COMMENTS ON COMPANIES AMENDMENT BILL [B 27 - 2023]

The LSSA has considered the Companies Amendment Bill [B 27 - 2023] (the Bill) and wish to comment as follows:

1. CLAUSE 1, AMENDING SECTION 1 OF 'SECURITIES' WITHIN THE COMPANIES ACT:

1.1 The definition of "securities" introduces debentures, which word is not defined in the Companies Act. It is suggested that "debentures" be defined. Section 43 of the Companies Act refers to "debt instrument" and it is suggested that this be changed to "debentures" for the sake of clarity.

1.2 It is suggested that section 43(1)(a) of the Companies Act be amended to read:

"(a) debentures -
(i) a written acknowledgement of debt issued by a company for one or more loans made to the company, whether on a secured or unsecured basis, which acknowledgement designates the debt/s as debenture/s and specifies the terms applicable, including that the debenture/s is/are freely tradeable, but
(ii) does not include promissory notes and loans, whether constituting an encumbrance on the assets of the company or not; and

2. CLAUSE 4, AMENDING SECTION 26:

2.1 Subsection 26(2) proposes that a person not contemplated in subsection 1 may also inspect and copy the information contained therein.

"(2) A person not contemplated in subsection (1) has a right to inspect and copy the information contained in the records referred to in subsection (1)(a), (b), (cA), (e) and (f), upon payment of no more than the prescribed maximum charges for any such inspection and copy.";

2.2 The proposed subsection 26(2) appears to be inconsistent with the provisions of section 31 of the Companies Act which provides access to financial statements or related information under limited circumstances only i.e. the provisions of section 31(2) provides a judgement creditor and section 31(3) provides trade unions access to financial

statements under certain conditions. The provisions of section 26(2) should also be made subject to the provisions of section 212 of the Companies Act.

3. CLAUSE 6, INSERTING SECTION 30A:

3.1 Subsection (1): It is suggested that subsection (1) deal only with the initial remuneration policy and so should be replaced with the following: “A public company or state-owned company must prepare a remuneration policy for directors and prescribed officers in the first 12 months of this section coming into effect and present such policy for approval by ordinary resolution at the first annual general meeting after the policy is prepared”.

3.2 Subsection (2): We propose that subsection (2) be amended to read as follows: “The remuneration policy, once approved as contemplated in sub-section (1), must be presented every three years for approval by ordinary resolution at the annual general meeting within that three year period. In addition an approved remuneration policy must be presented for approval by ordinary resolution if any material change in the policy is proposed to be introduced during that three year period.”.

3.3 Subsection (3)(b): Should our proposals in 3.1 and 3.2 be accepted, reference to subsection (1) must be deleted, as subsection (1) would only deal with the initial policy.

3.4 Subsection 3(c): The word “implementation” should read “remuneration”.

3.5 Subsection 4(a) should be deleted as this is matter of internal policy on how the report gets prepared.

3.6 Subsection 4 (c) should be deleted.

3.7 Subsection (5): This subsection should be deleted. Voting on the report cannot constitute voting on the policy.

3.8 Subsection (6): The word “implementation” should be “remuneration”. Further, the words “… which shall be approved by ordinary resolution” should be deleted.

3.9 Subsection (7): This subsection is unclear and should be redrafted. It should provide that, until a new remuneration policy is approved, the previous policy approved in terms of Section 30A, or a policy approved by way of non-binding vote from shareholders under the King IV Code before section 30A came into force, will be applicable. If there is neither an approved policy under section 30A, nor a policy approved by non-binding vote, the policy will be deemed to be the remuneration paid to the directors and prescribed officers before the new remuneration policy is approved.

3.10 Subsection (8): The words “by ordinary resolution in terms of subsection (7)” should be deleted.

3.11 Subsection (9):

3.11.1 “implementation” should be “remuneration” wherever it appears in this subsection.

3.11.2 Is this subsection not meant to deal with the policy, and not the report?

3.11.3 Subsection 9 should be amended to make it obligatory in instances where there is no remuneration policy approved in terms of Section 30A, to present a remuneration policy at every annual general meeting until same is approved. Thereafter, it can be presented for approval every three years or whenever any material change in the policy is made. It is suggested that a subsection (c) be inserted in this regard. Also refer to our comment on subsection (7).

3.11.4 Furthermore, for the entire remuneration committee to step down may lead to unintended consequences, including loss of institutional memory. It is suggested that provision rather be made for one- half of the non-executive directors to be replaced by other non-executive directors, to ensure some continuity.

3.11.5 Subsection (9)(b) makes reference to ‘non-executive directors’ whereas the Companies Act does not specifically define the concept of a ‘non-executive’ director.

4. CLAUSE 9, AMENDING SECTION 40:

The word “trusted” in the proposed clause 40 (5A) definition of “stakeholder” is subjective and we propose that it be deleted, and the wording be of the provision be amended for the sake of clarity.

5. CLAUSE 10, AMENDING SECTION 45

5.1 The LSSA believes that the proposed amendment in clause (b) does not go far enough. It should cover financial assistance to any group companies.

5.2 Proposed amendment

*(2A) The provisions of this section shall not apply to the giving by a company of financial assistance to, or for the benefit of **[its subsidiaries]**:*
(a) any company in a group of companies of which it is the holding company;
(b) its ultimate holding company or any intermediate holding company, subject to the common law that the board is satisfied that there is a reasonable benefit to the company in giving such financial assistance;

(c) any company forming part of the same group of companies as it is a member of.

6. CLAUSE 11, AMENDING SECTION 48:

6.1 The LSSA is of the view that if a pro rata offer is made pursuant to subsection (8)(b)(i), there should be no need to get a shareholders’ resolution for the directors since they are participating on a pro rata basis.

6.2 Provision should be made for the acquisition of shares from a wholly owned subsidiary.

The proposed subsection (8) should not apply if shares are being acquired but no consideration is made by the company and in addition, no mandatory offer as

contemplated under section 123 is triggered by the acquisition of shares as contemplated in subsection (8)(b)(i).

6.3 A new subsection should be added as follows: Unless an acquisition by the company of its securities is being done pursuant to section 114, none of the provisions of section 114 apply.

7. CLAUSE 13, AMENDING SECTION 72:

6.1 The LSSA suggests 7A (b) should read:

(7A) The social and ethics committee of a company must comprise not less than three members: Provided that—

(a) in the case of a public company and state-owned company, all the members must be directors who are not involved in the day-to-day management of the business of the company and must not have been so involved at any time during the previous three financial years; and

(b) in the case of any other company, not being a public company or state-owned company, the members must consist of not less than three directors or prescribed officers, at least one of whom must be a director, who is not involved in the day-to-day management of the business of the company and must not have been so involved within the previous three financial years.'

8. CLAUSE 15, AMENDING SECTION 118:

7.1 The meaning of indirect shareholders is not clear and should be changed to 'holders with a beneficial interest'

7.2 The number ten offers a low threshold in our view and should be increased to twenty.

9. CLAUSE 17, AMENDING SECTION 135:

The proposed clause 17(b) should read:

"by the substitution for subsection (3) of the following subsection:"

10. CLAUSE 19, AMENDING SECTION 166:

''(1) As an alternative to applying for relief to a court, or filing a complaint with the Commission in terms of Part D, a person who would be entitled to apply for relief, or file a complaint in terms of this Act, may refer a matter that could be the subject of such an application or complaint for resolution **by** mediation, conciliation or arbitration to…"

11. CLAUSE 23, AMENDING SECTION 204:

The defined term 'financial reporting pronouncements' in the proposed s204(3) should not be in capitals, and it is not used in capitals in the proposed amendments to s204(1) and (2)