

**FURTHER SUBMISSIONS
BY THE LAW SOCIETY OF SOUTH AFRICA (LSSA)
REGARDING AMENDMENTS TO AND REVIEW OF THE COMPANIES ACT 71 OF 2008**

1. INTRODUCTION

The Law Society of South Africa (LSSA) furnished written submissions to the Specialist Committee on Company Law (SCCL) on 29 August 2014 and addressed the Committee on 4 September 2014. The submissions dealt with a number of sections in the Companies Act 71 of 2008 and proposals for the amendment thereof. The SCCL requested further supporting information in relation to the above. What is contained in this submission is, therefore, a direct response to the questions raised by the SCCL.

2. SUBMISSIONS

2.1 Item 1: General note

The LSSA's submission read: "Many of the sections in the Act are not workable for companies which have only a few shareholders. We recommend an amendment to Section 6(3)(b) by inserting a subsection (iii) that in the case of a private company with a public interest score of 100 or less or a wholly owned subsidiary, it should not be necessary to comply with unnecessary requirements, including, without limitation, administrative requirements."

The SCCL asked the LSSA to identify with precision exactly which sections private companies with a score of 100 or less and wholly owned subsidiaries should be exempted from.

The LSSA in the time available has been unable to identify which sections of the Act should not be applicable to private companies with a score of 100 or less as this is a complicated issue. However the LSSA suggests that wholly owned subsidiaries should be exempted from the following provisions:

2.1.1 Sections 6(9)

The LSSA is of the view that it does not matter whether or not the prescribed methodology is used.

2.1.2 Section 40(1)

The LSSA's original submission proposed that the Act should provide that the issue of shares *on any terms*, may be ratified or approved by the shareholders by special resolution. The LSSA persists in this view, but if the SCCL is averse

towards a general exemption, the LSSA submits that that wholly owned subsidiaries should at least be exempted.

2.1.3 Sections 44 and 45

These sections should not apply to assistance given to wholly owned subsidiaries.

2.1.4 Section 48(8)(b)

The LSSA is of the view that this sub-section should be removed *in toto*. However, if the Committee is not in favour of its removal, the sub-section should not be applicable to a wholly owned subsidiary.

2.1.5 Section 57(2)

This sub-section should also specifically apply to a wholly owned subsidiary as a company could be a wholly owned subsidiary despite having more than one shareholder.

2.1.6 Section 57(3)

In respect of a wholly owned subsidiary which has the same directors as the holding company (identical boards) it should not be necessary to have separate meetings and the companies should be entitled to combine the meetings. A sub-section 3(bis) should be added to provide for this.

2.1.7 Section 66(2)(b)

The LSSA considers that the number of directors should not be prescribed. No company should be obliged to have at least three directors and this provision should be deleted *in toto*. However, should the SCCL not be in favour of its removal, the following should be added at the end of the sub-section: "... or one director if it is a wholly owned subsidiary".

2.1.8 Section 66(4)(b)

This section should not be applicable to wholly owned subsidiaries.

2.1.9 Section 68

This section should not be applicable to wholly owned subsidiaries.

2.1.10 Chapter 5

For purposes of Chapter 5, a wholly owned subsidiary should not constitute a regulated company.

2.2 **Item 13: Section 40(5)**

The LSSA's submission read: "13.1 Section 40(5)(b)(ii) provides that the shares must be held "in trust". 13.2 It needs to be clarified that this trust agreement is not required to be registered with the Master of the High Court under the Trust Property Control Act, 1988. 13.3 The provision should be rephrased so that it does not refer to the shares being held "in trust", but rather for the shares to be held in escrow or by a nominee of the company.

The LSSA has been asked to give wording to ensure the independence of the "escrow nominee," protecting both the company and the shareholder who was partly paying.

The LSSA proposes the following amendment:

Replace the words "in trust" in Section 40(5)(b)(ii) with "by an escrow agent independent of both the company and the subscribing party". Also change the words "trust agreement" to "an escrow agreement duly signed by the company, the subscribing party and the escrow agent".

All references in Section 40(6) to "trust agreement" should be replaced with "escrow agreement" and all references to "trust" should be to "escrow".

2.3 **Item 32: Section 112(1)**

The LSSA commented as follows: "It is proposed that an additional exemption be included by inserting a new subsection 112(1)(d) as follows: "(d) approved by all shareholders entitled to exercise voting rights in relation to that transaction."

The LSSA was asked to spell out the directors' duties as to the circular to shareholders seeking approval.

The LSSA suggests the following new sub-section (1)(d):

"(d) approved in writing by all shareholders entitled to exercise voting rights in relation to that transaction, which approval is given after receipt by all such shareholders of a written notice prepared by the directors of the company: (i) giving details of the transaction sufficient to enable each such shareholder to make a considered decision whether to give the approval sought or not; (ii) to which a copy of the provisions of Sections 112 and 115 is attached.

2.4 **Item 37: Section 154**

The LSSA commented as follows: "37.1 The discharge of debts in terms of section 152(2) could trigger capital gains tax implications and/or value added tax recruitment claims. 37.2 In this regard, it is suggested that the words "... or arising out of its approval ..." be inserted after the words "business rescue process" in section 154(2). Consequential amendments to the Value-Added Tax Act and Income Tax Act will be required."

The SCCL asked the LSSA to explain in detail why it considers that there would be GCT and/or VAT payable.

The LSSA notes that if claims against a company, which is a VAT vendor, are compromised pursuant to a business rescue process, a reversal of input credits previously claimed would be triggered. It is unclear whether the Act permits the business rescue plan to also cover such a reversal itself also being compromised. Similar difficulties arise in relation to a compromise triggering a recoupment of expenses previously claimed, or capital gains tax being levied on the compromise of debts under the Income Tax Act. Accordingly the LSSA suggests that the Act make it clear that any such tax consequences arising from the implementation of a business rescue plan can themselves be compromised as part of the business rescue plan.

In addition, claims may arise on compromise or variation of certain contractual rights pursuant to the implementation of a business rescue plan, e.g. breakage costs under hedging contracts.

The Minister has announced that the Department of Trade and Industry will implement relief measures in these circumstances, although there is no information as to exactly what these will be.

2.5 **Item 40: Regulation 86(4) and Section 123(2)**

The LSSA's proposal read: "This regulation provides that shareholders may whitewash and dispense with the obligation requiring a mandatory offer following the issue of securities as consideration for an acquisition, a cash subscription or a rights offer if independent holders of more than 50% waive the requirement. The regulation should be expanded to enable a majority of independent shareholders to waive the requirement for a mandatory offer in any situation. In other words, it should not be limited to those currently described in the regulation."

The LSSA has been asked to give wording to link this to section 123.

The LSSA proposes that instead of an amendment to the regulation, section 123 rather be amended as follows:

Add the following wording at the beginning of section 123(2): "Subject to subsection (6)..."

Add a new subsection (6) reading as follows: "(6) The panel may dispense with compliance with any or all of the provisions of sections 121 to 127, having regard to the facts of the case, the general principles outlined in those sections and equity, if such non-compliance has been approved by an ordinary resolution passed at a meeting of shareholders [or should this cover holders of all securities?] who are independent".

2.6 **Section 117**

The LSSA did not deal with this section in its previous submission. However the inclusion of the type of transaction referred to in Section 117(1)(c)(iv) as an "affected transaction" is incorrect as it operates retrospectively in the sense that section 122 only becomes operative once the securities in question have either been acquired or disposed of.

Section 121(b) prohibits giving effect to an affected transaction unless the panel has issued a compliance certificate or granted an exemption.

This is clearly impossible in that the transaction will already have taken place. It is also impractical as it will mean that any acquisition or disposal of share on an exchange in excess of the threshold amounts cannot take place without compliance with section 121, which will render trading on exchanges practically impossible.

2.7 **Section 129(7)**

The LSSA did not deal with this section in its previous submission but was asked by the SCCL to consider the section. Having done so the LSSA suggests that Section 129(7) should be replaced with the following:

“If the board of a company has reasonable grounds to believe that the company is financially distressed, but the board has not adopted a resolution contemplated in sub-section (1), the board shall be obliged to record in writing its full reasons for not adopting such a resolution.”

This will ensure that the board gives the issue due consideration, well knowing that at a later date its reasons could be fully investigated, but will not force the company to give the notice currently required which could bring about the very downfall of the company which the directors are trying to avoid.

2.8 **Amendments to Memorandum of Incorporation (MOI)**

The date on which amendments to an MOI come into effect is unclear under the Act. The LSSA understands that the Companies and Intellectual Property Commission (CIPC) is of the view that, CIPC is more than an office of record of MOI's, but also has a checking function by virtue of sections 14(1), 13(3) and 13(4) and that, until such time as it has approved amendments to an MOI, such amendments cannot take effect.

The LSSA submits that if CIPC should have a checking function, it must be a very limited one. The LSSA suggests that there should be a closed list of items which CIPC must check in respect of MOI's. In the view of the LSSA this should only comprise the following, namely:

- The name and registration number are correct;
- Whether the company has provided for share capital in its MOI and that there is no patent error in the provision, i.e. whether the company purported to create par value shares and that the arithmetic is correct.
- In the case of an RF company that the appropriate notice recording in which clauses the restrictive conditions are contained has been filed
- That the filing notice was signed by the company secretary, a director or someone who files a document authorising him / her to file the amendment.

If an MOI otherwise contravenes the Act, it is the directors of the company which must be held responsible. It is not, nor should it be, the duty of CIPC to scrutinise the entire MOI in

case some conflict with the Act is contained in the MOI. If needs be, CIPC may send out compliance notices.

Furthermore, the Act should provide that if the amendment is not rejected by CIPC within 14 days from time of lodgement, it will be deemed to be accepted. Provision should also be made that should the company consider the amendments to be urgent, detailed reasons for urgency should be provided, which if accepted by CIPC as being genuine grounds for urgency, will result in CIPC considering the amendment within 1 business day.

3. **CLOSING**

The LSSA would like to express its sincerest appreciation to the SCCL for being allowed this opportunity to amplify its submissions.