share in accordance with the constitution or the terms of issue, the former holder of the share retains the status of a claimant entitled -

- (a) to be paid as soon as the company is lawfully able to or
- (b) before removal of the company from the register, to be ranked subordinate to the rights of creditors but in priority to the other shareholders.

Cancellation of redeemed shares.

39. (1) Shares that are redeemed shall be treated as cancelled immediately on redemption, unless the constitution or the terms of issue provide otherwise.

(2) On the cancellation of a redeemed share under subsection (1) the rights attached to that share expire; and the company may re-issue the share.

Notice of redemption of redeemable shares.

40. (1) A company that redeems redeemable shares shall, within 14 days after the redemption, file with the Registrar for registration a notice of redemption in the prescribed form.

(2) A company that contravenes subsection (1) commits an offence and, every director shall upon conviction be liable to a fine not exceeding One hundred thousand (E100,000.00) or to a term of imprisonment not exceeding six (6) years or both.

**SUBPART 8 - ASSISTANCE BY COMPANY FOR PURCHASE
OF ITS OWN SHARES**

Financial assistance.

41. (1) A company may give financial assistance to a person for the purpose of, or in connection with, the purchase of a share issued or to be issued by the company if -

- (a) the assistance meets the requirements set out in subsection (3); and
- (b) the company has made the disclosure required by subsection (4).

(2) The financial assistance may be direct or indirect.

(3) The requirements for financial assistance are the following-

- (a) the company gives the assistance in the normal course of business and on usual terms and conditions; and
- (b) the assistance is authorised by the directors or by all the shareholders under section 59; and
- (c) there are reasonable grounds for believing that, after providing the assistance, the company will satisfy the solvency test; and
- (d) the company complies with any conditions or restrictions on giving assistance contained in the constitution.

(4) Before making an offer of financial assistance, the company shall send to each shareholder a disclosure document that contains the following information-

- (a) the nature and terms of the financial assistance-
- (b) the name of the person to whom it will be offered;

- (c) the nature and extent of any relevant interest of a director of the company in the financial assistance;
- (d) if the directors authorise the financial assistance, the text of that resolution;
- (e) such further information and explanation as is necessary for a reasonable shareholder to understand the nature of the financial assistance and its implications for the company and the shareholders.

(5) A disclosure document is not required if the assistance is authorised by all the shareholders under section 59.

SUBPART 9 - CROSS-HOLDINGS

Subsidiary may not hold shares in holding company.

42. (1) Subject to this section, a subsidiary shall not hold shares in its holding company.

(2) An issue of shares by a holding company to its subsidiary shall be void and of no effect.

(3) A transfer of shares in a holding company to its subsidiary shall be void and of no effect.

(4) Nothing in this section or section 43 prevents a subsidiary from holding shares in its holding company in its capacity as a personal representative or a trustee unless the holding company or another company has a beneficial interest under the trust other than an interest that arises by way of security for the purposes of a transaction made in the ordinary course of the business of lending money.

(5) This section and section 43 apply to a nominee for a subsidiary in the same way as they apply to the subsidiary.

Exception for company that subsequently becomes subsidiary.

43. Where a company that holds shares in another company becomes a subsidiary of that other company, the subsidiary -

- (a) may, notwithstanding section 42(1), continue to hold those shares, but may not exercise any voting rights attaching to those shares.

SUBPART 10 - TRANSFER OF SHARES

Transfer of shares.

44. (1) A share in a company is transferable subject to any limitation or restriction on the transfer of shares in the constitution.

(2) A share is transferred by entry in the share register in accordance with section 46.

(3) For the purpose of transferring shares, a form of transfer signed by the present holder of the shares or the shareholder's personal representative shall be delivered to -

- (i) the company; or
- (ii) an agent of the company who maintains the register of the company.

(4) The personal representative of a deceased shareholder may transfer a share even though the personal representative is not a shareholder at the time of transfer.

Transfer of shares by operation of law.

45. Shares in a company may pass by operation of law notwithstanding anything in the company constitution.

SUBPART 11 - SHARE REGISTER

Company to maintain share register.

46. (1) A company shall maintain a register that records the shares issued by the company and such share register shall state the following-

- (a) the names, alphabetically arranged, and the last known address of each person who is, or has within the last 7 years been, a shareholder;
- (b) the number of shares of each class held by each shareholder within the last 7 years;
- (c) the date of each of the following transactions within the last 7 years-
 - (i) the issue of shares to a shareholder;
 - (ii) the repurchase or redemption of shares from a shareholder;
 - (iii) the transfer of shares by or to a shareholder;
- (d) in relation to the transfer of shares by or to a shareholder, the name of the person to or from whom the shares were transferred.

(2) The share register shall be kept -

- (a) in written form or in a form that is readily accessible by members, domestic and foreign competent authorities and convertible into written form; and
- (b) at the registered office of the company.

(3) The share register may be maintained by an agent on behalf of the company.

(4) A company shall ensure that within 14 days after becoming aware of a change in the name or last known address of a shareholder, a notice of such change is filed in the prescribed form with the Registrar for registration.

(5) The requirement of Subsection (4) shall not apply where the company is subject to a listing agreement with a stock exchange.

(6) A company which contravenes this section commits an offence and, every director of the company shall upon conviction be liable to a fine not exceeding One hundred thousand Emalangeni (E1,000,000.00) or to a term of imprisonment not exceeding six years or both.

Share register as evidence of legal title.

47. (1) Subject to section 48, the entry of the name of a person in the share register as holder of a share is evidence that legal title to the share vests in that person.

- (2) A company shall treat the registered holder of a share as the only person entitled to -
- (a) exercise the right to vote attaching to the share;
 - (b) receive notices;
 - (c) receive a distribution in respect of the share; and
 - (d) exercise the other rights and powers attaching to the share.

Power of Court to rectify share register.

48. (1) Where the name of a person is wrongly entered in, or omitted from, the share register of a company, the Court may, on the application of the person aggrieved or a shareholder, order -

- (a) rectification of the share register;
 - (b) payment of compensation by the company for any loss sustained;
 - (c) both rectification and payment of compensation.
- (2) On an application under subsection (1), the Court may decide -
- (a) a question relating to the entitlement of a person who is a party to the application to have that person's name entered in, or omitted from, the register; and
 - (b) a question necessary or expedient to be decided for rectification of the register.

Beneficial ownership of shares.

49. (1) A notice of a trust, whether express or implied, shall not be entered on the share register.

- (2) However, a company shall -
- (a) obtain and maintain sufficient information to identify the beneficial owner of a company; and
 - (b) lodge that information in a written notice to the Registrar within 21 days of any change in beneficial ownership information.

(3) For the purposes of subsection (2), "beneficial owner" means a natural person who directly or indirectly through any contract, arrangement, understanding, relationship or otherwise ultimately owns or has control or has control ownership or exercises ultimate effective control through positions held in a company or is an ultimate beneficiary of a share or other securities in a company or legal arrangement.

(4) For purposes of subsection (2)(a), the information which shall be maintained by a company to identify the beneficial owner of shares includes -

- (a) the full legal name, nationality, birthdate and mailing address, of the beneficial owner,
- (b) for companies subject to a listing agreement, information in compliance with the Securities Act 2010.

(5) The Registrar may share beneficial ownership information with competent authorities.

(6) The term “competent authorities” as used in this section means Eswatini and international law enforcement agencies and tax authorities.

(7) Where a company contravenes subsection (2)(b)-

- (a) the company commits an offence and be liable on conviction to a fine not exceeding One million Emalangeni (E1000,000.00); and
- (b) every director commits an offence and is liable on conviction to a fine not exceeding Five hundred thousand Emalangeni (E500,000.00) or to a term of imprisonment not exceeding fifteen (15) years, or both.

Personal representative of deceased shareholder or assignee of bankrupt may be registered.

50. (1) Notwithstanding section 49, a personal representative of a deceased person whose name is registered in the share register as the holder of a share in a company is entitled to be registered as holder of that share as personal representative.

(2) Notwithstanding section 49, the assignee of the property of a bankrupt whose name is registered in the share register as the holder of a share in a company is entitled to be registered as holder of that share as the assignee of the property of the bankrupt.

(3) The registration under this section of a trustee, an executor or administrator, or an assignee in bankruptcy does not constitute notice of a trust.

SUBPART 12 - SHARE CERTIFICATES

Share certificates

51. (1) A shareholder may apply to the company for a share certificate relating to some or all of the shareholder’s shares in the company.

(2) On receipt of an application under subsection (1), the company shall, within 28 days after receiving the application -

- (a) where the application relates to all of the shares, send to the shareholder a certificate stating -
 - (i) the name of the company; and
 - (ii) the class of shares held by the shareholder; and
 - (iii) the number of shares held by the shareholder to which the certificate relates; or
- (b) Where the application relates to some of the shares -

- (i) separate the shares entered in the register in the name of the applicant into separate parcels (one being the shares to which the application relates, and the other parcel being the remaining shares); and
- (ii) send to the shareholder a certificate that complies with paragraph (a) in respect of each parcel.

(3) On the application of a shareholder whose share certificate is lost or destroyed, the company shall, on payment of a fee, issue a replacement certificate.

(4) A shareholder's application for a replacement certificate shall be accompanied by -

- (a) a statutory declaration by the shareholder that -
 - (i) the share certificate has been lost or destroyed;
 - (ii) where the share certificate has been lost, a proper search has been conducted and notwithstanding such search such share certificate has not been found;
 - (iii) the share certificate has not been sold, pledged, or otherwise disposed of; and
- (b) an undertaking by the shareholder to return the share certificate to the company if it is found or recovered.

Registration of share transfer.

52. (1) A company shall not register a transfer of shares to which a share certificate relates unless the form of transfer required by section 44(3) is accompanied by the share certificate or evidence of the loss or destruction of the share certificate and an appropriate indemnity.

(2) A company shall -

- (a) cancel a share certificate sent to the company to enable registration of the transfer of the shares to which it relates; and
- (b) not issue a further share certificate in relation to those shares except at the request of the transferee.

(3) A company shall, within 14 days after registering a transfer of its shares, file with the Registrar for registration a notice of transfer of shares in the prescribed form.

(4) The requirement of subsection (3) shall not apply where the company is subject to a listing agreement with a stock exchange.

(5) A company which contravenes subsection (2) commits an offence and, every director of the company shall upon conviction be liable to a fine not exceeding One hundred thousand Emalangeni (E100,000.00) or to a term of imprisonment not exceeding six years or both .

PART VI - SHAREHOLDERS
SUBPART 1 - GENERAL

Company to have at least one (1) shareholder.

53. A company shall, have at least one (1) shareholder at all times.

Liability of shareholders.

54. (1) A shareholder is not liable for an obligation of the company by reason only of being a shareholder.

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

- (a) any liability to repay a distribution that is recoverable under section 29; and
- (b) any liability under section 93.

SUBPART 2 - POWERS OF SHAREHOLDERS***Decisions reserved for shareholders only.***

55. (1) The following powers may be exercised by the shareholders only and may not be delegated under the constitution or otherwise –

- (a) the power to substitute or adopt a new constitution, or to amend the company's existing constitution or default constitution, under section 13;
- (b) the power to approve a major transaction under section 58;
- (c) the power to appoint a liquidator under section 199

(2) Unless the company constitution provides otherwise, the following powers may be exercised solely by shareholders -

- (a) the power to appoint or remove a director;
- (b) the power to appoint an auditor.

(3) The constitution may provide for other matters to be decided by shareholders or approved by shareholders.

How shareholder power may be exercised.

56. (1) A power referred to in section 55(1)(a) or (c) shall be exercised by special resolution.

(2) A power referred to in section 55(1)(b) shall be exercised -

- (a) by special resolution; or
- (b) in accordance with section 59.

(3) A power referred to in section 55(2) and (3) shall, unless the constitution provides otherwise, be exercised -

- (a) by ordinary resolution; or
- (b) in accordance with section 59.

Types of shareholder resolution.

57. (1) An ordinary resolution shall be construed as a resolution that is approved by a simple majority of the votes of those shareholders entitled to vote and voting on the question.

(2) A special resolution shall be construed as a resolution approved by a majority of 75% or, if a higher majority is required by the constitution, that majority of the votes of those shareholders entitled to vote and voting on the question.

Shareholder approval of major transaction.

58. (1) A company shall not enter into a major transaction unless the transaction is -

- (a) approved by the shareholders by special resolution;
- (b) approved by unanimous shareholder approval under section 59; or
- (c) conditional on approval under paragraph (a) or (b).

(2) In this section -

“assets” includes property of any kind, whether tangible or intangible;

“major transaction”, in relation to a company, means -

- (a) the acquisition of, or an agreement to acquire, whether contingent or not, assets the value of which is more than half of the company’s assets before the acquisition; or
- (b) the disposition of, or an agreement to dispose of, whether contingent or not, assets of the company the value of which is more than half the value of the company’s assets before the disposition; or
- (c) a transaction that has, or is likely to have, the effect of the company acquiring rights or interests or incurring obligations or liabilities the value of which is more than half the value of the company’s assets before the transaction.

(3) Nothing in paragraph (b) or (c) of the definition of major transaction in subsection (2) applies by reason only of the company granting, or agreeing to grant, a security interest in assets of the company, the value of which is more than half the value of the company’s assets, for the purpose of securing the repayment of money or the performance of an obligation.

(4) Nothing in this section applies to a major transaction entered into by a receiver appointed under a document granting a security interest in property of a company.

Unanimous assent to certain types of action.

59. (1) Where all the shareholders of a company consent to, or concur in, any action taken by the company or a director, the taking of that action shall be treated as validly authorised by the company notwithstanding -

- (a) anything to the contrary in the constitution; or
- (b) the absence of express authority to take that action in the constitution.

(2) The matters that may be authorised in accordance with subsection (1) include, but are not limited to, the following-

- (a) the issue of shares;
- (b) the making of a distribution subject to subsection (3);
- (c) the repurchase of shares;
- (d) giving financial assistance for the purpose of, or in connection with, the purchase of shares in the company;
- (e) the payment of remuneration to a director, or the making of a loan to a director, or the conferral of any other benefit on a director;
- (f) the making of a contract between the company and a director, or of any other contract in which a director has an interest;
- (g) entry into a major transaction;
- (h) the ratification after the event of any action that could have been authorised under this section.

(3) A company shall not authorise a distribution under this section unless there are reasonable grounds for believing that, after the distribution is made, the company will satisfy the solvency test.

(4) Section 29 applies to a distribution made in breach of subsection (3) as if -

- (a) the distribution had been made in breach of section 26; and
- (b) the distribution was authorised by all the shareholders.

SUBPART 3 - ALTERATION OF SHAREHOLDER RIGHTS

Alteration of shareholder rights.

60. (1) A company shall not take action that affects the rights attached to shares unless that action has been approved by -

- (a) a special resolution of each interest group; or
- (b) unanimous shareholder approval under section 59.

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

- (a) the rights, privileges, limitations, and conditions attached to the share by this Act or the constitution, including voting rights and rights to distributions; and
- (b) the obligation of the company to comply with any provision of the constitution in relation to the issue of further shares; and

- (c) the obligation of the company to comply with subsection (1) and any further procedure required by the company constitution for the amendment or alteration of rights; and
- (d) conforming to a procedure required by the constitution for the amendment or alteration of rights not be amended or altered.

Meaning of class and interest group.

61. (1) For the purposes of section 60 -

“class” means a class of shares having attached to them identical rights, privileges, limitations, and conditions;

“interest group”, in relation to any action or proposal affecting rights attached to shares, means a group of shareholders -

- (a) whose affected rights are identical; and
- (b) whose rights are affected by the action or the proposal in the same way; and
- (c) subject to subsection (2)(b), who comprise the holders of 1 or more classes of shares in the company.

(2) For the purposes of section 60 and the definition in subsection (1) of interest group -

- (a) one (1) or more interest groups may exist in relation to any action or proposal; and
- (b) holders of shares in the same class may fall into two (2) or more interest groups if -
 - (i) action is taken in relation to some holders of shares in one class ; or
 - (ii) a proposal expressly distinguishes between some holders of shares in a class and other holders of shares of that class.

Dissenting shareholder may require company to purchase shares.

62. (1) A shareholder is entitled to require the company to purchase shares in accordance with the procedure set out in Schedule 6 if the shareholder is a dissenting shareholder under subsection (2) or (3).

(2) A shareholder is a dissenting shareholder for the purposes of subsection (1) if -

- (a) the shareholder was entitled to vote on the exercise of one (1) or more of the following powers and the shareholders resolved to exercise that power -
 - (i) the power to substitute a constitution;
 - (ii) the power to adopt a new constitution;
 - (iii) the power to amend the existing constitution or default constitution, and the change imposes or removes a restriction on the activities of the company;

- (iv) the power to approve a major transaction; and
 - (b) the shareholder dissents.
- (3) A shareholder is also a dissenting shareholder for the purposes of subsection (1) if -
- (a) the shareholder was a member of an interest group that has, under section 60(1)
 - (a), by special resolution approved an action that affects the rights attached to the shareholder's shares;
 - (b) the company becomes entitled to take the action; and
 - (c) the shareholder dissents.

Meaning of dissent.

63. For the purposes of section 62(2)(c) and (3)(c), a shareholder dissents if -
- (a) the shareholder casts all the votes attached to the shares registered in the shareholder's name and having the same beneficial owner against the resolution in question; or
 - (b) in the case of a written resolution in lieu of a meeting as provided in section 68, the shareholder does not sign or assent to the resolution.

SUBPART 4 - MEETINGS OF SHAREHOLDERS

Shareholder meetings.

64. Meetings of the shareholders of a company shall be held in accordance with the company constitution, and the constitution shall include provisions for -
- (a) holding such meetings; and
 - (b) the procedure governing those meetings.

Annual meeting of shareholders.

65. (1) A company shall hold an annual meeting of shareholders -
- (a) not later than 6 months after the balance date of the company; and
 - (b) not later than 15 months after the previous annual meeting.
- (2) However -
- (a) a company may not have to hold its first annual meeting in the calendar year of its registration but shall hold that meeting within 18 months after its registration; and
 - (b) subsection (1) does not apply if any of section 15(2) of Schedule 2, section 40(3) of Schedule 3, or section 47(3) of Schedule 4, or their equivalent, applies.

Special meeting of shareholders.

66. A special meeting of shareholders entitled to vote on an issue -

- (a) may be called at any time by a director; and
- (b) shall be called by the directors on the written request of the shareholders carrying together not less than 10% of the votes that may be cast on the issue.

Written resolution in lieu of meeting.

67. (1) Subject to subsection (3), a resolution in writing signed or assented to by or on behalf of shareholders who together hold not less than 75% of the votes entitled to be cast on that resolution at a meeting of shareholders is as valid as if it had been passed at a meeting of the shareholders together holding not less than 75% of votes.

(2) A resolution in writing shall be made in accordance with this Act or the constitution of the company, as the case may be, if the resolution -

- (a) relates to a matter that is required by this Act or the constitution to be decided at a meeting of the shareholders of a company; and
- (b) the resolution is signed or assented to by or on behalf of the shareholders referred to in subsection (1).

(3) Where, in respect of any matter, the constitution of a company requires approval by a greater majority than 75% of the votes entitled to be cast, the reference in subsection (1) to 75% is taken to be that greater majority.

Procedure for written resolution in lieu of meeting.

68. (1) A resolution made under section 67 may consist of one (1) or more documents in similar form including letters, telegrams, cables, facsimiles, telex messages, electronic mail, or other similar means of communication each signed or assented to by or on behalf of 1 or more of the shareholders specified in section 67(1).

(2) A resolution made under section 67 may be made without any prior notice being given to shareholders.

(3) Within 7 days after a resolution is made under section 67, the company shall send a copy of the resolution to every shareholder who did not sign or assent to the resolution.

(4) A company which contravenes subsection (3) commits an offence and, every director of the company shall upon conviction be liable to a fine not exceeding One hundred thousand Emalangení (E100,000.00) or to a term of imprisonment not exceeding six years or both .

Court may call meeting of shareholders.

69. (1) On the application of a director, shareholder, or creditor of a company, the Court may order a meeting of the shareholders of the company to be held or conducted in such manner as the Court directs.

- (2) The grounds on which the Court may make the order include the following-

- (a) where it is impracticable to call or conduct a meeting of shareholders in the manner required by this Act or the constitution; or
- (b) where it is in the interests of a company that a meeting of the shareholders be held.

PART VII - DIRECTORS

SUBPART 1 - APPOINTMENT AND REMOVAL OF DIRECTORS

Meaning of director.

70. In this Act, “director”, in relation to a company -

- (a) includes a person occupying the position of director of the company by whatever name called; and
- (b) for purposes of liability, has the extended meaning set out in section 96;

but does not include a receiver.

Number of directors.

71. A company shall have one (1) or more directors at any given time.

Qualification of directors.

72. (1) A natural person who is not disqualified by subsection (2) may be appointed as a director of a company.

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

- (a) a person who is under 18 years of age;
- (b) a person who is an undischarged bankrupt in any jurisdiction;
- (c) a person who is prohibited from being a director or promoter of, or being concerned or taking part in the management of, a company under section 101 or 103;
- (d) in relation to any particular company, a person who does not comply with any qualifications for directors contained in the constitution of the company.

(3) A person that is not a natural person cannot be a director of a company.

(4) A person who is disqualified from being a director but who acts as a director is taken to be a director for the purposes of a provision of this Act that imposes a duty or an obligation on a director of a company.

Director's consent required.

73. (1) A person shall not be appointed a director of a company unless they have consented in writing to be a director.

(2) The company shall, if required to do so by the Registrar, produce any consent specified in subsection (1).

Appointment of first and subsequent directors.

74. (1) A person named as a director in an application for registration or in an amalgamation proposal holds office as a director from the date of registration or the date the amalgamation proposal is effective, as the case may be, until that person ceases to hold office as a director in accordance with this Act.

(2) All subsequent directors of a company shall, unless the constitution of the company provides otherwise, be appointed by ordinary resolution.

Removal of directors.

75. Subject to the constitution of a company, a director may be removed by ordinary resolution.

Director ceasing to hold office.

76. (1) A director ceases to hold office if the director -

- (a) resigns; or
- (b) is removed from office in accordance with this Act or the constitution of the company; or
- (c) becomes disqualified from being a director under section 72(2); or
- (d) dies; or
- (e) otherwise vacates office in accordance with the constitution of the company.

(2) Notwithstanding ceasing to hold office, a former director remains liable under the director liability provisions of this Act for their conduct whilst a director.

Resignation by director.

77. (1) A director resigns if they sign a written notice of resignation and deliver it to the registered office of the company.

(2) Subject to section 78, the notice referred to in subsection (1) is effective when it is received at that address or at a later time specified in the notice.

Restrictions on resignation by sole director

78. (1) The sole director of a company may not resign -

- (a) unless the director has called a meeting of shareholders to appoint a new director;
or
- (b) if the company has only one (1) shareholder, unless the director has -
 - (i) given the shareholder notice of the director's resignation; and

- (ii) given that notice at least 14 days before resigning.
- (2) The resignation of the sole director of a company does not take effect until the earlier of –
 - (a) the appointment of another director or -
 - (b) the time and date when the shareholders meet to appoint a new director; or
 - (c) if the company has only one (1) shareholder, 14 days after notice of the director's resignation has been given to that shareholder.

Notice of change of directors or details of directors.

79. (1) A company shall ensure that the following notices in the prescribed form are filed with the Registrar for registration:

- (a) notice of a change in the directors of the company, whether as the result of a director ceasing to hold office or the appointment of a new director, or both;
- (b) notice of a change in the name of a director;
- (c) notice of a change in the residential address or postal address of a director.
- (2) A notice under subsection (1) shall -
 - (a) specify the date of the change; and
 - (b) include the full name, residential address, and postal address of every person who is a director of the company from the date of the notice (including continuing directors); and
 - (c) be filed with the Registrar within 20 days after -
 - (i) the change occurring, in the case of the appointment or resignation of a director; or
 - (ii) the company first becoming aware of the change, in the case of the death of a director or a change in the name or residential address or postal address of a director.

(3) If a company contravenes this section -

- (a) the company shall pay a late filing fee to the Registrar; and
- (b) the company commits an offence and shall on conviction be liable to a fine not exceeding One hundred thousand Emalangeni (E100,000.00)

Remuneration of directors.

80. A director may receive remuneration and other benefits from the company -

- (a) in accordance with its constitution; or

- (b) with unanimous shareholder approval under section 59.

Proceedings of directors.

81. The constitution of a company shall include –

- (a) provision for holding meetings of directors of the company; and
- (b) provisions relating to proceedings at those meetings.

SUBPART 2 - MANAGEMENT OF COMPANY

Management of company.

82. (1) The business and affairs of a company shall be managed by, or under the direction or supervision of, the directors of the company.

(2) The directors of a company have all the powers necessary for managing, and for directing and supervising the management of the business and affairs of the company.

(3) Subject to any restrictions in the constitution of the company, the directors may delegate to a committee of directors, a director or employee of the company, or any other person, any one (1) or more of their powers other than a power relating to any of the following –

- (a) approval of the issue of shares;
- (b) determination of the consideration for the issue of shares;
- (c) authorisation of distributions;
- (d) authorisation of financial assistance for the purchase of the company's shares;
- (e) appointment of a liquidator.

(2) The directors are responsible for the exercise of a power by a delegate as if the power had been exercised by the directors, unless the directors -

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

(3) Subsections (1) and (2) apply except to the extent that this Act or the constitution provides otherwise.

SUBPART 3 - DIRECTORS' DUTIES

Director to act in good faith and in best interests of company.

83. A director of a company shall, when exercising powers or preforming duties as a director, act in good faith; and in the best interests of the company.

Director to comply with Act and constitution.

84. A director of a company shall not act, or agree to the company acting, in a manner that contravenes this Act or the constitution of the company.

Reckless trading.

85. A director of a company shall not -

- (a) agree to the business of the company being carried on in a manner likely to create a substantial risk of serious loss to the company's creditors; or
- (b) cause or allow the business of the company to be carried on in a manner likely to create a substantial risk of serious loss to the company's creditors.

Duty in relation to obligations.

86. A director shall not agree to the company incurring an obligation unless the director believes at that time on reasonable grounds that the company will be able to perform the obligation when it is required to do so.

Duty in relation to self-interest.

87. (1) A director shall not exercise any power as a director if they are materially interested, whether directly or indirectly, in the exercise of such power unless -

- (a) the director makes full disclosure of the interest;
- (b) there are reasonable grounds for believing that the company will satisfy the solvency test after such power is exercised; and
- (c) either -
 - (i) the constitution expressly permits the exercise of the power notwithstanding the interest of a director in its exercise; or
 - (ii) the exercise of the power is approved by unanimous shareholder approval under section 59.

(2) For the purposes of subsection (1)(a), a director makes full disclosure of the interest if they disclose the nature and extent of the interest in writing to -

- (a) all the shareholders, in the case of unanimous shareholder approval; or
- (b) the other directors or directors, provided that they are not also interested in the exercise of the power.

Duty in relation to company information.

88. (1) A director shall not disclose, use, or act upon company information except -

- (a) in the interests of the company; or

- (b) as required by law; or
 - (c) in accordance with subsection (2).
- (2) A director may disclose, use, or act upon company information if -
- (a) the disclosure or other use of the information is authorised by the constitution or approved by unanimous shareholder approval under section 59; and
 - (b) there are reasonable grounds for believing that the company will satisfy the solvency test after the disclosure or other use of the information.
- (3) In this section, “company information” means information that -
- (a) the director has in their capacity as director or employee of the company; and would not otherwise be available to such director.

Director’s duty of care.

89. A director of a company shall, when exercising powers or performing duties as a director, exercise care, diligence, and skill taking into account -

- (a) the nature of the company;
- (b) the nature of the decision;
- (c) the position of the director; and
- (d) the responsibilities undertaken by such director.

Reliance on information and advice.

90. (1) A director of a company may rely on such information as reports, statements, and financial data and other information prepared or supplied, and on professional or expert advice given, by a third party where the director -

- (a) acts in good faith; and
 - (b) believes on reasonable grounds that the information or advice is within the competence of the third party; and
- (c) makes proper inquiry where the need for inquiry is indicated by the circumstances.

(2) In subsection (1), “third party” means an employee of the company, a professional adviser or expert, or another director.

Offence of serious breach of duty to act in good faith and in company’s best interests.

91. (1) A director of a company commits an offence if he or she exercises powers or performs duties as a director of the company -

- (a) in bad faith towards the company and believing that the conduct is not in the best interests of the company; and

- (b) knowing that the conduct will cause serious loss to the company.

(2) A person who commits an offence under this section is liable on conviction to a fine not exceeding Five hundred thousand Emalangeni (E500,000.00) or to imprisonment for a term not exceeding fifteen (15) years, or both.

Effect of unanimous shareholder approval on certain duties of directors.

92. (1) Where a director of a company exercises any power or takes any other action in their capacity as director of the company with the unanimous shareholder approval under section 59-

- (a) the director is presumed to act in compliance with the constitution of the company; and
- (b) if, at the time the director performs such acts, there are reasonable grounds for believing that the company is able to meet its debts as they fall due, the director acts -
 - (i) in good faith and in the best interests of the company; and
 - (ii) in accordance with their duty of care as a director.

Subpart 4 - Liability of directors

Extended meaning of director for purposes of liability.

93. (1) A person who is not otherwise a director of a company may be liable as a director of the company if the person is one of the following –

- (a) a shadow director;
- (b) a controller of director powers; or
- (c) a delegate of a director power.
- (d) a nominee director.

(2) A person does not fall into any of the categories set out in subsection (1) where the person acts only in a professional category.

Liability of shadow director.

94. (1) A shadow director is a person in accordance with whose directions or instructions a director is required to act.

(2) Subject to subsection (3), a shadow director is liable under subpart 3 of this Part to the same extent as the director.

(3) A shadow director shall be exempted from liability if the shadow director shows that the director was not in fact acting in accordance with the shadow director's directions or instructions in acting or failing to act in the manner giving rise to liability on the part of the director.

Liability of controller of director powers.

95. (1) A controller of director powers is a person who exercises, or who is entitled to exercise, or who controls or is entitled to control the exercise, of powers that, apart from the constitution of the company, would be powers exercised by the directors.

(2) A controller of director powers is liable under subpart 3 of this Part in connection with the exercise of those powers as if that person were a director.

(3) Without limiting subsections (1) and (2), if the constitution of a company confers a power on shareholders that would otherwise be exercised by directors under this Act, any shareholder who exercises that power or who takes part in deciding whether to exercise that power is liable under subpart 3 of this Part in connection with the exercise of that power as if that person were a director.

Liability of delegate of director power.

96. (1) A delegate of a director power is a person -

- (a) to whom the directors of a company have directly delegated a power or duty of the directors with the delegate's consent or acquiescence; or
- (b) who exercises a power or duty of the directors with their consent or acquiescence.

(2) A delegate of a director power is liable under subpart 3 of this Part in connection with the exercise of the power or duty in question as if that person were a director.

Exclusion of shareholder liability.

97. For the avoidance of doubt, if any action is approved by unanimous shareholder approval under section 59 -

- (a) a shareholder is not liable under section 85 as a deemed director in respect of that action; and
- (b) if there are reasonable grounds for believing that the company is able to meet its debts as they fall due, a shareholder is not liable under sections 84, 88, 89 and 90 as a deemed director in respect of that action.

Certain indemnities prohibited.

98. (1) A company shall not indemnify a director of the company or of any related company in respect of any criminal liability.

(2) Unless section 100 applies, a company shall not indemnify a director of the company or of any related company in respect of -

- (a) any liability to the company or a related company for any act or omission in his or her capacity as a director of the company or of the related company, as the case may be; or
- (b) any liability to any person arising out of a breach of duty to the company or related company, as the case may be, under any of subpart 3 of this Part.

(3) An indemnity given in breach of this section shall be void.

(4) In this section -

“director” includes -

- (a) a person specified in section 93 who is liable under any of subpart 3 of this Part; and
- (b) a former director;

(5) “indemnify” includes relieve or excuse from liability, whether before or after the liability arises, and “indemnity” has a corresponding meaning.

Company may indemnify or insure directors in accordance with constitution or with unanimous shareholder approval.

99. Subject to section 98(1), a company may provide an indemnity or purchase insurance for a director of the company or of a related company -

- (a) in accordance with the constitution; or
- (b) with the unanimous approval of shareholders under section 59.

Defences to criminal liability.

100. (1) Where a director is charged with an offence in relation to a duty imposed on the directors of a company, the following circumstances shall be a defence on the part of the director -

- (a) where the director proves that the directors took all reasonable and proper steps to ensure that the requirements of this Act would be complied with; or
- (b) where the director took all reasonable and proper steps to ensure that the directors complied with the requirements of this Act; or
- (c) where in the circumstances, the director could not reasonably have been expected to take steps to ensure that the directors complied with the requirements of the Act.

(2) Where a director is charged with an offence in relation to a duty imposed on the company, the following circumstances shall be a defence on the part of the director -

- (a) where the director proves that the company took all reasonable and proper steps to ensure that the requirements of this Act would be complied with; or
- (b) where the director proves that they took all reasonable and proper steps to ensure that the company complied with the requirements of this Act; or
- (c) where in the circumstances, the director could not reasonably have been expected to take steps to ensure that the company complied with the requirements of the Act.

SUBPART 5 - PROHIBITION AND DISQUALIFICATION OF DIRECTORS

Persons prohibited from managing companies.

101. (1) A person who has been convicted of a relevant offence as specified in subsection (2) shall not, during the period of three (3) years after the conviction –

- (a) be a director of a company;
- (b) be a promoter of a company;
- (c) be concerned in or take part in the management of a company in any way, whether directly or indirectly.

(2) For the purposes of this section and section 103(2), a relevant offence is -

- (a) an offence in connection with the promotion, formation, or management of a company punishable by a term of imprisonment of not less than 3 months, whether or not a sentence of imprisonment was imposed or not;
- (b) an offence under this Act where a penalty has not been prescribed; or
- (c) any crime involving dishonesty as defined in the applicable laws.

(3) In this section, “company” includes a foreign company that carries on business in Eswatini.

(4) A person who contravenes this section commits an offence and is liable on conviction to a fine not exceeding Two hundred and fifty thousand Emalangeni (E250 000.00) or to a term of imprisonment not exceeding ten (10) years, or both.

Prohibited person may apply for leave to be director, etc.

102. (1) The prohibition in section 101(2) does not apply if a person first obtains the leave of the Court, which may be given on any conditions that the Court deems fit.

(2) Any person that the Court thinks fit, may attend and be heard at the hearing of an application for leave under this section.

(3) A person who contravenes an order granting leave under this section commits an offence and is liable on conviction to a fine not exceeding Two hundred and fifty thousand Emalangeni (E250,000.00) or to a term of imprisonment not exceeding 10 years, or both.

Court may disqualify directors.

103. (1) The Court may order that a person shall not, without the leave of the Court, be or do any of the following for the period specified by the Court –

- (a) be a director of a company;
- (b) be a promoter of a company;

- (c) in any way, whether directly or indirectly, be concerned in or take part in the management of a company.

(2) The Court may make the order if the person has -

- (a) been convicted of a relevant offence under section 101(3);
- (b) been convicted of an offence under this Part;
- (c) been convicted of fraud committed in relation to a company while a director of the company;
- (d) found liable for a breach of duty to a company or a shareholder while a director of the company;
- (e) been convicted of an offence in any other jurisdiction that corresponds to any of the offences referred to in paragraphs (a) to (c);
- (f) been prohibited under the law of any other jurisdiction from acting as a director of a company or being concerned or taking part in the management of a company; or
- (g) become of unsound mind.

(3) An order may be made under this section even though the person concerned may be liable in respect of the matters that are the grounds for making the order.

(4) The Registrar of the Court shall, as soon as practicable after an order has been made under this section, give notice of the order to the Registrar of Companies.

(5) A person who fails to comply with an order under this section commits an offence and is liable on conviction to a fine not exceeding Two hundred and fifty thousand (E250,000.00) or to a term of imprisonment not exceeding ten (10) years, or both.

(6) In this section and in section 104, “company” includes a foreign company.

Who may apply for disqualification order.

104. (1) Any of the following persons may apply for a disqualification order under section 103 –

- (a) the liquidator of the company;
- (b) a shareholder or former shareholder of the company; or
- (c) a creditor or former creditor of the company.

(2) Where the liquidator applies for a disqualification order, or a person applies for leave under section 103(1) in respect of a disqualification order that was made on the liquidator’s application, the liquidator -

- (a) shall attend the hearing;
- (b) shall bring to the Court’s attention any matters that seem to the liquidator to be relevant; and

- (c) may give evidence or call witnesses.

Notice of application for disqualification order.

105. (1) An applicant for a disqualification order under section 103 shall give not less than 14 days' notice of the intention to apply to the person against whom the order is sought.

(2) The person against whom the order is sought may attend the hearing and give evidence or call witnesses.

PART VIII - ENFORCEMENT

Subpart 1 - Injunctions

Injunction restraining contravention of Act or constitution.

106. (1) The Court may injunct a company or a director of a company from conduct that would contravene this Act or the constitution of the company.

(2) The application for an injunction under subsection (1) may be made by -

- (a) the company; or
- (b) a director or shareholder of the company; or
- (c) an entitled person; or
- (d) the Registrar.

(3) In granting an injunction the Court may also grant consequential relief.

(4) The Court may not make an order under this section in relation to conduct or a course of conduct that has been completed.

(5) The Court may, before finally determining an application for an injunction, make as an interim order an order that could be made under subsection (1).

SUBPART 2 - DERIVATIVE PROCEEDING

Meaning of derivative proceeding.

107. A derivative proceeding is a proceeding brought with the leave of the Court under section 108 by a director or shareholder of a company in the name and on behalf of the company or any subsidiary of the company, and includes a proceeding in which a director or shareholder intervenes.

Leave of Court required for derivative proceeding.

108. (1) On the application of a person specified in section 109, the Court may grant leave to the applicant to -

- (a) bring a derivative proceeding; or

- (b) intervene in a proceeding to which the company or subsidiary company is a party for the purpose of continuing, defending, or discontinuing the proceeding on behalf of the company or subsidiary company, as the case may be.

(2) Except as provided in this subpart, a shareholder is not entitled to bring or intervene in any proceeding in the name of, or on behalf of, a company or subsidiary company.

Who may apply for leave to bring proceedings.

109. The following persons may apply for leave under section 108:

- (a) a director of the company;
- (b) a shareholder or shareholders representing not less than 10% of the voting rights of all shareholders entitled to vote on a resolution to amend the constitution of the company.

Matters that Court shall consider on application for leave.

110. Without limiting section 108, the Court, in determining whether to grant leave under that section, shall consider the following -

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

Requirements for grant of leave.

111. The Court may grant leave under section 108 if the Court is satisfied that -

- (a) the company or subsidiary does not intend to bring, diligently defend or continue, or discontinue the proceeding, as the case may be; or
- (b) it is in the interests of the company or subsidiary that the conduct of the proceeding should not be left to directors or to the determination of the shareholders as a whole.

Procedure for application for leave.

112. (1) Notice of an application for leave under section 108 shall be served on the company or subsidiary company.

(2) The company or subsidiary company -

- (a) may attend the hearing and be heard; and
- (b) shall inform the Court whether it intends to bring, continue, defend, or discontinue the proceeding, as the case may be.

Powers of Court in relation to derivative proceeding.

113. The Court may at any time make any order it thinks fit in relation to a derivative proceeding, and without limitation may -

- (a) authorise the person to whom leave was granted or any other person to control the conduct of the proceeding; and
- (b) give directions for the conduct of the proceeding; and
- (c) order the company or the directors to provide information or assistance in relation to the proceeding; and
- (d) direct that any amount ordered to be paid by a defendant in the proceeding shall be paid, in whole or part, to former and present shareholders of the company or subsidiary instead of to the company or subsidiary company.

Costs of derivative proceeding.

114. (1) On the application of the person to whom leave under section 108 was granted, the Court may order that the company pay some or all of the reasonable costs of bringing or intervening in the proceeding, including any costs relating to any settlement, compromise, or discontinuance approved by the Court.

(2) Subsection (2) does not apply where it would be unjust or inequitable for the company to bear those costs, or to bear the whole of those costs.

SUBPART 3 - PERSONAL PROCEEDINGS BY SHAREHOLDER***Shareholder proceeding against director for breach of duty.***

115. A shareholder or former shareholder may sue a director or former director for breach of a director duty owed to the shareholder in that capacity.

Shareholder proceeding to enforce director compliance.

116. On the application of a shareholder, and if it is just and equitable, the Court may -

- (a) order the director to take any action that is required to be taken by the directors under the constitution of the company or under this Act; and
- (b) on making the order, also order any consequential relief that the court thinks fit.

Shareholder proceeding against company for breach of duty.

117. A shareholder may sue the company for breach of a company duty owed to the shareholder in that capacity.

Shareholder proceeding to enforce company compliance.

118. On the application of a shareholder, and if it is just and equitable, the Court may -

- (a) order the company to take any action that is required to be taken by the company under the constitution of the company or under this Act; and
- (b) on making the order, also order any consequential relief that the court thinks fit.

Representative proceeding.

119. (1) This section applies if -

- (a) a shareholder brings a proceeding against the company or a director; and
- (b) other shareholders have the same, or substantially the same interest in relation to the subject matter of the proceeding.

(2) The Court may appoint a shareholder to represent all or some of those other shareholders, and for that purpose may also make any other order that it thinks fit, including an order for any of the following -

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

SUBPART 4 - PREJUDICED SHAREHOLDERS

Prejudiced shareholders.

120. (1) A shareholder (including a former shareholder) of a company may apply to the Court for an order under subsection (2) if the shareholder complains that the affairs of the company have been, or are being, or are likely to be, conducted in a manner that is, or any act or acts of the company have been, or are, or are likely to be, oppressive, unfairly discriminatory, or unfairly prejudicial to the complainant whether in the capacity of shareholder or any other capacity.

(2) The Court may, if the court considers that it is just and equitable to do so, make any order that it thinks fit, including an order -

- (a) requiring the company or any other person to purchase the complainant's shares;
- (b) requiring the company or any other person to pay compensation to a person;
- (c) regulating the future conduct of the company's affairs;
- (d) altering or adding to the company's constitution;
- (e) appointing a receiver of the company;
- (f) directing the rectification of the records of the company;
- (g) appointing a liquidator; or

- (h) setting aside action taken by the company or the directors in breach of this Act or the constitution of the company.

(3) The Court shall not make an order against the company or any other person under subsection (2) unless the company or that person is a party to the proceedings in which the application is made.

Conduct taken to be prejudicial.

121. Failure to comply with any of the following sections of this Act is conduct that is unfairly prejudicial for the purposes of section 120 –

- (a) section 21 (which relates to the issue of shares);
- (b) section 23 (which relates to pre-emptive rights on the issue of shares);
- (c) section 29 (which relates to dividends);
- (d) section 30 (which relates to a company's acquisition of its own shares);
- (e) section 41 (which relates to the provision of financial assistance by a company for the purchase of its own shares);
- (f) section 58 (which relates to major transactions);
- (g) section 60 (which relates to the alteration of shareholder rights).

Alteration to constitution.

122. (1) Notwithstanding anything in this Act, but subject to the Court order, where the Court makes an order under section 120 altering or adding to the constitution of a company, the constitution shall not, to the extent that it has been altered or added to by the Court, again be altered or added to without the leave of the Court.

(2) Any alteration or addition to the constitution of a company by the Court under section 120 has the same effect as if it has been made by the shareholders under section 13 and this Act applies to the constitution as altered or added to.

(3) Within 14 days after the Court makes an order under section 120 altering or adding to the constitution of a company, the company shall ensure that a copy of the order and a copy of the constitution as altered or added to are filed with the Registrar for registration.

- (4) If the company fails to comply with subsection (3); -
 - (a) the company commits an offence and is liable on conviction to a fine not exceeding One hundred thousand Emalangeni (E100,000.00); and
 - (b) every director of the company commits an offence and is liable on conviction to a fine not exceeding Fifty thousand Emalangeni (E50,000.00) or to a term of imprisonment not exceeding three (3) years or both.

SUBPART 5 - INVESTIGATION

Investigation initiated by shareholder.

123. (1) On the application of a shareholder, creditor, or entitled person of a company, the Court may make -

- (a) an order authorising a person named in the order, at a time specified in the order, to inspect and make copies of, or to take extracts from, the company records and other documents of the company, or of the company records and documents that are specified in the order; and
- (b) any ancillary order that the Court thinks fit, including an order that the accounts of the company be audited by the named person.

(2) The Court shall not make an order under subsection (1) unless it is satisfied that -

- (a) the applicant is acting in good faith;
- (b) the inspection is for a proper purpose; and
- (c) the person appointed is a proper person for the task.

(3) The reasonable costs of the investigation shall be paid by the company unless the Court orders otherwise.

Report to Court following investigation.

124. (1) The person appointed by an order under section 123(1)(a) shall diligently carry out the inspection and then make a report to the Court.

(2) On the basis of the report, the Court may -

- (a) make any order it thinks fit for disclosure and use of the records and documents obtained in the inspection; and
- (b) vary that order from time to time.

(3) A person may not disclose or use records or documents obtained in the inspection except in accordance with an order under subsection (2).

(4) person who contravenes subsection (3) commits an offence and is liable on conviction to a fine not exceeding One hundred thousand Emalangeni (E100,000.00) or to imprisonment for a term not exceeding six (6) years or both.

PART IX - ADMINISTRATION OF COMPANIES

SUBPART 1 - COMPANY TRANSACTIONS

Requirements for company obligation.

125. (1) For a company to enter into an obligation that, if it were a natural person obligation, shall by law be in a deed, the obligation shall be -

- (a) in writing; and
- (b) signed in writing under the name of the company by -
 - (i) two (2) or more directors of the company; or
 - (ii) if the company has only one (1) director, that director; or
 - (iii) if the constitution so provides, a director or other person or class of persons; or
 - (iv) one (1) or more attorneys appointed by the company in accordance with section 126.

(2) For a company to enter into an obligation that, if it were a natural person obligation, shall by law be in writing, the obligation shall be -

- (a) in writing; and
- (b) entered into on the company's behalf by a person acting under the company's express or implied authority.

(3) For a company to enter into an obligation that, if it were a natural person obligation, is not required by law to be in writing, the obligation shall be entered into on the company's behalf by a person acting under the company's express or implied authority.

(4) A company may affix its common seal, if it has one, to an obligation in writing, but, even though the constitution may require it, the absence of the seal does not affect the enforceability of the obligation.

(5) This section applies to a contract or other obligation whether or not -

- (a) that contract or obligation was entered into in Eswatini; and
- (b) the law governing the contract or obligation is the law of Eswatini.

Attorneys.

126. (1) Subject to the company constitution, a company may appoint a person as an attorney, either generally or in relation to a specified matter.

(2) The appointment shall be in writing and signed in accordance with section 125(1)(b).

(3) An act of the attorney in accordance with the written appointment binds the company.

Validity of company transaction.

127. (1) Subject to sections 128 and 129, the validity of a transaction entered into by a company is not affected by -

- (a) a failure to comply with this Act (except if the failure is a breach of section 125);
- (b) a failure to comply with the company's constitution;

- (c) the absence of express authority in the company's constitution to enter into the transaction;
 - (d) a failure by the company or its directors to take any steps required by the constitution to authorise entry into the transaction;
 - (e) the fact that the transaction is not in the best interests of the company; or
 - (f) a breach of a duty by a director in connection with entry of the company into the transaction.
- (2) Subsection (1) does not limit -
- (a) section 106 (which relates to injunctions to restrain conduct by a company that would contravene this Act or its constitution); or
 - (b) sections 107 to 114 (which relate to derivative proceedings); or
 - (c) sections 115 and 116 (which relate to shareholder proceedings against directors); or
 - (d) sections 117 and 118 (which relate to shareholder proceedings against a company); or
 - (e) the obligations and liabilities of directors of a company in respect of any contract or other obligation, or transfer of property to or by the company.
- (3) In this section and sections 131 to 133, "transaction" -
- (a) includes any contract or other obligation entered into by a company, or any transfer of property to or by a company; but
 - (b) does not include -
 - (i) a distribution to shareholders; or
 - (ii) an indemnity provided to a director under sections 99 to 98; or
 - (iii) remuneration or other benefits given to a director under section 80.

Person dealing with company may make certain assumptions

128. (1) A person who deals with a company (the "company") may assume that -

- (a) the company has complied with this Act and its constitution; and
- (b) a person named as a director of the company in the most recent notice filed with the Registrar under section 79 or in the most recent annual return filed with the Registrar -
 - (i) is a director of the company; and
 - (ii) has been properly appointed; and

(iii) has the usual authority of a director of a company carrying on the same kind of business as the company; and

(c) a person held out by the company as a director, employee, or agent of the company -

(i) has been properly appointed; and

(ii) has the usual authority of a director, employee, or agent of a company carrying on the same kind of business as the company; and

(d) a person held out by the company as a director, employee, or agent having unusual authority (that is, authority that a director, employee, or agent of a company carrying on the same kind of business as the company does not usually have) does have that authority; and

(e) 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 valid and genuine.

(2) A person who deals with a company may not make an assumption specified in subsection (1) if that person -

(a) knows the contrary; or

(b) ought to know the contrary through the person's position with, or relationship to, the company.

(3) Subsection (1) applies even though a person referred to in subsection (1)(b) to (e) 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.

(4) In this section and section 129, a person dealing with a company includes a person who acquires property, rights, or interests from a company.

Effect of assumptions by person dealing with company.

129. A company, a person claiming through a company, or a guarantor of a company's obligation may not assert against a person dealing with the company that an assumption specified in section 128(1) is incorrect, unless -

(a) section 128(2) applies; or

(b) in the case of fraud or forgery, the person has actual knowledge of it (see section 128(3)).

No constructive notice.

130. A person is not affected by, and is not presumed to have notice or knowledge of the contents of, the constitution of the company or of other documents relating to the company merely because the constitution or documents are -

(a) registered on the Eswatini register; or

(b) available for inspection at an office of the company.

Company may cancel transaction in which director interested.

131. (1) If a director of a company is interested in a company transaction, the company may cancel the transaction at any time within 3 months after the transaction is disclosed to the shareholders, whether by means of the company's annual report or otherwise.

(2) A transaction shall not be cancelled where the company receives fair value under it.

(3) For the purposes of subsection (2), the question whether a company receives fair value shall be determined on the basis of the information known to the company and to the interested director at the time when the transaction is entered into.

(4) A company is presumed to receive fair value under a transaction in which a director is interested if the company in good faith enters into the transaction in the ordinary course of the company's business and on usual terms and conditions.

(5) For the purposes of this Act -

- (a) a person seeking to uphold a transaction and who knew or ought to have known of the director's interest at the time when the transaction was entered into has the onus of establishing fair value; and
- (b) in any other case the company has the onus of establishing that it did not receive fair value.

(6) A transaction in which a director is interested can only be cancelled on the ground of the director's interest in accordance with this section or the company's constitution.

Company may cancel transaction for breach of director duty.

132. (1) A company may cancel a transaction that the company entered into as the result of the action of a director in breach of section 83 or section 84 if -

- (a) the director or a person associated with them is the other party to the transaction;
or
- (b) the other party to the transaction knew of the circumstances giving rise to the breach of duty and the company did not receive fair value under the transaction.

(2) A company is presumed to receive fair value under the transaction in which a director is interested if the company in good faith enters into the transaction in the ordinary course of the company's business and on usual terms and conditions.

(3) In this section, a person is associated with a director if the director -

- (a) is the spouse, parent, or child of that person; or
- (b) is a director, employee, or trustee, of that person; or
- (c) has a material financial interest in that person.

Effect of cancellation on third parties

133. The cancellation of a transaction under section 131 or 132 does not affect the title or interest of a person in or to property that that person has acquired if the property was acquired -

- (a) from a person other than the company; and
- (b) for valuable consideration; and
- (c) without knowledge of the circumstances that entitled the company to cancel the transaction under which the property was acquired from the company.

SUBPART 2 - PRE-INCORPORATION CONTRACTS***Meaning of pre-incorporation contract.***

134. In sections 135 to 138, “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.

Company may ratify pre-incorporation contract.

135. (1) A company may ratify a pre-incorporation contract and the contract once ratified is as valid and enforceable as if the company had been a party to the contract when it was made.

(2) The contract may be ratified -

- (a) within the period specified in the contract or, if no period is specified, within a reasonable time after the company’s incorporation; and
- (b) in accordance with the requirements for a company obligation (see section 125).

(3) Notwithstanding any other enactment, a company may not enforce a pre-incorporation contract or take the benefit of it unless the company has ratified it or the Court has validated it under section 138.

Warranties implied in pre-incorporation contract.

136. (1) The following warranties are implied in a pre-incorporation contract by the person who purports to make the contract in the name of the company or on behalf of the company –

- (a) a warranty that the company will be incorporated within the period specified in the contract or, if no period is specified, within a reasonable time after the contract is made; and
- (b) a warranty that the company will ratify the contract within the period specified in the contract or, if no period is specified, within a reasonable time after the company’s incorporation.

(2) A person's liability under subsection (1) is discharged if, after incorporation, the company enters into a contract in the same terms as, or in substitution for, the pre-incorporation contract.

(3) Subsections (1) and (2) apply unless and to the extent that a contrary intention is expressed in the pre-incorporation contract.

Damages for breach of implied warranty.

137. Breach of an implied warranty under section 136 entitles a plaintiff to the same amount of damages that the plaintiff could have obtained from the company for any unperformed obligation under the contract, had the contract been ratified.

Failure to ratify.

138. (1) If a company does not ratify a pre-incorporation contract after its incorporation, a party to the contract may apply to the Court for an order -

- (a) directing the company to return to the applicant any property that the company has acquired from the applicant under the contract; or
- (b) for any other relief in favour of the applicant relating to that property; or
- (c) validating the contract whether in whole or in part.

(2) The Court may, if it is just and equitable to do so, make any order or grant any relief it deems fit, and may do so whether or not an order has been made for damages for breach of an implied warranty under section 136.

SUBPART 3 - REGISTERED OFFICE

Registered office and postal address.

139. (1) A company shall always have a registered office and postal address in Eswatini.

(2) Subject to section 140 -

- (a) the registered office of a company at a particular time is the place entered as its registered office on the register at that time; and
- (b) the postal address of a company at a particular time is the address entered as its postal address on the register at that time.

Change of registered office or postal address.

140. (1) Subject to the company's constitution and subsection (3), a company may change its registered office or postal address at any time.

(2) The company shall file a notice of the change in the prescribed form with the Registrar for registration.

(3) A change in the registered office or postal address takes effect on a date stated in the notice which shall not be earlier than 7 days after the notice is registered.

SUBPART 4 - COMPANY RECORDS***Company records.***

141. (1) A company shall keep the following records -

(a) category A records, which are -

- (i) the company's certificate of incorporation;
- (ii) if the company has been re-registered, its certificate of re-registration;
- (iii) the constitution of the company;
- (iv) the share register;
- (v) the full names and residential and postal addresses of the current directors;
- (vi) details of the company's registered office and postal address; and

(b) category B records, which are -

- (i) the minutes of all meetings and resolutions of shareholders within the last 7 years;
- (ii) copies of all written communications to all shareholders or all holders of the same class of shares during the last 7 years, including annual reports;
- (iii) copies of all financial statements required to be prepared under section 158 for the last 7 completed accounting periods of the company; and

(c) category C records, which are -

- (i) minutes of all meetings and resolutions of directors and directors' committees within the last 7 years;
- (ii) a consent in the prescribed form by each past and current director within the last 7 years to act as a director of the company;
- (iii) the accounting records required by section 155 for the current accounting period and for the last 7 completed accounting periods of the company.

(2) The Registrar may approve by notice in writing to the company a shorter period than 7 years or 7 completed accounting periods for the purposes of category B or category C records.

(3) If the company fails to comply with subsection (1), it commits an offence and is liable on conviction to a fine not exceeding One hundred and fifty thousand Emalangeni (E150 000.00).

Place where company records shall be kept.

142. (1) A company shall keep the company records at -

- (a) its registered office; or
- (b) another place in Eswatini that is not its registered office, provided the company has given the Registrar notice under subsection (2).

(2) Where a company keeps the company records at a place that is not its registered office, the company shall file with the Registrar for registration a notice of the location of the records within 14 days after the records are first kept there.

(3) Where the company changes the place where it keeps the company records, the company shall file with the Registrar for registration a notice of the new location of the records within 14 days after their relocation.

(4) If the company fails to comply with subsection (2) or (3), the company commits an offence and is liable on conviction to a fine not exceeding One hundred thousand Emalangeni (E150 000.00).

Form of company records.

143. (1) A company shall keep the company records -

- (a) in written form in English; or
- (b) in a form or in a manner in which they are easily accessible and convertible into written form in English.

(2) The company shall ensure that adequate measures exist to -

- (a) prevent the company records being falsified; and
- (b) detect any falsification of them.

Inspection of company records.

144. (1) Any person may inspect category A records under section 145.

(2) Any shareholder or authorised person may inspect category A, B, and C records under section 146.

(3) A director may inspect the documents of the company generally, which include but are not limited to category A, B, and C records, unless an order is made under section 149 refusing or limiting inspection by a director.

Inspection of company records by public.

145. (1) A person may inspect the category A records of a company if the person gives written notice to the company of intention to inspect.

(2) The company shall keep those records available for inspection in accordance with section 147.

(3) If a company fails to comply with this section, the company commits an offence and is liable on conviction to a fine not exceeding One hundred thousand Emalangeni (E150 000.00).

Inspection of company records by shareholder.

146. (1) Subject to subsection (3), any shareholder of a company, or any person authorised by a shareholder for the purpose of inspection, may inspect the category A, B, and C records of a company if the shareholder or authorised person gives written notice to the company of intention to inspect.

(2) The company shall keep those records available for inspection in accordance with section 147.

(3) Where a company considers that category C records are confidential or contain confidential information, the company may refuse inspection of those records or, if appropriate, allow inspection of redacted records only.

(4) On the application of the company or a shareholder, the Court may give directions for the inspection or redaction of records to which subsection (3) applies.

(5) If a company fails to comply with this section, it commits an offence and is liable on conviction to a fine not exceeding One hundred thousand Emalangeni (E100,000.00).

Manner of inspection.

147. (1) Records that may be inspected under section 145 or 146 shall be available for inspection at the place where the company's records are kept between the hours of 9 am and 5 pm on each working day during the inspection period.

(2) In this section, "inspection period" means the period of 7 days beginning on the third working day after notice of intention to inspect is served on the company.

Copies of records.

148. (1) A person may give a company written notice requiring the company to provide a copy of, or extract from, a record of the company that is available for inspection by that person under section 145 or 146.

(2) The company -

- (a) may specify a reasonable copying and administration fee for providing the copy or extract; and
- (b) if the fee has been paid, shall provide the copy or extract within 7 days after it receives the notice.

(3) Where a company fails to comply with subsection (2)(b), the company commits an offence and is liable on conviction to a fine not exceeding One hundred thousand Emalangeni (E100,000.00).

Inspection of company documents by directors.

149. (1) A director of a company is entitled to inspect the documents of the company -

- (a) in written form;

- (b) without any charge; and
- (c) at a reasonable time specified by the director.

(2) On the application of the company, the Court may authorise the company to refuse or limit inspection of the company records by a director as the Court thinks fit if the Court is satisfied that the inspection -

- (a) would not be in the company's interests; or
- (b) is intended for a purpose unconnected with the director's duties.

SUBPART 5 - ANNUAL RETURN

Annual return.

150. (1) Each year in its allocated month, a company shall file with the Registrar for registration an annual return that -

- (a) is in the prescribed form; and
- (b) contains the prescribed information; and
- (c) is signed by a director of the company or by a legal practitioner or chartered accountant who is authorised to sign it; and
- (d) is accompanied by the prescribed fee.

(2) The annual return shall be dated as at a date within the allocated month and the information contained in it shall be compiled as at that date.

(3) Notwithstanding subsection (1) -

- (a) a company need not file an annual return in the calendar year of incorporation of the company; and
- (b) a subsidiary may, with the written approval of the Registrar, file an annual return in its holding company's allocated month rather than its own.

(4) In this section and sections 151 and 152, "allocated month" means the month allocated to the company under section 151.

Time for filing annual return.

151. (1) A company shall file its annual return in the month allocated to the company for that purpose.

(2) On registration or re-registration of a company, the Registrar shall allocate a month to a company for filing its annual return.

(3) The Registrar may, by written notice to a company, alter its allocated month and a company may, by written request to the Registrar, apply for allocation of a different month.

Annual return pre-filled by Registrar.

152. (1) The Registrar may send or otherwise provide to a company an annual return form pre-filled with the prescribed information as it appears on the Eswatini register.

(2) The form complies with section 150(1)(a) and (b) if the pre-filled form, as amended as necessary by the company, is current as at a date in the company's allocated month.

Registrar may alter the register to correct company's address.

153. The Registrar may alter the register to correspond with the information given in a company's annual return as to the address of registered office or postal address of the company if the address given differs from the address entered in the register.

Other updating notices for information events.

154. (1) A company or a foreign company shall file with the Registrar for registration the notices required under the provisions relating to the information events listed in subsection (2).

(2) The information events requiring a notice to be filed with the Registrar are the following -

- (a) the substitution, adoption, or amendment of the constitution;
- (b) the issue of shares by the company;
- (c) the acquisition by the company of its own shares;
- (d) the redemption of a share by the company;
- (e) the registration of a transfer of shares;
- (f) a change in the directors of the company, or a change in the name, residential address, or other details of a director;
- (g) the making of an order altering or adding to the constitution;
- (h) a change in the company's registered office or postal address;
- (i) location of company records away from registered office;
- (j) a change in the location of company records;
- (k) the resignation or removal of the auditor;
- (l) a change in the name of a foreign company;
- (m) a change in the directors of a foreign company, or a change in the name, residential address, or other details of a director;
- (n) a foreign company ceasing to carry on business in Eswatini.

PART X - ACCOUNTING RECORDS AND FINANCIAL REPORTING

SUBPART 1 - ACCOUNTING RECORDS

Company to keep accounting records.

155. (1) The directors of a company shall ensure that accounting records that comply with section 156 are kept.

(2) A company which contravenes subsection (1) commits an offence and, every director of the company shall upon conviction be liable to a fine not exceeding One hundred thousand Emalangeni (E100,000.00) or to a term of imprisonment not exceeding six years or both.

Form and content of accounting records.

156. (1) The accounting records shall -

- (a) correctly record the company's transactions; and
- (b) at any time enable the company's financial position to be determined with reasonable accuracy; and
- (c) enable the directors to ensure that the company's financial statements comply with section 158 and with any regulations made under this Act; and
- (d) enable the company's financial statements to be readily and properly audited.

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

- (a) entries of money received and spent each day and the matters to which the money relates; and
- (b) a record of the company's assets and liabilities; and
- (c) if the company's business involves dealing in goods -
 - (i) a record of goods bought and sold; and
 - (ii) invoices for goods bought and sold; and
 - (iii) a record of stock held at the end of the financial year together with records of any stocktaking during the year; and
- (d) if the company's business involves providing services -
 - (i) a record of services provided; and
 - (ii) invoices for those services.

(3) Where a company sells goods or provides services for cash in the ordinary course of carrying on a retail business -

- (a) the company need not keep invoices for each retail transaction; and

- (b) in respect of those retail transactions, a record of the total money received each day in respect of the sale of goods or provision of services, as the case may be, is sufficient compliance with subsection (2).

(4) The accounting records shall be kept -

- (a) in written form in English; or
- (b) in a form or manner in which they are easily accessible and convertible into written form in English.

SUBPART 2 - FINANCIAL STATEMENTS

Companies that shall prepare financial statements.

157. (1) A company with ten (10) or more shareholders shall ensure that financial statements are prepared in accordance with section 158.

(2) Subsection (1) does not apply if the company has opted out under section 160.

(3) If a company fails to comply with subsection (1) -

- (a) the company commits an offence and is liable on conviction to a fine not exceeding Two hundred and fifty thousand Emalangeni (E250,000.00); and
- (b) every director commits an offence and is liable on conviction to a fine not exceeding One hundred thousand Emalangeni (E100,000.00) or to a term of imprisonment not exceeding (six) 6 years, or both.

Financial statements.

158. (1) A company to which this section applies shall ensure that, within 4 months after the company's balance date, financial statements that comply with subsection (2) are prepared in relation to the company and that balance date.

(2) The financial statements shall -

- (a) give a true and fair view of the matters to which the statements relate; and
- (b) comply with any applicable regulations made under this Act; and
- (c) be dated and signed on behalf of the company by the directors of the company or, if the company has only one (1) director, by that director.

(3) The following periods shall not exceed 15 months –

- (a) the period between the date of incorporation of a company and its first balance date;
- (b) the period between any 2 balance dates of a company.

Financial statements to be audited.

159. (1) A company that is required to prepare financial statements shall ensure that the financial statements are audited by a qualified auditor.

(2) If a company fails to comply with subsection (1) -

- (a) the company commits an offence and is liable on conviction to a fine not exceeding Two hundred and fifty thousand Emalangeni (E250,000.00); and
- (b) every director commits an offence and is liable on conviction to a fine not exceeding One hundred thousand Emalangeni (E100,000.00) or to a term of imprisonment not exceeding six (6) years or both.

Company may opt out of preparing financial statements.

160. A company may opt out of preparing financial statements for an accounting period if -

- (a) the constitution provides for opting out; and
- (b) opting out is approved by all the shareholders entitled to vote and voting at the annual meeting of the company held in the accounting period.

SUBPART 3 - AUDITOR' APPOINTMENT AND ROLE

Requirement that auditor be appointed.

161. (1) This section applies to a company in relation to an accounting period if the company is required to prepare financial statements for that period.

(2) At the annual meeting of the company held in the accounting period, the company shall appoint a qualified auditor to -

- (a) hold office from the conclusion of the meeting until the conclusion of the next annual meeting; and
- (b) audit the company's financial statements.

Registrar may appoint auditor.

162. (1) The Registrar may appoint an auditor if -

- (a) at an annual meeting of a company, no auditor is appointed as required by section 161; or
- (b) a casual vacancy in the office of auditor is not filled within 1 month of the vacancy occurring.

(2) A company shall give notice to the Registrar of the resignation or removal of the auditor.

(3) The notice shall be -

- (a) in the prescribed form; and
- (b) given within 14 days after the auditor's resignation or removal.

Resignation and casual vacancy.

163. (1) An auditor may resign at any time by giving written notice to the company, and the company, shall as soon as practicable, notify the shareholders of the auditor's resignation.

(2) The directors may fill any casual vacancy in the office of auditor.

Replacement of auditor.

164. (1) A company may at a meeting of shareholders remove an auditor and if necessary replace the auditor by appointing a new auditor, where the company has given the auditor -

- (a) at least 28 days' written notice of removal; and
- (b) a reasonable opportunity at the company's expense to make representations to the shareholders, whether in writing or in person on the appointment of another person.

Statement by auditor on resignation.

165. Where an auditor of a company resigns from office, on the request of the auditor the company shall -

- (a) as soon as practicable distribute to all shareholders at the company's expense a written statement of the auditor's reasons for resigning; and
- (b) allow the auditor or the auditor's representative to explain at a shareholder meeting the reasons for resigning.

Qualifications of auditor.

166. (1) A person is a qualified auditor if -

- (a) the person is -
 - (i) entitled to practise, and is certified by an association of accountants constituted in Eswatini as an accountant in Eswatini; and
 - (ii) meets any further requirements for practice as an auditor in Eswatini that may be prescribed by regulations made under this Act; or
 - (iii) where the audit is to be carried out outside Eswatini, the person is eligible to act as an auditor in the country, state, or territory in which the audit is to be carried out.

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

- (a) a director or employee of the company or any other person responsible for keeping the company's accounting records;
- (b) a person who is a business partner or employee of a person referred to in paragraph (a);
- (c) a liquidator or a person who is a receiver in respect of the property of the company;

- (d) a corporation;
- (e) a person who, by virtue of paragraph (a) or (b), may not be appointed or act as auditor of a related company.

(3) An auditor of a company shall in carrying out the duties of auditor under this Part, ensure, that the auditor's judgment is not impaired through any relationship with, or interest in, the company or any related company.

Auditor to report to shareholders.

167. (1) An auditor of a company shall make a report to the shareholders on the financial statements audited by the auditor.

(2) The report shall state -

- (a) the work done by the auditor;
- (b) the scope and limitations of the audit;
- (c) the existence of any relationship, other than that of auditor that the auditor has with, or any interests that the auditor has in, the company or any related company;
- (d) whether the auditor has obtained all information and explanations that the auditor has required;
- (e) whether, in the auditor's opinion, as far as appears from an examination of them, the company has kept proper accounting records;
- (f) whether, in the auditor's opinion and having regard to any information or explanations that may have been added by the company, the financial statements -
 - (i) give a true and fair view of the matters to which they relate;
 - (ii) comply with any applicable regulations made under this Act; and
- (g) if applicable, the respects in which the financial statements do not meet the criteria in paragraph (f)(i) and (ii); and
- (h) any other matter prescribed for the purposes of this section by regulations made under this Act.

Auditor's attendance at shareholder meetings.

168. (1) The directors of a company shall ensure that an auditor of a company -

- (a) is permitted to attend a meeting of shareholders of the company; and
- (b) receives the notices and communications that a shareholder is entitled to receive relating to meetings and resolutions of shareholders; and
- (c) may be heard at a meeting of shareholders that the auditor attends on any part of the business of the meeting that concerns the auditor as auditor.

(2) A company which contravenes subsection (1) commits an offence and, every director of the company shall upon conviction be liable to a fine not exceeding One hundred thousand Emalangeni (E50,000.00) or to a term of imprisonment not exceeding three (3) years or both.

Auditor's access to information.

169. An auditor of a company may require -

- (a) access at all reasonable times to the company records, accounting records, and other company documents; and
- (b) from a director or employee of the company the information and explanations that the auditor reasonably considers necessary for the audit of the company.

PART XI - DISCLOSURE TO SHAREHOLDERS

SUBPART 1 - ANNUAL REPORT

Annual report to shareholders.

170. (1) This section applies if a company is required prepare financial statements in accordance with section 158.

(2) Subject to subsection (3), the directors of a company shall, within 28 days after the date on which the company is required to complete its financial statements under section 158(1) -

- (a) prepare an annual report on the affairs of the company for the accounting period ending on the balance date; and
- (b) send the report to each shareholder.

(3) The constitution of a company may provide that the directors are not required to provide an annual report for an accounting period unless -

- (a) a shareholder has given written notice to the company requiring an annual report; and
- (b) the company has received the notice before the end of the accounting period.

(4) If the directors of a company fail to comply with subsection (2), each director commits an offence and is liable on conviction to a fine not exceeding Two hundred and fifty thousand Emalangeni (E250,000.00) or to a term of imprisonment not exceeding ten (10) years.

Contents of annual report.

171. A company's annual report shall -

- (a) be in writing and dated;
- (b) include financial statements for the accounting period that comply with section 158;
- (c) include the auditor's report, if an auditor's report is required for the financial statements included in the report;

- (d) state -
 - (i) the names of the directors in office at the end of the accounting period; and
 - (ii) the name of any person who ceased to be a director during the accounting period;
- (e) contain any other information that may be required by -
 - (i) regulations made under this Act; and
 - (ii) the constitution; and
- (f) be signed on behalf of the directors by 2 directors of the company or, if the company has only 1 director, by that director.

SUBPART 2 - MISCELLANEOUS DOCUMENTS

Other documents that company to send to shareholders.

172. A company shall send the following documents to shareholders –
- (a) any document that is required by the constitution to be sent to shareholders;
 - (b) a notice of acquisition of the company's own shares;
 - (c) a disclosure document for the purposes of an offer of financial assistance for the purchase of the company's own shares;
 - (d) a copy of a written resolution approved under section 68;
 - (e) an auditor's written statement of reasons for resigning.

SUBPART 3 - SHAREHOLDER REQUEST FOR INFORMATION

Shareholder may request information held by company

173. (1) A shareholder of a company may at any time request the company to provide information held by it.

- (2) The request shall -
 - (a) be in writing; and
 - (b) specify the information sought in sufficient detail for the company to identify it.

Company shall respond to request.

174. (1) A company shall, within 14 days after receiving a request under section 173 -
- (a) provide the information; or
 - (b) undertake to provide the information within a specified period; or

- (c) refuse to provide the information and specify the reason for the refusal.

(2) An undertaking to provide the information within a specified period may be subject to payment of a reasonable fee, as specified and explained by the company, to meet the cost of providing the information.

Reasons for refusing information.

175. Without limiting the reasons for which a company may refuse to provide information under section 174, the company may refuse to provide information if -

- (a) the disclosure of the information would or would be likely to prejudice the commercial position of the company; or
- (b) the disclosure of the information would or would be likely to prejudice the commercial position of any other person, whether or not that person supplied the information to the company; or
- (c) the request for the information is frivolous or vexatious.

Withdrawal of request.

176. (1) A shareholder is presumed to have withdrawn a request for information under section 173 if, after notification of the fee that may be required, the shareholder has not paid the fee within 14 days after receiving the notification.

- (2) Subsection (1) does not apply if the shareholder -

- (a) undertakes to pay the fee; or
- (b) disputes that the fee is reasonable.

Court may order company to provide requested information.

177. (1) A shareholder of a company who has requested information under section 173 may apply to the Court for an order requiring the company to provide the information requested.

(2) The Court may order the company to provide the information within the time and on payment of the fee that the Court thinks fit if it is satisfied that -

- (a) the company does not have sufficient reason to refuse the information; or
- (b) the period specified for providing the information is unreasonable; or
- (c) the fee required by the company is unreasonable.

(3) An order under subsection (2) may specify the use that may be made of the information and the persons to whom it may be disclosed.

PART XII - COMPANY REORGANISATIONS

Subpart 1 - Amalgamations

Amalgamations.

178. Any two (2) or more companies may amalgamate, and continue as one (1) company, subject to the relevant laws.

SUBPART 2 - COURT APPROVED REORGANISATIONS

Arrangement and company.

179. In this subpart -

“arrangement” includes a reorganisation of the share capital of a company by the consolidation of shares of different classes, or by the division of shares into shares of different classes, or by both those methods;

“company” includes a foreign company that is registered on the Eswatini register.

Application to Court for order approving amalgamation, arrangement, or compromise

180. (1) A company or any shareholder or creditor of a company may apply to the Court for an order under section 181 approving an amalgamation, arrangement, or compromise.

(2) Before making an order under section 181, the Court may make any 1 or more of the following interim orders –

- (a) an order that notice of the application, together with any information relating to it that the Court thinks fit, shall be in the form and manner and given to any persons or classes of persons that the Court thinks fit;
- (b) an order directing the holding of a meeting or meetings of shareholders or any class of shareholders or creditors or class of creditors of a company to consider and, if thought fit, approve, in the manner specified by the Court, the proposed amalgamation, arrangement, or compromise;
- (c) for the purposes of an order under paragraph (b), an order determining the shareholders or creditors that constitute a class of shareholders or creditors;
- (d) an order requiring that a report on the proposed amalgamation, arrangement, or compromise be prepared for the Court by a person specified by the Court;
- (e) an order that the report referred to in paragraph (d) be provided to the shareholders, class of shareholders, creditors, or class of creditors of a company, or to any other person that the Court considers has an interest;
- (f) an order as to the payment of the costs incurred in preparing the report;
- (g) an order specifying the persons who are entitled to appear and be heard on the application to approve the amalgamation, arrangement, or compromise.

(3) In making an order under subsection (2), the Court shall have regard to the procedures for amalgamations and for arrangements and compromises under Part XIII.

Court may approve amalgamation, arrangement, or compromise.

181. (1) On an application under section 180(1), the Court may order that an amalgamation, arrangement, or compromise is binding on the company and on any other person or classes of person specified by the Court.

(2) The Court shall not make an order under this section in relation to an amalgamation or compromise unless it is impracticable to effect an amalgamation under or a compromise under Part XIII or both.

(3) To avoid doubt, it is not impracticable to effect an amalgamation under or a compromise under Part XIII by reason only that the amalgamation or compromise has not been, or would not be likely to be, approved in accordance with the procedure set out in or Part XIII, as the case may be.

(4) The Court may make an order under subsection (1) on any conditions that the Court thinks fit, and the order has effect in and from the date specified in the order.

(5) Section 194 applies, with all necessary modifications, to a compromise approved under this section.

Additional orders.

182. Without limiting section 181(1), the Court may, for the purpose of giving effect to any amalgamation, arrangement, or compromise approved under that section, provide for, and prescribe terms and conditions relating to, the following -

- (a) the transfer or vesting of real or personal property, assets, rights, powers, interests, liabilities, contracts, and engagements;
- (b) the issue of shares, securities, or policies of any kind;
- (c) the liquidation of any company;
- (d) the provision to be made for persons who voted against the amalgamation, arrangement, or compromise at a meeting ordered to be held under section 180(2) (b), or who appeared before the Court in opposition to the application for approval;
- (e) any other matter that is necessary or desirable to give effect to the amalgamation, arrangement, or compromise.

Copies of orders to be filed with Registrar

183. (1) A company that is the subject to an order under this subpart shall ensure that, within 14 days after the order is made, a copy of the order is filed (using the prescribed form) with the Registrar for registration.

(2) If a company fails to comply with subsection (1), each director of the company commits an offence and is liable on conviction to a fine not exceeding One hundred thousand Emalangen (E100 000.00) or to a term of imprisonment not exceeding six (6) years or both.

PART XIII - COMPROMISES WITH CREDITORS

SUBPART 1 - GENERAL

Compromise.

184. In this Part, unless the context otherwise requires, “compromise” means a compromise between a company and its creditors, including a compromise -

- (a) cancelling all or part of a debt of the company; or
- (b) varying the rights of its creditors or the terms of a debt; or
- (c) relating to an alteration of the company’s constitution that affects the likelihood of the company being able to pay a debt.

Who may make compromise proposal.

185. (1) Any of the following persons with reason to believe that a company is or will be insolvent may propose a compromise under this Part –

- (a) the directors of the company;
- (b) a receiver appointed to the whole or substantially the whole of the company’s assets and undertaking;
- (c) a liquidator of the company;
- (d) with the leave of the Court, any creditor or shareholder of the company.

(2) Where the Court grants leave to a creditor or shareholder under subsection (1)(d), the Court may make an order directing the company to provide the creditor or shareholder, within a specified time, with -

- (a) a list of the names and addresses of the company’s creditors showing the amounts owed to each of them; and
- (b) such other specified information that will enable the creditor or shareholder to propose a compromise.

SUBPART 2 - COMPROMISE PROCEDURE

Proponent to compile list of affected creditors.

186. (1) A person who proposes a compromise (the “proponent”) shall compile, in relation to each class of creditors of the company, a list of the creditors known to the proponent who would be affected by the compromise.

(2) The list of creditors shall set out -

- (a) the amount owing or estimated to be owing to each of them; and
- (b) the number of votes that each of them is entitled to cast on a resolution approving the compromise.

Proponent to give notice of proposed compromise.

187. The proponent shall give notice of the intention to hold a meeting of creditors (or any 2 or more classes of creditors) to vote on a resolution approving the proposed compromise.

Requirements for notice of proposed compromise.

188. (1) A notice of the meeting shall -

- (a) comply with the requirements of such notice; and
- (b) be accompanied by -
 - (i) a statement that sets out the matters in subsection (2); and
 - (ii) the list of creditors compiled under section 186; and
- (c) be given to -
 - (i) each known creditor; and
 - (ii) the company; and
 - (iii) any receiver or liquidator; and
- (d) be filed with the accompanying documents with the Registrar in the prescribed form for registration.

(2) The statement accompanying the notice of meeting shall -

- (a) state the proponent's name and address and the capacity in which the proponent is acting; and
- (b) contain contact details (including telephone numbers and postal and email addresses) to which inquiries may be directed during normal business hours; and
- (c) set out the terms of the proposed compromise and the reasons for it; and
- (d) set out the reasonably foreseeable consequences for creditors of the company if the compromise is approved; and
- (e) set out the extent of the interest of any director in the proposed compromise; and
- (f) explain that the compromise will be binding on creditors (whether all creditors or a class of creditors) if approved; and
- (g) contain details of any procedure proposed as part of the proposed compromise for varying the compromise following its approval.

Approval of compromise.

189. (1) A compromise, including any amendment proposed at the meeting, is approved by the creditors, or a class of creditors if, adopted by the creditors or class of creditors at a meeting

conducted in accordance with Schedule 6.

(2) Approval of a compromise by a class of creditors is presumed, if there is more than 1 class voting, to be conditional on approval by every other class voting, unless the resolution expressly provides to the contrary.

(3) The proponent shall give written notice in the prescribed form of the result of the voting to -

- (a) each known creditor, the company, and any receiver or liquidator; and
- (b) the Registrar for registration.

Subpart 3 - Effect of compromise

Compromise is binding on company and creditors.

190. A compromise, including any amendment, that is approved by creditors or a class of creditors in accordance with this Part is binding on the company and on all the creditors, or, if there is more than 1 class of creditors, on all creditors of that class, to whom notice of the proposal was given.

Variation of compromise.

191. (1) A compromise approved under section 189 may be varied either -

- (a) in accordance with any procedure for variation incorporated in the compromise as approved; or
- (b) by the approval of a variation as if the proposed variation were a proposed compromise to which this Part applies but subject to all necessary modifications.

(2) This Part applies to any compromise that is varied in accordance with this section.

Court may make orders in relation to procedure or moratorium.

192. (1) On the application of the proponent or the company, the Court may -

- (a) give directions in relation to a procedural requirement imposed by this Part, or waive or vary that requirement, if it considers that it would be just to do so; or
- (b) order that during a specified moratorium period -
 - (i) proceedings in relation to a debt owing by the company be stayed; or
 - (ii) a creditor not take any other measures to enforce payment of a debt owing by the company.

(2) For the purposes of an order under subsection (1)(b), a moratorium period -

- (a) shall not begin earlier than the date on which notice was given of the proposed compromise; and

- (b) shall end not later than 14 days after the date on which notice was given of the result of voting on it.

(3) Nothing in subsection (1)(b) affects the right of a secured creditor during the specified moratorium period to take possession of, realise, or otherwise deal with, property of the company in which that creditor has a security interest.

Court may order that creditor not bound by compromise.

193. (1) A creditor who was entitled to vote on a compromise may apply, on one (1) or more of the grounds set out in subsection (3), to the Court for an order that the creditor is not bound by the compromise or for such other order that the Court thinks fit.

(2) An application under subsection (1) shall be made not later than 14 days after the date on which notice of the result of the voting on the compromise was given to the creditor.

(3) The Court may make the order if it is satisfied that -

- (a) the creditor was not given sufficient notice of the meeting or the matters required to be notified to creditors under section 188(1)(b); or
- (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 unfairly prejudicial to that creditor, or to the class of creditors to which that creditor belongs.

Effect of compromise on liquidation of company.

194. (1) Where a compromise is approved, the Court may make an order as it thinks fit with respect to the extent (if any) to which the compromise will, if the company is put into liquidation, continue in effect and be binding on the liquidator.

(2) The Court may make an order under subsection (1) on the application of -

- (a) the company;
- (b) a receiver appointed in relation to the property of the company;
- (c) with the leave of the Court, any creditor or shareholder of the company.

(3) If a compromise is approved and the company is later put into liquidation, the Court may make an order as it thinks fit with respect to the extent, if any, to which the compromise continues in effect and is binding on the liquidator.

(4) The Court may make an order under subsection (3) on the application of -

- (a) the liquidator; or
- (b) a person described in subsection (2)(b) or (c).

Costs of compromise.

195. 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 met by the company; or
- (b) if incurred by a receiver or a liquidator, are a cost of the receivership or liquidation; or
- (c) if incurred by any other person, are a debt due to that person by the company.

PART XIV - LIQUIDATIONS**SUBPART 1 - GENERAL*****Meaning of insolvency in this Part.***

196. For the purposes of this Part, unless the context otherwise requires, a company is insolvent if it is unable to pay its debts as they become due in the normal course of business.

SUBPART 2 - APPOINTMENT OF LIQUIDATOR***Liquidation begins with appointment of liquidator.***

197. (1) The liquidation of a company begins on the date on which, and the time when, the liquidator is appointed.

(2) The date and time of appointment shall be recorded in the order or resolution appointing the liquidator.

(3) For the purposes of a liquidation, an act done, or a transaction entered into or effected, on the date on which a liquidator is appointed, shall be treated as done or entered into or effected after the time of the appointment on that date, unless the contrary is shown.

Who may be appointed liquidator.

198. (1) The liquidator shall -

- (a) be a named person; and
- (b) consent in writing to the appointment.

(2) Subject to subsection (5), none of the following persons may be appointed or act as the liquidator of a company -

- (a) a corporation;
- (b) a person who is under 21 years of age;
- (c) a creditor of the company;

- (d) a person who has, within the 2 years immediately preceding the commencement of the liquidation, been a shareholder, director, auditor, or receiver of the company or of a related company;
- (e) an undischarged bankrupt in any jurisdiction;
- (f) a person who is prohibited from being a director or promoter, or being concerned in or taking part in the management, of a company under this Act.

(3) The appointment of a person as liquidator without the written consent of that person is of no effect.

(4) On the application of a person who is or becomes disqualified to become or remain a liquidator under subsection (2)(b) to (h), the Court may order that the person may be appointed and act, or may continue to act, as liquidator, notwithstanding being disqualified.

(5) A person who acts in contravention of subsection (2) commits an offence and is liable on conviction to a fine not exceeding One hundred and fifty thousand Emalangeni (E150,000.00) or to a term of imprisonment not exceeding eight (8) years , or both.

Who appoints liquidator

199. (1) A liquidator of a company may be appointed by-

- (a) the directors, on the occurrence of an event specified in the constitution of the company;
- (b) the shareholders, by special resolution;
- (c) the Court, on the application of -
 - (i) the company;
 - (ii) a director;
 - (iii) a shareholder;
 - (iv) a creditor, including any contingent or prospective creditor; or
 - (v) the Registrar.

(2) At any time after the making of an application under subsection (1) (c) and before a liquidator is appointed, the Court may, on the application of the company or any creditor or shareholder of the company, stay any application or proceeding against the company that is pending in the Court, the Court of Appeal or any other tribunal.

SUBPART 3 - COURT APPOINTMENT OF LIQUIDATOR

ROLE OF COURT

When Court may appoint liquidator

200. The Court may appoint a liquidator where the court is satisfied that-

- (a) the company is insolvent;
- (b) the company or its directors have persistently or seriously failed to comply with this Act;
- (c) the company does not comply with section 4; or
- (d) it is just and equitable that a liquidator be appointed.

PROOF OF INSOLVENCY

Appointment of liquidator on ground that company is insolvent

201. (1) For the purpose of the appointment of a liquidator by the Court, a company's insolvency may be-

- (a) presumed under section 202; or
- (b) proved by other means.

(2) Information or records obtained under section 173 or, where the Court so orders, under section 177 may be received as evidence that a company is insolvent.

(3) In determining whether a company is insolvent, the Court may take into account contingent or prospective liabilities.

(4) In the case of a prospective or contingent creditor-

- (a) the creditor may apply to the Court for the appointment of a liquidator only with the leave of the Court; and
- (b) the Court may give leave, with or without conditions, only where it is satisfied that a *prima facie* case has been made out that the company is insolvent.

Presumption of insolvency

202. Unless the contrary is proved, a company is presumed to be insolvent where-

- (a) the company has failed to comply with a statutory demand as provided for under section 203; or
- (b) execution issued against the company in respect of a judgment debt has been returned unsatisfied in whole or in part; or
- (c) a person with a security over all or substantially all of the property has appointed a receiver under the document creating the security; or
- (d) a compromise between a company and its creditors has been put to a vote in accordance with Part XIII.

Statutory demand

203. (1) A statutory demand is a demand by a creditor in respect of a debt owing or due by a company that is made in accordance with subsection (2).

(2) A statutory demand shall-

- (a) be in respect of a debt that is not less than the prescribed amount;
- (b) be in writing;
- (c) be served on the company; and
- (d) require the company to do any of the following things to the reasonable satisfaction of the creditor, within forty-two (42) days after the date of service or any longer period that the Court may order under section 205 (3);
 - (i) pay the debt;
 - (ii) enter into a compromise under Part XIII;
 - (iii) otherwise compound with the creditor; or
 - (iv) give a security over its property to secure payment of the debt.

(3) For failure by a company to comply with a statutory demand to be admissible as evidence of insolvency in an application to appoint a liquidator, the application shall be made within forty two (42) days after the last date for compliance with the demand.

Court may set aside statutory demand

204. (1) On the application of the company, the Court may set aside a statutory demand where it is satisfied that-

- (a) there is a substantial dispute whether or not the debt is owing or due;
- (b) the company appears to have a counterclaim, set-off, or cross-demand for an amount that, when deducted from the amount of the demand, leaves an amount owing or due by the company that is less than the prescribed amount; or
- (c) the demand ought to be set aside on other grounds.

(2) The Court shall not set aside a statutory demand by reason only of a defect or irregularity unless the Court considers that substantial injustice would result if it were not set aside.

(3) In subsection (2), “defect” includes a material misstatement of the amount due to the creditor and a material mis-description of the debt referred to in the statutory demand.

(4) An order setting aside a demand may be made subject to conditions.

Procedure for application to set aside statutory demand

205. (1) A company shall make its application to set aside a statutory demand, and serve it on the creditor, within twenty eight (28) days after the date of service of the statutory demand.

(2) The Court shall not extend the time for making or serving the application.

(3) When hearing an application to set aside a statutory demand, the Court may extend the time for compliance with the demand.

Court's options where satisfied that debt is due by company

206. (1) This section applies where, on hearing an application to set aside a statutory demand, the Court is satisfied that there is a debt owing or due by the company to the creditor that is not the subject of a substantial dispute or subject to a counterclaim, set-off or cross-demand.

(2) On the ground that the company is unable to pay its debts, the Court may-

- (a) order the company to pay the debt within a specified period and further order that, in default of payment, the creditor may apply for the appointment of a liquidator; or
- (b) dismiss the application to set aside the demand and immediately make an order appointing a liquidator.

(3) A company is presumed to be insolvent where it defaults in making payment within the period specified by an order under subsection (2)(a).

INTERIM LIQUIDATOR

Appointment of interim liquidator

207. (1) The Court may appoint a named person as interim liquidator where-

- (a) an application has been made to the Court for the appointment of a liquidator; and
- (b) the Court is satisfied that the appointment of an interim liquidator is necessary or expedient for maintaining the value of assets owned or managed by the company.

(2) The appointment takes effect on the date on which, and the time when, the order appointing the interim liquidator is made.

(3) The Court shall record in the order the date and time of the appointment.

(4) For the purposes of a liquidation, an act done or a transaction entered into or effected on the date on which an interim liquidator is appointed shall be treated as done or entered into or effected after the time of the appointment on that date, unless the contrary is shown.

Role of interim liquidator

208. (1) An interim liquidator has the rights and powers of a liquidator to the extent necessary or desirable to maintain the value of assets owned or managed by the company.

(2) The Court may limit the rights and powers of an interim liquidator as it thinks fit.

SUBPART 4 - PROCESS OF LIQUIDATION

COMMENCEMENT OF LIQUIDATION

Liquidator shall give public notice of appointment

209. (1) A liquidator shall, without delay after being appointed or being notified of their appointment, give public notice of-

- (a) the liquidator's appointment;
- (b) the date and time of the commencement of the liquidation; and
- (c) the address and contact details, including telephone numbers and postal and email addresses, to which inquiries may be directed during normal business hours by a creditor or shareholder.

(2) A liquidator shall, within fourteen (14) days after being appointed or being notified of the appointment, file with the Registrar for registration a notice in the prescribed form of the appointment as liquidator.

Documents shall state that company is in liquidation

210. Any document or negotiable instrument entered into, made or issued by a liquidator of a company shall state, in a prominent position, that the company is in liquidation.

Effect of commencement of liquidation

211. (1) With effect from the commencement of liquidation of a company-

- (a) the liquidator has custody and control of the company's assets;
- (b) the directors remain in office but cease to have powers, functions, or duties other than those required or permitted to be exercised by this Part;
- (c) unless the liquidator agrees or the Court orders otherwise, a person shall not -
 - (i) commence or continue legal proceedings against the company or in relation to its property; or
 - (ii) exercise or enforce, or continue to exercise or enforce, a right or remedy over or against property of the company;
- (d) unless the Court orders otherwise, a share in the company shall not be transferred;
- (e) there shall be no alteration in the rights and liabilities of a shareholder of the company;
- (f) a shareholder shall not exercise a power under the constitution of the company or this Act except for the purposes of this Part; and
- (g) there shall be no alteration in the constitution of the company.

(2) A creditor is subject to the restrictions relating to the prior execution process set out in Schedule 7.

(3) Subsection (1) does not affect the right of a secured creditor, subject to Part 3 of Schedule 8, to take possession of and realise or otherwise deal with property of the company that is subject to the creditor's security interest.

Obligations of suppliers of essential services

212. (1) Notwithstanding any other enactment or contract, a supplier of an essential service shall not-

- (a) refuse to supply the service to the liquidator, or to a company in liquidation, on the ground that the company has defaulted in paying charges due for the service for a period before commencement of the liquidation; or
- (b) make it a condition of the supply of the service to the liquidator, or to a company in liquidation, that payment be made of outstanding charges due for the service for a period before commencement of the liquidation.

(2) The charges incurred by a liquidator for the supply of an essential service are an expense incurred by the liquidator for the purposes of clause 19(a) of Schedule 8.

(3) In this section, an “essential service” means-

- (a) the retail supply of gas;
- (b) the retail supply of electricity;
- (c) the supply of water;
- (d) the retail supply of fuel and other similar consumable items necessary for the generation of electricity; and
- (e) telecommunications services.

TAKING CONTROL OF COMPANY PROPERTY***Directors and others shall deliver company property to liquidator***

213. (1) A present or former director or employee of a company in liquidation shall -

- (a) without delay after the appointment of the liquidator, give the liquidator details of company property in that person’s possession or under their control; and
- (b) on being required to do so by the liquidator, without delay or within any time specified by the liquidator -
 - (i) deliver the property to the liquidator or any other person as the liquidator directs; or
 - (ii) dispose of the property as the liquidator directs.

(2) A person who fails to comply with subsection (1) commits an offence and is liable on conviction to a fine not exceeding One hundred thousand (E 100,000.00) or to imprisonment for a term not exceeding six (6) years or both exceeding 4 years or both.

FIRST STEPS IN LIQUIDATION PROCESS

First report to creditors

214. (1) The liquidator shall within the applicable period-
- (a) prepare a list of every known creditor of the company; and
 - (b) prepare and send to every known creditor and shareholder and, using the prescribed form, file with the Registrar for registration –
 - (i) a report containing a statement of the company's affairs, proposals for conducting the liquidation and, where practicable, the estimated date of its completion; and
 - (ii) a notice explaining the right of a creditor or shareholder to request a meeting of creditors or shareholders, as the case may be.
- (2) For the purposes of subsection (1), the applicable period is-
- (a) in the case of a liquidator appointed by the directors or the shareholders, within seven (7) days after appointment:
 - (b) in the case of a liquidator appointed by the Court, within forty two (42) days after appointment.
 - (c) in either case, within any longer period as the Court may direct.
- (3) The requirement to prepare a first report to creditors may be-
- (a) dispensed with or modified by an order of the Court; or
 - (b) dispensed with by the liquidator under this Act.

First meeting of creditors

215. (1) Unless the liquidator has dispensed with creditors' meetings, the liquidator shall call a meeting of the creditors of the company-
- (a) in the case of a liquidator appointed by the directors or the shareholders, within fourteen (14) days after appointment.
 - (b) in the case of a liquidator appointed by the Court, within thirty (30) days after appointment.
 - (c) in either case, within any longer period as the Court may direct.
- (2) Where the liquidator has dispensed with creditors' meetings but receives a notice under section 218(2)(c) requesting a meeting, the first meeting of creditors shall be held within twenty-one (21) days after the liquidator receives the notice.
- (3) The liquidator shall-

- (a) give every known creditor notice of the meeting; and
- (b) include with the notice the report mentioned in section 214; and
- (c) not less than seven (7) days before the meeting, give public notice of the meeting.

(4) In subsection (3) (b), “section report” means the report and notice required under section 214 (1)(b).

Purpose of first meeting of creditors

216. (1) The purpose of the first meeting of creditors is -

- (a) in the case of a liquidator appointed by the directors or the shareholders, to resolve whether to confirm the appointment or to appoint a replacement liquidator;
- (b) in the case of a liquidator appointed by the Court, to resolve whether to confirm that appointment or to apply to the Court for the appointment of a replacement liquidator; and
- (c) in either case, to determine whether to pass a resolution expressing the views of the creditors.

(2) Where the meeting resolves to appoint a replacement for the liquidator appointed by the directors or the shareholders, the person named as the replacement by the resolution is, subject to section 198, appointed liquidator.

(3) Where the meeting resolves to appoint a replacement for the liquidator appointed by the Court-

- (a) the liquidator shall without delay apply to the Court for the appointment of the person named as the replacement by the resolution; and
- (b) the Court may appoint that person as liquidator.

First report and first meeting of creditors not required for solvent company

217. (1) Sections 214 to 216 do not apply where-

- (a) the liquidator has been appointed by the shareholders or the directors; and
- (b) within twenty eight (28) days before the appointment, the directors resolved that the company would, on the appointment of a liquidator by the shareholders or the directors, be able to pay its debts; and
- (c) a copy of the resolution is ,using the prescribed form, filed with the Registrar for registration.

(2) Where the liquidator, once appointed, is not satisfied as to the solvency of the company, the liquidator shall without delay call a first meeting of the creditors and sections to 214 to 216 shall apply with all necessary modifications.

(3) For the purposes of subsection (2), the liquidator is not satisfied as to the solvency of the company where the liquidator considers that-

- (a) the directors who voted in favour of a resolution referred to in subsection (1) (b) did not have reasonable grounds to believe that the company would be able to pay its debts; or
- (b) the company is insolvent.

(4) Subsection (2) shall be subject to section 218.

Liquidator may dispense with first meeting of creditors

218. (1) A liquidator is not required to call the first meeting of creditors or under section 217(2), as the case may be, where-

- (a) the liquidator considers that a meeting is unnecessary, having regard to -
 - (i) the assets and liabilities of the company;
 - (ii) the likely result of the liquidation; and
 - (iii) any other relevant matters;
- (b) the liquidator gives a notice in writing to the creditors that complies with subsection (2); and
- (c) no creditor has requested a meeting or, where a creditor has requested a meeting, the Court has directed that a meeting is not necessary.

(2) The liquidator's notice shall state-

- (a) that the liquidator considers that a meeting is unnecessary;
- (b) the reasons for the liquidator's view; and
- (c) that a meeting will not be called unless a creditor gives the liquidator written notice, within fourteen (14) days after receiving the liquidator's notice, requesting a meeting and giving reasons why it is necessary.

(3) The liquidator's notice shall be given to every known creditor together with the report referred to in section 214.

REPORTS

Six-monthly report

219. The liquidator shall, within two (2) months after the end of each period of six (6) months following the date of commencement of the liquidation, prepare and send to every known creditor and shareholder and, using the prescribed form, file with the Registrar for registration, a report on-

- (a) the conduct and progress of the liquidation during the preceding six (6) months; and

- (b) any further proposals that the liquidator has for completing the liquidation.

Dispensing with reporting

220. (1) On the application of a liquidator the Court may, on any conditions that the Court thinks fit-

- (a) dispense with the requirement to prepare a first report to creditors or a six (6) monthly report; or
- (b) modify one or both of those requirements.

(2) The liquidator may dispense with the requirement to prepare a first report to creditors or a six (6) monthly report where the liquidator considers that the value of the assets of the company available for distribution to unsecured creditors who are not preferential creditors is not likely to exceed the prescribed sum, in every dollar owed to those creditors.

(3) Where subsection (2) applies, and the liquidator does not intend to prepare a first report to creditors or a six (6) monthly report, the liquidator shall file a notice of that intention with the Registrar using the prescribed form.

MEETINGS

Meeting of creditors or shareholders to appoint liquidation committee

221. (1) At any time in the liquidation, the liquidator may, on the request of any creditor or shareholder or on the liquidator's own initiative, call a meeting of creditors or shareholders-

- (a) to vote on a proposal that a liquidation committee be appointed to act with the liquidator; and
- (b) where it is so decided, to choose the members of the committee.

(2) The liquidator may decline the request on the ground that-

- (a) the request is frivolous or vexatious;
- (b) the request was not made in good faith; or
- (c) except where a creditor or a shareholder agrees to meet the costs, the costs of calling a meeting would be out of all proportion to the value of the company's assets.

(3) The liquidator's decision to decline the request may be reviewed by the Court on the application of any creditor or shareholder.

(4) The sole shareholder of a company may present to the liquidator a view on any matter that could have been decided at a meeting of shareholders called under this section, and that view shall for all purposes be treated as a decision taken at a meeting of shareholders.

Other meetings of creditors or shareholders

222. The liquidator -

- (a) shall call meetings of shareholders at the times specified by a resolution of shareholders passed at a meeting to appoint a liquidator;
- (b) shall call meetings of creditors at the times specified by a resolution of creditors passed at the first meeting of creditors;
- (c) shall call a meeting of shareholders without delay when required to do so by a notice in writing given by shareholders who hold not less than 10% of all the shares issued by the company;
- (d) shall call a meeting of creditors without delay when required to do so by notice in writing given by creditors to whom is owed not less than 10% of the total amount owed to all creditors of the company; and
- (e) may, at his or her discretion, call a meeting of creditors or shareholders.

Procedure for meeting of creditors or shareholders

223. A liquidator who calls a meeting of creditors or shareholders shall call the meeting in accordance with-

- (a) Schedule 6; or
- (b) in the case of a meeting of shareholders, the constitution of the company, except that the liquidator has the power to give notice of the meeting and to act as, or appoint, the chairperson of the meeting.

LIQUIDATION COMMITTEES

Liquidation committees

224. (1) A liquidation committee shall consist of not less than three (3) persons who are-

- (a) creditors or shareholders;
 - (b) persons holding general powers of attorney from creditors or shareholders; or
 - (c) authorised directors or representatives of companies that are creditors or shareholders of the company in liquidation.
- (2) A liquidation committee has the power to-
- (a) call for reports from the liquidator on the progress of the liquidation;
 - (b) call a meeting of creditors or shareholders, which shall be held in accordance with Schedule 6;
 - (c) apply to the Court under sections 268, 270 or 271 and
 - (d) assist the liquidator as and where appropriate in the conduct of the liquidation.

(3) Where meetings of shareholders and creditors differ on the issue of whether to appoint a liquidation committee or on the membership of the committee, the liquidator shall refer the matter to the Court which may determine the issue as it sees fit.

(4) The provisions set out in Schedule 9 govern meetings of a liquidation committee.

(5) Where a liquidation committee is unable to act because of vacancies in membership, the liquidator shall call attention to that situation in the liquidator's next six (6) monthly report.

Restrictions on members of liquidation committee

225. (1) Except with leave of the Court, a member of a liquidation committee shall-

- (a) not receive any remuneration for services as member;
- (b) not directly or indirectly become a purchaser of any asset of the company in liquidation;
- (c) not receive out of the assets of the company in liquidation any payment for services by the member in connection with the administration of the assets of the company; and
- (d) not receive out of the assets of the company in liquidation any payment for goods supplied by the member to the liquidator for, or on account of, the company.

(2) The Court may set aside a transaction in breach of subsection (1) and may make other orders in relation to the breach as it sees fit, including orders for the recovery of assets and the repayment of any benefit or payment received by the member.

(3) The Court may grant leave under this section on any conditions it thinks fit.

(4) The Court shall not grant leave for the payment of services by a member unless the services are of a special nature, and the Court shall specify in its order the nature of the services for which payment may be made.

CREDITORS' CLAIMS

Claims process

226. (1) A claim by a creditor in the liquidation of a company is either a -

- (a) preferential claim; or
- (b) non-preferential claim.

(2) A claim is made according to the procedure set out in Schedule 8.

Order in which claims are paid

227. (1) The liquidator shall pay the preferential claims before non-preferential claims, that is, the liquidator shall-

(a) first pay out of the assets of the company the expenses, fees, and claims set out in Part 4 of Schedule 8; and

(b) pay them to the extent and in the order of priority specified in Part 4 of Schedule 8.

(2) The assets of the company that remain after paying the preferential claims shall be applied in payment of all other claims, that is, the non-preferential claims.

(3) The non-preferential claims rank equally among themselves and shall be paid in full unless the assets are insufficient to meet them, in which case payment abates rateably among them.

Other rules relating to claims

228. Other rules relating to claims are set out in Schedule 8.

FINAL REPORT

Final report and accounts

229. (1) As soon as practicable after completing a liquidator's duties in relation to the liquidation, the liquidator shall-

(a) prepare and send the documents set out in subsection (2) to every creditor whose claim has been admitted and to every shareholder; and

(b) using the prescribed form, file those documents with the Registrar for registration.

(2) The documents mentioned above are-

(a) the final report and statement of realisation and distribution in respect of the liquidation;

(b) a statement that-

(i) all known assets have been disclaimed, realised or distributed without realisation;

(ii) all proceeds of realisation have been distributed; and

(iii) the company is ready to be removed from the register; and

(c) a summary of the applicable grounds on which a creditor or shareholder may object to the removal of the company from the register.

Dispensing with final report and accounts

230. (1) On the application of the liquidator, the Court may make an order on any conditions that it thinks fit -

(a) exempting the liquidator from compliance with section 229; or

(b) modifying the application of all or part of section 229 in relation to the liquidation.

TERMINATION OF LIQUIDATION

Termination of liquidation

231. (1) At any time after the appointment of a liquidator, the Court may make an order terminating the liquidation of the company where the Court considers that it is just and equitable to do so.

(2) Any of the following persons may apply for an order under subsection (1) –

- (a) the liquidator;
- (b) a director;
- (c) a shareholder;
- (d) a creditor; and
- (e) the Registrar.

(3) The Court may require the liquidator to provide a report to the Court on any facts or matters relevant to the application.

(4) Where the Court makes an order, the company ceases to be in liquidation and the liquidator ceases to hold office with effect on and from the making of the order or any other date specified in the order.

(5) The Court may, on making the order or at any later time, make any other order that it thinks fit in relation to the termination of the liquidation.

Notice of termination of liquidation

232. (1) The applicant for an order terminating the liquidation of a company shall, within fourteen (14) days after the order was made, file using the prescribed form a notice of the order with the Registrar for registration.

(2) A person who fails to comply with subsection (1) commits an offence and is liable on conviction to a fine not exceeding One hundred thousand Emalangeni (E100,000.00) or to a term of imprisonment not exceeding six (6) years or both.

COMPLETION OF LIQUIDATION

Completion of liquidation

233. The liquidation of a company is completed when the liquidator-

- (a) complies with section 229 (1)(b); and
- (b) files with the Registrar for registration;
 - (i) a copy of any order made under section 230 (1)(a); or
 - (ii) a copy of any order made under section 230 (1)(b) together with any documents required to comply with the order.

Liquidation Surplus Account

234. (1) After completion of the liquidation-

- (a) the liquidator shall pay to the Registrar any money representing unclaimed assets of the company standing to the credit of the liquidator; and
- (b) the Registrar shall hold the money on trust and deal with it in accordance with this section.

(2) Twelve (12) months after the date on which the money is paid, the Registrar shall-

- (a) deduct any amount required to meet the claim of any person that is established in the twelve (12) month period; and
- (b) pay the balance into an account entitled “Liquidation Surplus Account” for distribution in accordance with this section.

(3) Money held in the Liquidation Surplus Account-

- (a) may be invested only in a bank that is licensed as a banking business under the Financial Institutions Act 2005, and the interest earned may be distributed in accordance with this section; and
- (b) is not subject to the ‘any unclaimed moneys’ statute.

(4) The Registrar may, from the Liquidation Surplus Account-

- (a) pay or distribute money to any person entitled to payment or distribution in the liquidation of a company of any money representing the surplus assets of the company that has been paid into the Liquidation Surplus Account; or
- (b) subject to any conditions that the Registrar may impose, pay costs incurred in the course of the liquidation of a company for the purpose of proceedings brought by the company (including the costs of legal or other expert advice, or the costs of any expert witness), where the Registrar is satisfied that it is fair and reasonable for those costs to be met out of the Liquidation Surplus Account.

(5) In making a payment under this section, the Registrar is not required to ascertain that money or sufficient money was received on account of any company to which the claim for payment relates.

LIQUIDATION OF ASSETS OF FOREIGN COMPANY***Court may order liquidation of assets of foreign company***

235. (1) An application may be made to the Court for an order for the liquidation of the assets in Eswatini of a foreign company in accordance with this Part subject to the modifications and exclusions set out in Schedule 12.

(2) The Court may make the order whether or not the foreign company-

- (a) is registered under section 399;
- (b) has given public notice of an intention to cease to carry on business in Eswatini in accordance with this Act;
- (c) has given notice to the Registrar of the date on which it will cease to carry on business in Eswatini in accordance with the Act; or
- (d) has been dissolved or otherwise ceased to exist as a company, under or by virtue of the laws of any other country.

POOLING OF ASSETS AND JOINT LIQUIDATION

Pooling of assets of related companies

236. (1) On the application of a person listed in subsection (2), the Court may, where it considers that it is just and equitable, 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 two (2) or more related companies are in liquidation, the liquidations in respect of each company shall proceed together as if they were one company to the extent that the Court orders and subject to any terms and conditions that the Court imposes.

(2) The persons who may make the application are the liquidator, creditor or a shareholder of the company in liquidation or of one or more of the related companies in liquidation.

(3) The Court may make any other order or give any directions to facilitate giving effect to an order under subsection (1) that it thinks fit.

Guidelines for orders

237. (1) In deciding whether it is just and equitable to make an order under section 236(1), the Court shall consider the following –

- (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) any other matters that the Court considers relevant.

(2) In deciding whether it is just and equitable to make an order under section 236(1) (b), the Court shall consider the following –

- (a) the extent to which any of the companies took part in the management of any of the other companies;

- (b) the conduct of any of the companies towards the creditors of any of the other companies;
- (c) the extent to which the circumstances that gave rise to the liquidation of any of the companies are attributable to the actions of any of the other companies;
- (d) the extent to which the businesses of the companies have been combined; and
- (e) any other matters that the Court considers relevant.

(3) Reliance by the creditors of a company in liquidation on the fact that another company was or is related to it is not a ground for making an order under section 236(1).

SUBPART 5 - OFFICE OF LIQUIDATOR

VACANCY OF THE OFFICE OF LIQUIDATOR

Vacancy

238. (1) The office of liquidator becomes vacant where the liquidator-

- (a) resigns in accordance with section 239;
- (b) dies;
- (c) is removed by the Court; or
- (d) is or becomes disqualified to act as liquidator.

(2) Except in the case of resignation, the person vacating office or their personal representative shall without delay file a notice, using the prescribed form, of the vacancy with the Registrar.

(3) Where, as a result of vacancy, no person is acting as liquidator, the Registrar may appoint a person to act as liquidator until a successor is appointed by the Court.

Resignation

239. A liquidator may resign by-

- (a) appointing another person as successor; and
- (b) filing a notice, using the prescribed form, of that appointment with the Registrar for registration.

Court may review appointment of successor

240. (1) On the application of a person listed in subsection (2), the Court may review the appointment of a successor to a liquidator and may instead appoint as liquidator any person qualified for appointment.

(2) The persons who may make the application are-

- (a) the company;
- (b) a shareholder or other entitled person; or
- (c) a director or creditor.

Appointment of successor by Court

241. (1) On the application of a person listed in subsection (3), the Court may appoint a liquidator where a vacancy has occurred and-

- (a) has not been filled; or
- (b) has been filled by an appointment by the Registrar.

(2) The Court may appoint as liquidator any person qualified for appointment.

(3) The following persons may apply-

- (a) the company;
- (b) a shareholder or other entitled person; or
- (c) a director or creditor.

(4) A liquidator appointed under this section shall, within fourteen (14) days after being appointed or being notified of the appointment file a notice, using the prescribed form, of the appointment with the Registrar for registration.

Duty to assist successor

242. (1) A person vacating the office of liquidator shall, where practicable, provide the information and give the assistance to their successor as the successor reasonably requires in taking over the duties of liquidator.

(2) A person vacating the office of liquidator shall without delay or within any reasonable time specified by the successor, deliver to the successor the following items that are in the possession or under the control of the liquidator -

- (a) any company records or documents;
- (b) any other property of the company;
- (c) all claims; and
- (d) the liquidation accounts, records, and documents.

REMUNERATION

Remuneration

243. (1) A liquidator appointed by a resolution or directors or shareholders is entitled to charge reasonable remuneration for carrying out the duties of and exercising powers as liquidator.

(2) Unless the Court orders otherwise, a liquidator appointed by the Court is entitled to charge remuneration-

- (a) of an amount fixed by regulations made under this Act; or
- (b) at the rate or rates prescribed by regulations made under this Act.

(3) A liquidator's remuneration and expenses are payable out of the assets of the company but the Court may approve payment of remuneration and expenses from another specific source.

SUBPART 6 - DUTIES OF LIQUIDATOR

Principal duty of liquidator

244. The principal duty of a liquidator of a company is, properly and efficiently-

- (a) 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 in accordance with this Act; and
- (b) where there are surplus assets remaining, to distribute them or the proceeds of the realisation of the surplus assets:
 - (i) in accordance with the company's constitution; or
 - (ii) where the constitution makes no provision for the distribution of surplus assets, in accordance with section 18(1)(c).

Other duties

245. Without derogating from section 244, a liquidator has the other duties and functions specified in this Act.

Liquidator not required to act in relation to property subject to charge or security interest

246. (1) Notwithstanding anything in this Act, a liquidator may, but is not required to, carry out any duty or exercise any power in relation to property that is subject to a charge or security interest.

(2) Subsection (1) shall not apply where the charge or security interest is surrendered or taken to be surrendered or redeemed.

Duty to consider views of creditors and shareholders

247. (1) The liquidator shall consider the views of -

- (a) shareholders as expressed in a resolution at the meeting held to appoint a liquidator;
- (b) creditors as set out in a resolution passed at the first meeting of creditors;
- (c) creditors or shareholders as set out at a meeting of creditors or shareholders called by the liquidator; and

(d) any liquidation committee given in writing to the liquidator.

(2) Nothing in this section limits or prevents a liquidator from exercising his or her discretion in carrying out the functions and duties under this Act.

Duty in relation to accounts

248. (1) The liquidator shall keep accounts and records of the liquidation.

(2) The liquidator shall permit inspection of the liquidation accounts and records, and of the company accounts and records (the “company accounts and records”) by-

- (a) a liquidation committee, unless the liquidator believes on reasonable grounds that inspection would be prejudicial to the liquidation; and
- (b) where the Court so orders, a creditor or shareholder.

(3) The liquidator shall retain the liquidation accounts and records and the company accounts and records for not less than one (1) year after completion of the liquidation.

(4) The Registrar, whether before or after the completion of the liquidation, may-

- (a) authorise the disposal of any accounts and records; and
- (b) require any accounts or records to be retained for longer than one (1) year after the completion of the liquidation.

Duties in relation to funds

249. (1) A liquidator shall deposit any funds received on behalf of a company in liquidation in a bank account in the name of the company or in a trust account with a bank to be held on trust for the benefit of the company.

(2) A liquidator may invest funds held on behalf of or to the credit of the company and not required for the time being to meet creditors’ claims only in the form of-

- (a) bank deposits;
- (b) securities issued by the Government of Eswatini; or
- (c) any other investment approved by the Court.

Duties in relation to company transactions

250. (1) Except with the leave of the Court, a liquidator shall not-

- (a) directly or indirectly, become a purchaser of any asset of the company in liquidation;
or
- (b) purchase goods or services for the purposes of the liquidation from any person whose connection with the liquidator would result in a direct or indirect benefit to the liquidator as a result of the purchase.

(2) The Court may set aside a transaction in breach of subsection (1) and may make other orders in relation to the breach as it sees fit, including orders for the recovery of assets and the repayment of any benefit by the liquidator.

(3) The Court may grant leave under subsection (1) on any conditions that it sees fit.

SUBPART 7 - POWERS OF LIQUIDATOR

GENERAL POWERS

Powers of liquidator

251. A liquidator has the powers-

- (a) necessary to carry out the functions and duties of a liquidator under this Act; and
- (b) conferred on a liquidator by this Act.

Liquidators shall act jointly unless otherwise stated

252. Where two (2) or more persons are appointed as liquidators of a company, they shall act jointly unless the resolution of shareholders or directors or the order of the Court appointing them states that they may exercise their powers individually.

SPECIFIC POWERS

Liquidator has specific powers set out in Schedule 10

253. A liquidator shall perform the functions provide in this Act together with the specific powers set out in Schedule 10.

PRODUCTION OF DOCUMENTS AND OTHER INFORMATION

Liquidator may require production of company documents or records

254. A liquidator may, by notice in writing, require a director or shareholder of the company or any other person to deliver to the liquidator any documents or records of the company in that person's possession or under that person's control, as the liquidator requires.

Liquidator may require provision of information

255. (1) A liquidator may from time to time and by notice in writing (the "liquidator's notice") require any of the persons listed in subsection (2) to do any of the following:

- (a) attend on the liquidator at any reasonable time or times, and at the place, specified in the liquidator's notice (and this may include attendance at a meeting of creditors);
- (b) provide the liquidator with information requested by the liquidator about the business, accounts, or affairs of the company;
- (c) be questioned on oath or affirmation by the liquidator or a lawyer acting for the liquidator about any matter relating to the business, accounts, or affairs of the company; or

(d) assist in the liquidation to the best of the person's ability.

(2) The persons referred to in subsection (1) are any of the following –

- (a) a director or former director of the company;
- (b) a shareholder of the company;
- (c) a person who was involved in the promotion or formation of the company;
- (d) a current employee of the company;
- (e) a past employee of the company;
- (f) a receiver, accountant, auditor, bank officer, or other person having knowledge of the affairs of the company; and
- (g) a person who is acting, or who has at any time acted, as a lawyer for the company.

(3) The liquidator may pay the reasonable travel and other expenses incurred by a person listed in subsection (2)(e), (f), or (g) in complying with the liquidator's notice.

(4) On the application of a person listed in subsection (2)(e), (f), or (g), the Court may order the liquidator to pay that person reasonable remuneration and travel and other expenses incurred in complying with the liquidator's notice.

(5) A person listed in subsection (2)(e), (f), or (g) may not refuse to comply with the liquidator's notice by reason only that-

- (a) an application under subsection (4) has yet to be made or determined;
- (b) the person has not been paid in advance the remuneration or expenses to which they entitled; or
- (c) the liquidator has not paid that person travel or other expenses previously incurred.

Examination by liquidator

256. (1) A liquidator or a lawyer acting for a liquidator may administer an oath to, or take the affirmation of, a person required to be questioned under section 255 (1)(c).

(2) A person required to be questioned under section 255 (1)(c) is entitled to be represented by a lawyer.

(3) A liquidator or lawyer acting for a liquidator who questions a person under section 255 (1)(c) shall ensure that the questions and answers are recorded in writing or by means of a sound recording, video and sound recording, or other similar means.

Court may order person to comply with requirement under section 254 or 255

257. On the application of the liquidator, the Court may order a person who has failed to comply with a requirement of a liquidator under section 254 or 255 to comply with that requirement.

Court process for examination and production of documents

258. (1) On the application of the liquidator, the Court may order a person whom section 255 applies to-

- (a) attend the Court and be questioned on oath or affirmation by the Court or the liquidator on any matter relating to the business, accounts, or affairs of the company; and
 - (b) produce any documents relating to the business, accounts, or affairs of the company in that person's possession or under their control.
- (2) Where the person is questioned by the Court or the liquidator under subsection (1)(a)-
- (a) the questions and answers shall be recorded in writing; and
 - (b) the person questioned shall sign the record.

(3) Subject to any directions by the Court, a record of an examination under this section is admissible in evidence in any proceedings under this Part or under section 103.

Restriction on enforcement of lien over company

259. (1) A person is not entitled, as against the liquidator of a company, to claim or enforce a lien over the documents of the company.

(2) Where the lien arises in relation to a debt for the provision of services to the company before the commencement of the liquidation, the debt is a preferential claim against the company under Part 4 of Schedule 8 to the extent of such amount as may be prescribed at the commencement of the liquidation.

- (3) Nothing in this section applies to a company where-
- (a) the liquidator was appointed by the directors or shareholders under section 199(1);
 - (b) the directors passed a resolution of the kind referred to in section 217 (1)(b); and
 - (c) section 217 (2) does not apply in relation to the company.

Documents held by receiver

260. (1) A receiver is not required to deliver to a liquidator any document that the receiver requires for the purpose of exercising any powers or functions as receiver in relation to the property of a company in liquidation.

- (2) The liquidator may from time to time and by notice in writing require the receiver to-
- (a) make any documents available for inspection by the liquidator at any reasonable time or times; and
 - (b) provide the liquidator with copies of any documents or extracts from them.
- (3) The liquidator may take copies of any documents made available or extracts from them.

(4) The liquidator shall pay the reasonable expenses of the receiver in complying with a requirement of the liquidator under subsection (2).

Document held by secured creditor

261. (1) A person shall deliver a document to a liquidator under section 259 even though possession of the document creates a security interest in property of a company.

(2) Production of the document to the liquidator does not prejudice the existence or priority of the security interest, and the liquidator shall make the document available to the person entitled to it for the purpose of dealing with, or realising, the security interest.

Self-incrimination

262. (1) A person is not excused from answering a question in the course of being questioned during, an examination by liquidator or during court process for examination and production of documents, on the ground that the answer may incriminate or tend to incriminate that person.

(2) The testimony of the person questioned is not admissible as evidence in criminal proceedings against that person except on a charge of perjury in relation to that testimony.

ENFORCEMENT OF SHAREHOLDER LIABILITY.

Power to enforce liability of shareholders and former shareholders

263. A liquidator may enforce the liability of a shareholder or former shareholder in respect of any shares issued to the shareholder or former shareholder.

DISCLAIMER OF ONEROUS PROPERTY

Onerous property

264. For the purposes of sections 268 to 270, “onerous property” means-

- (a) an unprofitable contract; or
- (b) property of a company which-
 - (i) is unsaleable;
 - (ii) is not readily saleable; or
 - (iii) may give rise to a liability to pay money or perform an onerous act.

Power to disclaim onerous property

265. (1) A liquidator may disclaim onerous property even though the liquidator has taken possession of it, tried to sell it or otherwise exercised rights of ownership in relation to it.

(2) A liquidator who disclaims onerous property shall, within ten (10) working days after the disclaimer, give notice in writing of the disclaimer to any person whose rights are, to the knowledge of the liquidator, affected by the disclaimer.

Effect of disclaimer

266. (1) A disclaimer-

- (a) brings to an end, on and from the date of the disclaimer, the rights, interests, and liabilities of the company in relation to the property disclaimed; and
- (b) does not, except so far as necessary to release the company from a liability, affect the rights or liabilities of any other person.

(2) A person who suffers loss or damage as a result of a disclaimer under section 268 may-

- (a) claim as a creditor of the company for the amount of the loss or damage, taking account of any order made by the Court under paragraph (b); and
- (b) apply to the Court for an order that the disclaimed property be delivered to or vested in that person.

(3) The Court may make an order under subsection (2) (b) where it is satisfied that it is just and equitable that the property should be vested in the applicant.

Liquidator may be required to elect whether to disclaim

267. (1) A person whose rights would be affected by the disclaimer of onerous property may give the liquidator notice in writing requiring the liquidator to elect whether to disclaim the property before the close of a date specified in the notice (the “specified date”).

(2) The specified date shall be at least twenty eight (28) days after the date on which the notice is received by the liquidator.

(3) The liquidator is not entitled to disclaim the property after the close of the specified date.

SUBPART 8 - COURT SUPERVISION***Court may make orders and give directions in relation to liquidation***

268. (1) On the application of a person listed in subsection (2), the Court may do any of the following-

- (a) give directions in relation to any matter arising in the liquidation;
- (b) confirm, reverse, or modify an act or decision of the liquidator;
- (c) order an audit of the liquidator’s accounts;
- (d) order the liquidator to produce the liquidation accounts and records for audit and to provide the auditor with the information about the conduct of the liquidation that the auditor requests;
- (e) for any period, review or fix the remuneration of the liquidator at a level that is reasonable in the circumstances;

- (f) order the liquidator to repay remuneration to the extent that the Court finds that it is unreasonable in the circumstances;
 - (g) declare whether or not the liquidator was validly appointed or validly assumed custody or control of property; and
 - (h) make an order concerning the retention or the disposition of the liquidation accounts and records or the company accounts and records.
- (2) The persons who may make the application are any of the following -
- (a) the liquidator;
 - (b) a liquidation committee; and
 - (c) with the leave of the Court, a creditor, shareholder, or director of the company in liquidation.
- (3) The powers of the Court under subsection (1)-
- (a) are in addition to any other powers the Court may exercise in its jurisdiction in relation to liquidators under this Act; and
 - (b) may be exercised-
 - (i) in relation to a matter occurring either before or after the liquidation commenced or the removal of the company from the register; and
 - (ii) whether or not the liquidator has ceased to act as liquidator when the application or order is made.

Liquidator's defence of acting in accordance with Court direction

269. (1) A liquidator who acts in accordance with a direction of the Court shall have a defence in relation to anything done or not done in accordance with that direction.

(2) On the application of any person, the Court may order that, because of the circumstances in which the direction was obtained, the liquidator does not have the defence given by subsection (1).

Compliance order

270. (1) On the application of a person listed in section 272 (1), the Court may, where satisfied that there is a failure of liquidator compliance-

- (a) relieve the liquidator of the duty to comply wholly or in part; or
- (b) order the liquidator to comply to the extent specified in the order, which may extend the time for compliance.

(2) An order to comply is made without prejudice to any other remedy that may be available in relation to the failure to comply.

(3) Where a liquidator fails to comply with an order made under subsection (1)(b), the Court may make an order removing the liquidator from office.

(4) In this section and in sections 271 and 272, “failure of liquidator means that a liquidator has failed, or is failing, to comply with a relevant duty arising-

- (a) under this Act or any other enactment or law; or
- (b) any order or direction of the Court (other than an order made under subsection (1)(b)).

Prohibition order

271. (1) This section applies where the Court is satisfied that a person (P) is unfit to act as liquidator because of -

- (a) persistent failures of liquidator compliance; or
- (b) the seriousness of the failure of liquidator compliance.

(2) On the application of a person listed in section 272(1), the Court shall prohibit a person, for a period not exceeding five (5) years, from-

- (a) acting as a liquidator in a current or other liquidation; and
- (b) acting as a receiver in a current or other receivership.

(3) For the purposes of subsection (1)(a), evidence of P’s persistent failures of liquidator compliance includes, in the absence of special reasons to the contrary-

- (a) evidence that, on two (2) or more occasions within the preceding five (5) years, the Court has made a compliance order under section 270 (1)(b) in respect of P; or
- (b) evidence that, on two (2) or more occasions within the preceding five (5) years, an application for a compliance order under section 270 (1)(b) has been made in respect of P and that in each case P complied after the application was made and before the hearing.

(4) The applicant for an order made under this section shall file a copy of the order with the Registrar within fourteen (14) days after the order is made.

Person who may apply for compliance or prohibition order

272. (1) The persons who may make an application under section 270(1) or (3) or 271(2) are any of the following –

- (a) the liquidator;
- (b) a liquidation committee;
- (c) a receiver appointed in relation to the property of the company in liquidation;
- (d) a creditor, shareholder, or director of the company in liquidation; and

(e) the Registrar.

(2) A person other than the liquidator shall not apply for an order under section 270(1)(b) unless-

- (a) notice of the failure of liquidator compliance has been served on the liquidator not less than seven (7) days before the date of the application; and
- (b) as at the date of the application, there is a continuing failure of liquidator compliance.

Subpart 9 - Voidable transactions

Definition of time periods

273. In this subpart -

“2-year period” means-

- (a) the period of two (2) years counted back from the close of the day on which liquidation commences;
- (b) in the case of a company that was put into liquidation by the Court, the period of two (2) years counted back from the close of the day on which the application was filed in the Court plus the period counted forward from that day until the time and date of the order; and
- (c) in the case of the appointment of a liquidator by a resolution of the shareholders or the directors subsequent to an application to the Court, the period of two (2) years counted back from the close of the day on which the application was filed in the Court plus the period counted forward from that day until the date and time of the appointment;

“1-year period” has the same meaning as 2-year period except that “1 year” shall be substituted for “2 years”;

“3-year period” has the same meaning as 2-year period except that “3 years” shall be substituted for “2 years”

“6-month period” has the same meaning as 2-year period except that “6 months” shall be substituted for “2 years”.

INSOLVENT TRANSACTION

Insolvent transaction voidable

274. (1) A transaction by a company is voidable by a liquidator where it is-

- (a) an insolvent transaction;
- (b) entered into otherwise than in the ordinary course of business; and
- (c) entered into within the two (2) year period.

(2) An insolvent transaction is a transaction by a company that-

- (a) is entered into at a time when the company is unable to pay its due debts; and
- (b) enables another person to receive more towards satisfaction of a debt owed by the company than the person would receive, or would be likely to receive, in the company's liquidation.

(3) In this section, "transaction" means any of the following steps by the Company –

- (a) conveying or transferring the company's property;
- (b) giving a security in the property of the company;
- (c) incurring an obligation;
- (d) undergoing an execution process;
- (e) paying money (including paying money in accordance with a judgment or an order of a court); and
- (f) anything done or omitted to be done for the purpose of entering into the transaction or giving effect to it.

(4) A transaction that is entered into within the six (6) month period is presumed, unless the contrary is proved, to be entered into-

- (a) at a time when the company is unable to pay its due debts; and
- (b) otherwise than in the ordinary course of business.

Intent or purpose of company to be disregarded

275. (1) In determining whether a transaction took place in the ordinary course of business, no account is to be taken of any intent or purpose of the company to-

- (a) enable another person to receive more towards satisfaction of a debt owed by the company than the person would receive, or would be likely to receive, in the company's liquidation;
- (b) reduce or cancel the liability, whether in whole or in part, of another person in respect of a debt incurred by the company; or
- (c) contribute towards the satisfaction of the liability, whether in whole or in part, of another person in respect of a debt incurred by the company.

(2) Subsection (1) does not apply if the other person knew that it was the intent or purpose of the company to do any of the things listed in subsection (1)(a), (b), or (c).

Procedure for setting aside insolvent transaction

276. The procedure for setting aside an insolvent transaction is the procedure set out in Schedule 11.

VOIDABLE SECURITY***Voidable security***

277. (1) A security in any property or undertaking of a company is voidable by the liquidator where-

- (a) the security was given within the one (1) year period; and
- (b) immediately after the security was given, the company was unable to pay its due debts.

(2) Unless the contrary is proved, a company giving a security within the six (6) month period is presumed to have been unable to pay its due debts immediately after giving the security.

Exception for money actually advanced, etc

278. Section 277 does not apply where the security secures any of the following things done at the time of, or immediately after, the giving of the security-

- (a) money actually advanced or paid to the company;
- (b) the actual price or value of property sold or supplied to the company; and
- (c) valuable consideration given in good faith by the security holder.

Exception for substituted security

279. (1) Section 277 does not apply where the security is in substitution for a security given before the one (1) year period.

- (2) However, the exception in subsection (1) does not apply to the extent that-
 - (a) the amount secured by the substituted security exceeds the amount secured by the existing security; or
 - (b) the value of the property subject to the substituted security at the date of the substitution exceeds the value of the property subject to the existing security at that date.

Exception for security securing unpaid purchase price

280. Section 277 shall not apply where the security secures the unpaid purchase price of property, whether or not the security is given over that property, if the instrument creating the security is executed-

- (a) not later than thirty (30) days after the sale of the property; or
- (b) in the case of the sale of an estate or interest in land, not later than thirty (30) days after the final settlement of the sale.

Payments received by secured party

281. For the purposes of sections 278 and 279, where a security was given by the company within the one (1) year period, all payments received by the security holder after it was given are taken to have been appropriated so far as may be necessary towards-

- (a) repayment of money actually advanced or paid by the security holder to the company;
- (b) payment of the actual price or value of property sold by the security holder to the company on or after the giving of the security; and
- (c) payment of any other liability of the company to the security holder in respect of any other valuable consideration given in good faith on or after the giving of the security.

Procedure for setting aside voidable security

282. The procedure for setting aside a voidable security is the procedure set out in Schedule 11.

TRANSACTIONS UNDER OR OVER VALUE***Recovery of profit in transaction at undervalue***

283. (1) Under subsection (2), the liquidator of a company may recover from a person ("X") the amount C in the formula $A - B = C$ where-

"A" is the value that X received from the company under a transaction to which the company was or is a party; and

"B" is the value (where any) that the company received from X under the transaction.

(2) The liquidator may recover the difference in value (that is, C in the formula in subsection (1)) from X where-

- (a) the company entered into the transaction within the 2-year period; and
- (b) either -
 - (i) the company was unable to pay its due debts when it entered into the transaction; or
 - (ii) the company became unable to pay its due debts as a result of entering into the transaction.

(3) For the purposes of this section, "transaction" has the same meaning as in section 274(3).

Acquisition for excessive consideration

284. (1) This section applies where-

- (a) a company has acquired a business, property, or services (the “acquisition”) within the three (3) year period;
- (b) the acquisition was acquired from a person listed in subsection (2); and
- (c) the consideration given by the company for the acquisition exceeded its value at the time it was made.

(2) The liquidator may recover the difference between the consideration given for the acquisition and the value at the time it was made from the person from whom it was acquired where that person was, at the time of the acquisition, any of the following –

- (a) a director of the company;
- (b) a nominee or relative of a director;
- (c) a trustee for a director or for a relative of a director;
- (d) a person, or a relative of a person, who controlled the company;
- (e) a company controlled by a person listed in paragraph (a), (b), or (c); or
- (f) a related company.

(3) For the purposes of this section and sections 285 and 286-

- (a) the value of a business or property includes the value of any goodwill attaching to the business or property; and
- (b) without limiting the circumstances in which a company may be taken to be controlled by a person, a person controls a company where that person may, by exercise of a power exercisable by that person, with or without the consent or concurrence of any other person, appoint or remove all the directors of the company, or any number of directors as together hold a majority of voting rights at a meeting of directors.

Disposal for inadequate consideration

285. (1) This section applies where-

- (a) a company has disposed of a business, property, or services (the “disposition”) within the three (3) year period;
- (b) the disposition was made to a person listed in subsection (2); and
- (c) the value of the business, property, or services exceeded the consideration received by the company for the disposition.

(2) The liquidator may recover the difference between the consideration received for the disposal and the value at the time it was made from the person to whom it was disposed where that person was, at the time of the disposition, any of the following –

- (a) a director of the company;

- (b) a nominee or relative of a director;
- (c) a trustee for a director or for a relative of a director;
- (d) a person, or a relative of a person, who controlled the company;
- (e) a company controlled by a person listed in paragraph (a), (b), or (c); or
- (f) a related company.

COURT MAY SET ASIDE SECURITY

Court may set aside security over company property

286. (1) On the application of the liquidator, the Court may, as against the liquidator, set aside a security given by the company over any of its property or undertaking where -

- (a) the company is unable to meet all its debts;
- (b) the security holder is a person listed in subsection (2); or
- (c) the Court considers that it is just and equitable to set the security aside having regard to the considerations set out in subsection (3).

(2) a person referred to in subsection (1)(b) is any of the following at the time when the security was given –

- (a) a director of the company;
- (b) a nominee or relative of a director;
- (c) a trustee for a director or for a relative of a director;
- (d) a person, or a relative of a person, who controlled the company;
- (e) a company controlled by a person listed in paragraph (a), (b), or (c); or
- (f) a related company.

(3) The considerations referred to in subsection (1)(c) are-

- (a) the circumstances in which the security was given;
- (b) the conduct of the security holder in relation to the affairs of the company; and
- (c) any other relevant circumstances.

(4) The Court may make any other orders that it thinks proper for giving effect to an order under this section.

(5) Nothing in any law relating to the registration of an interest or estate in land restricts the operation of this section.

Section 286 does not apply to certain securities

287. Section 286 does not apply to a security that has been transferred by the person (“A”) who was the original security holder and has been purchased by another person, whether or not from A, where-

- (a) at the time of purchase, the purchaser was not a person listed in section 286(2); and
- (b) the purchase was made in good faith and for valuable consideration.

SUBPART 10 - LIABILITY OF DIRECTORS AND OTHERS***Liability if proper accounting records not kept***

288. (1) This section applies where-

- (a) a company in liquidation is unable to pay all its debts;
- (b) the company has failed to comply with the-
 - (i) keeping of accounting records; or
 - (ii) preparation of financial statements; and
- (c) the Court considers that –
 - (i) the failure to comply has-
 - (a) contributed to the company’s inability to pay all its debts;
 - (b) resulted in substantial uncertainty as to the company’s assets and liabilities; or
 - (c) substantially impeded the orderly liquidation; or
 - (ii) for any other reason it is proper to make a declaration under subsection (2).

(2) On the application of the liquidator, the Court may declare that any one (1) or more of the directors or former directors of the company are personally responsible, without limitation of liability, for all or any part of the debts and other liabilities of the company.

(3) The Court may give any direction it thinks fit for giving effect to the declaration.

(4) The Court may make a declaration under this section even though the person concerned is liable to be convicted of an offence.

Defence to liability under section 288

289. The Court shall not make a declaration under section 288 in relation to a person if the Court considers that the person-

- (a) took all reasonable steps to secure compliance by the company with the applicable provision referred to in section 288(1)(b); or

- (b) had reasonable grounds to believe, and did believe, that a competent and reliable person was responsible for ensuring compliance with that provision and was in a position to discharge that responsibility.

Court may require repayment of money or return of property

290. (1) This section applies where it appears to the Court that a person (“P”) listed in subsection (3) has-

- (a) misapplied, or retained, or become liable or accountable for, money or property of a company; or
- (b) been guilty of negligence, default, or breach of duty or trust in relation to a company.

(2) On the application of the liquidator or a creditor or shareholder, the Court may-

- (a) inquire into the conduct of P; and
- (b) order P to -
 - (i) to repay or restore the money or property or any part of it with interest at a rate that the Court thinks just;
 - (ii) to contribute such sum to the assets of the company by way of compensation as the Court thinks just; or
 - (iii) if the application is made by a creditor, to pay or transfer to the creditor the money or property or any part of it with interest at a rate that the Court thinks just.

(3) The persons referred to in subsection (1) are-

- (a) a past or present director of the company;
- (b) a manager or officer of the company; or
- (c) a liquidator or receiver of the company.

(4) This section has effect even though the conduct may constitute an offence.

PART XV - COMPANY RECEIVERSHIPS

SUBPART 1 - GENERAL

Outline of company receivership

291. (1) A receiver is appointed to take control of the property of the company that is subject to a creditor’s security.

(2) A receiver may be appointed-

- (a) by a secured creditor of the company under a power of appointment; or

(b) by the Court, on the application of a secured creditor.

(3) In this Part, unless the context otherwise requires -

“company” means the company in respect of whose property a receiver is appointed; and

“property in receivership” means the property of the company in respect of which a receiver is appointed.

SUBPART 2 - APPOINTMENT OF RECEIVER

Who may be appointed receiver

292. (1) Subject to subsection (3), none of the following persons may be appointed or act as the receiver of a company -

- (a) a corporation;
- (b) a person who is under twenty one (21) years of age;
- (c) a creditor of the company;
- (d) a person who is, or who has within the two (2) years immediately before the commencement of the receivership, been;
 - (i) a director or employee of the company; or
 - (ii) a director or employee of a mortgagee of the property in receivership;
- (e) an undischarged bankrupt in any jurisdiction;
- (f) a person who is prohibited by an order under section 271 from being or continuing as a liquidator;
- (g) a person who is prohibited by an order under section 327 from being or continuing as a receiver;
- (h) a person who is prohibited from being a director or promoter, or being concerned in or taking part in the management, of a company; or
- (i) a person who is disqualified from acting as a receiver by the document that confers the power to appoint a receiver.

(2) A person who contravenes of subsection (1) commits an offence and is liable on conviction to a fine not exceeding One hundred and fifty thousand Emalangeni (E150,000.00) or to a term of imprisonment not exceeding eight (8) years, or both.

(3) The appointment of a person as a receiver without the written consent of that person is of no effect.

(4) On the application of a person who is or becomes disqualified to become or remain a receiver under subsection (1)(b) to (i), the Court may order that the person may be appointed and act, or may continue to act, as a receiver, notwithstanding being disqualified.

Appointment of receiver under document

293. (1) A receiver may be appointed in respect of the property of a company by, or in the exercise of a power conferred by, a document to which the company is a party.

(2) The appointment of a receiver in the exercise of a power conferred by a document shall be in writing.

(3) A receiver appointed under subsection (1) is the agent of the company unless the terms of appointment expressly provide otherwise.

(4) Appointment under subsection (1) is in addition to appointment by the Court.

Extent of power to appoint receiver

294. (1) A power conferred by a document to appoint a receiver includes, unless the document expressly provides otherwise, the power to appoint-

- (a) two (2) or more receivers;
- (b) an additional receiver; or
- (c) a receiver to succeed a receiver who has vacated office.

(2) Two (2) or more receivers may act jointly or severally to the extent that they have the same powers unless the terms of appointment expressly provide otherwise.

Notice of appointment

295. (1) A receiver shall, within seven (7) days after appointment-

- (a) give written notice of appointment to the company;
- (b) give public notice of appointment, including –
 - (i) the receiver's full name;
 - (ii) the date of appointment; and
 - (iii) the receiver's address and contact details, including telephone numbers and postal and email addresses, to which inquiries may be directed during normal business hours; and
 - (iv) a description of the property in receivership; and
- (c) file a copy of the public notice, using the prescribed form, with the Registrar.

(2) Where applicable, a notice under this section shall also state that the receiver is-

- (a) appointed as an additional receiver; or
- (b) appointed as a replacement receiver.

(3) A receiver who fails to comply with this section commits an offence and shall be liable on conviction to a fine not exceeding one hundred and fifty thousand Emalangeni or to a term of imprisonment not exceeding eight years.

Notice of receivership

296. (1) A company or receiver who, in the course of a receivership, issues a document on which the name of the company appears shall ensure that the document clearly states that a receiver has been appointed.

(2) A failure to comply with subsection (1) does not affect the validity of the document.

(3) A person who fails to comply with subsection (1) commits an offence and is liable on conviction to a fine not exceeding One hundred thousand Emalangeni (E100,000.00) or to a term of imprisonment not exceeding six years or both.

SUBPART 3 - VACANCY

Vacancy

297. The office of receiver becomes vacant when the receiver-

- (a) resigns;
- (b) dies;
- (c) is removed by the Court; or
- (d) is or becomes disqualified to act as receiver.

Resignation

298. (1) A receiver resigns by giving written notice of not less than seven (7) days to the person who appointed him or her.

(2) A receiver appointed by the Court resigns by giving written notice of not less than seven (7) days to the Registrar of the Court.

Notice of resignation or disqualification

299. (1) Where a receiver is disqualified, they shall without delay give written notice of the resulting vacancy to the person who appointed them.

(2) Where a receiver resigns or is disqualified, they shall-

- (a) without delay give public notice of the resulting vacancy; and
- (b) within seven (7) days after the vacancy occurred, file a notice, using the prescribed form, of the vacancy with the Registrar.

(3) A person who fails to comply with subsection (1) or (2) commits an offence and is liable on conviction to a fine not exceeding One hundred thousand Emalangeni(E100,000.00) or to a term of imprisonment not exceeding six (6) years or both.

Duty to assist successor

300. (1) A person vacating the office of receiver shall, where practicable, provide the information and give assistance in the conduct of the receivership to his or her successor as that person reasonably requires.

(2) On the application of a replacement receiver, the Court may make any order that the Court considers necessary or desirable to facilitate the performance of the receiver's duties.

SUBPART 4 - DUTIES OF RECEIVER***General duties***

301. (1) A receiver shall exercise given powers in good faith and for a proper purpose.

(2) A receiver shall exercise given powers in a manner that the receiver believes on reasonable grounds to be in the best interests of the person in whose interests he or she was appointed.

(3) To the extent consistent with subsections (1) and (2), a receiver shall exercise given powers with reasonable regard to the interests of-

- (a) the company;
- (b) persons claiming, through the company, interests in the property in receivership;
- (c) unsecured creditors of the company; and
- (d) sureties who may be called upon to fulfil obligations of the company.

(4) Where a receiver appointed under a document acts or refrains from acting in accordance with any directions given by the person in whose interests he or she was appointed, the receiver-

- (a) is not in breach of the duty referred to in subsection (2); and
- (b) is still liable for breach of the duty referred to in subsection (1) or (3).

(5) Nothing in this section limits the duty of a receiver disposing of property in receivership.

Duty of receiver disposing of property in receivership

303. (1) In disposing of the property in receivership, a receiver owes a duty to the persons listed in subsection (2) to act in a commercially reasonable manner.

(2) The duty is owed to-

- (a) the company;
- (b) persons claiming, through the company, interests in the property in receivership;
- (c) unsecured creditors of the company; and
- (d) sureties who may be called upon to fulfil obligations of the company.

(3) A disposition is not commercially unreasonable merely because a better price could have been obtained by disposition at a different time or by a different method from the time and method adopted by the receiver.

(4) In the case of personal property, a disposition of the property is commercially reasonable if the receiver disposes of the property-

- (a) in conformity with commercial practice among dealers in that type of property; or
- (b) at a public auction held after public notice of not less than five (5) working days.

(5) Where the Court has given directions for the disposition of the property in receivership, disposition in accordance with those directions is commercially reasonable, but nothing in this section requires that the directions of the Court be obtained.

No defence or indemnity

304. Notwithstanding any law or rule of law or anything contained in the document under which a receiver is appointed-

- (a) it is not a defence to a breach of the duty in section 303 that the receiver was acting as the company's agent or under a power of attorney from the company; and
- (b) a receiver is not entitled to compensation or indemnity from the property in receivership or the company for any liability for breach of the duty in section 308.

Duty in relation to money

305. A receiver shall keep money relating to the property in receivership separate from-

- (a) the other money received in the course of, but not relating to, the receivership; and
- (b) other money held by or under the control of the receiver.

Duty in relation to accounting records

306. (1) A receiver shall at all times keep accounting records that correctly record and explain the receipts, expenditure, and other transactions relating to the property in receivership.

(2) The receiver shall retain the accounting records for not less than seven (7) years after the receivership ends.

Duty to notify suspected offences, etc

307. (1) A receiver of a company shall notify the Registrar in writing where the receiver considers that-

- (a) the company or any director or officer of the company has committed an offence under this Act; or
- (b) any director or officer of the company has been guilty of any default, breach of duty, or breach of trust in relation to the company.

(2) A report made under subsection (1), and any communication between the receiver and the Registrar relating to that report, are protected by absolute privilege.

(3) Nothing in subsection (1) imposes a duty on a receiver to investigate whether an offence has been committed.

(4) A receiver who fails to comply with subsection (1) commits an offence and is liable on conviction to a fine not exceeding One hundred thousand Emalangeni (E100,000.00) or to a term of imprisonment not exceeding six (6) years or both.

Duty to prepare reports

308. (1) A receiver shall prepare the following reports-

- (a) an initial report that complies with clause 1 of Schedule 13;
- (b) interim reports that comply with clause 2 of Schedule 13 for each 6-month period after appointment; and
- (c) a final report that complies with clause 3 of Schedule 13 at the end the receivership.

(2) The receiver shall prepare-

- (a) the initial report within two (2) months after appointment;
- (b) an interim report within two (2) months after the end of the period to which it relates; and
- (c) the final report within two (2) months after the end of the receivership.

(3) On the application of the receiver, the time for preparing a report may be extended by-

- (a) the Court, in the case of a receiver appointed by the Court; or
- (b) the Registrar, in all other cases.

(4) In this section and section 309 “receiver” includes the person who was receiver at the end of the receivership.

(5) A person who fails to comply with this section commits an offence and is liable on conviction to a fine not exceeding One hundred and fifty thousand Emalangeni (E150,000.00) or to a term of imprisonment not exceeding eight (8) years or both.

Persons entitled to receive and inspect receiver’s reports

309. (1) A receiver shall send a copy of each report required under section 308 -

- (a) within seven (7) days after preparing it, to each of the following –
 - (i) the company;
 - (ii) the person in whose interests the receiver was appointed;

- (iii) the Registrar, using the prescribed form; and
- (iv) the Registrar of the Court, if the receiver was appointed by the Court; and
- (b) to any of the following, within twenty-one (21) days of a written request for a copy and on payment of the reasonable cost of making and sending the copy -
 - (i) a creditor, director, or surety of the company;
 - (ii) any other person with an interest in the receivership; and
 - (iii) the authorised agent of a person referred to in subparagraph (i) or (ii).

(2) A person entitled to receive a receiver's report is entitled to inspect it at the office of the receiver during normal business hours.

(3) A person who fails to comply with this section commits an offence and is liable on conviction to a fine not exceeding One hundred thousand Emalangeni (E100,000.00) or to a term of imprisonment not exceeding six (6) years or both.

SUBPART 5 - POWERS OF RECEIVER

General powers

310. A receiver has the powers expressly or impliedly conferred by the terms of appointment.

Specific powers

311. Subject to the terms of appointment, a receiver may do any of the following:

- (a) demand and recover income of the property in receivership;
- (b) issue receipts for income recovered;
- (c) manage the property in receivership;
- (d) insure the property in receivership;
- (e) repair and maintain the property in receivership;
- (f) inspect at any reasonable time documents that relate to the property in receivership and are in the possession or under the control of the company;
- (g) exercise, on behalf of the company, a right to inspect documents that relate to the property in receivership and that are in the possession or under the control of a person other than the company; and
- (h) buy and sell the property in receivership in the ordinary course of business.

Power to execute documents

312. (1) A receiver may execute in the name and on behalf of the company all documents necessary or incidental to the exercise of the receiver's powers.

(2) A document signed by a receiver on behalf of the company shall be taken to have been properly executed.

Power to sell real property in absence of mortgagee's consent

313. (1) This section applies where a receiver is unable to obtain the requisite consent of a mortgagee to the sale of real property in the receivership.

(2) On an application by the receiver, the Court may make any order that it thinks fit authorising the receiver to sell the property, alone or together with other assets, where the Court is satisfied that-

- (a) the receiver has made reasonable efforts to obtain the mortgagee's consent; and
- (b) the sale-
 - (i) is in the interests of the company and the company's creditors; and
 - (ii) will not substantially prejudice the interests of the mortgagee.

(3) An order under subsection (2) may be made on the terms and conditions that the Court thinks fit.

Power of receiver on liquidation

314. (1) Subject to subsection (2), a receiver may, unless the Court orders otherwise, be appointed or continue to act as a receiver and exercise all the powers of a receiver in respect of property of a company in liquidation.

(2) A receiver in respect of property of a company in liquidation may act as the agent of the company only-

- (a) with the approval of the Court; or
- (b) with the written consent of the liquidator.

(3) A person who is excluded by subsection (2) from acting as the agent of the company does not on that account become the agent of a person by whom or in whose interests the receiver was appointed.

(4) A debt or liability incurred by a company through the acts of a receiver acting as the agent of the company is not a cost, charge, or expense of the liquidation.

Validity of receiver's acts

315. (1) The act of a receiver is not invalid merely because of any of the following defects-

- (a) the receiver was not validly appointed;
- (b) the receiver is disqualified as a receiver; or
- (c) the receiver is not authorised to do the act.

(2) Subsection (1) does not apply to a transaction entered into by a receiver where the person dealing with the receiver-

- (a) knows of a defect listed in subsection (1); or
- (b) ought to know of that defect by reason of the person's relationship with the receiver or the receiver's appointor.

SUBPART 6 - LIABILITY OF RECEIVER

Contractual liability

316. (1) A receiver is personally liable on a contract entered into in the exercise of any of the receiver's powers.

(2) The contract may exclude or limit the personal liability of a receiver who is not appointed by the Court.

Liability for wages or salary under existing contract of employment

317. (1) A receiver is personally liable for payment of wages or salary that accrue under a contract of employment entered into before the receiver's appointment where-

- (a) the wages or salary accrue during the receivership; and
- (b) the contract of employment relates to the property in receivership.

(2) Subsection (1) does not apply where, within fourteen (14) days after the appointment, the receiver gives notice lawfully terminating the contract of employment.

(3) On the application of the receiver and on any conditions that the Court thinks fit, the Court may extend the period for terminating the contract after appointment.

(4) The application shall be made before the expiry of the fourteen (14) day period.

Liability for director's remuneration

318. A receiver is personally liable for the payment of remuneration under a contract with a director of the company where the receiver has expressly confirmed the contract.

Liability for rent and other payments

319. (1) This section applies where-

- (a) rent and any other payments become due under an agreement in force at the date of appointment of a receiver; and
- (b) the rent and payments relate to the use, possession, or occupation by the company of property in receivership.

(2) The receiver is personally liable for that portion of the rent or other payments that accrues in the period beginning fourteen (14) days after the date of appointment and ending on the earlier of-

- (a) the date on which the receivership ends; or
- (b) the date on which the company ceases to use, possess, or occupy the property.

(3) The Court may, on the application of a receiver-

- (a) excuse the receiver from liability under this section; or
- (b) limit the liability of the receiver to a greater extent than specified in this section.

(4) Nothing in this section-

- (a) shall be taken as giving rise to an adoption by a receiver of an agreement referred to in subsection (1)(a); or
- (b) renders a receiver liable to perform any other obligation under the agreement.

Liability on contract entered into without authority

320. Nothing in sections 316 to 319 -

- (a) limits the liability of a receiver on a contract entered into without authority; or
- (b) confers on a receiver a right to an indemnity in respect of liability on a contract entered into without authority.

RELIEF FROM LIABILITY

Receiver is entitled to indemnity

321. A receiver is entitled to an indemnity out of the property in receivership in respect of the receiver's liability under sections 316 to 319.

Court may relieve receiver from liability

322. (1) The Court may make an order relieving a person who has acted as a receiver from all or any personal liability incurred in the course of the receivership if the Court is satisfied that-

- (a) the liability was incurred solely by reason of a defect in the receiver's appointment or in the document or order of Court under which the receiver was appointed;
- (b) the receiver acted honestly and reasonably; and
- (c) the receiver ought, in the circumstances, to be excused.

(2) The Court may make the order on any terms and conditions that it thinks fit.

(3) A person in whose interests a receiver was appointed is liable, subject to any terms and conditions that the Court thinks fit, to the extent that the receiver is relieved from liability under subsection (1).

SUBPART 7 - COURT SUPERVISION

Court may give directions in relation to receivership

323. On the application of a receiver, the Court may-

- (a) give directions in relation to any matter arising in the receivership; or
- (b) revoke or vary those directions.

Court may make orders in relation to remuneration and validity of appointment

324. (1) On the application of a person listed in subsection (2), the Court may-

- (a) for any period, review or fix a receiver's remuneration at a level that is reasonable in the circumstances;
- (b) order a receiver to refund remuneration in excess of what the Court finds is reasonable remuneration in the circumstances;
- (c) declare whether or not a receiver was validly appointed in respect of any property;
- (d) declare whether or not a receiver validly entered into possession or assumed control of any property; or
- (e) revoke or vary an order made under this subsection.

(2) The persons who may make an application under subsection (1) are any of the following –

- (a) the receiver;
- (b) the company;
- (c) a creditor of the company;
- (d) a person claiming, through the company, an interest in the property in receivership;
- (e) the directors of the company or, if the company is in liquidation, the directors of the company at the time the liquidator was appointed; and
- (f) where the company is in liquidation, the liquidator.

(3) The powers of the Court under this section or section 322 may be exercised whether or not the receiver has ceased to act as receiver when the application is made.

Receiver's defence of acting in accordance with Court direction

325. (1) A receiver who acts in accordance with a direction of the Court has a defence in relation to anything done or not done in accordance with that direction.

(2) On the application of any person, the Court may order that, because of the circumstances in which the direction was obtained, the receiver does not have the defence given by subsection (1).

Compliance order

326. (1) On the application of a person listed in section 328 (1), the Court may, where satisfied that there is a failure of compliance-

- (a) relieve the receiver of the duty to comply wholly or in part; or
- (b) order the receiver to comply to the extent specified in the order (which may extend the time for compliance).

(2) An order to comply is made without prejudice to any other remedy that may be available in relation to the failure to comply.

(3) Where a receiver fails to comply with an order made under subsection (1)(b), the Court may make an order removing the receiver from office.

(4) In this section, “failure of compliance” means that a receiver has failed, or is failing, to comply with a relevant duty arising-

- (a) under this Act or any other enactment or law; or
- (b) any order or direction of the Court (other than an order made under subsection (1)(b)).

Prohibition order

327. (1) This section applies where the Court is satisfied that a person is unfit to act as receiver because of -

- (a) the seriousness of their failure of compliance; or
- (b) persistent failures of compliance on their part.

(2) On the application of a person listed in section 328(1), the Court shall prohibit P, for a period not exceeding five (5) years, from-

- (a) acting as a receiver in a current or other receivership; or
- (b) acting as a liquidator in a current or other liquidation.

(3) For the purposes of subsection (1)(b), evidence of the person’s persistent failures of compliance includes, in the absence of special reasons to the contrary –

- (a) evidence that, on two (2) or more occasions within the preceding five (5) years, the Court has made a compliance order under section 270(1)(b) or 326 (1)(b) in respect of P;
- (b) evidence that, within the preceding five (5) years and in respect of P, the Court has made one (1) or more orders under section 270 (1)(b) and one (1) or more orders under section 326 (1)(b);

- (c) evidence that on two (2) or more occasions within the preceding five (5) years, an application for a compliance order under section 270 (1)(b) or 326(1)(b) has been made in respect of P and that in each case P complied after the application was made and before the hearing; and
- (d) evidence that, within the preceding five (5) years and in respect of P, there have been one (1) or more applications for an order under section 270(1)(b) and one (1) or more applications for an order under section 326(1)(b) and that in each case P complied after the application was made and before the hearing.

(4) The applicant for an order made under this section shall file a copy of the order with the Registrar within fourteen (14) days after the order is made and the Registrar shall file the order by reference to the name of the person subject to the order.

Person who may apply for compliance or prohibition orders

328. (1) The persons who may make an application for an order under section 326 (1) or (3) or 327(2) are any of the following –

- (a) the Registrar;
- (b) a receiver;
- (c) a person seeking appointment as a receiver;
- (d) the company;
- (e) a creditor of the company;
- (f) a person claiming, through the company, an interest in the property in receivership;
- (g) a guarantor of an obligation of the company; and
- (h) if the company is in liquidation, the liquidator.

(2) A person shall not apply for an order under section 326(1) unless-

- (a) notice of the failure of compliance has been served on the receiver not less than seven (7) days before the date of the application; and
- (b) as at the date of the application, there is a continuing failure of compliance.

Order protecting property in receivership

329. The Court may, on making an order that removes or has the effect of removing a receiver from office, make the orders that it thinks fit-

- (a) for preserving the property in receivership; or
- (b) requiring the receiver for that purpose to make available to any person specified in the order any information and documents in or under the receiver's possession or control.

Court may terminate or limit receivership

330. (1) On the application of a person listed in subsection (2), the Court may make an order-

- (a) terminating the receivership, including prohibiting the appointment of another receiver; or
- (b) limiting the receivership to specified assets.

(2) The persons who may make an application under subsection (1) are-

- (a) the company; or
- (b) where the company is in liquidation, the liquidator.

(3) An order under this section-

- (a) may be made only where the Court is satisfied that the purpose of the receivership has as far as possible been met or that its continuation is not justified;
- (b) may include an order prohibiting a person in whose interests the receiver was appointed from taking possession or assuming control of the property in receivership;
- (c) may be made on the terms and conditions that the Court thinks fit;
- (d) may be rescinded or amended on the application of any person who applied for the order or who is affected by it; and
- (e) except for an order under paragraph (b), does not affect a security or charge over the property to which the order relates.

(4) Unless the Court orders otherwise-

- (a) a copy of an application under this section shall be served on the receiver not less than seven (7) days before the hearing of the application; and
- (b) the receiver may appear and make submissions at the hearing.

SUBPART 8 - SUPPLY OF ESSENTIAL SERVICES***Obligations of suppliers of essential services***

331. (1) Notwithstanding any other law or contract, a supplier of an essential service shall not-

- (a) refuse to supply the service to a receiver or to the company on the ground that the company has defaulted in paying charges due for the service for a period before the date of the appointment of the receiver; or
- (b) make it a condition of the supply of the service to a receiver or to the company that payment be made of outstanding charges due for the service for a period before the appointment of the receiver.

(2) In this section, “essential service” means-

- (a) the retail supply of gas;
- (b) the retail supply of electricity;
- (c) the supply of water;
- (d) the retail supply of fuel and other similar consumable items necessary for the generation of electricity; or
- (e) telecommunications services.

PART XVI - BUSINESS RECOVERY

SUBPART 1 - GENERAL

Object of administration

332. The object of an administration (“an administration”) under this Part is to administer the business, property and affairs of an insolvent company or a company that may in the future become insolvent, in a way that-

- (a) maximises the chances of the company, or as much as possible of its business, continuing in existence; or
- (b) where it is not possible for the company or its business to continue in existence, results in a better return for the company’s creditors and shareholders than would result from an immediate liquidation of the company.

Interpretation for this Part

333. In this Part, unless the context otherwise requires-

“administration” means an administration under this Part;

“creditor”, in relation to a company, includes-

- (a) a person who, in the liquidation of the company, would be entitled to claim under clause 1 of Schedule 8 that a debt is owing to that person by the company; and
- (b) a secured creditor;

“financially distressed”, in relation to a company, means that the company is likely to be insolvent within the immediately ensuing 6 months;

“independent creditor”, in relation to a company in administration, means a creditor who is not-

- (a) a director or shareholder of the company; or
- (b) a relative of a director or shareholder of the company;

“insolvent”, in relation to a company, means that-

- (a) the company is unable to pay its debts as they become due in the normal course of business; and

- (b) the value of the company's assets is less than the value of its liabilities, including its contingent liabilities;

“security agreement” means an agreement under which property becomes subject to a security for the performance of an obligation;

SUBPART 2 - COMMENCEMENT

When administration commences

334. (1) The administration of a company commences with the appointment of an administrator under this Part.

(2) An administrator may be appointed by-

- (a) the company;
- (b) where the company is in liquidation, the liquidator;
- (c) a secured creditor holding a security over the whole, or substantially the whole, of the company's property which includes both real and personal property; or
- (d) the Court.

Appointment by company

335. (1) The board of a company may appoint an administrator by a resolution that complies with subsection (2) where the board has reasonable grounds for believing that-

- (a) the company is financially distressed; and
- (b) the appointment of the administrator is necessary or expedient for-
 - (i) maintaining the company as a going concern;
 - (ii) achieving a better outcome for the company's creditors as a whole than is likely to be the case if the company were to be liquidated; or
 - (iii) realising the property of the company in order to make a distribution to one (1) or more secured or preferential creditors.

(2) The resolution shall-

- (a) be recorded in writing;
- (b) be dated;
- (c) name the administrator or administrators where there is more than one; and
- (d) be signed by the directors voting in favour of the resolution.

(3) The company shall not appoint an administrator where the company is already in liquidation.

(4) The company shall, within seven (7) days of the resolution-

- (a) file a notice of the appointment in the prescribed form with the Registrar; and
- (b) give written notice of the appointment to each shareholder and known creditor.

Objection to appointment of administrator by company

336. At any time before the adoption of a business recovery plan under section 370, a creditor or shareholder of the company, or a director who voted against the resolution appointing the administrator, may apply to the Court for an order:

- (a) setting aside the appointment by the company on the grounds that-
 - (i) there are no reasonable grounds for believing that the company is insolvent or that appointment of an administrator is necessary or expedient; or
 - (ii) the company has failed to give notice in accordance with section 335 (4);
- (b) setting aside the appointment by the company on the grounds that the administrator-
 - (i) is not qualified as required by section 341;
 - (ii) is not independent of the company or its management; or
 - (iii) lacks the necessary skills, having regard to the company's circumstances; or
- (c) requiring the administrator to provide security in an amount and on terms and conditions that the Court considers necessary, to secure the interests of the company and its creditors and shareholders.

Appointment by major creditor

337. (1) A major creditor may appoint an administrator where that creditor's security has become, and is still, at risk.

(2) The appointment shall-

- (a) be recorded in writing;
- (b) be dated;
- (c) name the administrator or administrators where there is more than one (1); and
- (d) be signed by the creditor.

(3) The creditor shall not appoint an administrator where the company is already in liquidation.

(4) The creditor shall, within seven (7) days of the appointment-

- (a) file a notice of the appointment in the prescribed form with the Registrar; and

(b) give written notice of the appointment to each shareholder and known creditor.

(5) In this section-

“at risk”, in relation to a major creditor’s security, means that the creditor has commercially reasonable grounds to believe-

(a) the collateral for the security has been or will be destroyed, damaged, endangered, disassembled, removed or concealed contrary to the terms of the security; or

(b) the debtor is or will be unable to pay or perform the debtor’s obligations under the terms of the security; and

“major creditor” means a person who holds a security over the whole, or substantially the whole, of the company’s property.

Appointment by Court

338. (1) The Court may appoint an administrator on the application of a creditor, the liquidator, where the company is in liquidation, or the Registrar.

(2) The Court may appoint an administrator where -

(a) the Court is satisfied that the company is or may become financially distressed and that an administration is likely to result in a better return for the company’s creditors and shareholders than would result from an immediate liquidation of the company; or

(b) it is just and equitable to do so.

Administrator’s notice of appointment

339. (1) An administrator shall, within seven (7) days after appointment-

(a) where appointed by the Court or a major creditor, give written notice of appointment to the company;

(b) give public notice of appointment, including-

(i) the administrator’s full name;

(ii) the date of appointment; and

(iii) the administrator’s address and contact details, including telephone numbers and postal and email addresses, to which inquiries may be directed during normal business hours; and

(c) file a copy of the public notice with the Registrar.

(2) Where applicable, a notice under this section shall also state that the administrator is-

(a) appointed as an additional administrator; or

- (b) appointed as a replacement administrator.

(3) An administrator who fails to comply with this section commits an offence and is liable on conviction to a fine not exceeding one hundred thousand Emalangeni (E100 000 00) or to a term of imprisonment not exceeding six (6) years or to both.

When administration terminates

340. The administration of a company under this Part terminates-

- (a) on the filing by the administrator of a notice of termination;
- (b) on the appointment by the Court of a liquidator; or
- (c) in the case of an order of Court setting aside or otherwise terminating the administration, on the date and time specified in the order.

SUBPART 3 - ADMINISTRATOR

Qualifications

341. An administrator shall be a person who is qualified to be appointed a receiver under Part XV.

Remuneration

342. (1) An administrator is entitled to paid remuneration at the prescribed rate.

(2) An administrator who receives remuneration knowing that it exceeds the prescribed rate-

- (a) is personally liable to reimburse the amount of the excess remuneration so collected; and
- (b) commits an offence and is liable, on conviction, to a fine not exceeding One hundred and fifty thousand Emalangeni (E150,000.00) or to a term of imprisonment not exceeding eight (8) years, or both.

(3) An administrator's claim for remuneration, to the extent that the claim remains unpaid, ranks in priority to the claims of all other secured and unsecured creditors.

(4) In this section, "remuneration" includes reimbursement of expenses properly incurred.

SUBPART 4 - VACANCY IN THE OFFICE OF ADMINISTRATOR

Vacancy

343. (1) The office of administrator becomes vacant where the administrator-

- (a) resigns;
- (b) dies;

- (c) is removed by the Court; or
 - (d) is or becomes disqualified to act as administrator.
- (2) The Court may remove an administrator on any of the following grounds-
- (a) incompetence or failure to perform duties;
 - (b) failure to exercise the proper degree of care in the performance of the administrator's functions;
 - (c) engaging in illegal acts or conduct;
 - (d) conflict of interest or lack of independence; or
 - (e) incapacity such that the administrator is unable to perform the functions of administrator and is unlikely to regain the capacity to do so within a reasonable time.

Resignation

344. (1) An administrator resigns by giving written notice of not less than seven (7) days to the person who appointed them.

(2) An administrator appointed by the Court resigns by giving written notice of not less than seven (7) days to the Registrar of the Court.

Notice of resignation or disqualification

345. (1) Where an administrator is disqualified, the administrator shall without delay give written notice of the resulting vacancy to the person by whom they were appointed.

(2) Where an administrator resigns or is disqualified, the administrator shall-

- (a) without delay give public notice of the resulting vacancy; and
- (b) within seven (7) days after the vacancy occurred, file a notice of the vacancy with the Registrar.

(3) A person who fails to comply with subsection (1) or (2) commits an offence and is liable on conviction to a fine not exceeding One hundred thousand Emalangeni (E100.000.00) or to a term of imprisonment not exceeding six (6) years or both.

Duty to assist successor

346. (1) A person vacating the office of administrator shall, where practicable, provide the information and give assistance in the conduct of the administration to their successor as that person reasonably requires.

(2) On the application of a replacement administrator, the Court may make any order that the Court considers necessary or desirable to facilitate the performance of the administrator's duties.

Notice of change in contact details

347. Within seven (7) days of a change in the administrator's contact details, including a change following the appointment of a replacement administrator, the administrator or replacement administrator, as the case may be, shall-

- (a) file a notice of change of details in the prescribed form with the Registrar; and
- (b) give written notice of the change to each shareholder and known creditor.

SUBPART 5 - POWERS OF ADMINISTRATOR***General powers***

348. (1) An administrator, in the course of the administration, has in addition to any other powers and duties set out in this Part-

- (a) full management control of the company in substitution for the board and the pre-existing management;
- (b) the power to delegate any power or function to a person who was part of the board or pre-existing management of the company;
- (c) the power to appoint a person as part of the management of a company, subject to subsection (2); and
- (d) the responsibility to-
 - (i) develop a business recovery plan to be considered by affected persons under section 366;
 - (ii) implement a business recovery plan that is adopted under section 371; and
 - (iii) issue any notices required to be issued in relation to the administration.

(2) An administrator shall not, except with the approval of the Court, appoint a person as part of the management of the company or an advisor to the company or administrator, where that person-

- (a) has any relationship with the company that would lead a reasonable and informed third party to conclude that the integrity, impartiality or objectivity of that person is compromised by that relationship; or
- (b) is related to a person who has a relationship with the company as provided in paragraph (a).

Liability of administrator

349. An administrator, during the administration-

- (a) has the responsibilities, duties and liabilities of a director of the company; and

- (b) is not liable for any act or omission done in good faith in the exercise of the powers and performance of the functions of the administrator, except-
 - (i) as provided in paragraph (a); and
 - (ii) in accordance with any relevant law for the consequences of any act or omission amounting to gross negligence in the exercise of the powers and performance of the functions of the administrator.

SUBPART 6 - EFFECT OF APPOINTMENT OF ADMINISTRATOR

Moratorium

350. (1) A legal proceeding shall not be brought, against a company or in relation to any property belonging to the company or lawfully in its possession, during the administration of the company, except-

- (a) with the written consent of the administrator;
- (b) with the leave of the Court and in accordance with any terms and conditions the Court considers appropriate in any particular matter related to the administration;
- (c) as a set-off against any claim made by the company in any other legal proceedings, irrespective of whether those proceedings commenced before or after the administration commenced;
- (d) in the case of a criminal proceeding against any of the company's directors or officers; or
- (e) in the case of a proceeding concerning any property or right over which the company exercises the powers of a trustee.

(2) A guarantee or surety by a company in favour of any other person may not be enforced by any person against the company during the administration of the company, except with leave of the Court and in accordance with any terms and conditions the Court considers appropriate in the circumstances.

(3) A time limit for commencing proceedings or otherwise asserting a claim against a company is extended by any period during which the company is in administration.

Protection of property interests

351. (1) Subject to subsections (2) and (3), during the administration of a Company-

- (a) the company may dispose, or agree to dispose, of property only-
 - (i) in the ordinary course of its business;
 - (ii) in a bona fide transaction at arm's length for fair value and with the written prior approval of the administrator; or
 - (iii) in a transaction specified within, and undertaken as part of the implementation of, a business recovery plan that has been approved under section 372;

- (b) a person who, as a result of an agreement made in the ordinary course of the company's business before the administration began, is in lawful possession of any property owned by the company, may continue to exercise any right in respect of that property as specified in that agreement, subject to section 354; and
- (c) a person shall not exercise any right in respect of any property in the lawful possession of the company, irrespective of whether the property is owned by the company, except to the extent that the administrator consents in writing.

(2) An administrator shall not unreasonably withhold consent under subsection (1)(c), having regard to-

- (a) the purposes of this Part;
- (b) the circumstances of the company; and
- (c) the nature of the property and the rights claimed in respect of it.

(3) Where the company, during its administration, wishes to dispose of any property over which another person has a security or title interest, the company shall-

- (a) obtain the prior consent of that person, unless the proceeds of the disposal is sufficient to fully discharge the indebtedness protected by the person's security or title interest; and
- (b) promptly-
 - (i) pay to the person the amount, from the proceeds of the sale of the property, that the company owes the person; or
 - (ii) provide security for the amount the company owes the person.

Post-commencement financing

352. (1) Where a company is required to pay any remuneration or reimbursement for expenses or other amount of money relating to an employee, during the company's administration, and the company fails to pay, the money shall be-

- (a) regarded as post-commencement financing; and
- (b) paid in the order of preference set out in subsection (3)(a).

(2) The company may, during its administration, obtain financing which-

- (a) may be secured to the lender by an asset of the company to the extent that the asset is not otherwise encumbered; and
- (b) shall be paid in the order of preference set out in subsection (3)(b).

(3) After the payment of the administrator's remuneration and expenses, and other costs arising out of the administration-

- (a) the claims specified in subsection (1):

(i) rank equally with each other; and

(ii) rank in preference to-

(A) claims specified in subsection (2), irrespective of whether they are secured or unsecured; and

(B) unsecured claims against the company; and

(b) the claims specified in subsection (2) rank in preference in the order in which they were incurred over all unsecured claims against the company.

(4) Where an administration is superseded by a liquidation order, the preference conferred under this section applies in the liquidation also, except to the extent of any claims arising out of the costs of liquidation.

Employees

353. Notwithstanding a provision of any agreement to the contrary-

(a) the employees of a company immediately before the commencement of its administration continue to be employed during the administration on the same terms and conditions, subject to -

(i) changes in personnel through the ordinary course of attrition; or

(ii) an variation in terms and conditions agreed between the company and its employees in accordance with applicable employment laws; and

(b) the redundancy or retrenchment of an employee under a business recovery plan is subject to applicable employment laws.

Contracts

354. (1) Notwithstanding a provision of any agreement to the contrary and subject to subsection (2), an administrator may, with leave of the Court, cancel or conditionally suspend in whole or in part, an agreement to which the company was a party at the commencement of its administration.

(2) Subsection (1) does not apply to a contract of employment.

(3) The cancellation or suspension of an agreement under subsection (1) entitles a party to assert a claim, as against the company, in damages only.

(4) Where liquidation proceedings are converted into an administration, the liquidator is a creditor of the company to the extent of any outstanding claim by the liquidator for any remuneration due for work performed or compensation for expenses incurred before the administration commenced.

Securities

355. An alteration in the classification or status of any issued securities of a company, during its administration, other than by a transfer of securities in the ordinary course of business, is invalid unless-

- (a) the Court otherwise directs; or
- (b) it is specified in an approved business recovery plan.

Directors

356. (1) A director of the company during its administration-

- (a) continues to exercise the functions of a director, subject to the authority of the administrator; and
- (b) shall exercise any management function within the company, in accordance with the express instructions or direction of the administrator, to the extent that it is reasonable so to do; and
- (c) remains bound by the common law and statutory duties of a director.

(2) A director shall, during an administration, attend to the requests of the administrator and provide the administrator with any information about the company's affairs.

(3) A board or director shall not, during an administration, take any action on behalf of the company without obtaining the approval of the administrator.

(4) An administrator may, during an administration, remove a director from office on the grounds that the director has-

- (a) failed to comply with a requirement of this Part; or
- (b) by act or omission, impeded or is impeding-
 - (i) the administrator in the performance of his or her powers and functions or in the management of the company; or
 - (ii) the development or implementation of a business recovery plan in accordance with this Part.

SUBPART 7 - CREDITOR AND SHAREHOLDERS

Participation by creditors

357. (1) A creditor of a company in administration is entitled-

- (a) to receive a notice of every Court proceeding, decision, meeting or other event concerning the administration; and
- (b) to participate in any Court proceeding arising during the administration; and
- (c) to participate in the administration to the extent provided in this Part; and
- (d) to vote to amend, approve or reject a proposed business recovery plan as provided in this Part; and
- (e) where the proposed business recovery plan is rejected, to-

- (i) propose the development of an alternative plan as provided in this Part, within thirty (30) days; or
- (ii) present an offer to acquire the interests of any or all of the other creditors, as provided in this Part, within thirty (30) days.

Participation by shareholders

358. A shareholder of a company in administration is entitled-

- (a) to receive a notice of each Court proceeding, decision, meeting or other relevant event concerning the administration; and
- (b) to participate in any Court proceedings arising during the administration; and
- (c) to participate in the business rescue proceedings to the extent provided for in this Part; and
- (d) to vote to amend, approve or reject a proposed business recovery plan as provided in this Part, if the plan would alter the rights associated with the class of shares held by that person; and
- (e) where the business recovery plan is rejected-
 - (i) to propose the development of an alternative plan, as provided in this Part; or
 - (ii) to present an offer to acquire the interests of any or all of the creditors or other holders of the company's securities, as provided in this Part.

Voting interests of creditors and shareholders

359. For the purposes of this Part-

- (a) a creditor of a company in administration has a voting interest equal to the value of the amount that the creditor is owed by the company; and
- (b) a shareholder of a company in administration has a voting interest equal to the number of shares held in the class of shares affected by a proposal under the business recovery plan to alter the rights associated with that class of shares.

SUBPART 8 - ADMINISTRATOR'S INITIAL STEPS

Investigation of company's affairs

360. (1) An administrator shall, as soon as practicable after being appointed-

- (a) investigate the affairs, business, property and financial situation of the company; and
- (b) consider whether there is any reasonable prospect of the recovery of the company.

(2) Where, during the administration, the administrator concludes that-

- (a) there is no reasonable prospect of recovery of the company, the administrator:
 - (i) shall inform the Court, the company and all affected persons; and
 - (ii) apply to the Court for an order discontinuing the administration and appointing a liquidator; or
- (b) there are no reasonable grounds to believe that the company is insolvent, the administrator shall.
 - (i) notify the Court, the company and all affected persons accordingly; and
 - (ii) in the case of an administration confirmed or ordered by the Court, apply to the Court for an order terminating the administration; or
 - (iii) in all other cases, file a notice of termination of the administration with the Registrar.

Duty to notify suspected offences, etc

361. (1) An administrator of a company shall notify the Registrar in writing where the administrator considers that-

- (a) the company or any director or officer of the company has committed an offence under this Act; or
- (b) any director or officer of the company has been guilty of any default, breach of duty, or breach of trust in relation to the company.

(2) A report made under subsection (1), and any communication between the administrator and the Registrar relating to that report, are protected by absolute privilege.

(3) Nothing in subsection (1) imposes a duty on an administrator to investigate whether an offence has been committed.

(4) An administrator who fails to comply with subsection (1) commits an offence and is liable on conviction to a fine not exceeding One hundred thousand Emalangeni (E100,000.00) or to a term of imprisonment not exceeding six (6) years or both.

362. (1) A director of a company shall, within fourteen (14) days after commencement of the administration of the company, deliver to the administrator all documents and records relating to the affairs of the company that are in the director's possession or control.

(2) A director who knows where the documents and records relating to the company are kept shall, within fourteen (14) days after commencement of the administration, inform the administrator of such locations.

(3) A person who contravenes this section commits an offence and is liable on conviction to a fine not exceeding One hundred thousand Emalangeni (E100,000.00) or to imprisonment for a term not exceeding six (6) or both.

Board shall compile statement of affairs

363. (1) The board of a company in administration shall, within fourteen (14) days after the administration commenced, or such longer period as the administrator allows, provide the administrator with a statement of affairs containing, at a minimum, particulars of the following -

- (a) any material transaction involving the company or the assets of the company, and occurring within twelve (12) months immediately before the administration commenced;
- (b) all Court, arbitration or administrative proceedings, including pending enforcement proceedings, involving the company;
- (c) the assets and liabilities of the company, and the company's income and disbursements within the immediately preceding twelve (12) months;
- (d) the number of employees and any collective agreements or other agreements relating to the rights of employees;
- (e) any debtors and their obligations to the company; and
- (f) any creditors and their rights or claims against the company.

(2) As against the administrator, a person is not entitled to retain possession of, or claim or enforce a lien over, any document or record of a company in administration.

(3) A person who contravenes this section commits an offence and is liable, on conviction, to a fine not exceeding One hundred thousand (E100,000.00) or to imprisonment for a period not exceeding six (6) years or both.

First meeting of creditors

364. (1) An administrator shall, within thirty (30) days after being appointed, convene and preside over a first meeting of creditors, at which -

- (a) the administrator-
 - (i) shall inform the creditors on whether a reasonable prospect of recovery of the company exists; and
 - (ii) may receive proof of claims by creditors; and
 - (b) the creditors may appoint a committee of creditors.
- (2) An administrator shall give seven (7) days' notice of the first meeting of creditors to every creditor whose name and address is known or can reasonably be obtained setting out the.
- (a) date, time and place of the meeting; and
 - (b) the agenda for the meeting.

(3) At a meeting of creditors, other than a meeting under section 370, a resolution is passed where a simple majority of the independent creditors voting on a matter vote in favour.

Creditors' committee

365. (1) A committee of creditors, appointed under this Part-

- (a) may consult with the administrator on any matter relating to the administration, but shall not direct or instruct the administrator on any matter related to the proceedings;
- (b) shall on behalf of the general body of creditors receive and consider reports relating to the administration; and
- (c) shall act independently of the administrator to ensure fair and unbiased representation of creditors' interests.

(2) A person may be a member of a committee of creditors where that person is-

- (a) an independent creditor;
- (b) an agent, proxy or attorney of an independent creditor or other person acting under a general power of attorney; or
- (c) authorised in writing by an independent creditor to be a member.

SUBPART 9 - BUSINESS RECOVERY PLAN

Administrator shall propose business recovery plan

366. (1) An administrator shall, after consulting the creditors, the board and management of the company and, where applicable, shareholders, prepare a business recovery plan for consideration and possible adoption at a meeting held under section 370.

Content of business recovery plan

367. (1) The business recovery plan prepared by an administrator -

- (a) shall contain all the information reasonably required to assist the affected persons in making the decision to accept or reject the plan; and
- (b) without limiting paragraph (a), shall be divided into Parts A, B and C parts containing as a minimum the information set out in subsections (2) to (4).

(2) Part A ("Background") shall contain the following -

- (a) a complete list of all the material assets of the company, indicating which assets were held as security at the commencement of the administration;
- (b) a complete list of creditors at the commencement of the administration and a categorisation of creditors as secured, statutory preferential or unsecured;
- (c) the probable dividend that would be received by creditors, in their specific classes, if the company were to be placed in liquidation;

- (d) a complete list of the holders of the company's issued debt instruments;
- (e) a copy of the written agreement relating to the administrator's remuneration;
- (f) a statement as to whether the business recovery plan includes a proposal made informally by a creditor; and
- (g) a statement as to the likely cost of the administration (including the administrator's remuneration).

(3) Part B ("Proposals") shall contain proposals for the following -

- (a) the nature and duration of any moratorium for which the business recovery plan makes provision;
- (b) the extent to which the company is to be released from the payment of its debts, and the extent to which any debt is proposed to be converted to equity in the company or another company;
- (c) the ongoing role of the company, and the treatment of any existing agreements;
- (d) the property of the company that is to be available to pay creditors' claims under the business recovery plan;
- (e) the order of preference in which the proceeds of the property of the company shall be applied to pay creditors if the business recovery plan is adopted;
- (f) the benefits of adopting the business recovery plan as opposed to the benefits that would be received by creditors if the company were to be placed in liquidation; and
- (g) the effect that the business recovery plan will have on-
 - (i) each class of shareholder; and
 - (ii) each class of creditor.

(4) Part C ("Assumptions and Conditions") shall contain the following -

- (a) a statement of the conditions that shall be satisfied for the business recovery plan to come into operation and be fully implemented;
- (b) a statement of the effect, where any, that the business recovery plan will have on the number of employees and their terms and conditions of employment;
- (c) a statement of the circumstances in which the business recovery plan will terminate; and
- (d) projected financial statements for the next three (3) years, prepared on the assumption that the proposed business recovery plan is adopted.

(5) The financial statements referred to in subsection (4)(d) -

- (a) shall include a notice of any material assumptions on which the projections are based; and
- (b) may include alternative projections based on varying assumptions and contingencies.

Certification by administrator

368. The administrator shall certify as part of the business recovery plan that-

- (a) the administrator has taken all reasonable steps to verify that the information provided in the plan is accurate, complete and up to date; and
- (b) the projections provided in the plan are based on estimates made in good faith and on factual information and assumptions as set out in the statement.

Publication of recovery plan

369. An administrator shall publish the business recovery plan within forty five (45) days after the date on which the administrator was appointed, or such longer time as may be allowed by-

- (a) the Court, on application by the company; or
- (b) the holders of a majority of the creditors' voting interests.

SUBPART 10 - DETERMINATION OF COMPANY'S FUTURE

Meeting to consider recovery plan

370. (1) An administrator shall, within twenty one (21) days after publication of the business recovery plan, convene and preside over a meeting of creditors called for the consideration of the plan.

(2) An administrator shall, at least ten (10) days before the meeting convened under subsection (1), deliver a notice of the meeting to all known creditors setting out-

- (a) the date, time and place of the meeting;
- (b) the agenda of the meeting; and
- (c) a summary of the rights of affected persons to participate in and vote at the meeting.

(3) A meeting convened under this section may be adjourned, as necessary or expedient, for a period not exceeding sixty (60) days, until a decision regarding the company's future has been taken under this Part.

Consideration of recovery plan

371. An administrator shall, at a meeting convened under section 370 -

- (a) introduce a proposed business recovery plan for consideration by the creditors and, where applicable, by the shareholders;
- (b) inform the meeting on whether a reasonable prospect for the recovery of the company continues to exist;

- (c) invite discussion and conduct a vote on any motions to.
 - (i) amend the proposed plan as proposed and seconded by any affected person; or
 - (ii) adjourn the meeting in order to revise the plan for further consideration; and
- (d) call for a vote for preliminary approval of the proposed business recovery plan or the plan as amended, where applicable, unless the meeting has first been adjourned in accordance with paragraph (c)(ii).

Approval of recovery plan

372. (1) A proposed business recovery plan is approved, at a meeting convened under section 370, on a preliminary basis where, in a vote called under section 371 (1)(d), the plan is approved by a majority of the independent creditors' voting interests.

(2) Where the plan does not alter the rights of the holders of any class of the company's securities, the approval of the plan on a preliminary basis under subsection (1) constitutes the final adoption of the plan, subject to satisfaction of any conditions on which that plan is contingent.

(3) Where the plan does alter the rights of any class of shares-

- (i) the administrator shall immediately hold a meeting of the holders of the class or classes of shares whose rights would be altered by the plan and require them to vote on the adoption of the proposed business recovery plan; and
- (ii) where, in a vote under subparagraph (i), a majority of the affected shareholders approve the plan, the approval of the majority constitutes the final adoption of the plan, subject to satisfaction of any conditions on which the plan is contingent.

Rejection of business recovery plan

373. (1) A business recovery plan is rejected where it fails to gain approval under section 372(1) or (3), as the case may be.

(2) Where there is no step taken at the meeting under section 373, 374 or 375, the administrator shall promptly file a notice of termination of the administration with the Registrar.

Revised recovery plan

374. (1) On the rejection of a recovery plan at a meeting under section 373, the administrator may seek the approval of the meeting to prepare and publish a revised business recovery plan.

(2) Where the administrator takes no steps under subsection (1), any creditor at the meeting may propose a resolution directing the administrator to prepare and publish a revised plan.

(3) Where the meeting approves the preparation and publication of a revised plan, the administrator shall -

- (a) conclude the meeting and prepare and publish a new or revised business recovery plan within ten (10) days; and

- (b) the provisions of this Part shall apply afresh to the publication and consideration of that new or revised plan.

Offer to purchase voting interests

375. (1) Where the meeting does not approve the preparation and publication of a revised business recovery plan, any creditor present at the meeting may make a binding offer, either as an individual or as a combination of creditors, to purchase the voting interests of one (1) or more persons who opposed approval of the business recovery plan, at a value independently and expertly determined, on the request of the administrator, to be a fair and reasonable estimate of the return to that person, or those persons, if the company were to be liquidated.

(2) Where a creditor makes an offer under subsection (2), the administrator shall-

- (a) adjourn the meeting for not more than ten (10) days, as may be necessary to afford the administrator an opportunity to make necessary revisions to the business recovery plan to appropriately reflect the results of the offer; and
- (b) set a date for resumption of the meeting, without further notice.

(3) A holder of a voting interest, or a person acquiring that interest in terms of a binding offer, may apply to the Court to review, re-appraise and re-value a determination by an independent expert in terms of subsection (1).

Application to Court challenging voting

376. (1) At a meeting under section 370, the administrator or any creditor present may notify the meeting of that person's intention to apply to the Court for an order setting aside as invalid voting interests cast for or against approval of a business plan.

(2) An application to set aside voting interests shall be brought within ten (10) days and the administrator shall adjourn the meeting accordingly.

(3) On deciding the application, the Court may make directions for the resumption of the meeting where required.

Effect of approval of business recovery plan

377. (1) A business recovery plan that has been adopted binds the company, its shareholders and every creditor of the company, whether or not that person-

- (a) was present at the meeting;
- (b) voted in favour of adoption of the plan; or
- (c) had proven their claims against the company.

(2) A company, under the direction of the administrator, shall take all necessary steps to-

- (a) satisfy any conditions that have been imposed relating to a business recovery plan; and
- (b) implement the business recovery plan as adopted.

(3) An administrator may, in order to implement a business recovery plan that has been adopted-

- (a) determine the consideration for, and authorise the issue of shares by the company; and
- (b) amend the company's constitution to authorise and determine the preferences, rights, limitations and other terms of any shares.

(4) The administrator may authorise the issue of shares by the company and amend its constitution for the purposes of implementation of the business recovery plan without regard to the provisions of this Act relating to the issue of shares or the amendment of the constitution but shall promptly file with the Registrar -

- (a) a notice specifying the amendments to the constitution; and
- (b) a notice specifying the issue of shares and the rights or conditions attaching to those shares.

(5) Except to the extent that an approved business recovery plan provides otherwise, a pre-emptive right of any shareholder does not apply to an issue of shares by the company for the purposes of implementation of the business recovery plan.

Notice of implementation of business recovery plan

378. An administrator shall, when the business recovery plan has been substantially implemented, file a notice of the substantial implementation of the business recovery plan with the Registrar.

PART XVII - REMOVAL FROM ESWATINI REGISTER

SUBPART 1 - REMOVAL FROM REGISTER

Removal from register

379. A company is removed from the register when the Registrar registers a notice stating the company is removed from the register.

Grounds for removal

380. Subject to section 382, the Registrar shall remove a company from the register where-

- (a) the company fails to file its annual return within the period of six (6) months after the month allocated for filing the return;
- (b) the company does not comply with sections on. essential requirements;
- (c) the company is in liquidation and:
 - (i) six (6) months have elapsed after the completion of liquidation; and
 - (ii) the Registrar has not received the prescribed documents confirming completion of liquidation; or

- (d) the company is in liquidation and the Registrar receives the prescribed documents confirming completion of liquidation; or
- (e) there is filed with the Registrar a request under section 381 for the company's removal.

Request for removal

381. (1) Any of the following persons may request the removal of a company from the register-

- (a) a shareholder;
- (b) a person authorised to make the request by a special resolution of shareholders entitled to vote and voting on the question; or
- (c) a director or any other person, where the constitution so provides.

(2) A request for removal may be made on the grounds that the company-

- (a) has ceased to carry on business, has discharged in full its liabilities to all known creditors, and has distributed its surplus assets in accordance with its constitution and this Act; or
- (b) has no surplus assets after paying its debts in full or in part, and no creditor has applied to the Court for an order putting the company into liquidation.

(3) The request shall be-

- (a) in the prescribed form, where any; and
- (b) accompanied by prescribed third party consents, where any; and
- (c) filed with the Registrar.

SUBPART 2 - PROCEDURE FOR REMOVAL FROM REGISTER

When notice of removal required

382. (1) The Registrar shall not remove a company from the register unless-

- (a) public notice of the removal has first been given for removal.
 - (i) under section 380 (b) or (c), by the Registrar;
 - (ii) under section 380 (d), by the liquidator; or
 - (iii) under section 380 (e), by the person requesting removal; and
- (b) the deadline date has passed without an application for an order under section 384.

(2) Public notice is not required for removal under section 380 (a).

(3) The notice of removal shall specify a date that is the deadline for a person who objects to the removal to apply for an order under section 384.

Objection to removal

382. (1) A person may not object to the removal of a company from the register under section 380 (a).

(2) Any person may object to the removal of a company from the register under any of section 380 (b) to (e).

(3) A person may object to removal in terms of subsection (2) above on any one (1) or more of the following grounds:

- (a) the company is still carrying on business or there is other reason for it to continue in existence;
- (b) the company is a party to a legal proceeding;
- (c) the company is in receivership or liquidation;
- (d) the person objecting is a creditor, shareholder, or other person having an undischarged claim against the company;
- (e) the person objecting believes that there exists, and intends to pursue, a right of action on the part of the company under Part VIII; or
- (f) for any other reason, removal would not be just and equitable.

Meaning of undischarged claim

383. (1) For the purposes of section 382(3)(d), a claim by a creditor against the company is not an undischarged claim where-

- (a) the claim has been paid in full;
- (b) the claim has been paid in part under a compromise entered into under Part XIII or by being otherwise compounded to the reasonable satisfaction of the creditor;
- (c) claim has been paid in full or in part by a receiver or a liquidator in the course of a completed receivership or liquidation; or
- (d) a receiver or liquidator has notified the creditor that the assets of the company are not sufficient for any payment to be made to the creditor.

(2) For the purposes of section 382(3)(d), a claim by a shareholder or other person against the company is not an undischarged claim where-

- (a) the shareholder or other person has been paid in accordance with a right under the constitution to receive or share in the company's surplus assets; or
- (b) a receiver or liquidator has notified the shareholder or other person that the company has no surplus assets.

Procedure for objection

384. (1) A person who intends objects to the removal of a company from the register shall apply to the Court for an order that the company not to be removed.

(2) The application shall be made on or before the date specified in the public notice of the removal.

(3) The Court may order that the company not be removed where the Court is satisfied, on one (1) or more of the grounds specified in section 382 (3), that the company should not be removed.

SUBPART 3 - EFFECT OF REMOVAL FROM REGISTER***Property of company vests in government agency***

385. (1) Property of a company that, immediately before the company's removal from the register, had not been distributed or disclaimed vests in the government agency designated to deal with abandoned, lost or ownerless property on removal from the register.

(2) For the purposes of this section, property of the former company-

- (a) includes leasehold property and all other rights vested in or held on trust for the former company; and
- (b) does not include property held by the former company on trust for any other person.

(3) The Minister shall without delay give public notice that the property has vested in the government agency designated to deal with abandoned, lost or ownerless property and the notice shall state the name of the former company and describe the property.

Person claiming property may apply to Court

386. (1) This section applies where a person ("P") would have been entitled to receive all or part of the property of a company removed from the register, or payment from the proceeds of its realization, if the property had been in the hands of the former company immediately before its removal from the register.

(2) On an application by P, or a person claiming through P, the Court may-

- (a) order that all or part of the property vest in the applicant; or
- (b) order the government agency designated to deal with abandoned, lost or ownerless property, to pay the applicant compensation which shall not be greater than the value of the property.

(3) The Court may also-

- (a) determine issues of value, entitlement, and apportionment;
- (b) consolidate the hearing of applications;

- (c) treat an application as made on behalf of all the persons, or all of a class of persons, with an interest in the property; and
- (d) make any ancillary order.

(4) Compensation ordered to be paid under subsection (2)(b) shall be paid out of the Consolidated Fund without further appropriation than this section.

Liability of directors, shareholders, and others continues

387. The liability of any person, including a former director or shareholder, in respect of any act or omission occurring before the company was removed from the register-

- (a) is not affected by the removal; and
- (b) continues and may be enforced as if the company had not been removed.

**SUBPART 4 - DISCLAIMER OF PROPERTY VESTING ON
REMOVAL FROM REGISTER**

Government agency may disclaim onerous property

388. (1) The Minister may, by notice in writing, disclaim onerous property vesting in the government agency under section 385 and the property is then treated as not having vested in the government agency.

- (2) The Minister shall without delay give public notice of the disclaimer.
- (3) In this section, “onerous property” means –
 - (a) an unprofitable contract; or
 - (b) company property that-
 - (i) is unsaleable;
 - (ii) is not readily saleable; or
 - (iii) may give rise to a liability on the part of the Government agency.

Restrictions on disclaimer

389. (1) Subject to any order of the Court, the Minister may not disclaim under section 390-

- (a) after a date specified in a notice in writing to the Minister to elect whether to disclaim, provided that date is not less than three (3) months after the Minister receives the notice; and
- (b) in any event, after twelve (12) months from the date when the Minister first became aware of the vesting of the property.

(2) A statement in the Minister's notice of disclaimer that the Minister first became aware of the vesting of the property on a specified date is evidence of that fact in the absence of proof to the contrary.

Effect of disclaimer

390. (1) A disclaimer under section 389-

- (a) terminates, on and from the date of the disclaimer, the government agency's rights, interest and liabilities in relation to the property; and
 - (b) does not affect the rights and liabilities of any other person, except to the extent necessary to release the government agency from a liability.
- (2) A person who suffers loss or damage as the result of disclaimer under section 389 may-
- (a) claim as a creditor of the company for the amount of the loss or damage, taking account of an order under paragraph (b); or
 - (b) apply to the Court for an order that the disclaimed property be delivered to or vested in that person.

SUBPART 5 - RESTORATION OF COMPANY TO REGISTER

When Registrar shall restore company to register

391. (1) Subject to subsection (2), the Registrar shall on the application of a person specified in subsection (3), restore to the register a company that has been removed from the register under section 380(a) for failing to file an annual return.

(2) The application shall be-

- (a) filed with the Registrar within two (2) years after removal from the register;
- (b) in the prescribed form (if any); and
- (c) accompanied by –
 - (i) all outstanding annual returns;
 - (ii) the associated filing fees; and
 - (iii) a late filing fee for each outstanding annual return.

(3) A person may apply where the person was any of the following at the time the company was removed from the register –

- (a) a shareholder, director, creditor, or entitled person of the company;
- (b) a party to any legal proceedings against the company;
- (c) a person with an undischarged claim against the company;
- (d) the liquidator;

- (e) a receiver of property of the company.

(4) The Registrar may waive the requirement in subsection (2)(c)(i) of all outstanding annual returns, or accept one (1) or more partially completed annual returns, where the Registrar is satisfied that it is not practical for the applicant to fulfil the requirement.

Court may order restoration

392. (1) The Court may, on the application of a person specified in subsection (2), order restoration to the register of a company that has been removed from the register under section 380 where the Court is satisfied that-

- (a) at the time of removal-
 - (i) the company was still carrying on business or there was other reason for it to continue in existence;
 - (ii) the company was a party to a legal proceeding;
 - (iii) the company was in receivership or liquidation;
 - (iv) the applicant was a creditor, shareholder, entitled person or other person having an undischarged claim against the company; or
 - (v) the applicant believed that there existed, and intended to pursue, a right of action on the part of the company under Part VIII; or
- (b) for any other reason it is just and equitable to restore the company to the register.

(2) Any of the following persons may apply –

- (a) the Registrar;
- (b) a person specified in section 391 (3); and
- (c) any other person who has the leave of the Court to apply.

(3) The Court may make restoration conditional on compliance with any provisions of this Act or of regulations made under this Act where the company had failed to comply with those provisions before it was removed from the register.

(4) The Court may give any directions or make any order that may be necessary or desirable for the purpose of restoration to the register.

Restoration to register

393. (1) A company shall be restored to the register when the Registrar registers a notice stating that the company is restored to the register.

(2) A company that is restored to the register shall be treated as having continued in existence as if it has not been removed from the register.

Property re-vests in company on restoration to register

394. (1) Property of a company that has vested in the government agency under this Act shall re-vests in the company on its restoration to the register as if the company had not been removed from the register.

(2) However, subsection (1) does not apply to-

- (a) property for which the Court has ordered the government agency to pay compensation under section 395(1)(b); or
- (b) land or any estate or interest in land that has vested in the government agency under section 395(1) where transmission of the land or estate or interest in land to the government agency has been registered under any enactment relating to the registration of an estate or interest in land.

Court may order re-transfer of land or compensation on restoration of company to register.

395. (1) On the application of a company that has been restored to the register, the Court may make an order for-

- (a) the re-transfer to the company of property referred to in section 394 (2)(b); or
- (b) payment of compensation by the government agency to the company.

(2) Compensation by the government agency under subsection (1)(b) shall be an amount-

- (a) that does not exceed the value of the property as at the date of registration of the transmission to the government agency; or
- (b) where the property has been sold or contracted to be sold, that is equal to the proceeds of the sale.

(3) On an application under this section, the Court may decide any issue of the value of the property.

(4) Compensation by the government agency under subsection (1) (b) shall be paid out of the Consolidated Fund without further authorisation than this section.

PART XVII - FOREIGN COMPANIES**SUBPART 1 - PRELIMINARY*****Carrying on business***

396. (1) For the purposes of this Part, a reference to a foreign company carrying on business in Eswatini includes a reference to the foreign company-

- (a) subject to subsection (3), establishing or using a share transfer office or a share registration office in Eswatini; or
- (b) administering, managing, or dealing with property in Eswatini as an agent, or personal representative, or trustee, and whether through its employees or an agent or in any other manner.

(2) For the purposes of this Part, a foreign company does not carry on business in Eswatini merely because in Eswatini it-

- (a) is or becomes a party to a legal proceeding or settles a legal proceeding or a claim or dispute;
- (b) holds meetings of its directors or shareholders or carries on other activities concerning its internal affairs;
- (c) maintains a bank account;
- (d) effects a sale of property through an independent contractor;
- (e) solicits or procures an order that becomes a binding contract only where the order is accepted outside Eswatini;
- (f) creates evidence of a debt or creates a charge over property or gives a security interest in property;
- (g) secures or collects any of its debtor or enforces its rights in relation to securities relating to those debts;
- (h) conducts an isolated transaction that is completed with a period of six (6) weeks, not being one of a number of similar transactions repeated from time to time; or
- (i) invests in funds or holds property.

(3) A foreign company does not carry on business in Eswatini by reason only of transactions effected through an offshore register that is authorised, required, or established by or for the purposes of an offshore Act.

Name of foreign company shall comply with section 8

397. (1) A foreign company shall not carry on business in Eswatini unless its name could be registered under section 8 if it were incorporated under this Act.

(2) A foreign company that changes its name shall file with the Registrar for registration a notice in the prescribed form of the change of name within ten (10) working days of the change of name.

(3) On receiving the notice, the Registrar shall register the change of name on register.

(4) A foreign company that contravenes this section commits an offence and is liable on conviction a fine not exceeding two hundred and fifty thousand Emalangeni (E250,000.00)

Use of name by foreign company

398. A foreign company that carries on business in Eswatini shall ensure that its full name and the name of the country where it was incorporated are clearly stated in-

- (a) written communications sent by or on behalf of the company; and
- (b) documents issued or signed by or on behalf of the company that evidence or create a legal obligation of the company.

SUBPART 2 - REGISTRATION***Foreign company to register under this Act***

399. (1) A foreign company that, on or after the commencement of this Act, intends to carry on business in Eswatini, shall apply for registration under this Part in accordance with section 401 before commencing to carry on business.

(2) A foreign company that contravenes this section commits an offence and is liable on conviction to a fine not exceeding Two hundred and fifty thousand Emalangenani (E250,000.00).

Validity of transactions not affected

400. A contravention by a foreign company of section 399 or 401 does not affect the validity or enforceability of any transaction entered into by the foreign company.

Application for registration

401. (1) An application by a foreign company for registration under this Part shall-

- (a) be filed with the Registrar;
- (b) be in the prescribed form;
- (c) contain the prescribed information;
- (d) be signed by or on behalf of the foreign company; and
- (e) be accompanied by the prescribed fee.

(2) The application shall also have attached-

- (a) evidence of the company's foreign incorporation and its current status in its home jurisdiction;
- (b) where the evidence of its foreign incorporation is not in English, a certified translation of it; and
- (c) at least one (1) director who shall be resident in Eswatini to ensure that the company is properly managed and will be responsible for all the local purposes and obligations of the company. Including managing the registers of the company and ensuring that the company provides appropriate and sufficient basic information and sufficient Beneficial ownership information.
- (d) any other prescribed information.

(3) The Registrar shall, on receiving a properly completed application for registration of a foreign company and without delay, register the company in the register.

SUBPART 3 - ADMINISTRATION OF FOREIGN COMPANY

Annual return by foreign company

402. (1) Each year in its allocated month, a foreign company that carries on business in Eswatini shall file with the Registrar for registration an annual return that-

- (a) is in the prescribed form;
 - (b) confirms that the information on Eswatini register in respect of the company is correct at the date of the return;
 - (c) is signed by or on behalf of the company; and
 - (d) is accompanied by the prescribed annual return fee.
- (2) The return shall be dated as at a date within the allocated month.

(3) Notwithstanding subsection (1), a foreign company need not file an annual return in the calendar year of its registration under this Act.

(4) In this section, “allocated month” means the month allocated to the company under section 403.

Allocated month

403. (1) On registration or re-registration of a foreign company, the Registrar shall allocate a month to the company for filing its annual return.

- (2) The Registrar may, by written notice to the foreign company, alter its allocated month.

Registrar shall remove foreign company for failure to make annual return after six (6) months

404. (1) Where a foreign company fails to comply with section 403, and six (6) months have elapsed without the company filing a late return that otherwise complies, the Registrar shall remove the company from the register.

(2) However, on the application of a director or shareholder that complies with subsection (3), the Registrar shall restore to the register a company that has been removed under subsection (1).

- (3) The application shall be -

- (a) filed with the Registrar within two (2) years after removal;
- (b) in the prescribed form; and
- (c) accompanied by –
 - (i) all outstanding annual returns and associated filing fees; and
 - (ii) a late filing fee for each outstanding annual return.

Notice of change of directors, shareholders, etc, of foreign company

405. (1) A foreign company shall ensure that the following notices in the prescribed form are filed with the Registrar for registration –

- (a) notice of a change in the directors of the foreign company, whether as the result of a director ceasing to hold office or the appointment of a new director, or both;
- (b) notice of a change in the name of a director;
- (c) notice of a change in the residential address or postal address of a director;
- (d) notice of a change in the shareholders or shareholdings in the foreign company.

(2) A notice under subsection (1) shall -

- (a) specify the date of the change;
- (b) in the case of director changes, include the full name, residential address, and postal address of every person who is a director of the company from the date of the notice (including continuing directors);
- (c) in the case of shareholder changes, include the full name and address of every person who is a shareholder of the foreign company and their shareholdings from the date of the notice (including continuing shareholders);
- (d) be filed with the Registrar within twenty (20) days after-
 - (i) the change occurring, in the case of the appointment or resignation of a director;
 - (ii) the company first becoming aware of the change, in the case of the death of a director or a change in the name or residential address or postal address of a director; or
 - (iii) in the case of any change of shareholders or shareholdings, when the change is recorded on the share register maintained by the foreign company.

(3) Where a foreign company fails to comply with this section -

- (a) the company shall pay a late filing fee to the Registrar; and
- (b) the company commits an offence and is liable on conviction to a fine not exceeding two hundred and fifty thousand Emalangení (E250,000.00).

Foreign company ceasing to carry on business in Eswatini

406. (1) A foreign company registered under this Part that intends to cease to carry on business in Eswatini shall -

- (a) give public notice of that intention; and
- (b) file with the Registrar a notice in the prescribed form stating the date on which it will cease to carry on business in Eswatini.

(2) The Registrar shall remove a foreign company from Eswatini register as soon as practicable after-

- (a) the date specified in the notice given under subsection (1)(b); or
- (b) receipt of a written notice given by a liquidator that the liquidation of the assets in Eswatini of the foreign company has been completed.

Exemption from requirements of this Part

407. Regulations may be made exempting any class or classes of foreign company from any or all of the requirements of this Part, or modifying the application of this Part to those foreign companies on the terms and conditions prescribed by those regulations.

Foreign non-profit companies

408. The provisions of this Part XVII relating to the registration and administration of foreign companies shall apply, mutatis mutandis, to the registration and administration of foreign non-profit companies.

PART XVIII - REGISTRAR OF COMPANIES

SUBPART 1 - REGISTRAR

Registrar

409. There shall be a Registrar of Companies who shall be a public officer appointed under the law appointing officers into the public service.

Deputy Registrars

410. (1) There shall be Deputy Registrars of Companies appointed under the law appointing officers into the public service as may be necessary for the purposes of this Act.

(2) Subject to the control of the Registrar, a Deputy Registrar shall exercise the powers, duties and functions of the Registrar under this Act.

First appointment of Registrar under this Act

411. A person holding office as Registrar of Companies under the Companies Act 2009 immediately before the commencement of this Act shall be deemed as the first person appointed under section 409.

SUBPART 2 - REGISTER

Register

412. (1) The Registrar shall ensure that a register of companies (the “register”) is kept and maintained.

(2) The register may be kept in the manner that the Registrar thinks fit including, either wholly or in part, by means of a digital register.

Registration of documents

413. Upon receiving a document for registration under this Act, the Registrar shall without delay-

- (a) register the document in the register, unless the Registrar rejects the document under section 415; and
- (b) in the case of a document that is not an annual return, in writing notify the registration to the person from whom the document was received.

When document registered

414. For the purposes of this Act, a document is registered when-

- (a) the document itself becomes part of the register; or
- (b) the document or details of the document including the time and date of registration are recorded or stored in the digital register.

When Registrar may reject document for registration

415. (1) The Registrar may refuse to register a document that-

- (a) is not in the prescribed form, where any;
- (b) does not comply with this Act or regulations made under this Act;
- (c) is not printed or typewritten;
- (d) where the register is a digital register, is in a format that does not enable it be registered;
- (e) has not been fully and properly completed;
- (f) contains material that is not clearly legible; or
- (g) is not accompanied by the prescribed fee.

(2) Where subsection (1) applies, the Registrar may require that-

- (a) the document is submitted for registration again, appropriately amended or completed, or accompanied by the prescribed fee; or
- (b) a fresh document is submitted in its place.

No presumption of validity or invalidity

416. The registration or refusal of registration of a document by the Registrar does not affect or create a presumption as to-

- (a) the validity or invalidity of the document; or

- (b) the correctness or otherwise of the information contained in the document.

Inspection of register

417. (1) Any person may, on payment of the prescribed fee where any, inspect -

- (a) a document that is part of the register; or
- (b) a document or details of a document that have been recorded or stored in the digital register.

(2) An inspection made at the office of the Registrar shall be made during the hours when the office is open to the public for business on a working day.

Copies and certified copies of documents

418. Any person may, on payment of the prescribed fee where any, require the Registrar to give or certify-

- (a) a certificate of incorporation of a company or a certificate of registration of a foreign company;
- (b) a copy of, or extract from, a registered document;
- (c) details of a registered document that have been recorded or stored in the digital register;
- (d) a copy of, or extract from, a registered document or documents that have been recorded or stored in the digital register; or
- (e) a certificate of good standing or equivalent reflecting the status of a registered company.

SUBPART 3 - CHANGES TO REGISTER

Rectification or correction of register

419. (1) The Registrar may-

- (a) rectify the register where the Registrar is satisfied that any information has been wrongly entered in, or omitted from, the register; and
- (b) correct any particulars that appear to the Registrar to have been incorrectly entered in the register.

(2) Unless the rectification or correction relates solely to the person who provided it, the Registrar shall not rectify or correct the register without first -

- (a) giving notice of the rectification or correction to the company and to persons whom the Registrar considers will be materially affected by it; or
- (b) allowing a person to whom notice is given a reasonable opportunity to object.

(3) This section does not limit the Registrar's power of amendment under section 421.

Registrar may require information from company

420. (1) The Registrar may give notice to a company requiring it to provide -

- (a) corrected or updated details on any matter entered in the register for that company; and
- (b) a certified copy of any document that has been or ought to have been filed with the Registrar for registration under this Act.

(2) The company shall provide the information or certified copy within the time specified by the Registrar's notice, and that time shall not be less than fourteen (14) days after the date on which the Registrar sends the notice.

(3) A company that fails to comply with a notice under subsection (1) commits an offence and is liable on conviction to a fine not exceeding One hundred thousand Emalangeni (E100,000.00).

(4) In this section, section 420, "company" includes a foreign company.

Registrar may amend register

421. Where information provided to the Registrar differs from the information shown in the register for the company, the Registrar may amend the register accordingly.

SUBPART 4 - INSPECTION BY REGISTRAR

Registrar may require production of documents and confirmation of information

422. (1) For a purpose specified in subsection (2), the Registrar or a person authorised by the Registrar may-

- (a) require a person, including a person carrying on the business of banking, to produce for inspection relevant documents within that person's possession or control;
- (b) inspect and take copies of relevant documents;
- (c) take possession of relevant documents and remove them from the place where they are kept, and retain them for a reasonable time, for the purpose of taking copies;
- (d) retain relevant documents for a period that is, in all the circumstances reasonable, if there are reasonable grounds for believing that they are evidence of an offence; and
- (e) require a person, in relation to information provided to the Registrar, to -
 - (i) confirm that the information is correct; or
 - (ii) correct the information.

(2) The purposes for which the Registrar or a person authorised by the Registrar may act under subsection (1) are to-

- (a) ascertain whether a company or a director of a company is complying with this Act;
- (b) ascertain whether the Registrar should exercise any of his or her powers under this Act;
- (c) detect offences against this Act; or
- (d) ascertain whether information provided to the Registrar is correct.

(3) A person shall not obstruct or hinder the Registrar or a person authorised by the Registrar while exercising a power under subsection (2).

(4) A person who fails to comply with a requirement under subsection (1)(a) or (e) or contravenes subsection (3) commits an offence and is liable on conviction to a fine not exceeding One hundred thousand Emalangeni (E100,000.00) or to a term of imprisonment not exceeding six (6) years or both.

(5) In this section -

“relevant document”, in relation to a company, means a document that contains information relating to -

- (a) the company; or
- (b) money or other property that is, or has been, managed, supervised, controlled, or held in trust by or for the company.

(6) In this section, section 422, “company” includes a foreign company.

Disclosure of information and reports

423. (1) The Registrar may require a person authorised under section 422 to give any document or information obtained, or report prepared by that person in acting under section 422-

- (a) as required by the Registrar or a Deputy Registrar, to the Registrar or a Deputy Registrar; or
- (b) as required by the Registrar, to the persons specified in subsection (2).

(2) As required by the Registrar, the person authorised shall give the document, information, or report to-

- (a) the Minister or -
- (b) any person authorised to receive it for the purposes of, or in connection with, the exercise of a power under this Act; or
- (c) a liquidator for the purposes of the liquidation of the company; or
- (d) any person authorised by the Registrar to receive the document, information, or report for the purposes of detecting offences against any Act.

(3) A person who fails to comply with this section commits an offence and is liable on conviction to a fine not exceeding One hundred thousand Emalangeni (E100,000.00) or to a term of imprisonment not exceeding six (6) years or both.

Restrictions on disclosing information

424. (1) A person authorised under section 422 shall not disclose any document or information obtained, or report prepared by that person in acting under section 422 except -

- (a) as required under section 423; or
- (b) to the extent that the information, or information contained in the document or report, is available under any Act or in a public document; or
- (c) in the course of criminal proceedings; or
- (d) subject to the Registrar's approval-
 - (i) with the consent of the person to whom the document, information, or report relates;
 - (ii) for the purposes of, or in connection with, the exercise of powers under this Act;
 - (iii) to a liquidator for the purposes of the liquidation of a company or the assets of a foreign company; or
 - (iv) for the purposes of detecting offences against any Act.

(2) A person who contravenes this section commits an offence and is liable on conviction to a fine not exceeding One hundred thousand Emalangeni (E100,000.00) or to a term of imprisonment not exceeding six (6) years or both.

Report admissible in liquidation proceedings

425. Notwithstanding any other enactment or rule of law, a report prepared by a person in relation to an inspection carried out under section 422 is admissible as evidence in an application to the Court to appoint a liquidator.

SUBPART 5 - APPEALS

Appeals from Registrar's decisions

426. (1) A person who is aggrieved by an act or decision of the Registrar under this Act may apply to the Court within twenty one (21) days after notification of the act or decision, or within any further time that the Court may allow.

- (2) The Court may-
 - (a) approve the Registrar's act or decision; or
 - (b) give any direction or make any determination that the Court thinks fit.

Exercise of inspection power not affected by appeal

427. Notwithstanding any other enactment or rule of law, on an appeal or application to the Court in relation to the exercise of a power under section 426, and until the appeal or application is determined-

- (a) the Registrar or authorised person may continue to exercise the powers under that section as if no appeal or application had been made; and
- (b) the appeal or application does not excuse any person from fulfilling an obligation under that section.

Destruction of documents on successful appeal against inspection power

428. (1) This section applies where an appeal or application in relation to an act done or decision taken in the exercise of a power under section 422 is allowed or granted.

(2) The Registrar shall ensure that, without delay after the Court gives its decision, any copy of a document taken or retained by the Registrar or authorised person in the exercise of the power is destroyed.

(3) Any information acquired under the exercise of the power is inadmissible in any proceeding unless the court hearing the proceeding is satisfied that it was not unfairly obtained.

SUBPART 6 - NOTICES BY REGISTRAR***Notices generally***

429. Clause 7 (Additional provisions relating to service) of Schedule 14 applies, with the necessary modifications, to the giving of notices by the Registrar.

Notice to individuals

430. (1) Notice that under this Act the Registrar shall give to an individual shall be given-

- (a) in writing; and
- (b) in a manner that the Registrar considers appropriate in the circumstances.

(2) Without limiting subsection (1), the Registrar may give a notice to an individual by-

- (a) having it delivered to that person;
- (b) posting it to that person at his or her last known postal address;
- (c) sending it by email to an electronic address used by that person; or
- (d) having it published in a newspaper or other publication in circulation where that person lives or is believed to live.

Admissibility of copy of Registrar's notice

431. A document derived from a device or facility that records or stores information electronically or otherwise is admissible in a proceeding as a copy of a notice given by the Registrar where-

- (a) it appears to be a copy of the notice; and
- (b) is certified by the Registrar, or a person authorised by the Registrar, as having been derived from a such a device or facility.

PART XIX - OFFENCES

SUBPART 1 - DISHONESTY OFFENCES

False statements in documents

432. (1) A person who, with respect to a document required for the purposes of this Act-

- (a) makes, or authorises the making of, a statement in it that is false or misleading in a material particular knowing it to be false or misleading; or
- (b) omits, or authorizes the omission from it, of any matter knowing that the omission makes the document false or misleading in a material particular,

commits an offence.

(2) A director or employee of a company who, notwithstanding knowing the statement or report to be false and misleading, makes or provides, or authorises the making or providing of, a statement or report that relates to the affairs of the company and that is false or misleading in a material particular, to any of the following, commits an offence -

- (a) a director, employee, auditor, shareholder, creditor, debenture holder, or trustee for debenture holders of the company;
- (b) a liquidator, liquidation committee, receiver of property of the company or administrator; or
- (c) where the company is a subsidiary, a director, employee, or auditor of its holding company.

(3) A person who commits an offence under subsection (1) or (2) is liable on conviction to a fine not exceeding One hundred and fifty thousand Emalangeni (E150,000.00) or to imprisonment for a term not exceeding eight (8) years or both.

(4) For the purposes of this section, a person who voted in favour of the making of a statement at a meeting is taken to have authorised the making of the statement.

(5) In this section, section 432, “company” includes a foreign company.

Fraudulent use or destruction of company property

433. (1) A director, employee or shareholder of a company who-

- (a) fraudulently takes or applies property of the company -
 - (i) for that person’s own use or benefit; or
 - (ii) for a use or purpose that is not a use or purpose of the company; or

(b) fraudulently conceals or destroys property of the company,

commits an offence.

(2) A person who commits an offence under subsection (1) is liable on conviction to a fine not exceeding Five hundred thousand Emalangeni (E500,000.00) or to imprisonment for a term not exceeding fifteen 15 years or both.

(3) In this section, section 433, “company” includes a foreign company.

Falsification of records

434. (1) A director, employee, or shareholder of a company who, with the intent to defraud or deceive a 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.

(2) A person who, in relation to a mechanical, electronic or other device used in connection with the 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-

- (a) records or stores in the device, or makes available to a person from the device, matter that he or she knows to be false or misleading in a material particular; 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 any matter in the device,

commits an offence.

(3) A person who commits an offence under subsection (1) or (2) is liable on conviction to a fine not exceeding Five hundred thousand Emalangeni (E500,000.00) or to imprisonment for a term not exceeding fifteen (15) years or both.

(4) In this section, section 434, “company” includes a foreign company.

Carrying on business fraudulently

435. (1) A person who is knowingly a party to a company carrying on business-

- (a) with intent to defraud creditors of the company or any other person; or
- (b) for a fraudulent purpose,

commits an offence.

(2) A director of a company who -

- (a) by false pretences or other fraud induces a person to give credit to the company;
or
- (b) with intent to defraud creditors of the company.
 - (i) gives, transfers, or causes a charge or security interest to be given on or in property of the company to any person;
 - (ii) causes property to be given or transferred to any person; or
 - (iii) causes or is party to execution being levied against property of the company,

commits an offence.

(3) A person who commits an offence under subsection (1) or (2) is liable on conviction to a fine not exceeding Five hundred thousand Emalangeni (E500,000.00) or to imprisonment for a term not exceeding 15 years, or both.

(4) In this section, section 435, “company” includes a foreign company.

Causing material loss to creditors

436. (1) A director of a company who, with the intent to defraud a creditor or creditors of the company, does anything that causes material loss to any creditor of the company, commits an offence.

(2) A person who commits an offence under subsection (1) is liable on conviction to a fine not exceeding a fine not exceeding Five hundred thousand Emalangeni (E500,000.00) or to imprisonment for a term not exceeding 15 years, or both.

(3) In this section, section 436, “company” includes a foreign company.

Dishonestly incurring debt

437. (1) A director of a company commits an offence where-

- (a) the company incurs a debt (the “debt”) under the following conditions:
 - (i) the company is insolvent at the time that it incurs the debt; or
 - (ii) the company becomes insolvent by incurring the debt; or
 - (iii) the company is insolvent at the time that it incurs debts that include the debt; or
 - (iv) becomes insolvent by incurring debts that include the debt;
- (b) the director knows, at the time when the director incurs the debt, that the company is insolvent or will become insolvent as a result of incurring the debt or other debts that include the debt; and
- (c) the director’s failure to prevent the company incurring the debt is dishonest.

(2) In subsection (2), “insolvent” means that the company is unable to pay its due debts.

(3) A person who commits an offence under subsection (1) is liable on conviction to a fine not exceeding Five hundred thousand Emalangeni (E500,000.00) or to imprisonment for a term not exceeding 15 years, or both.

(4) In this section, section 437, “company” includes a foreign company.

SUBPART 2 - OFFENCE IN RELATION TO OFFER OF SECURITIES TO PUBLIC

Misleading or deceptive conduct in relation to offer of securities to public

438. (1) A person shall not engage in conduct that is-

- (a) reckless conduct in relation to:
 - (i) any advertisement; or
 - (ii) the offer of debt or equity securities generally; or
 - (iii) any dealing (including trading) in debt or equity securities; and
- (b) misleading or deceptive or likely to mislead or deceive.

(2) A person who contravenes this section commits an offence and is liable on conviction to a fine not exceeding Five hundred thousand Emalangeni (E500,000.00) or to imprisonment for a term not exceeding 15 years, or both.

(3) A person who suffers loss as a result of contravention of this section may claim damages or other relief or both against-

- (a) the issuer of the debt or equity security; and
- (b) where the issuer is a company, the directors of the company at the time of contravention.

(4) A director of an issuer who is liable under subsection (3)(b) is jointly and severally liable with the issuer and the other liable directors.

Definitions for purposes of section 438

439. For the purposes of section 438 –

“advertisement” means a form of communication-

- (a) that -
 - (i) contains or refers to an offer of debt or equity securities to the public; or
 - (ii) is reasonably likely to induce persons to subscribe for the debt or equity securities of an issuer, being securities to which the communication relates and that have been, or are to be, offered to the public;

(b) that is authorised or instigated by or on behalf of the issuer of the debt or equity securities or prepared with the co-operation of, or by arrangement with, the issuer of the securities; and

(c) that has been, or is to be, distributed to a person;

“allot” includes, but is not limited to, sell, issue, assign, and convey; and “allotment” has a corresponding meaning;

“broadcasting” means any transmission of programmes, whether or not encrypted, by radio waves or other means of telecommunication for reception by the public by means of broadcasting received apparatus, but does not include any such transmission of programmes-

(a) made on the demand of a particular person for reception only by that person; or

(b) made solely for performance or display in public;

“debt security”-

(a) means any interest in or right to be paid money that is, or is to be deposited with, lent to, or otherwise owing by, any person (whether or not the interest or right is secured by a security interest in any property); and

(b) includes –

(i) a debenture, debenture stock, bond, note, certificate of deposit, and convertible note;

(ii) an interest or right that is declared by regulations made under this Act to be a debt security for the purposes of this Act; and

(iii) a renewal or variation of the terms or conditions of any interest or right of a security referred to in subparagraph (i) or (ii); but

(c) does not include any interest or right or a security referred to in paragraph (b)(i) or (iii) that is declared by regulations made under this Act not to be a debt security for the purposes of this Act;

“distribute” includes-

(a) make available, publish, and circulate; and

(b) communicate by letter, email, newspaper, broadcasting, sound recording, television, cinematographic film, video, internet site, or any form of electronic or other means of communication;

“equity security”-

(a) means any interest in, or a right to share in, the share capital of a company; and

(b) includes -

(i) a preference share, and company stock;

- (ii) a security that is declared by regulations made under this Act to be an equity security for the purposes of this Act; and
- (iii) a renewal or variation of the terms or conditions of any interest or right or a security referred to in subparagraph (i) or (ii); but
- (c) does not include any interest or right or a security referred to in paragraph (b)(i) or (iii) that is declared by regulations made under this Act not to be an equity security for the purposes of this Act;

“issuer”, in relation to a debt security or an equity security, means the person on whose behalf any money paid in consideration of the allotment of the security is received;

“offer” includes an invitation, and any proposal or invitation to make an offer, and “to offer” has a corresponding meaning;

“subscribe” includes purchase or contribute to, whether by way of cash or otherwise, and

“subscription” has a corresponding meaning; and

“subscriber”, in relation to an offer of securities, means a person who subscribed for the securities.

SUBPART 3 - LIQUIDATION OFFENCES

Conduct hindering liquidation

440. (1) Where a company is in liquidation, or an application has been made to the Court for the appointment of a liquidator, a person shall not-

- (a) leave Eswatini with the intention of -
 - (i) avoiding payment of money due to the company; or
 - (ii) avoiding questioning in relation to the affairs of the company; or
 - (iii) avoiding compliance with an order of the Court or some other obligation under this Part in relation to the affairs of the company;
- (b) conceal or remove property of the company with the intention of preventing or delaying the liquidator from taking custody or control of it; or
- (c) destroy, conceal, or remove company records or documents.

(2) A person who contravenes subsection (1) commits an offence and is liable on conviction to a fine not exceeding Five hundred and fifty thousand Emalangeni (E500,000.00) or to imprisonment for a term not exceeding fifteen (15) years, or both.

False or misleading claim in liquidation

441. (1) A person who-

- (a) makes, or authorises the making of, a claim under Schedule 8 (Creditors' claims) that is false or misleading in a material particular knowing it to be false or misleading; or
- (b) omits, or authorises the omission, from a claim under Schedule 8 of any matter knowing that the omission makes the claim false or misleading in a material particular,

commits an offence.

(2) A person who commits an offence under subsection (1) is liable on conviction to a fine not exceeding Two hundred and fifty thousand Emalangeni (E250,000.00) or to imprisonment for a term not exceeding ten (10) years or both.

SUBPART 4 - PROCEDURE

Proceedings for offences

442. (1) Notwithstanding anything to the contrary in any law relating to criminal procedure, any information for an offence under this Act may laid at any time within three (3) years after the date of the offence.

(2) Nothing in this Act affects the liability of any person under any other Act, but no person may be convicted of an offence against this Act and any other Act in respect of the same conduct.

PART XX - NON-PROFIT COMPANIES

non-profit companies

443. (1) For the purposes of this Part, "non-profit company" means a company that has as its object or objects-

- (a) a public benefit object; or
- (b) an object relating to one (1) or more cultural or social activities or communal or group interests.

(2) For purposes of this Part, "public benefit object" means charitable, social, educational, health, recreational, agricultural, religious, environmental, wildlife conservation, wildlife habitat conservation, science, or artistic purposes, and any other similar purposes for the general benefit of the public or a segment of the public.

(3) In the event of a conflict between the provisions of this Part and the rest of the Act in its application to a non-profit company, the provisions of this Part prevail.

Shareholders

444. (1) With respect to a non-profit company that has voting members, a reference in this Act to "shareholder" or "shareholders" shall be read, where the context allows and subject to the provisions of this Part, as a reference to a voting member or voting members of the company.

(2) A reference in this Act to “share register” shall be read as a reference to the register of members.

Part V (Shares) and Part VI (Shareholders) disapplied

445. Part V (Shares) and Part VI (Shareholders) do not apply to a non-profit company, except that Subpart 4 of Part VI does apply if the company has voting members.

Incorporation of non-profit company

446. (1) There is substituted for section 4(c) and (d) the requirement that a non-profit company shall have one (1) or more members.

(2) There is substituted for section 4(e) the requirement that a non-profit company shall have three (3) or more directors, one of whom shall live in Eswatini.

(3) Section 5(3)(a) does not apply.

(4) There is substituted for section 5(3)(e) the requirement that the application shall specify the full names of the proposed members of the company.

(5) There is substituted for section 5(5)(a) the requirement that the application shall be accompanied by the constitution of the company.

(6) There is substituted for section 10(1) the requirement that a non-profit company name shall end in “NPC”.

(7) Incorporation as a non-profit company in terms of this Act, or registration as a foreign non-profit company in terms of this Act, and compliance by either with the provisions of this Act, does not necessarily qualify that non-profit company, or foreign non-profit company, for any particular status, category, classification or treatment in terms of tax status.

Constitution of non-profit company

447. (1) Section 12(2) to (5) does not apply.

(2) The constitution of a non-profit company shall-

(a) set out the object or objects that qualify it as a non-profit company; and

(b) be consistent with the provisions of this Part.

Restrictions on use of income and assets

448. (1) A non-profit company-

(a) shall apply all of its assets and income, however derived, to advance its stated objects, as set out in its constitution; and

(b) subject to paragraph (a), may-

(i) acquire and hold securities issued by a profit company; or

- (ii) directly or indirectly, alone or with any other person, carry on any business, trade or undertaking consistent with or ancillary to its stated objects.

(3) A non-profit company shall not, directly or indirectly, pay any portion of its income or transfer any of its assets, regardless of the manner in which the income or assets were earned or derived, to any person who is or was an incorporator of the company, or who is a member or director, or person appointing a director, of the company, except-

- (a) as reasonable remuneration for goods delivered or services rendered to, or at the direction of, the company; or
- (b) as reasonable payment of, or reimbursement for, expenses incurred to advance a stated object of the company; or
- (c) as a payment of an amount due and payable by the company in terms of a bona fide agreement between the company and that person or another; or
- (d) as a payment in respect of any rights of that person, to the extent that those rights are administered by the company in order to advance a stated object of the company; or
- (e) in respect of any legal obligation binding on the company.

Restrictions on distribution of assets

449. Notwithstanding any provision in any law or agreement to the contrary, on the liquidation or dissolution of a non-profit company-

- (a) no past or present member or director of that company, or person appointing a director of that company, is entitled to any part of the net value of the company after its obligations and liabilities have been satisfied; and
- (b) the entire net value of the company shall be distributed to one (1) or more non-profit companies, foreign non-profit companies carrying on activities within Eswatini, voluntary associations or non-profit trusts.
 - (i) having objects similar to its main object; and
 - (ii) as determined-
- (a) in accordance with the company's constitution;
- (b) by its members, if any, or its directors, at or immediately before the time of its dissolution; or
- (c) by the court, where there is no determination under subparagraph (a) or (b).

Members

450. (1) A non-profit company is not required to have members, but its constitution may provide for it to do so.

(2) A non-profit company shall not presume the membership of any person, regard a person to be a member, or provide for the automatic or *ex officio* membership of any person without that person's consent.

(3) Unless a non-profit company's constitution provides otherwise, a non-profit company may not allow for membership to be held by juristic persons, including profit companies.

(4) Each voting member of a non-profit company has at least one (1) vote.

(5) The vote of each member of a non-profit company is of equal value to the vote of each other voting member on any matter to be determined by vote of the members, except to the extent that the company's constitution provides otherwise.

(6) The constitution of a non-profit company-

(a) may provide for no more than two (2) classes of members, that is voting and non-voting members, respectively; and

(b) shall set out-

(i) the qualifications for membership for any class; and

(ii) the process for applying for membership for any class; and

(iii) any initial or periodic cost of membership in any class; and

(iv) the rights and obligations, if any, of membership in any class; and

(v) the grounds for suspension, withdrawal or, in the case of non-voting members, revocation, of membership.

Register of members

451. A non-profit company shall maintain a register of members that records the names, alphabetically arranged, and the last known address of each person who is, or has within the last seven (7) years been, a member.

Directors

452. (1) Where a non-profit company has members, the constitution shall-

(a) set out the basis on which the members choose the directors of the company; and

(b) where any directors are to be elected by the voting members, provide for the election each year of at least one-third of those elected directors.

(2) Where a non-profit company has no members, the constitution shall set out the basis on which directors are to be appointed by its board, or other persons.

(3) A non-profit company shall not provide a loan to, secure a debt or obligation of, or otherwise provide direct or indirect financial assistance to-

(a) a director of the company;

- (b) a director of a related company; or
 - (c) a person who is a relative of a director of the company or a related company.
- (4) Subsection (3) does not prohibit a transaction where it-
- (a) is in the ordinary course of the company's business and for fair value; or
 - (b) constitutes an accountable advance to meet.
 - (i) legal expenses in relation to a matter concerning the company; or
 - (ii) anticipated expenses to be incurred by the person on behalf of the company;
 - (c) is to defray the person's expenses for removal at the company's request; or
 - (d) is in terms of an employee benefit scheme generally available to all employees or a specific class of employees.

Fundamental transactions

453. (1) A non-profit company may not-

- (a) amalgamate or merge with, or convert to, a profit company; or
- (b) dispose of any part of its assets, undertaking or business to a profit company, other than for fair value, except to the extent that such a disposition of an asset occurs in the ordinary course of the activities of the non-profit company.

(2) Where a non-profit company has voting members, any proposal for the following shall be submitted to the members for approval:

- (a) a proposal to dispose of all or the greater part of its assets or undertakings;
- (b) a proposal to change the nature of the object or objects of the non-profit company;
or
- (c) a proposal to amalgamate or merge with another non-profit company.

PART XXI - MISCELLANEOUS

SUBPART 1 - SERVICE AND COMMUNICATION OF DOCUMENTS

Service of documents

454. A document for service on any of the following may be served in accordance with the methods set out in Schedule 14 -

- (a) a company;
- (b) a foreign company;
- (c) a director; or

- (d) a shareholder or creditor.

Company communication with shareholders

455. Any communication by a company with a shareholder that is required by this Act (for example, the sending or giving of reports, statements, information, or other notices) may be made electronically where-

- (a) the shareholder has provided the company with the shareholder's electronic address; and
- (b) the shareholder has requested that communications by the company be made electronically.

SUBPART 2 - PRIVILEGED COMMUNICATIONS

Privileged communications

456. (1) Nothing in this Act requires a legal adviser to disclose a communication or other document that is protected by legal professional privilege.

(2) The Court may, on the application of any person, determine whether a claim of privilege is valid and may, for that purpose, require the communication or document to be produced.

SUBPART 3 - RE-REGISTRATION

Interpretation for this subpart

457. In this subpart:

“existing company”-

- (a) means a company registered under the Act that, immediately before the commencement of this Act, was entered in the register of companies maintained under the 2009 Act; but
- (b) does not include a company that is in liquidation;

“existing foreign company” means a foreign company registered under the repealed Act of 2009; and

“existing shareholder rights and obligations” means the rights and obligations of the existing shareholders in relation to-

- (a) voting at meetings of shareholders; or
- (b) the appointment and removal of directors; or
- (c) preferential or fixed entitlements to dividends; or
- (d) the distribution of surplus assets of the company.

Application for re-registration of existing company

458. (1) An existing company may apply for re-registration under this Act.

(2) An application for re-registration shall be-

- (a) in the prescribed form; and
- (b) signed by the person completing the application; and
- (c) filed with the Registrar within one (1) year after the commencement of this Act;

(3) The application shall specify, in respect of the company once re-registered –

- (a) the name of the company, which shall comply with section 5;
- (b) whether the constitution of the company differs from the appropriate default constitution;
- (c) whether the constitution with which the company proposes to be re-registered adversely affects existing shareholder rights and obligations;
- (d) the full name, residential address, and postal address of each director of the company;
- (e) that each person named as a director of the company has consented to act as a director of the company;
- (f) the full name of every shareholder of the company, and the number of shares held by each shareholder;
- (g) the registered office of the company;
- (h) the postal address of the company, which may be the registered office or any other postal address; and
- (i) any other prescribed information.

(4) The application for re-registration shall be accompanied by-

- (a) the prescribed fee; and
- (b) a copy of the constitution to the extent that the company elects not to use the appropriate default constitution or to modify it.

(5) Where the constitution with which the company proposes to be re-registered adversely affects shareholder rights and obligations, the application shall be accompanied by the written consent of each shareholder to re-registration.

Court may direct application for re-registration

459. On the application of a director, shareholder, or creditor of an existing company, the Court may-

- (a) direct the Registrar to make an application for re-registration on behalf of the company; and
- (b) make any other orders necessary to effect the re-registration of the company.

Application for re-registration of existing foreign company

460. (1) An existing foreign company may apply for re-registration under this Act.

(2) An application for re-registration of an existing foreign company shall be -

- (a) filed by the Registrar within one (1) year after the commencement of this Act; and
- (b) in the prescribed form.

Re-registration

461. (1) The Registrar shall, without delay on receiving an application for re-registration of an existing company or existing foreign company that complies with section 465 or 468, as the case may be-

- (a) enter the company on the Eswatini register; and
- (b) issue to the company a certificate in the prescribed form of its re-registration.

(2) A certificate of re-registration issued under subsection (1) is conclusive evidence that-

- (a) all the requirements for re-registration have been complied with; and
- (b) on and from the date of re-registration stated in the certificate, the company is a company or foreign company registered under this Act.

(3) The re-registration of an existing company or existing foreign company under this section does not-

- (a) create a new legal entity; or
- (b) affect the shares or share capital of the company except as provided by this Act; or
- (c) affect the property, rights, or obligations of the company except as provided by this Act; or
- (d) affect proceedings by or against the company.

(4) A company is not required to make an annual return under this Act in the year in which it is re-registered.

(5) The shares issued by existing company before re-registration are deemed to be converted into shares of no par value but that conversion does not affect the rights and obligations attached to the shares, and in particular does not affect-

- (a) the entitlements of the holder of the shares in respect of distributions, voting, the redemption of any redeemable shares or the distribution of surplus assets of the company in a liquidation; or

- (b) any unpaid liability of a shareholder in respect of a share.

SUBPART 4 - LATE RE-REGISTRATION

former company

462. (1) This subpart applies to a former company.

(2) In this subpart a former company means-

- (a) a company or foreign company that was registered under the repealed Act but has failed to re-register under section 458 of the Act; or.
- (b) a company or foreign company that was removed from the register under the repealed Act but was not restored to the register and consequently has also not re-registered under this Act within time.

Former company ceases to be registered

463. (1) A former company ceases to be registered at the expiry of one (1) year after the commencement of this Act.

(2) An application may be made under this subpart for the re-registration of a former company.

When Registrar may re-register former company

464. On an application under section 458, the Registrar-

- (a) shall re-register a former company under this Act where the former company's failure to do so results, has resulted or will result in undue and serious hardship or detriment to any person affected by the failure to re-register or otherwise having an interest in the re-registration; and
- (b) may re-register a former company under this Act in any other case at the discretion of the Registrar.

Form of application

465. (1) Any person may apply to the Registrar for the late re-registration of a former company.

(2) Subject to subclause (3), the application shall-

- (a) comply with the requirements of section 458 of this Act with any necessary modifications;
- (b) be accompanied by the fees payable under this Act for which the company would have been liable had it re-registered in time; and
- (c) be accompanied by outstanding fees and late fees or penalties payable by the company under the 2009 Act.

(3) In any case where the application is made for the purpose of commencing or continuing the prosecution of a claim or the enforcement of a right (including liquidation) against or in the former company, or a director or shareholder, and full compliance with the requirements of section 458 is impractical, the Registrar may-

- (a) accept for purpose of re-registration so much of the details of company officers, shareholders, share capital and other material information as is relevant taken from most recent entry for the company in the register of companies maintained under the 2009 Act; and
- (b) otherwise waive compliance as the Registrar thinks appropriate.

Constitution of former company valid for purpose of application

466. (1) This section applies where any step is to be taken under the articles of association of a former company to enable a former company to comply with the requirements for re-registration under this Act.

(3) For that purpose, a step purported to be taken under the articles of association is valid where it is in accordance with the articles.

Effect of late re-registration

467. On re-registration of a former company under this Act-

- (a) the former company is deemed to have been re-registered on the date that is the last day within the period of one (1) year from commencement of that Act; and
- (b) all property of the former company reverts in the company with effect from the date of re-registration as set out in paragraph (a).

Role of Court in late re-registration

468. (1) On an application under section 458-

- (a) either or both the applicant and the Registrar may apply to the Court for directions for effecting the re-registration of the former company; and
- (b) the Court may make such directions as it considers necessary or expedient.

(2) Where the Registrar refuses the application-

- (a) the applicant may apply to the Court for an order over-ruling the Registrar's decision;
- (b) the Registrar shall be served with notice of the application and may be heard on the application; and
- (c) the Court may make-
 - (i) an order directing the Registrar that the applicant be re-registered or otherwise as it thinks fit; and

- (ii) any ancillary orders as it considers necessary or expedient for effecting re-registration.

Waiver of fee

469. (1) The Registrar , may, in their discretion waive the whole or part of a fee required to be paid on late re-registration on a ground set out in subsection (2).

(2) The Registrar may waive the fee or where the Registrar considers that to require payment of whole or part of the fee-

- (a) is likely to cause undue and serious hardship to the applicant; or
- (b) is likely to cause detriment to the creditors of the company in question.

SUBPART 5 - REGULATIONS

Regulations

470. (1) The Minister may make regulations to give effect to the provisions of this Act and in particular for all or any of the following purposes –

- (a) amending this Act by prescribing any amendment to, or modification or substitution of, a default constitution set out in Schedule 1, 2, or 3;
- (b) prescribing forms (including Court forms in respect of any Court proceedings under this Act); and those regulations may require-
 - (i) the inclusion in, or attachment to, forms of specified information or documents; and
 - (ii) forms to be signed by specified persons;
- (c) prescribing the information that shall be provided for the proper completion of a prescribed form;
- (d) prescribing requirements with which documents delivered for registration shall comply;
- (e) prescribing when a fee, late fee, penalty, or other sum is payable under this Act;
- (f) prescribing the amount of any fee, late fee, penalty, or other sum payable under this Act;
- (g) prescribing the circumstances in which the Registrar may waive, or exempt a person or class of persons from liability to pay, a fee, penalty, or other sum payable under this Act, whether in whole or in part;
- (h) prescribing requirements, in relation to the form or content of financial statements, or any other matters in respect of financial statements, including (without limitation)-
 - (i) prescribing different requirements in respect of different classes of company; and

- (ii) requiring compliance with standards issued or published by a specified body or bodies, with or without modification;
- (i) regulating the financial reporting of a company, non-profit company, foreign company, foreign non-profit company or class of companies or foreign companies, including (without limitation)-
 - (i) prescribing requirements in respect of the adoption by directors of a balance date for a company; and
 - (ii) regulating changes to the balance date of a company;
- (j) exempting a class or classes of foreign companies from the requirements of Part XVII, or modifying the application of Part XVII to those foreign companies;
- (k) declaring that a right, interest, or security, for the purposes of this Act-
 - (i) is a debt security or an equity security; or
 - (ii) is not a debt security or an equity security;
- (l) prescribing the minimum amount of a debt for the purposes of a statutory demand (see section 203);
- (m) prescribing a minimum sum under section 220(2) for the purpose of setting a threshold for dispensing with a liquidator's report;
- (n) fixing the amount or rates of remuneration of a liquidator appointed by the Court (see section 243(2));
- (o) fixing the maximum amount for which a debt subject to a lien is a preferential debt (see section 259(2));
- (p) fixing the maximum priority sum under clause 20(2) of Schedule 9; and
- (q) providing for any other matters contemplated by this Act, necessary for its full administration, or necessary for giving it full effect.

(2) Without limiting subsection (1)(c), a provision of this Act requiring or contemplating prescribed information for the purposes of completing a prescribed form is satisfied where the information necessary for the proper completion of the form appears from the face of the form or from the content of the form.

SUBPART 6 - TRANSITIONAL PROVISIONS

Liquidation or other proceeding that is incomplete on commencement of this Act

471. (1) This section applies to an amalgamation, compromise, judicial management or winding up, or of or by a company (the "proceeding") that is incomplete on the commencement of this Act.

(2) The balance of the proceeding shall be conducted in accordance with the law in force immediately before the commencement of this Act with all necessary modifications.

(3) The Court on the application of the company, a creditor, a liquidator or a judicial manager may give directions as the Court thinks fit for the conduct of the proceeding.

SUBPART 7 - REPEAL

Repeal and savings

472. (1) The Companies Act, 2009 is repealed, one year after the commencement of this Act.

(2) There must be no new companies incorporated under the Companies Act 2009 after the commencement of this Act.

(3) There must be no new foreign companies registered under the Companies Act 2009 after the commencement of this Act.

(4) Upon successful re-registration of a company within the first year after commencement of this Act, the company shall be subject to this Act.

(5) Companies that fail to re-register shall be subject to this Act upon the effective date of repeal of the Companies Act 2009.

(6) Notwithstanding the repeal, rules or regulations issued under the repealed Act, shall, to the extent that they are not inconsistent with this Act, continue to be valid unless otherwise revoked under this Act.

SUBPART 8 - CONSEQUENTIAL AMENDMENTS

473. Schedule XX effects the consequential amendment of other enactments and the updating of references in other enactments to legislation repealed by this Act. **To Be Determined.**