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GENERAL NOTICE

NOTICE 299 OF 2004**DEPARTMENT OF TRADE AND INDUSTRY****COMPANIES AMENDMENT BILL, 2004**

The abovementioned Bill is hereby published for comment.

Interested persons are invited to furnish written comment and representations on or before 26 March 2004 to—

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GENERAL EXPLANATORY NOTICE:

- [] Words in bold type in square brackets indicate omissions from existing enactments.
- Words underlined with a solid line indicate insertions in existing enactments.

COMPANIES AMENDMENT BILL

TO AMEND the Companies Act, 1973, so as to prevent companies to have delinquent directors to serve as directors or in the management of such companies, and to protect a bona fide owner or holder of a dematerialized share certificate against rectification order by a court of law, and to provide for matters incidental thereto.

Amendment of sections of the Companies Act, 1973 (Act No. 61 of 1973) 5

1. Definitions

- “**Master**” means the Master of the **[Supreme]** High Court, and in relation to—
- (a) a company in respect of which application is made to a Court for a winding-up or judicial management order, the Master having jurisdiction in the area of jurisdiction of the Court where application is made; 10
- (b) a company being wound up by the Court or under judicial management, the Master having jurisdiction in the area of jurisdiction of the Court which issued the winding-up or judicial management order;
- (c) a company other than a company referred to in paragraph (a) or (b), the Master having jurisdiction in the area in which the registered office of that company is situated; 15
- (d) any other body corporate, the Master having jurisdiction in the area where the main place of business of that body corporate is situated;
- [Definition of ‘Master’ substituted by s. 1(1) of Act 84 of 1980.]
- “**National director or Deputy National director**” means the national director or deputy national director as defined in the National Prosecuting Authority Act (Act No. 32 of 1998). 20

Non-rectification court orders

91A By the insertion in subsection (4) after paragraph (c) of the following subsections: 25

- (cA) A court may not order the name of a member of a company to be removed from a sub-register, unless the person recorded as a member was a party to or had notice of a fraud or illegality, as in paragraph (c).
- (cB) The provisions of subsection (cA) shall not preclude a court from awarding damages, whether under section 115 of the Act or in common law. 30

Disqualifications of directors

218 (1) Any of the following persons shall be disqualified from being appointed or acting as a director of a company or to directly or indirectly take part in or be concerned in the management of any company:

- (a) A body corporate; 5
- (b) a minor or any other person under legal disability;
- (c) any person who is the subject of any order under this Act or the repealed Act disqualifying him from being a director;
- (d) any person who is disqualified from appointment as director or officer or from the management of a body corporate or other undertaking under an Act or whose appointment as director or officer has been terminated under an Act on the basis that he or she is not fit and proper to hold the office concerned; 10
- [(d)](e) save under authority of the Court—
 - (i) an unrehabilitated insolvent;
 - (ii) any person removed from an office of trust on account of misconduct; 15
 - (iii) any person who has at any time been convicted (whether in the Republic or elsewhere) of theft, fraud, forgery or uttering a forged document, perjury, an offence under the Prevention of Corruption Act, 1958 (Act 6 of 1958), or any offence involving dishonesty or in connection with the promotion, formation or management of a company, and has been sentenced therefore to imprisonment without the option of a fine or to a fine exceeding one hundred rand. 20

(2) (a) The Master shall, upon receipt of a sequestration order under section 17 of the Insolvency Act, 1936, and the Registrar of the Court shall upon any order or conviction as contemplated in subsection 1(e)(ii) and (iii), send a copy of the order or conviction, as the case may be, to the Registrar of Companies who shall notify each company of which the person to whom the order or conviction relates is a director, of the order or conviction. 25

(b) The Registrar of Companies shall establish and maintain a register of the orders and convictions under subsection (2)(a) and such register shall be open to inspection *mutatis mutandis* as if it were a register contemplated in section 113. 30

[(2)] (3) Any person disqualified from being appointed or acting as a director of a company and who purports to act as a director or directly or indirectly takes part in or is concerned in the management of any company, and any director or officer who knew or should reasonably have known of the contravention shall be guilty of an offence. 35

(4) Any person disqualified from being appointed or acting as a director of a company or from the management of a body corporate or other undertaking and who purports to act as a director or directly or indirectly takes part in or is concerned in the management of any company shall, together with the directors and officers who knew or who should reasonably have known of such disqualification, be jointly and severally liable for all debts incurred by the company for the period during which that person held such appointment or acted as director or directly or indirectly took part in or was concerned in the management of any company. 40

[(3)] (5) Nothing in this section shall be construed as preventing a company from providing in its articles for any further disqualifications for the appointment of or the retention of office by any person as a director of such company. 45

Disqualification of directors, officers and others by the Court

219 (1) The Court may make an order directing that, for such period as may be specified in the order, a person, director or officer shall not without the leave of the Court be a director of or in any way, whether directly or indirectly, be concerned or take part in the management of any company when- 50

- (a) such person, director or officer, has been convicted of an offence in connection with the promotion, formation or management of a company; or
- (b) the Court has made an order for the winding-up of a company and the Master has made a report under this Act stating that in his opinion a fraud has been committed— 55
 - (i) by such person in connection with the promotion or formation of the company; or
 - (ii) by any director or officer of the company in relation to the company since its formation; or 60

- (c) in the course of the winding-up or judicial management of a company it appears that any such person—
- (i) has been guilty of an offence referred to in section 424, whether or not he has been convicted of that offence; or
 - (ii) has otherwise been guilty while an officer of the company of any fraud in relation to the company or of any breach of his duty to the company; or
- (d) a declaration has been made in respect of any person under section 424 (1).
- (2) (a) An order under subsection (1) may be made—
- (i) by the Court having jurisdiction to wind up the company affected by the act or omission in respect of which the order is sought, on application by the Master, or, in the case of a company being wound up or under judicial management, by the **[Attorney-General]** National director or Deputy National director in terms of section 401, or by the liquidator or the judicial manager or by any person who is a creditor or is or has been a member of such company; or
 - (ii) in the case of an order in the circumstances set out in paragraph (a) of that subsection, also summarily by the Court convicting the person concerned, and any leave required under that subsection may be granted by the Court having jurisdiction to wind up the company in relation to which such leave is sought.
- (b) The applicant for any such order shall give not less than ten days' notice of his intention to apply for the order, to the person against whom the order is sought and such person may attend the hearing of the application and give evidence and call witnesses to give evidence on his behalf.
- (3) Where an order under subsection (1) has been made, the person to whom the order relates shall give not less than ten days' notice to the Master, the **[Attorney-General]** National director or Deputy National director, the liquidator or the person who was the judicial manager of the company concerned, of any application he intends making for leave of the Court referred to in subsection (1), who shall draw the attention of the Court to any matter which may appear to them to be relevant, may give evidence and call witnesses.
- (4) (a) For the purposes of subsection (1) (b) (ii) the reference therein to an officer of a company shall be construed as including a reference to any person in accordance with whose directions or instructions the directors of the company have been accustomed to act.
- (b) An order may be made under the said subsection (1) (b) (ii) whether or not criminal proceedings have been instituted in respect of any matter on which the order is based.
- (5)(a) A copy of the order made under subsection (1) shall within seven days after the making of the order be transmitted by the Registrar of the Court to the Registrar of Companies, who must notify every company of which the person to whom the order relates is a director.
- (b) The Registrar of Companies shall establish and maintain a register of the orders and convictions under subsection (5)(a) and such register shall be open to inspection *mutatis mutandis* as if it were a register contemplated in section 113.
- [(5)] (6)** Any person who contravenes any order made under subsection (1) and any director or officer of a company in respect of which such a person is appointed or acts as a director or purports to act as a director or directly or indirectly takes part in or is concerned in the management of any company, who knew or should reasonably have known of the contravention shall be guilty of an offence.
- (7) Any person disqualified under this section from being appointed or acting as a director of a company and who purports to act as a director or directly or indirectly takes part in or is concerned in the management of any company shall, together with the directors and officers who knew or who should reasonably have known of such disqualification, be jointly and severally liable for all debts incurred by the company for the period during which that person held such appointment or acted as director or directly or indirectly took part in or was concerned in the management of the company.